will not seek money damages as part of remedial action required of a recipient for Title IX violations.

Comments: Many commenters argued that the definition for Title IX sexual harassment should be aligned with the definition for Title VII, under which employers are liable for harassment that is sufficiently severe *or* pervasive to alter the conditions of employment.[660] Some commenters argued that under the proposed rules, schools would be held to a lower standard under Title IX to protect students (some of whom are minors) than the standard of protection for employees under Title VII. Some such commenters asserted that everyone on campus benefits from a culture in which sexual assault and harassment are deterred as they would be in a work environment and that Title IX, which applies to students, must not be weaker than Title VII.[661] Several commenters argued that the Title VII standard protects against visual and graphic displays, slurs, comments, and an array of other activities that are severe *or* pervasive on the basis of sex, while the NPRM would deny students the same protections by requiring conduct be both severe *and* pervasive.

Other commenters argued that college students must be able to succeed in college without being told that sexual assault and harassment is just something they must endure so they can finally get jobs at companies that do protect them from assault and harassment. Some commenters further argued that colleges and universities do a severe disservice to would-be

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[660] Commenters cited: *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (holding under Title VII "For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment.") (internal quotation marks and citation omitted; brackets in original) (emphasis added); U.S. Equal Emp. Opportunity Comm'n, *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors* (Jun. 18, 1999).

[661] Commenters cited: *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) for the proposition that if an employer is aware of and allows the continuation of sexual harassment creating a hostile work environment, it is a violation of Title VII.

harassers and assaulters by creating an environment where, unlike their future work environments, harassment and assault are tolerated. A few commenters asserted that because students can simultaneously be both students and employees it is necessary for the prohibited conduct to be the same under both Title VII and Title IX.

Many commenters asserted that the hostile environment standard expressed in the 2001 Guidance or the withdrawn 2011 Dear Colleague Letter should be adopted in the final regulations, such that sexual harassment is "unwelcome conduct of a sexual nature" and such harassment is actionable when the conduct is "sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's programs." Some commenters asserted that the "looser" definition from Department guidance provides greater protection for victims compared to the subjectivity and gray areas created by ill-fitting terminology used in the § 106.30 definition. Many commenters argued that "unwelcome conduct of a sexual nature" is a simple definition of harassment that avoids the self-doubt and discouragement victims may feel if victims are required under the proposed rules to wonder if the harassment they experience fits the § 106.30 definition. Some commenters argued that the § 106.30 definition makes it too easy to dismiss cases as not severe enough when any case of unwelcome sexual conduct should be clearly prohibited out of common sense and fairness.

Some commenters asserted that the Department's guidance definition is more in line with the reality of the type of misconduct that occurs most often. Other commenters pointed to the "Factors Used to Evaluate Hostile Environment Sexual Harassment" section of the 2001

Guidance[662] outlining a variety of factors used to determine if a hostile environment has been created and argued that schools should continue to use these factors to evaluate conduct in order to draw common sense conclusions about what conduct is actionable.

Discussion: The Department acknowledges, as has the Supreme Court, that both Title VII and Title IX prohibit sex discrimination. Significant differences in these statutes, however, lead to different standards for actionable harassment in the workplace, and in schools, colleges, and universities. The Department disagrees with commenters who asserted that an identical standard for prohibited conduct in the workplace and in an educational environment is the appropriate outcome. In the elementary and secondary school context, students and recipients benefit from an approach to non-discrimination law that distinguishes between school and workplace settings.[663] In the higher education context, as some commenters noted, students and faculty must be able to discuss sexual issues even if that offends some people who hear the discussion.[664] Similarly, as a commenter stated, the Supreme Court rejected the idea that "First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'"[665] Thus, even vulgar or indecent college speech is

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[662] Commenters cited: 2001 Guidance at 5-7 (listing factors including: the degree to which the conduct affected one or more students' education; the type, frequency, and duration of the conduct; the identity of the relationship between the alleged harasser and the subject or subjects of the harassment; the number of individuals involved; the age and sex of the alleged harasser and the subject or subjects of the harassment; the size of the school, location of the incidents, and context in which they occurred; other incidents at the school; and incidents of gender-based, but nonsexual harassment).

[663] *See Davis*, 526 U.S. at 650 ("Courts, moreover, must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults. . . . Indeed, at least early on, students are still learning how to interact appropriately with their peers.").

[664] *See Snyder v. Phelps*, 562 U.S. 443 (2011).

[665] *Healy v. James*, 408 U.S. 169, 180 (1972) (internal citation omitted).

protected.[666] The *Davis* standard ensures that speech and expressive conduct is not peremptorily chilled or restricted, yet may be punishable when the speech becomes serious enough to lose protected status under the First Amendment.[667] The rationale for preventing a hostile workplace environment free from any severe or pervasive sexual harassment that alters conditions of employment does not raise the foregoing concerns (i.e., allowing for the social and developmental growth of young students learning how to interact with peers in the elementary and secondary school context; fostering robust exchange of speech, ideas, and beliefs in a college setting). Thus, the Department does not believe that aligning the definitions of sexual harassment under Title VII and Title IX furthers the purpose of Title IX or benefits students and employees participating in education programs or activities.[668]

The *Davis* standard embodied in the second prong of the § 106.30 definition differs from the third prong prohibiting sexual assault (and in the final regulations, dating violence, domestic violence, and stalking) because the latter conduct is not required to be evaluated for severity, pervasiveness, offensiveness, or causing a denial of equal access; rather, the latter conduct is assumed to deny equal access to education and its prohibition raises no constitutional concerns. In this manner, the final regulations obligate recipients to respond to single instances of sexual

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[666] *Papish v. Bd. of Curators*, 410 U.S. 667 (1973).
[667] The Department notes that requiring severity, pervasiveness, objective offensiveness, and resulting denial of equal access to education for a victim, matches the seriousness of conduct and consequences of other types of speech unprotected by the First Amendment, such as fighting words, threats, and defamation.
[668] *See* Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 JOURNAL OF COLL. & UNIV. L. 385, 449 (2009) (arguing that restrictions on workplace speech "ultimately do not take away from the workplace's essential functions – to achieve the desired results, make the client happy, and get the job done" and free expression in the workplace "is typically not necessary for that purpose" such that workplaces are often "highly regulated environments" while "[o]n the other hand, freedom of speech and unfettered discussion are so essential to a college or university that compromising them fundamentally alters the campus environment to the detriment of everyone in the community" such that free speech and academic freedom are necessary preconditions to a university's success.).

assault and sex-related violence more broadly than employers' response obligations under Title VII, where even physical conduct must be severe or pervasive and alter the conditions of employment, to be actionable.[669] The Department therefore disagrees that the final regulations provide students less protection against sexual assault than employees receive in a workplace, or that sexual assault is tolerated to a greater extent under these Title IX regulations than under Title VII.

For reasons discussed above and in the "Adoption and Adaption of the Supreme Court Framework to Address Sexual Harassment" section of this preamble, the Department believes that the *Davis* definition in § 106.30 provides a definition for non-*quid pro quo*, non-Clery Act/VAWA offense sexual harassment better aligned with the purpose of Title IX than the definition of hostile environment harassment in the 2001 Guidance or the withdrawn 2011 Dear Colleague Letter. The *Davis* Court carefully crafted its formulation of actionable sexual harassment under Title IX for private lawsuits under Title IX, and the Department is persuaded by the Supreme Court's reasoning that administrative enforcement of Title IX is similarly best served by requiring a recipient to respond to sexual harassment that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education. The Department believes that rooting a definition of sexual harassment in the Supreme Court's

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[669] *E.g.*, *Meritor*, 477 U.S. at 67 ("not all workplace conduct that may be described as harassment affects a term, condition, or privilege of employment within the meaning of Title VII") (internal quotation marks and citation omitted); *Brooks v. City of San Mateo*, 229 F.3d 917, 927 (9th Cir. 2000) (where the plaintiff alleged a sexual assault in the form of fondling plaintiff's breast: "The harassment here was an entirely isolated incident. It had no precursors, and it was never repeated. In no sense can it be said that the city imposed upon Brooks the onerous terms of employment for which Title VII offers a remedy."). Under the final regulations, a single instance of sexual assault (which includes fondling) requires a recipient's prompt response, including offering the complainant supportive measures and informing the complainant of the option of filing a formal complaint. § 106.30 (defining "sexual harassment" to include "sexual assault"); § 106.44(a).

interpretation of Title IX provides more clarity without unnecessarily chilling speech and expressive conduct; these advantages are lacking in the looser definitions used in Department guidance. The *Davis* definition in § 106.30 utilizes the phrase unwelcome conduct on the basis of sex, which is broader than the "unwelcome conduct of a sexual nature" phrase used in Department guidance.[670] The other elements in § 106.30 (severe, pervasive, and objectively offensive) provide a standard of evaluation more precise than the "sufficiently serious" description in Department guidance, yet serve a similar purpose – ensuring that conduct addressed as a Title IX civil rights issue represents serious conduct unprotected by the First Amendment or principles of free speech and academic freedom. As discussed further below, the "effectively denies a person equal access" element in § 106.30 has the advantage of being adopted from the Supreme Court's interpretation of Title IX, yet does not act as a more stringent element than the "interferes with or limits a student's ability to participate in or benefit from the school's programs" language found in Department guidance. The Department does not believe that recipients will err on the side of ignoring reports of conduct that might be considered severe and pervasive, and believes that a prohibition on *any* unwelcome sexual conduct would sweep up speech and expression protected by the First Amendment, and require schools to intervene in situations that do not present a threat to equal educational access. Because the § 106.30 definition provides precise standards for evaluating actionable harassment focused on whether sexual harassment has deprived a person of equal educational access, the Department believes it

[670] As noted by some commenters, sex-based harassment includes unwelcome conduct of a sexual nature but also includes unwelcome conduct devoid of sexual content that targets a particular sex. The final regulations use the phrase "sexual harassment" to encompass both unwelcome conduct of a sexual nature, and other forms of unwelcome conduct "on the basis of sex." § 106.30 (defining "sexual harassment").

is unnecessary to list the factors from the 2001 Guidance that purport to evaluate whether a hostile environment has been created.

Changes: None.

Comments: Many commenters believed that the second prong of the § 106.30 definition means that rape and sexual assault incidents will be scrutinized for severity and set a "pain scale" for sexual assault such that only severe sexual assault will be recognized under Title IX, or that a definition that requires a school to intervene only if sexual violence is "severe, pervasive, and objectively offensive" means that someone would need to be repeatedly, violently raped before the school would act to support the survivor.

Many commenters criticized the second prong of the § 106.30 definition by asserting that, under that standard, only the most severe harassment situations will be investigated, which will reduce and chill reporting of sexual harassment when sexual harassment is already underreported. Many such commenters argued that victims will be afraid to report because the school will scrutinize whether the harassment suffered was "bad enough" and that instead the Department needs to err on the side of caution by including more, not less, conduct as reportable harassment. Many commenters similarly argued that many victims are already unsure of whether their experience qualifies as serious enough to report and therefore narrowing the definition will only discourage victims from reporting unwanted sexual conduct. Many commenters argued that a broad definition of sexual harassment is needed because research shows that students are unlikely to report when their experience does not match common beliefs about what rape is, and because even "less severe" forms of harassment may also lead to negative outcomes and increase a victim's risk of further victimization. Similarly, some commenters noted that research shows

that victims already minimize their experiences[671] and knowing that school administrators will be judging their report for whether it is really serious, really pervasive, and really objectively offensive, will result in more victims feeling dissuaded from reporting due to uncertainty about whether their report will meet the definition or not.

Several commenters argued that the Federal government should stand by a zero-tolerance policy against sexual harassment, and that applying a narrow definition means that some forms of harassment are acceptable, contrary to Title IX's bar on sex discrimination. Several commenters argued that the § 106.30 definition will allow abusers to do everything just short of the narrowed standard while keeping their victims in a hostile environment, further silencing victims.

A few commenters stated that if a student believes conduct "makes me feel uncomfortable," that should be sufficient to require the school to respond. At least one commenter suggested that the final regulations provide guidance on what misconduct is actionable by using behavioral measures such as the Sexual Experiences Survey[672] or the Sexual Experiences Questionnaire.[673]

At least one commenter argued that the language of offensiveness and severity clouds the necessary understanding of unequal power relations and negates a culture of consent. Several

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[671] Commenters cited: The Association of American Universities, *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* iv (Westat 2015) ("More than 50 percent of the victims of even the most serious incidents (e.g., forced penetration) say they do not report the event because they do not consider it 'serious enough.'").
[672] Commenters cited: Mary Koss & Cheryl J. Oros, *Sexual Experiences Survey: A research instrument investigating sexual aggression and victimization*, 50 JOURNAL OF CONSULTING & CLINICAL PSYCHOL. 3 (1982).
[673] Commenters cited: Louise Fitzgerald *et al.*, *Measuring sexual harassment: Theoretical and psychometric advances*, 17 BASIC & APPLIED SOCIAL PSYCHOL. 4 (1995).

commenters asserted that a definition of sexual harassment that holds up only the dramatic and extreme as worthy of investigation would do little to change rape culture. Many commenters argued that while individual acts are rarely pervasive, individual acts across a society can result in pervasiveness throughout society so that what seem like one-off or minor incidents, or "normal" sexual gestures and conventions, actually do create a pervasive rape culture because they are rooted in patriarchy (for example, a culture that accepts statements like "these women come to parties to get laid"), misunderstanding or ignorance of consent (for example, "she didn't say no" despite several cues of discomfort and unwillingness), and lack of support from authority figures (for example, reactions from school personnel like "boys will be boys," or "this is just college campus culture"). Some commenters argued that to achieve a drop in cases of sexual misconduct, even seemingly minor incidents that make women feel threatened need to be taken seriously.

Similarly, a few commenters argued that the threat of potential violence against women permeates American society and interferes with educational equity. At least one commenter argued that young women already are affected in many ways by the constant presence of potential violence, such that women feel that they cannot be alone with another student for study group purposes, with a teaching assistant to get extra help, or with a professor during office hours. This commenter further stated that young women already do not feel safe attending an academic function if it means walking to her car in the dark, or collaborating online for fear of enduring cyber harassment. A few commenters argued that a narrow definition of harassment ignores the scope of gender-based violence in our society and does nothing to address patterns of harassment as opposed to just an individual case that moves through a formal process.

A few commenters asserted by adding the "and" between "severe, pervasive and objectively offensive" survivors will be forced to quantify their suffering to fit into an imaginary scale determined according to a pass or fail rubric and artificially create categories of legitimate and illegitimate misconduct, when misconduct that is either severe or pervasive or objectively offensive should be more than enough to warrant stopping the misconduct. Many commenters opined that the § 106.30 definition sets an arbitrary and unnecessarily high threshold for when conduct would even constitute harassment. Many commenters viewed the § 106.30 definition as raising the burden of proof on victims to an unnecessary degree, making their reporting process more strenuous and exhausting, and requiring survivors to prove their abuse is worthy of attention. Other commenters noted that the burden is on recipients to show the severity of the reported conduct yet asserted that survivors will still feel pressured to present their complaint in a certain way in order to be perceived as credible enough. A few commenters asserted that this raises concerns especially for people with disabilities, who may react to and communicate about trauma differently. At least one commenter stated that to the extent that the § 106.30 definition is in response to the perception that students and Title IX Coordinators have been pursuing a lot of formal complaints over low-level harassment, such a perception is inaccurate.

Many commenters argued that what is severe, pervasive, and objectively offensive leaves too much room for interpretation and will be subject to the biases of Title IX Coordinators and other school administrators. Another commenter expressed concern that schools would have too much discretion to decide whether conduct was severe, pervasive, and offensive and this will lead to arbitrary decisions to turn away reporting parties. Several commenters asserted that permitting administrators to judge the severity, pervasiveness, and offensiveness of reported conduct will foster a culture of institutional betrayal because some institutions will choose to

investigate misconduct while others will not. A few commenters asserted that courts have found some unwanted sexual behavior (for example, a supervisor forcibly kissing an employee) is not severe *and* pervasive even though such behavior may constitute criminal assault or battery under State laws and that a definition of sexual harassment must at least cover misconduct that would be considered criminal.

Several commenters argued that a narrow definition would contribute to the overall effect of the proposed rules to eliminate most sexual harassment from coverage under Title IX, to the point of absurdity. Several commenters asserted that research shows that narrow definitions of sexual assault indicate that reports will decrease while underlying violence does not decrease.[674] At least one commenter argued that the proposed rules seek to use a single definition of sexual harassment in all settings, from prekindergarten all the way up to graduate school, and this lack of a nuanced approach fails to take into account the vast developmental differences between children, young adults, and college and graduate students. One commenter stated that especially for community college students, whose connections to a physical campus and its resources can be limited, a narrower definition of sexual harassment with "severe and pervasive" rather than "severe or pervasive" could make it harder for reporting parties to prove their victimization.

One commenter asserted that conduct that may not be considered severe in an isolated instance can qualify as severe when that conduct is pervasive, because "severe" and "pervasive" should not always entail two separate inquiries. One commenter suggested that the second prong of § 106.30 be changed to mirror the Title IX statute, by using the phrase "causes a person to be

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[674] Commenters cited: Mary P. Koss, *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students*, 55 JOURNAL OF CONSULTING & CLINICAL PSYCHOL. 2 (1987).

excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity."

Discussion: The Department appreciates the opportunity to clarify that sexual assault (which includes rape) is referenced in the third prong of the § 106.30 definition of "sexual harassment," while the *Davis* standard (with the elements of severe, pervasive, and objectively offensive) is the second prong. This means that any report of sexual assault (including rape) is not subject to the *Davis* elements of whether the incident was "severe, pervasive, and objectively offensive." Thus, contrary to commenters' concerns, the final regulations do not require rape or sexual assault incidents to be "scrutinized for severity," rated on a pain scale, or leave students to be repeatedly or violently raped before a recipient must intervene. The Department intentionally did not want to leave students (or employees) wondering if a single act of sexual assault might not meet the *Davis* standard, and therefore included sexual assault (and, in the final regulations, dating violence, domestic violence, and stalking) as a stand-alone type of sexual harassment that does not need to demonstrate severity, pervasiveness, objective offensiveness, or denial of equal access to education, because denial of equal access is assumed. Complainants can feel confident turning to their school, college, or university to report and receive supportive measures in the wake of a sexual assault, without wondering whether sexual assault is "bad enough" to report. The Department understands that research shows that rape victims often do not report due to misconceptions about what rape is (e.g., a misconception that rape must involve violence inflicted by a stranger), and that rape victims may minimize their own experience and not report

sexual assault, for a number of reasons.[675] The definition of sexual assault referenced in § 106.30 broadly defines sexual assault to include all forcible and nonforcible sex offenses described in the FBI's Uniform Crime Reporting system. Those offenses do not require an element of physical force or violence, but rather turn on lack of consent of the victim. The Department believes that these definitions form a sufficiently broad definition of sexual assault that reflects the range of sexually violative experiences that traumatize victims and deny equal access to education. The Department believes that by utilizing a broad definition of sexual assault, these final regulations will contribute to greater understanding on the part of victims and perpetrators as to the type of conduct that constitutes sexual assault. The FBI's Uniform Crime Reporting system similarly does not exclude from sexual assault perpetration by a person known to the victim (whether as an acquaintance, romantic date, or intimate partner relationship), and the final regulations' express inclusion of dating violence and domestic violence reinforces the reality that sex-based violence is often perpetrated by persons known to the victim rather than by strangers.

As to unwelcome conduct that is not *quid pro quo* harassment, and is not a Clery Act/VAWA offense included in § 106.30, the *Davis* standard embodied in the second prong of the § 106.30 definition applies. The Department understands commenters' concerns that this means that only "the most severe" harassment situations will be investigated and that complainants will feel deterred from reporting non-sexual assault harassment due to wondering if the harassment is "bad enough" to be covered under Title IX. The Department understands that research shows that even "less severe" forms of sexual harassment may cause negative outcomes

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[675] The Association of American Universities, *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* iv (Westat 2015) ("More than 50 percent of the victims of even the most serious incidents (e.g., forced penetration) say they do not report the event because they do not consider it "serious enough.").

for those who experience it. The Department believes, however, that severity and pervasiveness are needed elements to ensure that Title IX's non-discrimination mandate does not punish verbal conduct in a manner that chills and restricts speech and academic freedom, and that recipients are not held responsible for controlling every stray, offensive remark that passes between members of the recipient's community. The Department does not believe that evaluating verbal harassment situations for severity, pervasiveness, and objective offensiveness will chill reporting of unwelcome conduct, because recipients retain discretion to respond to reported situations not covered under Title IX. Thus, recipients may encourage students (and employees) to report any unwanted conduct and determine whether a recipient must respond under Title IX, or chooses to respond under a non-Title IX policy.

The Department believes that the Supreme Court's *Gebser* and *Davis* opinions provide the appropriate principles to guide the Department with respect to appropriate interpretation and enforcement of Title IX as a non-sex discrimination statute. Title IX is not an anti-sexual harassment statute; Title IX prohibits sex discrimination in education programs or activities. The Supreme Court has held that sexual harassment may constitute sex discrimination under Title IX, but only when the sexual harassment is so severe, pervasive, and objectively offensive that it effectively denies a person's equal access to education. Title IX does not represent a "zero tolerance" policy banning sexual harassment as such, but does exist to provide effective protections to individuals against discriminatory practices, within the parameters set forth under the Title IX statute (20 U.S.C. 1681 *et seq*.) and Supreme Court case law. While the Supreme Court interpreted the level of harassment differently under Title VII than under Title IX, neither Federal non-sex discrimination civil rights law represents a "zero-tolerance" policy banning all

sexual harassment.[676] Rather, interpretations of both Title VII and Title IX focus on sexual harassment that constitutes sex discrimination interfering with equal participation in a workplace or educational environment, respectively. Contrary to the concerns of commenters, the fact that not every instance of sexual harassment violates Title VII or Title IX does not mean that sexual harassment not covered under one of those laws is "acceptable" or encourages perpetration of sexual harassment.[677] The Department does not believe that parameters around what constitutes actionable sexual harassment under a Federal civil rights statute creates an environment where abusers "do everything just short of the narrowed standard" to torment and silence victims. A course of unwelcome conduct directed at a victim to keep the victim fearful or silenced likely crosses over into "severe, pervasive, and objectively offensive" conduct actionable under Title IX. Whether or not misconduct is actionable under Title IX, it may be actionable under another part of a recipient's code of conduct (e.g., anti-bullying). These final regulations only prescribe a recipient's mandatory response to conduct that does meet the § 106.30 definition of sexual

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[676] *E.g.*, *Chesier v. On Q Financial Inc.*, 382 F. Supp. 3d 918, 925-26 (D. Ariz. 2019) (reviewing Title VII cases involving single instances of sexual harassment determined not to be sufficiently severe enough to affect a term of employment under Title VII) ("not all workplace conduct that may be described as 'harassment' affects a term, condition, or privilege of employment within the meaning of Title VII. . . . For sexual harassment to be actionable, it must be *sufficiently severe or pervasive* to alter the conditions of [the victim's] employment and create an abusive working environment.") (citing to *Meritor*, 477 U.S. at 67) (emphasis and brackets in original); Julie Davies, *Assessing Institutional Responsibility for Sexual Harassment in Education*, 77 TULANE L. REV. 387, 398, 407 (2002) ("Although the Court adopted different standards for institutional liability under Titles VII and IX, several themes serve as leitmotifs, running through the cases regardless of the technical differences. Neither Title VII nor Title IX is construed as a federal civility statute; the Court does not want entities to be obliged to litigate cases where plaintiffs have been subjected to 'minor' annoyances and insults.") (internal citation omitted).

[677] *See, e.g.*, *Brooks v. City of San Mateo*, 229 F.3d 917, 927 (9th Cir. 2000) ("Our holding in no way condones [the supervisor's] actions. Quite the opposite: The conduct of which [the plaintiff] complains was highly reprehensible. But, while [the supervisor] clearly harassed [the plaintiff] as she tried to do her job, not all workplace conduct that may be described as harassment affects a term, condition, or privilege of employment within the meaning of Title VII. The harassment here was an entirely isolated incident. It had no precursors, and it was never repeated. In no sense can it be said that the city imposed upon [the plaintiff] the onerous terms of employment for which Title VII offers a remedy.") (internal quotation marks and citation omitted).

harassment; these final regulations do not preclude a recipient from addressing other types of misconduct.

For the same reasons that Title IX does not stand as a zero-tolerance ban on all sexual harassment, Title IX does not stand as a Federal civil rights law to prevent all conduct that "makes me feel uncomfortable." The Supreme Court noted in *Davis* that school children regularly engage in "insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it" yet a school is liable under Title IX for responding to such behavior only when the conduct is "so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect."[678] Though not specifically in the Title IX context, the Supreme Court has noted that speech and expression do not lose First Amendment protections on college campuses, and in fact, colleges and universities represent environments where it is especially important to encourage free exchange of ideas, viewpoints, opinions, and beliefs.[679] The Department believes that the *Davis*

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[678] *Davis*, 526 U.S. at 650-51*; see also* Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 JOURNAL OF COLL. & UNIV. L. 385, 399 (2009) ("misapplication of harassment law . . . has contributed to a sense among students that there is a general 'right' not to be offended' – a false notion that ill serves students as they transition from the relatively insulated college or university setting to the larger society. Colleges and universities too often address the problems of sexual and racial harassment by targeting any expression which may be perceived by another as offensive or undesirable.") (citing Alan Charles Kors & Harvey A. Silverglate, *The Shadow University: The Betrayal of Liberty on America's Campuses* (Free Press 1998) ("At almost every college and university, students deemed members of 'historically oppressed groups' . . . are informed during orientations that their campuses are teeming with illegal or intolerable violations of their 'right' not to be offended.")).

[679] *Healy v. James*, 408 U.S. 169, 180-81 (1972) ("At the outset we note that state colleges and universities are not enclaves immune from the sweep of the First Amendment. 'It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.' *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Of course, as Mr. Justice Fortas made clear in *Tinker*, First Amendment rights must always be applied 'in light of the special characteristics of the . . . environment in the particular case.' *Ibid*. And, where state-operated educational institutions are involved, this Court has long recognized 'the need for affirming the comprehensive authority of the States and of school officials, consistent with

formulation, applied to unwelcome conduct that is not *quid pro quo* harassment and not a Clery Act/VAWA offense included in § 106.30, appropriately safeguards free speech and academic freedom,[680] while requiring recipients to respond even to verbal conduct so serious that it loses First Amendment protection and denies equal access to the recipient's educational benefits.

While the Department appreciates a commenter's suggestion to describe prohibited conduct by references to terms used in the Sexual Experiences Survey or the Sexual Experiences

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fundamental constitutional safeguards, to prescribe and control conduct in the schools.' *Id.*, at 507. Yet, the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, '(t)he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.") (internal citations omitted).

[680] As noted in the "Role of Due Process in the Grievance Process" section of this preamble, the Department is aware that Title IX applies to all recipients operating education programs or activities regardless of a recipient's status as a public institution with obligations to students and employees under the U.S. Constitution or as a private institution not subject to the U.S. Constitution. However, the principles of free speech, and of academic freedom, are crucial in the context of both public and private institutions. *E.g.*, Kelly Sarabynal, 39 JOURNAL OF L. & EDUC. 145, 145, 181-82 (2010) (noting that "The vast majority of [public and private] universities in the United States promote themselves as institutions of free speech and thought, construing censorship as antipathetic to their search for knowledge") and observing that where public universities restrict speech (for example, through anti-harassment or anti-hate speech codes) the First Amendment "solves the conflict between a university's policies promising free speech and its speech-restrictive policies by rendering the speech-restrictive policies unconstitutional" and arguing that as to private universities, First Amendment principles embodied in a private university's policies should be enforced contractually against the university so that private liberal arts and research universities are held "to their official promises of free speech" which leaves private institutions control over changing their official promises of free speech if they so choose, for instance if the private institution expects students to "abide by the dictates of the university's ideology"). The Department is obligated to interpret and enforce Federal laws consistent with the U.S. Constitution. *E.g.*, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 574-575 (1988) (refusing to give deference to an agency's interpretation of a statute where the interpretation raised First Amendment concerns); 2001 Guidance at 22. While the Department has recognized the importance of responding to sexual harassment under Title IX while protecting free speech and academic freedom since 2001, as explained in the "Adoption and Adaption of the Supreme Court Framework to Address Sexual Harassment" section of this preamble, protection of free speech and academic freedom was weakened by the Department's use of wording that differed from the *Davis* definition of what constitutes actionable sexual harassment under Title IX and for reasons discussed in this section of the preamble, these final regulations return to the *Davis* definition verbatim, while also protecting against even single instances of *quid pro quo* harassment and Clery/VAWA offenses, which are not entitled to First Amendment protection.

Questionnaire,[681] for the above reasons the Department believes that the better formulation of prohibited conduct under Title IX is captured in § 106.30, prohibiting conduct on the basis of sex that is either *quid pro quo* harassment, unwelcome conduct so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education, or sexual assault, dating violence, domestic violence, or stalking under the Clery Act and VAWA.

The Department understands commenters' concerns that the § 106.30 definition of sexual harassment, and the *Davis* standard in the second prong particularly, does not sufficiently acknowledge unequal power relations and societal factors that contribute to perpetuation of violence against women, and commenters' arguments that in order to reduce the prevalence of sexual misconduct across society even minor-seeming incidents should be taken seriously. The Department believes that the Supreme Court's recognition of sexual harassment as a form of sex discrimination[682] represents an important acknowledgement that sexual harassment often is not a matter of private, individualized misbehavior but is representative of sex-based notions and attitudes that contribute to systemic sex discrimination. However, the Department heeds the Supreme Court's interpretation of sexual harassment as sex discrimination under Title IX, premised on conditions that hold recipients liable for how to respond to sexual harassment. The § 106.30 definition of sexual harassment adopts the Supreme Court's *Davis* definition, adapted

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[681] Mary Koss & Cheryl J. Oros, *Sexual Experiences Survey: A research instrument investigating sexual aggression and victimization*, 50 JOURNAL OF CONSULTING & CLINICAL PSYCHOL. 3 (1982) (discussing survey questions designed to assess experiences with sexual harassment consisting of a series of questions about whether a respondent has encountered specific examples of sexual behavior); Louise Fitzgerald *et al.*, *Measuring sexual harassment: Theoretical and psychometric advances*, 17 BASIC & APPLIED SOCIAL PSYCHOL. 4 (1995).

[682] *E.g.*, *Meritor*, 477 U.S. at 64 ("Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."); *Gebser*, 524 U.S. at 283 (reference in *Franklin* to *Meritor* "was made with regard to the general proposition that sexual harassment can constitute discrimination on the basis of sex under Title IX, . . . an issue not in dispute here.") (internal citations omitted).

under the Department's administrative enforcement authority to provide broader protections for students (i.e., by ensuring that *quid pro quo* harassment and Clery Act/VAWA offenses included in § 106.30 count as sexual harassment without meeting the *Davis* standard). Similarly, the Department believes that by clearly defining sexual harassment to include sexual assault, dating violence, domestic violence, and stalking, affected parties will understand that no instance of sexual violence is tolerated under Title IX and may reduce the fear commenters described being felt by some young women participating in educational activities that involve proximity with fellow students or professors.

The Department does not believe that the § 106.30 definition creates categories of "legitimate" sexual misconduct or makes victims prove that their abuse is worthy of attention. The three-pronged definition of sexual harassment in § 106.30 captures physical and verbal conduct serious enough to warrant the label "abuse," and thereby assures complainants that sex-based abuse is worthy of attention and intervention by a complainant's school, college, or university. The Department appreciates the opportunity to clarify that the burden of describing or proving elements of the § 106.30 definition does not fall on complainants; there is no magic language needed to "present" a report or formal complaint in a particular way to trigger a recipient's response obligations. Rather, the burden is on recipients to evaluate reports of sexual harassment in a common sense manner with respect to whether the facts of an incident constitute one (or more) of the three types of misconduct described in § 106.30. This includes taking into account a complainant's age, disability status, and other factors that may affect how an individual complainant describes or communicates about a situation involving unwelcome sex-based conduct.

The Department disagrees with commenters' contention that § 106.30 gives school officials too much discretion to decide whether conduct was severe, pervasive, and objectively offensive or that these elements will lead to arbitrary decisions to turn away reporting parties based on biases of school administrators, fostering a culture of institutional betrayal, or that the § 106.30 definition eliminates "most" sexual harassment from coverage under Title IX, or that this definition is problematic because not all unwanted sexual behavior is severe and pervasive. Elements of severity, pervasiveness, and objective offensiveness must be evaluated in light of the known circumstances and depend on the facts of each situation, but must be determined from the perspective of a reasonable person standing in the shoes of the complainant. The final regulations revise the second prong of the § 106.30 definition to state that the *Davis* elements must be determined under a reasonable person standard. Title IX Coordinators are specifically required under the final regulations to serve impartially, without bias for or against complainants or respondents generally or for or against an individual complainant or respondent.[683] A recipient that responds to a report of sexual harassment in a manner that is clearly unreasonable in light of the known circumstances violates the final regulations,[684] incentivizing Title IX Coordinators and other recipient officials to carefully, thoughtfully, and reasonably evaluate each complainant's report or formal complaint.

The Department appreciates commenters' contention that recipients' Title IX offices have not been processing great quantities of "low-level" harassment cases; however, if that is accurate, then the § 106.30 definition simply will continue to ensure that sexual harassment is

[683] Section 106.45(b)(1)(iii).
[684] Section 106.44(a).

adequately addressed under Title IX, for the benefit of victims of sexual harassment. Far from excluding "most" sexual harassment from Title IX coverage, the definition of sexual harassment in § 106.30 requires recipients to respond to three separate broadly-defined categories of sexual harassment. While not all unwanted sexual conduct is both severe and pervasive, as explained above, the Supreme Court has long acknowledged that not all misconduct amounts to sex discrimination prohibited by Federal civil rights laws like Title VII and Title IX, even where the misconduct amounts to a criminal violation under State law.[685] Where a Federal civil rights law does not find sexual harassment to also constitute prohibited sex discrimination, this does not mean the conduct is acceptable or does not constitute a different violation, such as assault or battery, under non-sex discrimination laws. The Department does not believe that the § 106.30 definition of sexual assault is a "narrow" definition, as it includes all forcible and nonforcible sex offenses described in the FBI's Uniform Crime Reporting system and thus this definition will not discourage reporting of sexual assault.

The Department disagrees that it is inappropriate to use a uniform definition of sexual harassment in elementary and secondary school and postsecondary institution contexts. No person, of any age or educational level, should endure *quid pro quo* harassment, severe, pervasive, objectively offensive unwelcome conduct, or a Clery Act/VAWA offense included in § 106.30, without recourse from their school, college, or university. The § 106.30 definition

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[685] *See, e.g.*, *Brooks v. City of San Mateo*, 229 F.3d 917, 924, 927 (9th Cir. 2000) (Plaintiff alleged a workplace sexual assault in the form of a supervisor fondling plaintiff's breast, which is "egregious" and the perpetrator "spent time in jail" for the assault, yet the Court held that "[t]he harassment here was an entirely isolated incident. It had no precursors, and it was never repeated. In no sense can it be said that the city imposed upon [the plaintiff] the onerous terms of employment for which Title VII offers a remedy."); *see also Davis*, 526 U.S. at 634 (noting that the peer harasser in that case was charged with, and pled guilty to, sexual battery, yet still evaluating the harassment by whether it amounted to severe, pervasive, objectively offensive conduct).

applies equally in every educational setting, yet the definition may be applied in a common sense manner that takes into account the ages and developmental abilities of the involved parties.

The Department disagrees with a commenter's contention that community college students will find it more difficult to report sexual harassment because such students have less of a connection to a physical campus. Under § 106.8 of the final regulations, contact information for the Title IX Coordinator, including an office address, telephone number, and e-mail address, must be posted on the recipient's website, and that provision expressly states that any person may report sexual harassment by using the Title IX Coordinator's contact information. We believe this will simplify the process for community college students, as well as other complainants, to make a report to the recipient's Title IX Coordinator.

The Department disagrees with a commenter's assertion that pervasiveness necessarily transforms harassment into also being severe, because these elements are separate inquiries; however, the Department reiterates that a course of conduct reported as sexual harassment must be evaluated in the context of the particular factual circumstances, under a reasonable person standard, when determining whether the conduct is both severe and pervasive. The Department appreciates a commenter's suggestion to revise the second prong of the § 106.30 definition by stating that severe, pervasive, objectively offensive conduct counts when it "causes a person to be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity" instead of "effectively denies a person equal access to the recipient's education program or activity" to more closely mirror the language in the Title IX statute. However, as discussed above, the Department notes that when considering sexual harassment as a form of sex discrimination under Title IX, the Supreme Court in *Davis* repeatedly used the "denial of equal access" phrase to describe when sexual harassment is

actionable, implying that this is the equivalent of a violation of Title IX's prohibition on exclusion from participation, denial of benefits, and/or subjection to discrimination.[686] We believe this element as articulated by the *Davis* Court thus represents the full scope and intent of the Title IX statute.

Changes: We have revised the § 106.30 definition of sexual harassment by specifying that the elements in the *Davis* definition of sexual harassment (severe, pervasive, objectively offensive, and denial of equal access) are determined under a reasonable person standard.

Comments: Several commenters described State laws under which a recipient is required to respond to a broader range of misconduct than what meets the *Davis* standard, and stated that the NPRM places recipients in a "Catch-22" by requiring recipients to dismiss cases that do not meet the narrower § 106.30 definition; one such commenter urged the Department to either broaden the definition of sexual harassment or remove the mandatory dismissal provision in § 106.45(b)(3). A few commenters requested clarification on whether a school may choose to include a wider range of misconduct than conduct that meets this definition. Many commenters urged the Department not to prevent recipients from addressing misconduct that does not meet

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[686] *Davis*, 526 U.S. at 650 ("The statute's other prohibitions, moreover, help give content to the term 'discrimination' in this context. Students are not only protected from discrimination, but also specifically shielded from being 'excluded from participation in' or 'denied the benefits of' any 'education program or activity receiving Federal financial assistance.' 20 U.S.C. § 1681(a). The statute makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender. We thus conclude that funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."); *id.* at 644-45 (holding that a recipient is liable where its "deliberate indifference 'subjects' its students to harassment – "[t]hat is, the deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it."); *id.* at 650-652 (expressing the denial of access element in different ways as "depriv[ing] the victims of access to the educational opportunities or benefits provided by the school," "effectively den[ying] equal access to an institution's resources and opportunities," and "den[ying] its victims the equal access to education that Title IX is designed to protect.").

the § 106.30 definition because State laws and institutional policies often require recipients to respond. A few commenters asserted that even if the final regulations allow recipients to choose to address misconduct that does not meet the § 106.30 definition, this creates two different processes and standards (one for "Title IX sexual harassment" and one for other sexual misconduct) which will lead to confusion and inefficiency. At least one commenter stated that the Title IX equitable process should be used for all sexual misconduct violations such that the final regulations should allow recipients to use that process for Title IX, VAWA, Clery Act, and State law sex and gender offenses under a single campus policy and process. At least one commenter recommended that the Department clarify that the final regulations establish minimum Federal standards for responses to sex discrimination and that recipients retain discretion to exceed those minimum standards.

Discussion: The Department is aware that various State laws define actionable sexual harassment differently than the § 106.30 definition, and that the NPRM's mandatory dismissal provision created confusion among commenters as to whether the NPRM purported to forbid a recipient from addressing conduct that does not constitute sexual harassment under § 106.30. In response to commenters' concerns, the final regulations revise § 106.45(b)(3)(i)[687] to clearly state that dismissal for Title IX purposes does not preclude action under another provision of the recipient's code of conduct. Thus, if a recipient is required under State law or the recipient's own policies to investigate sexual or other misconduct that does not meet the § 106.30 definition, the

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

final regulations clarify that a recipient may do so. Similarly, if a recipient wishes to use a grievance process that complies with § 106.45 to resolve allegations of misconduct that do not constitute sexual harassment under § 106.30, nothing in the final regulations precludes a recipient from doing so. Alternatively, a recipient may respond to non-Title IX misconduct under disciplinary procedures that do not comply with § 106.45. The final regulations leave recipients flexibility in this regard, and prescribe a particular grievance process only where allegations concern sexual harassment covered by Title IX. The Department does not agree that this results in inefficiency or confusion, because so long as a recipient complies with these final regulations for Title IX purposes, a recipient retains discretion as to how to address non-Title IX misconduct. Because the final regulations extend the § 106.30 definition to include all four Clery Act/VAWA offenses (sexual assault, dating violence, domestic violence, stalking), the Title IX grievance process will apply to formal complaints alleging the Clery Act/VAWA offenses included in § 106.30, and recipients may choose to use the same process for State-law offenses, too.

The Department appreciates a commenter's suggestion to clarify (and does so here) that the final regulations establish Federal standards for responding to sex discrimination in the form of sexual harassment, and recipients retain discretion to respond to more conduct than what these final regulations require.

Changes: The final regulations revise § 106.45(b)(3)(i) to clearly state that dismissal for Title IX purposes does not preclude action under another provision of the recipient's code of conduct.

Comments: Many commenters opposed the second prong of the § 106.30 sexual harassment definition by giving examples of harassing conduct that might not be covered. One such commenter stated that the "severe and pervasive" standard will conflict with elementary and secondary school anti-bullying policies, asserting that, for example, a classmate repeatedly

taunting a girl about her breasts may not be considered both severe and pervasive enough to fall under the proposed rules, whereas a similarly-described scenario was clearly covered under the 2001 Guidance (at p. 6).

A few commenters raised examples such as snapping a girl's bra, casual jokes and comments of a sexual nature, or unwelcome e-mails with sexual content, which commenters asserted can be ignored under § 106.30 because the unwanted behavior might be considered not severe even though it is pervasive, leaving victims in a state of anxiety and negatively impacting victims' ability to access education.

One commenter asserted that under § 106.30, a professor whispering sexual comments to a female student would be "severe" but since it happened once it would not be "pervasive" so even if the female student felt alarmed and uncomfortable and dropped that class, the recipient would not be obligated to respond. The same commenter asserted that the following example would not be sexual harassment under § 106.30 because the conduct would be pervasive but not severe: a graduate assistant e-mails an undergraduate student multiple times per week for two months, commenting each time in detail about what the student wears and how she looks, making the student feel uncomfortable about the unwanted attention to the point where she drops the class.

One commenter described attending a holiday party for graduate students where a fellow student wore a shirt with the words "I'm just here for the gang bang" and while the offensive shirt did not prevent the commenter from continuing an education it made the commenter feel unsafe and showed how deep-seated toxic rape culture is on college campuses; the commenter contended that narrowing the definition of harassment will only perpetuate this culture.

One commenter recounted the experience of a friend who was drugged at a dorm party; the commenter contended that because the boys who drugged the girl did not also rape her, the situation would not even be investigated under the new Title IX rules even though an incident of boys drugging a girl creates a dangerous, ongoing threat on campus.

One commenter urged the Department to authorize recipients to create lists of situations that constitute *per se* harassment, for example where a recipient receives multiple reports of students having their towels tugged away while walking to the dorm bathrooms, or reports of students lifting the skirts or dresses of other students. The commenter asserted that creating lists of such *per se* violations will create more consistent application of the harassment definition within recipient communities and address problematic situations that occur frequently at some institutions.

Discussion: In response to commenters who presented examples of misconduct that they believe may not be covered under the *Davis* standard in the second prong of the § 106.30 definition, the Department reiterates that whether or not an incident of unwanted sex-based conduct meets the *Davis* elements is a fact-based inquiry, dependent on the circumstances of the particular incident. However, the Department does not agree with some commenters who speculated that certain examples would *not* meet the *Davis* standard, and encourages recipients to use common sense in evaluating conduct under a reasonable person standard, by taking into account the ages and abilities of the individuals involved in an incident or course of conduct.

Furthermore, the Department reiterates that the *Davis* standard is only one of three categories of conduct on the basis of sex prohibited under § 106.30, and incidents that do not meet the *Davis* standard may therefore still constitute sexual harassment under § 106.30 (for example, as fondling, stalking, or *quid pro quo* harassment). The Department also reiterates that

inappropriate or illegal behavior may be addressed by a recipient even if the conduct clearly does not meet the *Davis* standard or otherwise constitute sexual harassment under § 106.30, either under a recipient's own code of conduct or under criminal laws in a recipient's jurisdiction (e.g., with respect to a commenter's example of drugging at a dorm party).

The Department understands commenters' concerns that anything less than the broadest possible definition of actionable harassment may result in some situations that make a person feel unsafe or uncomfortable without legal recourse under Title IX; however, for the reasons described above, the Department chooses to adopt the Supreme Court's approach to interpreting Title IX, which requires schools to respond to sexual harassment that jeopardizes the equal access to education promised by Title IX. Whether or not a college student wearing a t-shirt with an offensive slogan constitutes sexual harassment under Title IX, other students negatively impacted by the t-shirt are free to opine that such expression is inappropriate, and recipients remain free to utilize institutional speech to promote their values about respectful expressive activity.

The Department notes that nothing in the final regulations prevents a recipient from publishing a list of situations that a recipient has found to meet the § 106.30 definition of sexual harassment, to advise potential victims and potential perpetrators that particular conduct has been found to violate Title IX, or to create a similar list of situations that a recipient finds to be in violation of the recipient's own code of conduct even if the conduct does not violate Title IX.

Changes: None.

Comments: At least one commenter urged the Department to expressly include verbal sexual coercion in the § 106.30 definition of sexual harassment, noting that studies indicate that college women are likely to experience verbal sexual coercion as a tactic of sexual assault on a

continuum ranging from non-forceful verbal tactics to incapacitation to physical force, and that studies indicate that verbal sexual coercion is the most common sexual assault tactic.[688]

One commenter insisted that the second prong of the § 106.30 definition of sexual harassment is too broad and contended that the Department should adopt the minority view in the *Davis* case, or alternatively change the second prong to "unwelcome physical conduct on the basis of sex that is so severe, and objectively offensive" (eliminating the word pervasive because a single act of a physical nature could trigger the statute while excluding purely verbal conduct from the definition).

At least one commenter suggested that the second prong should be subject to a general requirement of objective reasonableness; the commenter asserted that objective offensiveness is no substitute for requiring all the elements of the hostile environment claim be not only subjectively valid but also objectively reasonable. The commenter asserted that the stakes are high: many complaints come to Title IX offices from students who sincerely believe that they have experienced sexual harassment, meeting any subjective test, but which cannot survive reasonableness scrutiny and thus objective reasonableness under all the circumstances is a necessary guard against arbitrary enforcement.

At least one commenter stated that subjective factors must be taken into consideration to decide if conduct is severe and pervasive because how severe the experience is to a particular victim depends on factors such as the status of the offender, the power the offender holds over

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[688] Commenters cited: Brandie Pugh & Patricia Becker, *Exploring Definitions and Prevalence of Verbal Sexual Coercion and its Relationship to Consent to Unwanted Sex: Implications for Affirmative Consent Standards on College Campuses*, 8 BEHAVIORAL SCI. 8 (2018).

the victim's life, the victim's prior history of trauma, or whether the victim has a support system for dealing with the trauma.

Discussion: The Department appreciates commenters' concerns that verbal sexual coercion is the most common sexual assault tactic, but declines to list verbal coercion as an element of sexual harassment or sexual assault. As explained in the "Consent" subsection of the "Section 106.30 Definitions" section of this preamble, the Department leaves flexibility to recipients to define consent as well as terms commonly used to describe the absence or negation of consent (e.g., incapacity, coercion, threat of force), in recognition that many recipients are under State laws requiring particular definitions of consent, and that other recipients desire flexibility to use definitions of consent and related terms that reflect the unique values of a recipient's educational community.

The Department disagrees with commenters who argued that the *Davis* standard is too broad and that the Department should adopt the dissenting viewpoint from the *Davis* decision. For reasons explained in the "Adoption and Adaption of the Supreme Court Framework to Address Sexual Harassment" section of this preamble, the Department believes that the Supreme Court appropriately described the conditions under which sexual harassment constitutes sex discrimination under Title IX, and the Department's goal through these final regulations is to impose requirements for recipients to provide meaningful, supportive responses fair to all parties when allegations of sexual harassment are brought to a recipient's attention. Similarly, the Department declines a commenter's recommendation to restrict the *Davis* standard solely to "physical" conduct because the Supreme Court has acknowledged that not all speech is protected by the First Amendment, and that verbal harassment can constitute sex discrimination requiring a

response when it is so severe, pervasive, and objectively offensive that it denies a person equal access to education.

The Department is persuaded by commenters' recommendation that the second prong of the § 106.30 definition must be applied under a general reasonableness standard. We have revised § 106.30 to state that sexual harassment includes "unwelcome conduct" on the basis of sex "determined by a reasonable person" to be so severe, pervasive, and objectively offensive that it effectively denies a person equal educational access. We interpret the *Davis* standard formulated in § 106.30 as subjective with respect to the unwelcomeness of the conduct (i.e., whether the complainant viewed the conduct as unwelcome), but as to elements of severity, pervasiveness, objective offensiveness, and denial of equal access, determinations are made by a reasonable person in the shoes of the complainant.[689] The Department believes this approach appropriately safeguards against arbitrary application, while taking into account the unique circumstances of each sexual harassment allegation.

Changes: We have revised the § 106.30 definition of sexual harassment by specifying that the elements in the *Davis* standard (severe, pervasive, objectively offensive, and denial of equal access) are determined under a reasonable person standard.

Comments: Many commenters opposed the § 106.30 definition on the ground that a narrow definition fails to stop harassing behavior before it escalates into more serious violations. Some

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[689] *See Davis*, 526 U.S. at 653-54 (applying the severe, pervasive, objectively offensive, denial of access standard to the facts at issue under an objective) ("Petitioner alleges that her daughter was the victim of repeated acts of sexual harassment by G. F. over a 5-month period, and there are allegations in support of the conclusion that G. F.'s misconduct was severe, pervasive, and objectively offensive. The harassment was not only verbal; it included numerous acts of objectively offensive touching, and, indeed, G. F. ultimately pleaded guilty to criminal sexual misconduct. . . . Further, petitioner contends that the harassment had a concrete, negative effect on her daughter's ability to receive an education.").

commenters urged the Department to consider statistics regarding violent offenders who could be identified by examining their history of harassment that escalated over time into violence. Other commenters emphasized that sexual harassment is often a first stop on a continuum of violence and schools have a unique opportunity and duty to intervene early. At least one commenter asserted that the definition should be more in line with academic definitions of sexual harassment.[690] At least one commenter analogized to laws against drunk driving, asserting that such laws do not distinguish between instances where a driver is marginally above the legal intoxication limit from those where a driver is significantly above the limit; the commenter argued that just as all driving while intoxicated situations are dangerous, all harassment regardless of severity is dangerous. Another commenter likened the § 106.30 approach to choosing not to address a rodent infestation until the problem escalates and becomes costlier to redress.

A few commenters argued that waiting until sexually predatory behavior becomes extremely serious risks women's lives, pointing to instances where women reporting domestic violence have been turned away by police due to individual incidents seeming "non-severe" and then been killed by their violent partners.[691]

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[690] Commenters cited: *Handbook for Achieving Gender Equity Through Education* 215-229 (Susan G. Klein *et al.* eds., 2d ed. 2007).

[691] Commenter cited: Elizabeth Bruenig, *What Do We Owe Her Now?*, THE WASHINGTON POST (Sept. 21, 2018); Lindsay Gibbs, *College track star warned police about her ex-boyfriend 6 times in the 10 days before he killed her*, THINKPROGRESS (Dec. 18, 2018), https://thinkprogress.org/mccluskey-university-of-utah-warned-police-about-ex-boyfriend-6-times-bc08aed0fad5/; Sirin Kale, *Teen Killed By Abusive Ex Even After Reporting Him to Police Five Times*, VICE (Jan. 15, 2019), https://broadly.vice.com/en_us/article/59vnbx/teen-killed-by-abusive-ex-even-after-reporting-him-to-police-five-times.

Many commenters stated that a victim turned away while trying to report a less severe instance of harassment will be unlikely to try and report a second time when the harassing conduct has escalated into a more severe situation.

Discussion: The Department understands commenters' concerns that sometimes harassing behavior escalates into more serious harassment, up to and even including violence and homicide, and that commenters therefore advocate using a very broad definition of sexual harassment that captures even seemingly "low level" harassment. The Department is persuaded that every instance of dating violence, domestic violence, and stalking should be considered sexual harassment under Title IX and has therefore revised § 106.30 to include these offenses in addition to sexual assault. However, for the reasons described above, the Department chooses to follow the Supreme Court's framework recognizing that Title IX is a non-sex discrimination statute and not a prohibition on all harassing conduct, and declines to define actionable sexual harassment as broadly as some academic researchers define harassment. The Department further believes that § 106.30 appropriately recognizes certain forms of harassment as *per se* sex discrimination (i.e., *quid pro quo* and Clery Act/VAWA offenses included in § 106.30), while adopting the *Davis* definition for other types of harassment such that free speech and academic

freedom[692] are not chilled or curtailed by an overly broad definition of sexual harassment.[693] The Department believes that as a whole, the § 106.30 definition appropriately requires recipient intervention into situations that form a course of escalating conduct, without requiring recipients to intervene in situations that might – but have not yet – risen to a serious level. By adding dating violence, domestic violence, and stalking to the third prong of the § 106.30 definition, it is even more likely that conduct with potential to escalate into violence or even homicide will be reported and addressed before such escalation occurs.

The Department contends that, similar to laws setting a legal limit over which a person's blood alcohol level constitutes illegal driving while intoxicated,[694] the § 106.30 definition as a whole sets a threshold over which a person's unwelcome conduct constitutes sexual harassment. While some harassment does not meet the threshold, serious incidents that jeopardize equal educational access exceed the threshold and are actionable. In addition, the § 106.30 definition

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[692] The Supreme Court has recognized academic freedom as protected under the First Amendment. *See, e.g.*, *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. . . . The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection.") (internal quotation marks and citations omitted).

[693] Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563 (1995) ("[T]he vagueness of harassment law means the law actually deters much more speech than might ultimately prove actionable."); Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L. J. 481, 483 (1991) ("A broad definition of sexual and racial harassment necessarily delegates broad powers to courts to determine matters of taste and humor, and the vagueness of the definition of 'harassment' leaves those subject to regulation without clear notice of what is permitted and what is forbidden. The inescapable result is a substantial chilling effect on expression.").

[694] While several States have zero-tolerance laws for driving while intoxicated that set illegal blood alcohol content levels at anything over 0.00, those zero-tolerance laws only apply to persons under the legal drinking age; for persons age 21 and older, all States have laws that set an illegal blood alcohol content level at 0.08 – in other words, not all levels of intoxication are prohibited, but rather only blood alcohol content levels above a certain amount. *See* Michael Wechsler, *DUI, DWI, and Zero Tolerance Laws by State*, THELAW.COM, https://www.thelaw.com/law/dui-dwi-and-zero-tolerance-laws-by-state.178/.

includes single instances of *quid pro quo* harassment and Clery Act/VAWA offenses, requiring recipients to address serious problems before such problems have repeated or multiplied and become more difficult to address. Similarly, the Department disagrees that § 106.30 makes complainants wait until sexually predatory behavior becomes extremely serious, because the definition as a whole captures serious conduct (not just "extremely" serious conduct) that Title IX prohibits.

The Department understands commenters' concerns that if a complainant reports a sexual harassment incident that does not meet the § 106.30 definition, that complainant may feel discouraged from reporting a second time if the sexual harassment escalates to meet the § 106.30 definition. However, complainants and recipients have long been familiar with the concept that sexual harassment must meet a certain threshold to be considered actionable under Federal non-discrimination laws.[695] The final regulations follow the same approach, and the Department does not believe that having a threshold for when harassment is actionable will chill reporting. The Department also reiterates that recipients retain discretion to respond to misconduct not covered by Title IX.

Changes: None.

Comments: Several commenters argued that adopting a narrower definition of sexual harassment makes it easier for sexist, misogynistic, and homophobic microaggressions, including sexist

[695] In the workplace under Title VII, and in educational environments under Title IX as interpreted in the Department's 2001 Guidance, not all sexual harassment is actionable. Title VII requires severe or pervasive conduct that alters a condition of employment. *E.g.*, *Meritor*, 477 U.S. at 67 ("For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment.") (internal quotation marks and citation omitted). The 2001 Guidance requires conduct "sufficiently serious" to deny or limit the complainant's ability to participate in education to be actionable under Title IX. 2001 Guidance at 5.

hostility and crude behavior, to continue unchecked. Commenters argued that making the definition of sexual harassment less inclusive tacitly condones microaggressions, making campuses less safe and decreasing diversity because more students from underrepresented groups will perform worse in school or leave school entirely.

A few commenters recommended that the definition include microaggressions. Some commenters asserted that microaggressions can cause the same negative impact on victims as more severe harassment does.[696] Other commenters asserted that using a "severe, pervasive, and objectively offensive" standard fails to consider personal, cultural, and religious differences in determining what constitutes sexual harassment, ignoring the fact that especially for individuals in marginalized identity groups, microaggressions may not seem pervasive or severe to an outsider but accumulate to make marginalized students feel unwelcome and unable to continue their education. One commenter suggested that rather than narrow the definition of harassment, it should be expanded to include what one professor has called "creepiness."[697] A few commenters asserted that cat-calling and other microaggressions may constitute more subtle forms of sexual harassment yet cause very real harms to victims[698] and the final regulations should protect more students from harmful violations of bodily and mental autonomy and dignity. At least one commenter argued that research indicates that gendered microaggressions, while not extreme,

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[696] Commenter cited: Lucas Torres & Joelle T. Taknint, *Ethnic microaggressions, traumatic stress symptoms, and Latino depression: A moderated mediational model*, 62 JOURNAL OF COUNSELING PSYCHOL. 3 (2015).
[697] Commenters cited: Bonnie Mann, *Creepers, Flirts, Heroes, and Allies: Four Theses on Men and Sexual Harassment*, 11 AM. PHIL. ASS'N NEWSLETTER ON FEMINISM & PHILOSOPHY 24 (2012).
[698] Commenter cited: Emma McClure, *Theorizing a Spectrum of Aggression: Microaggressions, Creepiness, and Sexual Assault*, 14 THE PLURALIST 1 (2019) (noting an accepted definition of "microaggressions" as "the brief and commonplace daily verbal, behavioral, and environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial, gender, sexual-orientation, and religious slights and insults to the target person or group" and stating that "although each individual microaggression may seem negligible, when repeated over time, microaggressions can seriously damage the target's mental and physical health").

increase the likelihood of high-severity sexual violence[699] and that unaddressed subtly aggressive behavior leads to more extreme sexual harassment.[700]

One commenter suggested that recipients will save money by investigating all survivor complaints, including of microaggressions, rather than waiting until harassment is severe and pervasive, because trauma from sexual harassment is analogous to chronic traumatic encephalopathy (CTE) in contact sports – it is not necessarily one big trauma that causes CTE but many repeated and seemingly asymptomatic injuries that accumulate over time causing CTE. Commenters argued that schools should be required, or at least allowed, to intervene in cases less severe than the § 106.30 definition.

Discussion: The Department appreciates commenters' concerns about the harm that can result from microaggressions, cat-calling, and hostile, crude, or "creepy" behaviors that can make students feel unwelcome, unsafe, disrespected, insulted, and discouraged from participating in a community or in programs or activities. However, the Supreme Court has cautioned that while Title VII and Title IX both prohibit sex discrimination, neither of these Federal civil rights laws is designed to become a general civility code.[701] The Supreme Court interpreted Title IX's non-

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[699] Commenters cited: Rachel E. Gartner & Paul R. Sterzing, *Gender Microaggressions as a Gateway to Sexual Harassment and Sexual Assault: Expanding the Conceptualization of Youth Sexual Violence*, 31 AFFILIA: J. OF WOMEN & SOCIAL WORK 4 (2016).

[700] Commenters cited: Dorothy Espelage *et al.*, *Longitudinal Associations Among Bullying, Homophobic Teasing, and Sexual Violence Perpetration Among Middle School Students*, 30 JOURNAL OF INTERPERSONAL VIOLENCE 14 (2015).

[701] *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) ("These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a 'general civility code.' . . . Properly applied, they will filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.") (internal quotation marks and citations omitted); *Davis*, 526 U.S. at 684 (Kennedy, J., dissenting) ("the majority seeks, in effect, to put an end to student misbehavior by transforming Title IX into a Federal Student Civility Code."); *id.* at 652 (refuting dissenting justices' arguments that the majority

discrimination mandate to prohibit sexual harassment that rises to a level of severity, pervasiveness, and objective offensiveness such that it denies equal access to education.[702] The *Davis* Court acknowledged that while misbehavior that does not meet that standard may be "upsetting to the students subjected to it,"[703] Title IX liability attaches only to sexual harassment that does meet the *Davis* standard. The Department declines to prohibit microaggressions as such, but notes that what commenters and researchers consider microaggressions[704] could form part of a course of conduct reaching severity, pervasiveness, and objective offensiveness under § 106.30, though a fact-specific evaluation of specific conduct is required. As to a commenter's likening of microaggressions to "asymptomatic" injuries that in the aggregate cause CTE from playing contact sports, actionable sexual harassment under Title IX involves conduct that is unwelcome and so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity. Where harm results from behavior that does not meet the § 106.30 definition of sexual harassment, nothing in these final regulations precludes recipients from addressing such behavior under a recipient's own student or employee conduct code.

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opinion permits too much liability under Title IX or turns Title IX into a general civility code, by emphasizing that it is not enough to show that a student has been teased, called offensive names, or taunted, because liability attaches only to sexual harassment that is severe and pervasive); Julie Davies, *Assessing Institutional Responsibility for Sexual Harassment in Education*, 77 TULANE L. REV. 387, 398, 407 (2002) ("Although the Court adopted different standards for institutional liability under Titles VII and IX, several themes serve as leitmotifs, running through the cases regardless of the technical differences. Neither Title VII nor Title IX is construed as a federal civility statute; the Court does not want entities to be obliged to litigate cases where plaintiffs have been subjected to 'minor' annoyances and insults.") (internal citation omitted).

[702] *Davis*, 526 U.S. at 652.

[703] *Id.* at 651-52.

[704] *See, e.g.*, Emma McClure, *Theorizing a Spectrum of Aggression: Microaggressions, Creepiness, and Sexual Assault*, 14 THE PLURALIST 1 (2019) (noting an accepted definition of "microaggressions" as "the brief and commonplace daily verbal, behavioral, and environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial, gender, sexual-orientation, and religious slights and insults to the target person or group").

As noted above, the fact that not every harassing or offensive remark is prohibited under Title IX in no way condones or encourages crude, insulting, demeaning behavior, which recipients may address through a variety of actions; as a commenter pointed out, a recipient's response could include providing a complainant with supportive measures, responding to the conduct in question with institutional speech, or offering programming designed to foster a more welcoming campus climate generally, including with respect to marginalized identity groups. We have revised § 106.45(b)(3) in the final regulations to clarify that mandatory dismissal of a formal complaint due to the allegations not meeting the § 106.30 definition of sexual harassment does not preclude a recipient from acting on the allegations through non-Title IX codes of conduct. The final regulations also permit a recipient to provide supportive measures to a complainant even where the conduct alleged does not meet the § 106.30 definition of sexual harassment.

Changes: We have revised § 106.45(b)(3) to clarify that mandatory dismissal of a formal complaint because the allegations do not constitute sexual harassment as defined in § 106.30 does not preclude a recipient from addressing the allegations through the recipient's code of conduct.

Comments: Several commenters argued that concern for protecting free speech and academic freedom does not require or justify using the *Davis* definition of sexual harassment in the second prong of the § 106.30 definition because harassment is not protected speech if it creates a hostile

environment.[705] Commenters asserted that schools have the authority to regulate harassing speech,[706] that there is no conflict between the First Amendment and Title IX's protection against sexually harassing speech, and that the Department has no evidence that a broader definition of harassment over the last 20 years has infringed on constitutionally protected speech or academic freedom. On the other hand, at least one commenter argued that verbal conduct creating a hostile environment may still be constitutionally protected speech.[707]

Discussion: The Supreme Court has not squarely addressed the intersection between First Amendment protection of speech and academic freedom, and non-sex discrimination Federal civil rights laws that include sexual harassment as a form of sex discrimination (i.e., Title VII and Title IX).[708] With respect to sex discriminatory conduct in the form of admissions or hiring and firing decisions, for example, prohibiting such conduct does not implicate constitutional concerns even when the conduct is accompanied by speech,[709] and similarly, when sex

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[705] Commenters cited: Joanna L. Grossman & Deborah L. Brake, *A Sharp Backward Turn: Department of Education Proposes to Protect Schools, Not Students, in Cases of Sexual Violence*, VERDICT (Nov. 29, 2018) ("There is no legitimate First Amendment or academic freedom protection afforded to unwelcome sexual conduct that creates a hostile educational environment.").

[706] Commenters cited: *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513-14 (1969) (holding school officials can regulate student speech if they reasonably forecast "substantial disruption of or material interference with school activities" or if the speech involves "invasion of the rights of others").

[707] Commenters cited: *White v. Lee*, 227 F.3d 1214, 1236-37 (9th Cir. 2000) (refusing to extend labor law precedents allowing restrictions on workplace speech to non-workplace contexts such as discriminatory speech about housing projects); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (holding student speech that created a hostile environment was protected even though workplace speech creating a hostile environment is banned by Title VII).

[708] *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 204, 207 (3d Cir. 2001) ("There is no categorical 'harassment exception' to the First Amendment's free speech clause.") ("Although the Supreme Court has written extensively on the scope of workplace harassment, it has never squarely addressed whether harassment, when it takes the form of pure speech, is exempt from First Amendment protection") ("Loosely worded anti-harassment laws may pose some of the same problems as the St. Paul hate speech ordinance [struck down by the Supreme Court as unconstitutional in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)]: they may regulate deeply offensive and potentially disruptive categories of speech based, at least in part, on subject matter and viewpoint.").

[709] *E.g.*, John F. Wirenius, *Actions as Words, Words as Actions: Sexual Harassment Law, the First Amendment and Verbal Acts*, 28 WHITTIER L. REV. 905 (2007) (identifying a First Amendment issue only with respect to hostile environment sexual harassment, as opposed to discriminatory conduct in the form of discrete employment decisions and *quid pro quo* sexual harassment).

discrimination occurs in the form of non-verbal sexually harassing conduct, or speech used to harass in a *quid pro quo* manner, stalk, or threaten violence against a victim, no First Amendment problem exists.[710] However, with respect to speech and expression, tension exists between First Amendment protections and the government's interest in ensuring workplace and educational environments free from sex discrimination when the speech is unwelcome on the basis of sex.[711]

In striking down a city ordinance banning bias-motivated disorderly conduct, the Supreme Court in *R.A.V. v. City of St. Paul* emphasized that the First Amendment generally prevents the government from proscribing speech or expressive conduct "because of disapproval

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[710] *Id.*; *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) (citing Supreme Court cases in support of the view that a variety of conduct can be prohibited even where the person engaging in the conduct uses speech or expresses an idea, such that the First Amendment provides no protection for physical assault, violence, threat of violence, or other special harms distinct from communicative impact); *United States v. Osinger*, 753 F.3d 939, 953 (9th Cir. 2014) ("Because the sole immediate object of [the defendant's] speech was to facilitate his commission of the interstate stalking offense, that speech isn't entitled to constitutional protection.") (internal quotation marks and citation omitted).

[711] Andrea Meryl Kirshenbaum, *Hostile Environment Sexual Harassment Law and the First Amendment: Can the Two Peacefully Coexist?*, 12 TEX. J. OF WOMEN & THE L. 67, 68-70 (2002) ("Although the Supreme Court has never directly addressed this issue, the tension between the First Amendment and hostile environment sexual harassment law is evidenced by an increase in litigation involving these issues in courts throughout the nation." . . . "the clash between the First Amendment and the hostile environment sexual harassment doctrine is acute."); Peter Caldwell, *Hostile Environment Sexual Harassment & First Amendment Content-Neutrality: Putting the Supreme Court on the Right Path*, 23 HOFSTRA LAB. & EMP. L. J. 373 (2006) ("Where pure expression is involved, Title VII steers into the territory of the First Amendment. It is no use to deny or minimize this problem because, when Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech."); John F. Wirenius, *Actions as Words, Words as Actions: Sexual Harassment Law, the First Amendment and Verbal Acts*, 28 WHITTIER L. REV. 905 (2007) ("For nearly two decades, a debate has smoldered over the perceived tension between the law of sexual harassment and the First Amendment's guarantee of freedom of speech. As the protection against sexual harassment in the workplace spread beyond overt discrimination in discrete employment decisions and *quid pro quo* sexual harassment to include the less readily quantified 'hostile work environment,' free speech advocates became less sanguine about the compatibility between the protections against workplace discrimination and the First Amendment, especially its proscription of viewpoint discrimination."). The same tension exists with respect to the First Amendment, and verbal and expressive unwelcome conduct on the basis of sex under Title IX, and the Department aims to ensure through a carefully crafted definition of actionable sexual harassment that "discrete" sex offenses "and *quid pro quo* sexual harassment" are *per se* sexual harassment under Title IX because no First Amendment issues are raised, while verbal and expressive conduct is evaluated under the *Davis* standard so that prohibiting sexual harassment under Title IX is consistent with the First Amendment.

of the ideas expressed. Content-based regulations are presumptively invalid."[712] The Supreme Court explained that even categories of speech that can be regulated consistent with the First Amendment (for example, obscenity and defamation) cannot do so in a content-discriminatory manner (for instance, by prohibiting only defamation that criticizes the government).[713] The Supreme Court further explained that while "fighting words" can permissibly be proscribed under First Amendment doctrine, such a conclusion is based on the nature of fighting words to provoke injury and violence,[714] not merely the impact on the listener to be insulted or offended, and government still cannot regulate "based on hostility—or favoritism—towards the underlying message expressed."[715] Side-stepping the direct question of how the First Amendment prohibition against content-based regulations applies to hostile environment sexual harassment claims based on speech rather than acts, the *R.A.V.* Court stated that "sexually-based 'fighting words'" could "produce a violation of Title VII's general prohibition against sexual discrimination in employment *practices*" because "[w]here the government does not target *conduct* on the basis of its expressive conduct, *acts* are not shielded from regulation merely because they express a discriminatory idea or philosophy."[716] The *R.A.V.* Court struck down the city ordinance at issue, even though it was intended to protect persons in historically marginalized groups from victimization, in part because the "secondary effect" of whether a particular listener or audience is offended by speech does not justify restricting the speech.[717] In

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[712] *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).
[713] *See id.* at 383-84.
[714] *Id.* at 380-81 (*citing Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) for proposition that "fighting words" represent "conduct that itself inflicts injury or tends to incite immediate violence").
[715] *Id.* at 386.
[716] *Id.* at 389-90 (internal citation omitted) (emphasis added).
[717] *Id.* at 394.

striking down the ordinance, the Supreme Court noted that city officials retained the ability to communicate their hostility for certain biases – but not "through the means of imposing unique limitations upon speakers who (however benightedly) disagree."[718]

Seven years after deciding *R.A.V.* under the First Amendment, the Supreme Court decided *Davis* under Title IX. While the *Davis* Court did not raise the issue of First Amendment intersection with anti-sexual harassment regulation,[719] it focused on the sexually harassing *conduct* of the peer-perpetrator in that case,[720] indicating that the Supreme Court recognizes that proscribing conduct, as opposed to speech, raises no constitutional concerns, and that even when anti-harassment rules are applied to verbal harassment, requiring the harassment to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education avoids putting recipients in the untenable position of protecting a recipient from legal liability

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[718] *Id.* at 395-96.

[719] The majority opinion did not address First Amendment concerns, although the dissent raised the issue. *Davis*, 526 U.S. at 667-68 (Kennedy, J., dissenting) ("A university's power to discipline its students for speech that may constitute sexual harassment is also circumscribed by the First Amendment. A number of federal courts have already confronted difficult problems raised by university speech codes designed to deal with peer sexual and racial harassment. *See*, *e.g.*, *Dambrot v. Cent. Michigan Univ.*, 55 F.3d 1177 (6th Cir. 1995) (striking down university discriminatory harassment policy because it was overbroad, vague, and not a valid prohibition on fighting words); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wisconsin Sys.*, 774 F.Supp. 1163 (E.D. Wis. 1991) (striking down university speech code that prohibited, *inter alia*, 'discriminatory comments' directed at an individual that 'intentionally . . . demean' the 'sex . . . of the individual' and 'create an intimidating, hostile or demeaning environment for education, university related work, or other university-authorized activity'); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (similar); *Iota XI Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993) (overturning on First Amendment grounds university's sanctions on a fraternity for conducting an 'ugly woman contest' with 'racist and sexist' overtones) The difficulties associated with speech codes simply underscore the limited nature of a university's control over student behavior that may be viewed as sexual harassment."). Presumably, the majority believed that ensuring that even verbal harassment that meets the severe, pervasive, and objectively offensive standard avoids this constitutional problem; the majority expressed a similar rationale in response to the dissent's contention that the majority opinion permitted too much liability against recipients. *Davis*, 526 U.S. at 651-53.

[720] *Davis*, 526 U.S. at 653 ("Petitioner alleges that her daughter was the victim of repeated acts of sexual harassment by G. F. over a 5-month period, and there are allegations in support of the conclusion that G. F.'s misconduct was severe, pervasive, and objectively offensive. *The harassment was not only verbal; it included numerous acts of objectively offensive touching*, and, indeed, G. F. ultimately pleaded guilty to criminal sexual misconduct.") (emphasis added).

arising from how the recipient responds to sexual harassment only by unconstitutionally restricting its students' (or employees') rights to freedom of speech and expression.

The legal commentary and Supreme Court precedent often cited by commenters[721] arguing that the *Davis* definition of sexual harassment is not necessary for protection of First Amendment freedoms because harassment is unprotected if it creates a hostile environment, and because schools have authority to regulate harassing speech, do not support a conclusion that a categorical "harassment exception" exists under First Amendment law and do not justify applying a standard lower than the *Davis* standard for speech-based harassment in the educational context. For example, the statement in a legal commentary frequently cited by commenters that "[t]here is no legitimate First Amendment or academic freedom protection afforded to unwelcome sexual conduct that creates a hostile educational environment" contains no citations to legal authority.[722] Likewise, commenters citing *Tinker v. Des Moines Indep. Comm. Sch. Dist.* for the proposition that school officials can regulate student speech if they reasonably forecast "substantial disruption of or material interference with school activities" or if the speech involves "invasion of the rights of others" fail to acknowledge: (i) in *Tinker* the Supreme Court struck down the school decision in that case forbidding students from wearing armbands expressing opposition to war because that expressive conduct was akin to pure speech

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[721] *E.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513-14 (1969); Joanna L. Grossman & Deborah L. Brake, *A Sharp Backward Turn: Department of Education Proposes to Protect Schools, Not Students, in Cases of Sexual Violence*, VERDICT (Nov. 29, 2018).

[722] Joanna L. Grossman & Deborah L. Brake, *A Sharp Backward Turn: Department of Education Proposes to Protect Schools, Not Students, in Cases of Sexual Violence*, VERDICT (Nov. 29, 2018) (stating, without citation to legal authority, the proposition that "There is no legitimate First Amendment or academic freedom protection afforded to unwelcome sexual conduct that creates a hostile environment").

warranting First Amendment protection;[723] (ii) the *Tinker* Court insisted that the "substantial disruption" or "interference with school activities" exceptions only apply where school officials have more than unspecified fear of disruption or interference;[724] and (iii) the precise scope of *Tinker's* "interference with the rights of others" language is unclear, but is comparable to the *Davis* standard.[725] By requiring threshold levels of serious interference with work or education environments before sexual harassment is actionable, the Supreme Court standards under *Meritor*[726] (for the workplace) and *Davis*[727] (for schools, colleges, and universities) prevent these non-discrimination laws from infringing on speech and academic freedom,[728] precisely because

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[723] *Tinker*, 393 U.S. at 505-06 ("the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment.").
[724] *Id.* at 508 ("undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression").
[725] *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293 (3d Cir. 2013) ("As we have repeatedly noted, the precise scope of *Tinker's* 'interference with the rights of others' language is unclear.") (internal quotation marks and citation omitted); *cf.* Brett A. Sokolow *et al.*, *The Intersection of Free Speech and Harassment Rules*, 38 HUM. RIGHTS 19 (2011) ("The *Tinker* standard is comparable to the *Davis* standard, which places the threshold for harassment at the point where conduct 'bars the victim's access to an educational opportunity,' in that speech can be restricted only when the educational process is substantially impeded. In other words, when reviewing school policies, and the implementation thereof, it is critical to ensure students are being disciplined as a result of the objective impact of their speech, and not solely based on its content and/or the feelings of those to whom that speech is targeted.").
[726] *Meritor*, 477 U.S. at 67; *see also* John F. Wirenius, *Actions as Words, Words as Actions: Sexual Harassment Law, the First Amendment and Verbal Acts*, 28 WHITTIER L. REV. 905, 908 (2007) (arguing that the hostile work environment doctrine, properly understood with its critical threshold requirement that harassing speech be severe or pervasive enough to create an objectively hostile or abusive work environment, converts harassing speech into "verbal conduct" that may be regulated under Title VII consistent with the First Amendment). Similarly, when harassing speech is severe, pervasive, and objectively offensive enough to create deprivation of equal educational access it may be regulated under Title IX consistent with the First Amendment.
[727] *Davis*, 526 U.S. at 651 ("Rather, a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."); Brett A. Sokolow, *et al.*, *The Intersection of Free Speech and Harassment Rules*, 38 HUM. RIGHTS 19 (2011) (cautioning that institutional anti-harassment policies must not prevent students from exercising rights of speech and expression, a result that the *Davis* standard makes clear).
[728] *E.g.*, Brett A. Sokolow *et al.*, *The Intersection of Free Speech and Harassment Rules*, 38 HUM. RIGHTS 19, 20 (2011) ("[S]chool regulations and actions that impact speech must be content and viewpoint neutral and must be

non-discrimination laws are not "categorically immune from First Amendment challenge when they are applied to prohibit speech solely on the basis of its expressive content."[729]

The First Amendment plays a crucial role in ensuring that the American government remains responsive to the will of the people and effects peaceful change by fostering free, robust exchange of ideas,[730] including those relating to sex-based equality and dignity.[731] There is no doubt that words can wound, and speech can feel like an "assault, seriously harm[ing] a private

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narrowly tailored to fit the circumstances. These regulations must be clear enough for a person of ordinary intelligence to understand, or courts will find them unconstitutionally void for vagueness. They cannot overreach by covering both protected and unprotected speech or courts will find them unconstitutionally overbroad. The regulation cannot act to preemptively prevent students from exercising their right to freely express themselves because the courts will find the prior restraint of speech presumptively unconstitutional.") ("In some ways, activist courts, agencies, and educational messages about civility and tolerance may have given a false impression that any sexist, ageist, racist, and so forth, remark is tantamount to harassment. As a society, we now use the term 'harassment' to mean being bothered, generically. We must distinguish generic harassment from discriminatory harassment. The standard laid out in *Davis* . . . makes this clear: To be considered discriminatory harassment, the conduct in question must be 'so severe, pervasive, *and* objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.'") (emphasis in original).

[729] *Saxe*, 240 F.3d at 209.

[730] *See Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) ("The vitality of civil and political institutions in our society depends on free discussion. . . . [I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes. Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.") (internal citations omitted).

[731] Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 JOURNAL OF COLL. & UNIV. L. 385, 397 (2009) ("In drafting and applying their harassment policies, colleges and universities frequently target protected speech merely because the expression in question is alleged to be sexist, prejudicial, or demeaning. . . . This approach ignores the fact that even explicitly sexist or racist speech is entitled to protection, and all the more so where it espouses views on important issues of social policy. Few people would disagree, for example, that the subjects of relations between the sexes, women's rights, and the pursuit of economic and social equality are all important matters of public concern and debate. Therefore, speech relating to such topics, regardless of whether it takes a favorable or negative view of women, is highly germane to the debate of public matters and social policy. In the marketplace of ideas, these expressions should not be suppressed merely to avoid offense or discomfort.") (citing *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) (holding invalid under the First Amendment a statute that prohibited pornography depicting the subordination of women because the statute was a content-based restriction – that is, it applied not to all sexual depictions but to depictions of women in a disfavored manner).

individual" with effects that often linger.[732] Nonetheless, serious risks attach to soliciting the coercive power of government to enforce even laudable social norms such as respect and civility.[733] Even low-value speech warrants constitutional protection, in part because government should not be the arbiter of valuable versus worthless expression.[734] This principle holds true for elementary and secondary schools as well as postsecondary institutions.[735] Schools, colleges, and

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[732] *Snyder v. Phelps*, 562 U.S. 443, 461 (2011) (Breyer, J., concurring); s*ee also Davis*, 526 U.S. at 651-52 (acknowledging that gender-based banter, insults, and teasing can be upsetting to those on the receiving end).

[733] Catherine J. Ross, *Assaultive Words and Constitutional Norms*, 66 JOURNAL OF LEGAL EDUC. 739, 744 (2017) ("Recently, students have been in the vanguard, demanding that offensive speech be silenced. Students ask to be protected from hurtful words, sentiments, even gestures, and inadvertent facial clues or rolling eyes that communicate dismissal. They seek the coercive power of authority to enforce laudable social norms – respect, dignity, and equality regardless of race, ethnicity, gender, gender identity, and so forth. Meritorious as these proclaimed goals are, the rules and penalties some students lobby for would suppress the expressive rights of others including students, faculty, and invited guests, a particularly disturbing prospect at an institution devoted to the academic enterprise.").

[734] *Id*. at 749-50 (2017) ("Many people question whether rude epithets, crude jokes, and disparaging statements are the kind of expression that merits First Amendment protection. The Supreme Court has long held the Constitution protects the right to speak 'foolishly and without moderation.' You might maintain that racist, misogynist and other vile speech makes no contribution at all to the exchange of ideas – but the Speech Clause protects even so-called low-worth expression, in large part because no public authority can be trusted to distinguish valuable from worthless expression. The government cannot ban hateful expression, no matter how hurtful.") (citing *Cohen v. California*, 403 U.S. 15, 25-26 (1971)). Furthermore, permitting censorship of speech in an effort to be on the right side of history with respect to racial or sexual equality ignores the role that commitment to the First Amendment has played in achieving milestones for racial and sexual equality. *See, e.g.*, Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L. J. 484, 536-37 (1990) ("History demonstrates that if the freedom of speech is weakened for one person, group, or message, then it is no longer there for others. The free speech victories that civil libertarians have won in the context of defending the right to express racist and other anti-civil libertarian messages have been used to protect speech proclaiming anti-racist and pro-civil libertarian messages. For example, in 1949, the ACLU defended the right of Father Terminiello, a suspended Catholic priest, to give a racist speech in Chicago. The Supreme Court agreed with that position in a decision that became a landmark in free speech history. Time and again during the 1960s and 1970s, the ACLU and other civil rights groups were able to defend free speech rights for civil rights demonstrators by relying on the *Terminiello* decision [*Terminiello v. City of Chicago*, 337 U.S. 1 (1949)].") (internal citations omitted); *see also* Anthony D. Romero, *Equality, Justice and the First Amendment*, AMERICAN CIVIL LIBERTIES UNION (ACLU) (Aug. 15, 2017), https://www.aclu.org/blog/free-speech/equality-justice-and-first-amendment (explaining that the ACLU's nearly century-long history defending freedom of speech "including speech we abhor" is due to belief that "our democracy will be better and stronger for engaging and hearing divergent views. Racism and bigotry will not be eradicated if we merely force them underground. Equality and justice will only be achieved if society looks such bigotry squarely in the eyes and renounces it. . . . There is another reason that we have defended the free speech rights of Nazis and the Ku Klux Klan. . . . We simply never want government to be in a position to favor or disfavor particular viewpoints.").

[735] *See* Catherine J. Ross, *Assaultive Words and Constitutional Norms*, 66 JOURNAL OF LEGAL EDUC. 739, 754-55 (2017) ("Constitutional doctrine asks our youngest students to use the traditional constitutional responses to vile

universities, and their students and employees, who find speech offensive, have numerous avenues to confront offensive speech without "the means of imposing unique limitations upon speakers who (however benightedly) disagree."[736]

The Department believes that the tension between student and faculty freedom of speech, and regulation of speech to prohibit sexual harassment, is best addressed through rules that prohibit harassing and assaultive physical conduct, while ensuring that harassment in the form of speech and expression is evaluated for severity, pervasiveness, objective offensiveness, and denial of equal access to education. This is the approach taken in the § 106.30 definition of sexual harassment, under which *quid pro quo* harassment and Clery Act/VAWA offenses receive *per se* treatment as actionable sexual harassment, while other forms of harassment must meet the *Davis* standard. This approach balances the "often competing demands of the First Amendment's express guarantee of free speech and the Fourteenth Amendment's implicit promise of dignity and equality."[737]

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speech: Walk away, don't listen, or respond with 'more and better speech.' These general First Amendment principles apply with at least as much vigor to college campuses, where most students are adults, not schoolchildren, the guiding ethos of higher education supplements constitutional mandates, and students are not compelled to attend. Looking at what the Constitution requires in grades K-12 reveals a lot about what we should expect the adults enrolled in college to have the capacity to withstand. Since our constitutional framework expects this degree of coping from children beginning in elementary school, it is not asking too much of college students to handle offensive sentiments by using the standard First Amendment tools: Walk away, throw the pamphlet in the trash, get off the screen or, even better, tackle objectionable speech with more and better speech.") (discussing and citing *Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668, 672 (7th Cir. 2008); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 202 (3d Cir. 2001); *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 967 (S.D. Ohio 2005)).

[736] *R.A.V.*, 505 U.S. at 395-96. As a commenter observed, recipients retain the ability and discretion to respond to offensive speech by a student (or employee) by providing the complainant with supportive measures, responding to the offensive speech with institutional speech, or offering programming designed to foster a welcoming campus climate more generally.

[737] Catherine J. Ross, *Assaultive Words and Constitutional Norms*, 66 JOURNAL OF LEGAL EDUC. 739, 739 (2017) ("Campuses are rocked by racially and sexually offensive speech and counter speech. Offensive speech and counter speech, including demonstrations and calls for policies that shield the vulnerable and repercussions for offenders, are

Contrary to commenters' assertions, evidence that broadly and loosely worded anti-harassment policies have infringed on constitutionally protected speech and academic freedom is widely available.[738] The fact that broadly-worded anti-harassment policies have been applied to protected speech "leads many potential speakers to conclude that it is better to stay silent and not risk the consequences of being charged with harassment. . . . This halts much campus discussion and debate, taking away from the campus's function as a true marketplace of ideas."[739] Where

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both protected by the Constitution. Yet some college administrations regulate this protected speech. Expression on both sides of a cultural and political divide brings to the fore a conflict that has been simmering in legal commentary for about two decades: the tension between the often competing demands of the First Amendment's express guarantee of free speech and the Fourteenth Amendment's implicit promise of dignity and equality. This clash between two fundamental principles seems to have been exacerbated recently by a renewed focus on identity politics both on campus and in national and international affairs.").

[738] *E.g.*, Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 JOURNAL OF COLL. & UNIV. L. 385, 391-92 (2009) (discussing examples of universities punishing protected speech including: a student-employee charged with racial harassment merely for reading a book entitled *Notre Dame vs. The Klan*; finding a professor guilty of racial harassment for explaining in a Latin American Politics class that the term "wetbacks" is commonly used as a derogatory reference to Mexican immigrants; investigating a criminal law professor for a sexually hostile environment where the professor's exam presented a hypothetical case in which a woman seeking an abortion felt thankful after she was attacked because the physical attack resulted in the death of her fetus; finding a student guilty of sexual harassment for posting flyers joking that freshman women could lose weight by using the stairs); *see also* Nadine Strossen, Law Professor and former ACLU President, 2015 Richard S. Salant Lecture on Freedom of the Press at Harvard University (Nov. 5, 2015), https://shorensteincenter.org/nadine-strossen-free-expression-an-endangered-species-on-campus-transcript/ (identifying the free speech and academic freedom problems with "the overbroad, unjustified concept of illegal sexual harassment as extending to speech with any sexual content that anyone finds offensive," opining that the current college climate exalts a misplaced concept of "safety" by insisting that "safety seeks protection from exposure to ideas that make one uncomfortable . . . . [W]hen it comes to safety, our students are being doubly disserved. Too often, denied safety from physical violence, which is critical for their education, but too often granted safety from ideas, which is antithetical to their education," and detailing numerous examples "of campus censorship in the guise of punishing sexual harassment" including: subjecting a professor to investigation for writing an essay critical of current sexual harassment policies; punishing a professor who, during a lecture, paraphrased Machiavelli's comments about raping the goddess Fortuna; finding a professor guilty of sexual harassment for teaching about sexual topics in a graduate-level course called "Drugs and Sin in American Life;" suspending a professor for showing a documentary that examined the adult film industry; punishing a professor for having students play roles in a scripted skit about prostitution in a course on deviance; punishing a professor for requiring a class to write essays defining pornography; firing an early childhood education professor who had received multiple teaching awards, for occasionally using vulgar language and humor about sex in her lectures about human sexuality).

[739] Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 JOURNAL OF COLL. & UNIV. L. 385, 397 (2009) ("Of course, sexual and racial

speech and expression are not given sufficient "breathing room," the "safety valve" function of speech is diminished.[740] Furthermore, even seemingly low-value speech can have a "downstream effect of leading to constructive discussion and debate which would not have taken place otherwise."[741] For these reasons, the § 106.30 definition of sexual harassment is designed to capture non-speech conduct broadly (based on an assumption of the education-denying effects of such conduct), while applying the *Davis* standard to verbal conduct so that the critical purposes of both Title IX and the First Amendment can be met.

Changes: None.

So Severe

Comments: Some commenters asserted that the "so severe" element of the second prong of the § 106.30 definition means that recipients must ignore many harassment incidents that result in academic, economic, and psychological harm and suffering including depression and post-traumatic stress disorder, whereas the better approach is to treat any level of harassment as

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harassment policies, regardless of the terms in which they are drafted, are oftentimes applied against protected speech, which again leads many potential speakers to conclude that it is better to stay silent and not risk the consequences of being charged with harassment. . . . The unfortunate result, then, is that students have a strong incentive to refrain from saying anything provocative, inflammatory, or bold and to instead cautiously stick to that which is mundane or conventional. This halts much campus discussion and debate, taking away from the campus's function as a true marketplace of ideas."); *id.* at 432-34 (discussing several Federal court cases striking down university anti-harassment codes as applied to constitutionally protected speech, including *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968 (9th Cir. 1996); *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993); *Silva v. Univ. of N.H.*, 888 F. Supp. 293 (D. N.H. 1994)).

[740] Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 JOURNAL OF COLL. & UNIV. L. 385, 398-99 (2009) ("Furthermore, one of the benefits of providing breathing room for such expression is that it allows the speaker to espouse his or her views through constructive dialogue rather than act out of frustration by committing acts of violence or hate crimes. This outlet has been labeled the 'safety valve' function of speech.").

[741] *Id.* ("By exposing the real ugliness of prejudice, ignorance and hate, such speech can reach and convince people in ways that polite conversation never could. Moreover, ignorant or misguided speech, though seemingly possessing little value or merit on its own, often has the 'downstream' effect of leading to constructive discussion and debate which would not have taken place otherwise. Consequently, the initial expression greatly benefits the marketplace of ideas and enriches students' understanding of important issues by increasing the potential for real and meaningful debate on campus.").

seriously as the most severe level. Some commenters asserted that schools should never try to tell a survivor what was or was not severe because the survivor is the only person who can determine what was severe. Other commenters wondered what threshold determines an incident as "severe," whether severity refers to the mental impact on the victim or the physical nature of the unwelcome conduct (or both), and how a victim is expected to prove severity.

Discussion: For reasons discussed above, the Department believes that severity is a necessary element to balance protection from sexual harassment with protection of freedom of speech and expression. The Department interprets the *Davis* standard formulated in § 106.30 as subjective with respect to the unwelcomeness of the conduct (i.e., whether the complainant viewed the conduct as unwelcome), and the final regulations clarify that the elements of severity, pervasiveness, objective offensiveness, and resulting denial of equal access are determined under a reasonable person standard.[742] In this way, evaluation of whether harassment is "severe" appropriately takes into account the circumstances facing a particular complainant, such as the complainant's age, disability status, sex, and other characteristics. This evaluation does not burden a complainant to "prove severity," because a complainant need only describe what occurred and the recipient must then consider whether the described occurrence was severe from the perspective of a reasonable person in the complainant's position.

Changes: None.

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[742] *See Davis*, 526 U.S. at 653-54 (applying the severe, pervasive, objectively offensive, denial of access standard to the facts at issue under an objective approach) ("Petitioner alleges that her daughter was the victim of repeated acts of sexual harassment by G. F. over a 5-month period, and there are allegations in support of the conclusion that G. F.'s misconduct was severe, pervasive, and objectively offensive. The harassment was not only verbal; it included numerous acts of objectively offensive touching, and, indeed, G. F. ultimately pleaded guilty to criminal sexual misconduct. . . . Further, petitioner contends that the harassment had a concrete, negative effect on her daughter's ability to receive an education.").

And Pervasive

Comments: Many commenters believed that the "pervasive" element of the second prong of the § 106.30 definition means that students would be forced to endure repeated, escalating levels of harassment before seeking help from schools, and that by the time schools must intervene it might be too late because victims will already have suffered emotional harm and derailed educational futures (e.g., ineligibility for an advanced placement course or rejection from admission to a dream college after grades dropped due to harassment that was not deemed pervasive). Several commenters asserted that every instance of discrimination deserves investigation, or else patterns of harassment will not be discovered because each single instance will be dismissed as not "pervasive." Some such commenters argued that without an investigation, a school will not know whether a single instance of an inappropriate remark or joke is truly an isolated incident or part of a pattern. A few commenters argued that especially in elementary and secondary schools, students whose reports are turned away for not being "pervasive" will be very unlikely to report again when the conduct repeats and does become pervasive.

Several commenters described scenarios that they asserted would not be covered as sexual harassment under § 106.30 because they fail to meet the pervasive element even though such scenarios present severe, objectively offensive, threatening, humiliating, harm-inducing consequences on victims, including: a professor blocking a teaching assistant's exit from a small office while badgering the assistant with sexual insults; a teacher inappropriately touching a student while making sexually explicit comments during an after-school meeting; students posting videos of "revenge porn" on social media.

Discussion: The Department reiterates that *quid pro quo* harassment and Clery Act/VAWA offenses (sexual assault, dating violence, domestic violence, and stalking) constitute sexual harassment under § 106.30 without any evaluation for pervasiveness. Thus, students do not have to endure repeated incidents of such abuse without recourse from a recipient. The Department further reiterates that recipients retain discretion to provide supportive measures to any complainant even where the harassment is not pervasive. The Department disagrees that an investigation into every offensive comment or joke is necessary in order to discern whether the isolated comment is part of a pervasive pattern of harassment. For reasons discussed above, chilling speech and expression by investigating each instance of unwelcome speech is not a constitutionally permissible way of ensuring that unlawful harassment is not occurring. The Department appreciates commenters' concerns that if a complainant receives no support after reporting one incident (that does not rise to the level of actionable harassment under Title IX) the complainant may feel deterred from reporting again if the harassment escalates and meets the *Davis* standard. This is one reason why the Department emphasizes that recipients remain free to provide supportive measures even where alleged conduct does not meet the § 106.30 definition of sexual harassment, and to utilize institutional speech and provide general programming to foster a respectful educational environment, none of which requires punishing or chilling protected speech.

With respect to the scenarios presented by commenters as examples of harassment that may not meet the *Davis* standard because of lack of pervasiveness, the Department declines to make definitive statements about examples, due to the necessarily fact-specific nature of the analysis. However, we note that sexual harassment by a teacher or professor toward a student or subordinate may constitute *quid pro quo* harassment, which does not need to meet a

pervasiveness element. The *Davis* standard as applied in § 106.30 is broad, encompassing any unwelcome conduct on the basis of sex that a reasonable person would find so severe, pervasive, and objectively offensive that a person is effectively denied equal educational access. Disseminating "revenge porn," or conspiring to sexually harass people (such as fraternity members telling new pledges to "score"), or other unwelcome conduct that harms and humiliates a person on the basis of sex may meet the elements of the *Davis* standard including pervasiveness, particularly where the unwelcome sex-based conduct involves widespread dissemination of offensive material or multiple people agreeing to potentially victimize others and taking steps in furtherance of the agreement. Finally, a single instance of unwelcome physical conduct may meet definitions of assault or battery prohibited by other laws, even if the incident does not meet one of the three prongs of the § 106.30 definition of sexual harassment.

Changes: None.

Objectively Offensive

Comments: Several commenters argued that the "objectively offensive" element of the second prong of the § 106.30 definition will mean different things to different school officials, and result in similar incidents being investigated by some schools and not by others. Several commenters asserted that "objectively offensive" creates an unnecessary and inappropriate scrutiny of victims and their experiences, creating barriers to reporting and making campuses less safe, contributing to victim-blaming, perpetuating myths and misconceptions about sexual violence, and minimizing the harm caused by sexual harassment.

Several commenters asserted that nothing is "objectively" offensive because what is offensive is based on how conduct subjectively makes a person feel yet "objective" means not influenced by personal feelings; these commenters argued that therefore the term "objectively

offensive" is an oxymoron. At least one commenter argued that research shows that individuals experience sex-based misconduct differently, depending on prior life experiences, previous victimization, and other factors.[743]

Commenters similarly opined that offensiveness depends on the impact of the conduct, not the intent of the perpetrator. One commenter opined that cat-calling may not sound objectively threatening, yet knowing that cat-calling and similar objectification of women may contribute to physical violence against women[744] might cause a woman targeted by cat-calling to feel unsafe.

At least one commenter argued that what is "objectively offensive" tends to be interpreted as what white, privileged men would find to be offensive, lending itself to a "boys will be boys" attitude that excuses a lot of behavior that offends women and marginalized individuals. One commenter recommended that the Department issue guidance for what factors to consider so that unconscious bias does not impact evaluation of what conduct is "offensive." One commenter claimed that the § 106.30 definition fails to account for the intersectional dynamics (race, gender, sexual orientation, culture, etc.) that may impact the severity and objective offensiveness of an act. This commenter argued that since the purpose of having an investigation is to decide whether conduct was in fact severe, pervasive, and objectively offensive it makes little sense to require schools to dismiss claims at the outset when the rape culture pyramid explains how small microaggressions and supposedly "less severe" offenses fuel

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[743] Commenters cited: Emma M. Millon *et al.*, *Stressful Life Memories Relate to Ruminative Thoughts in Women with Sexual Violence History, Irrespective of PTSD*, FRONTIERS IN PSYCHIATRY 9 (2018).
[744] Commenters cited: Eduardo A. Vasquez *et al.*, *The sexual objectification of girls and aggression towards them in gang and non-gang affiliated youth*, 23 PSYCHOL., CRIME & L. 5 (2017).

a culture for severe behaviors to become normalized. This commenter recommended that "objectively offensive" should be defined and understood with a high bar for sensitive, respectful language and conduct towards all in the community.

At least one commenter argued that because violence against women is often normalized,[745] and perpetrators of even heinous sexual crimes rationalize their behaviors through victim blaming,[746] these social realities make it very difficult for any act of sexual violence or harassment to be deemed "objectively offensive" even when the acts are disruptive or traumatic to the victim. At least one commenter asserted that the § 106.30 definition eliminates the possibility of recipients focusing on unique or personally harmful situations; for example, when private or "inside" jokes do not seem offensive to outsiders but have a harmful connotation for the victim.

Several commenters noted that under case law, what is objectively offensive is analyzed from the perspective of a reasonable person standing in the shoes of the complainant, using an approach that rejects disaggregation of allegations and instead looks at the aggregate or cumulative impact of conduct.[747] One commenter urged the Department to clarify that whether conduct is "severe, pervasive, and objectively offensive" depends on evaluation by a reasonable person and the hypothetical "reasonable person" must consider both male and female views of what is "offensive."

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[745] Commenters cited: Heather R. Hlavka, *Normalizing Sexual Violence: Young Women Account for Harassment and Abuse*, 28 GENDER & SOC'Y 3 (2014).
[746] Commenters cited: Diana Scully, & Joseph Marolla, *Convicted rapists' vocabulary of motive: Excuses and justifications*, 31 SOCIAL PROBLEMS 5 (1984).
[747] Commenters cited: *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

At least one commenter argued that the "objectively offensive" element undermines a longstanding analytic requirement that recipients evaluate conduct from both objective and subjective viewpoints (e.g., 2001 Guidance at p. 5).

Discussion: The Department agrees with commenters who note that whether harassing conduct is "objectively offensive" must be evaluated under a reasonable person standard, as a reasonable person in the complainant's position,[748] though the Department declines to require a commenter's suggestion that the "reasonable person" standard must consider offensiveness from both male and female perspectives because the latter suggestion would invite application of sex stereotypes. The final regulations revise the second prong of the § 106.30 definition to expressly state that the *Davis* elements are determined under a reasonable person standard.

The Department disagrees that "objectively offensive" is oxymoronic; the objective nature of the inquiry simply means that evaluation is made by a reasonable person considering whether, standing in the shoes of the complainant, the conduct would be offensive. The reasonable person standard appropriately takes into account whether a reasonable person, in the position of the particular complainant, would find the conduct offensive, thus the standard should not result in victims being blamed or excluded from receiving support regardless of whether the school officials evaluating the conduct share the same race, sex, age, or other characteristics as the complainant. It would be inappropriate for a Title IX Coordinator to evaluate conduct for

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[748] *See Davis*, 526 U.S. at 653-54 (applying the severe, pervasive, objectively offensive, denial of access standard to the facts at issue under an objective approach) ("there are allegations in support of the conclusion that G. F.'s misconduct was severe, pervasive, and objectively offensive. The harassment was not only verbal; it included numerous acts of objectively offensive touching"); s*ee also Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 81 (1998) ("We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances.") (internal quotation marks and citations omitted.).

objective offensiveness by shrugging off unwelcome conduct as simply "boys being boys" or make similar assumptions based on bias or prejudice. To take that approach would risk evidencing sex-based bias in contravention of § 106.45(a) or bias for or against a complainant or respondent in violation of § 106.45(b)(1)(iii), in addition to indicating improper evaluation of the *Davis* elements under a reasonable person standard. For reasons discussed under § 106.45(b)(1)(iii), the Department leaves recipients flexibility to decide the content of the training required for Title IX personnel under that provision, and nothing in the final regulations precludes a recipient from addressing implicit or unconscious bias as part of such training.

The Department disagrees that this standard inappropriately results in different schools making different decisions about what is objectively offensive. The Department believes that a benefit of the *Davis* standard as formulated in the second prong of § 106.30 is that whether harassment is actionable turns on both subjectivity (i.e., whether the conduct is unwelcome, according to the complainant) and objectivity (i.e., "objectively offensive") with the *Davis* elements determined under a reasonable person standard, thereby retaining a similar "both subjective and objective" analytic approach that commenters point out is used in the 2001 Guidance.[749] The fact-specific nature of evaluating sexual harassment does mean that different people may reach different conclusions about similar conduct, but this is not unreasonable because the specific facts and circumstances of each incident and the parties involved may require different conclusions. The *Davis* standard does not require an "intent" element;

[749] 2001 Guidance at 5 (conduct should be evaluated from both a subjective and objective perspective); *id*. at fn. 39 (citing case law for the proposition that whether conduct is severe, or objectively offensive, must be judged from the perspective of a reasonable person in the complainant's position, such as *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20-22 (1993) (requiring subjective and objective creation of a hostile work environment)).

unwelcome conduct so severe, pervasive, and objectively offensive that it denies a person equal educational opportunity is actionable sexual harassment regardless of the respondent's intent to cause harm.

The Department disagrees that the objectively offensive element results in unnecessary scrutiny of victims' experiences that will create reporting barriers, make campuses less safe, lead to victim-blaming, or perpetuate sexual violence myths and misconceptions. The *Davis* standard ensures that all students, employees, and recipients understand that unwelcome conduct on the basis of sex is actionable under Title IX when a reasonable person in the complainant's position would find the conduct severe, pervasive, and objectively offensive such that it effectively denies equal access to the recipient's education program or activity.

For reasons explained above, the Department appreciates commenters' concerns that even conduct characterized by commenters as low-level harassment (such as cat-calling and microaggressions) can be harmful, and that some situations have escalated from minor incidents into violence and even homicide against women. This is why, in response to commenters, we have revised final § 106.30 to include as *per se* sexual harassment every incident of the Clery Act/VAWA offenses of dating violence, domestic violence, and stalking (in addition to sexual assault, which was referenced in the NPRM and remains part of the final regulations). In this way, the § 106.30 definition stands firmly against sex-based physical conduct, including violence and threats of violence, while ensuring that verbal and expressive conduct is punishable as Title IX sex discrimination only when the conduct crosses a line from protected speech into sexual harassment that denies a person equal access to education. For the same reasons, the § 106.30 definition pushes back against an historical, societal problem of normalizing violence against women. By not imposing an "intent" element into the sexual harassment definition, § 106.30

makes clear that sexual harassment under any part of the § 106.30 definition cannot be excused by trying to blame the victim or rationalize the perpetrator's behavior, tactics pointed to by commenters (and supported by research) as common reasons why victims (particularly women) have often faced dismissiveness, shame, or ridicule when reporting sex-based violence to authorities.

Changes: We have revised the second prong of the § 106.30 definition to expressly state that the *Davis* elements are determined under a reasonable person standard.

Effectively Denies Equal Access

Comments: Many commenters objected to the element in the second prong of the § 106.30 definition that conduct "effectively denies a person equal access" as a confusing, stringent, unduly restrictive standard that will harm survivors, benefit perpetrators, and send the message to assailants that non-physical sexual harassment is acceptable. At least one commenter stated that requiring conduct to rise to the level of denying a person equal access to the recipient's education program or activity is inconsistent with the language of Title IX because it is a higher bar than the statute's provision (20 U.S.C. 1681) that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance." Several commenters asserted that waiting until a complainant's access to education has been denied means that students must wait for help until harassing or violent behaviors cause victims to reach a breaking point, making a mockery of institutional responsibility and the values of an educational community.

Many commenters believed that the "effectively denies equal access" element supports a culture that conveys acceptance of sexual harassment of women as long as the victims continue

showing up to school, leaving girls and women in situations that are difficult and discouraging without recourse until they have lost access altogether. Many commenters believed that in order to file a Title IX complaint meeting this element, a victim would need to drop out of school entirely, fail a class, have a panic attack, be unable to function, or otherwise provide evidence of denial of access. Commenters argued that this standard makes no sense because help should be given to complainants before access has been denied, and will lead to more victims dropping out of school. One commenter relayed a personal story of sexual assault and stated that the commenter felt deterred from reporting the incident because the commenter was unsure whether, under the NPRM, the university would consider the incident significant enough to respond, despite the fact that the commenter knew of witnesses who could attest to the incident, and the commenter had to switch out of a class to avoid crossing paths with the perpetrator.

Many commenters believed that this element has a perverse effect of leaving students who demonstrate resilience by managing to attend classes and participate in educational activities despite being subjected to harassment and abuse without protection from the harassment they suffer. A few commenters opposed this element because it places the focus on a survivor's response to trauma instead of on the unwelcome conduct itself, when everyone responds differently to trauma. One commenter recounted an experience of reporting sexual violence to the police and being told that they did not appear "traumatized enough" to be

credible; the commenter argued that this element of the § 106.30 definition leaves too much subjectivity with school officials to interpret a victim's reaction to trauma.[750]

One commenter supported the proposed rules because for the first time the Department is regulating sexual harassment as a form of sex discrimination under Title IX, and sexual assault as a form of sexual harassment, but expressed concern that many commenters interpret the "effectively denies equal access" element as requiring students to drop out of school before action can be taken, amounting to a "constructive expulsion" requirement that is much more strict than what Title IX requires. Many commenters expressed the belief that this element means harassment is not actionable unless a complainant has been effectively driven off campus, and most of these commenters urged the Department to use "denies or limits" or simply "limits" instead of "effectively denies" to clarify that unwelcome conduct is actionable when it limits (not only when it has already denied) equal access to education. Many such commenters noted that the 2001 Guidance used "deny or limit" to recognize that students should not be denied a remedy for sexual harassment because they continue to come to class or participate in athletic practice no matter at what personal or emotional cost. At least one commenter stated that the 2001 Guidance only prohibits conduct that is sufficiently serious to deny or limit a student's educational benefits or opportunities from both a subjective and objective perspective, so if the purpose of the proposed definition is to minimize its misapplication to low-level situations that remain protected by the First Amendment (for public institutions) and principles of academic freedom (for private

[750] Commenters cited: Rebecca Campbell, *Survivors' Help-Seeking Experiences With the Legal and Medical Systems*, 20 VIOLENCE & VICTIMS 1 (2005), for the proposition that trauma cannot be identified or understood by looking at someone and everyone responds to trauma in a different manner.

institutions), that could be accomplished simply through clarification of the 2001 Guidance rather than adopting the *Davis* definition.

Several commenters wondered how a victim is supposed to prove effective denial, and stated that such a hurdle only perpetuates the harmful concept of "the perfect victim" that already causes too many victims to question whether their experience has been "bad enough" to be considered valid and worthy of intervention. One commenter asserted that knowledge about high functioning depression is growing more common, but a victim who is attending classes and does not appear significantly affected might believe they cannot even report sexual harassment and must continue suffering in silence. One commenter wondered if this element would mean that a third grade student sexually harassed by a sixth grade student who still attends school but expresses anxiety to their parent every day, begins bed-wetting, or cries themselves to sleep at night, has experienced "effective denial" or not. The same commenter further wondered if a ninth grader joining the wrestling team who gets sexually hazed by teammates has been "effectively denied" access if he quits the team but still carries on with other school activities. Another commenter stated that "deny access" would seem to allow for a professor to make inappropriate gender related jokes, making students of that gender feel uncomfortable in the class and potentially perform poorer, although they still attend class, so thus they are not "denied," but rather just "negatively impacted."

One commenter argued that this element mirrors the statutory language of "excluded from participation," but neglects the other two clauses (denial of benefits and subjected to discrimination) in the Title IX statute. This commenter stated that while this higher standard might be appropriate under the Supreme Court's rubric for Title IX private lawsuits, the Department should not reduce its own administrative authority because sexual harassment can,

and does, deny people educational benefits and opportunities even without excluding them entirely from access to education. This commenter argued that if Congress intended for the denial of benefits clause to be as narrow as the exclusion from participation clause, Congress would not have bothered using the two phrases separately; rules of statutory construction mean that Congress does not use words accidentally or without meaning. The commenter argued that a plain interpretation of the Title IX statute means that a lower level of denial of benefits could violate Title IX as much as a higher level of exclusion from participation. The commenter asserted that this does not mean that a very minor limitation of access would meet the standard, but some limitations (short of "denial") should meet the standard and must be covered by Title IX.

One commenter expressed concern over the varied interpretations of "access" to educational activities among Federal courts, noting that some interpret it narrowly (i.e., the ability of a student to enter in or begin an educational activity) while others interpret it more broadly (i.e., the ability to enter into an educational activity free from discriminatory experiences). Another commenter requested clarification that the Department interprets the "effective denial of equal access" element as not just physical inability to attend classes but also where a complainant experiences negative impacts on learning opportunities. Some commenters expressed concern that recipients will be confused about whether they are obligated to intervene if a student skips class to avoid a harasser, has difficulty focusing in class because of harassment, or suffers a decline in their grade point average (GPA) due to harassment, since these consequences have not yet cut off the student's "access" to education.

A few commenters expressed concern that this element could have detrimental effects on international students because they rely on student visas that require them to meet a certain

academic performance, so waiting until academic performance has suffered may be too late to help the international student because the student may already have lost their student visa. At least one commenter argued that this element is inappropriate in the elementary and secondary school context because the time-limited nature of education during the developmental years means that requiring inaction until a student has already lost educational access impedes basic civil rights.

One commenter wondered if a recipient exercising disciplinary power over student misconduct that does not affect the complainant's access to its program or activity, but declining to do so for sexual harassment, would be making a gender-based exception that constitutes sex discrimination in violation of Title IX.

Several commenters urged the Department to adopt an alternative approach adapted from workplace sexual harassment law, under which unwelcome conduct is actionable where it creates an environment reasonably perceived (and actually perceived) as hostile and abusive, altering work conditions, without requiring any showing of a tangible adverse action or psychological harm.[751] One such commenter urged the Department to adopt this "tried and tested formula" because the harm done to a survivor's educational access and performance should be just one factor in determining whether harassing conduct creates an environment which would be reasonably perceived as hostile, and no single factor should be dispositive but rather based on the totality of all the circumstances.[752] One commenter suggested replacing "effectively denies a

[751] Commenters cited: *Harris*, 510 U.S. at 22.
[752] Commenters cited: *Harris*, 510 U.S. at 22-23 ("This is not, and by its nature cannot be, a mathematically precise test . . . But we can say that whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances . . . no single factor is required.").

person's equal access" with "effectively bars a person's access to an educational opportunity or benefit" because the former sets too high a standard while the "effectively bars" phrase is used in *Davis*.[753]

A few commenters argued that eliminating hostile environment in its entirety from analyses of sexual harassment leaves victims without recourse and reflects the Department's ignorance of the realities of sexual violence because conduct considered benign when examined in isolation can be oppressive and limiting when considered in the context of sexual trauma. One such commenter argued that the decision to eliminate the concept of "hostile environment" without anything in its place is a callous decision that fundamentally contradicts the purpose of Title IX. This commenter contended that harassment in the form of cat-calling, for instance, creates a hostile environment even without interfering with access to education, and should not be tolerated.

One commenter stated that the NPRM is inconsistent because at some points, the Department writes that schools must intervene in harassment that "effectively denies a person *equal* access to the recipient's education program or activity," but at other points, the Department omits the critical word "equal" before "access."

Discussion: The Department understands commenters' concerns that the "effectively denies a person equal access" element sets too high a bar for a sexual harassment complainant to seek assistance from their school, college, or university. The Department reiterates that this element does not apply to the first or third prongs of the § 106.30 definition (*quid pro quo* harassment

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[753] Commenters cited: *Davis*, 526 U.S. at 640 ("that such an action will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit").

and Clery Act/VAWA offenses, none of which need a demonstrated denial of equal access in any particular situation because the Department agrees with commenters that such acts inherently jeopardize equal educational access).

The Department appreciates the opportunity to clarify that, contrary to many commenters' fears and concerns, this element does *not* require that a complainant has already suffered loss of education before being able to report sexual harassment. This element of the *Davis* standard formulated in § 106.30 requires that a person's "equal" access to education has been denied, not that a person's total or entire educational access has been denied. This element identifies severe, pervasive, objectively offensive unwelcome conduct that deprives the complainant of *equal* access, measured against the access of a person who has not been subjected to the sexual harassment. Therefore, we do not intend for this element to mean that more victims will withdraw from classes or drop out of school, or that only victims who do so will have recourse from their schools.

This element is adopted from the Supreme Court's approach in *Davis*, where the Supreme Court specifically held that Title IX's prohibition against exclusion from participation, denial of benefits, and subjection to discrimination applies to situations ranging from complete, physical exclusion from a classroom to denial of *equal* access.[754] In line with this approach, the § 106.30 definition does not apply only when a complainant has been entirely, physically excluded from educational opportunities but to any situation where the sexual harassment "so undermines and

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[754] *See Davis*, 526 U.S. at 651 ("*It is not necessary, however, to show physical exclusion* to demonstrate that students have been deprived by the actions of another student or students of an educational opportunity on the basis of sex. Rather, a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied *equal access* to an institution's resources and opportunities.") (emphasis added).

detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."[755] Neither the Supreme Court, nor the final regulations in § 106.30, requires showing that a complainant dropped out of school, failed a class, had a panic attack, or otherwise reached a "breaking point" in order to report and receive a recipient's supportive response to sexual harassment. The Department acknowledges that individuals react to sexual harassment in a wide variety of ways, and does not interpret the *Davis* standard to require certain manifestations of trauma or a "constructive expulsion." Evaluating whether a reasonable person in the complainant's position would deem the alleged harassment to deny a person "equal access" to education protects complainants against school officials inappropriately judging how a complainant has reacted to the sexual harassment. The § 106.30 definition neither requires nor permits school officials to impose notions of what a "perfect victim" does or says, nor may a recipient refuse to respond to sexual harassment because a complainant is "high-functioning" or not showing particular symptoms following a sexual harassment incident.

School officials turning away a complainant by deciding the complainant was "not traumatized enough" would be impermissible under the final regulations because § 106.30 does not require evidence of concrete manifestations of the harassment. Instead, this provision assumes the negative educational impact of *quid pro quo* harassment and Clery Act/VAWA offenses included in § 106.30 and evaluates other sexual harassment based on whether a

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[755] *See id.* at 650-652 (describing the denial of access element variously as: "depriv[ing] the victims of access to the educational opportunities or benefits provided by the school," "effectively den[ying] *equal access* to an institution's resources and opportunities" and "den[ying] its victims the *equal access* to education that Title IX is designed to protect.") (emphasis added).

reasonable person in the complainant's position would be effectively denied *equal* access to education compared to a similarly situated person who is not suffering the alleged sexual harassment. Thus, contrary to commenters' concerns, victims do not need to suffer in silence, and do not need to worry about what types of symptoms of trauma will be "bad enough" to ensure that a recipient responds to their report. Commenters' examples of a third grader who starts bed-wetting or crying at night due to sexual harassment, or a high school wrestler who quits the team but carries on with other school activities following sexual harassment, likely constitute examples of denial to those complainants of "equal" access to educational opportunities even without constituting a total exclusion or denial of an education, and the Department reiterates that no specific type of reaction to the alleged sexual harassment is necessary to conclude that severe, pervasive, objectively offensive sexual harassment has denied a complainant "equal access."

For reasons described above, the Department believes that adoption and adaption of the *Davis* standard better serves both the purposes of Title IX's non-discrimination mandate and constitutional protections of free speech and academic freedom, and thus the final regulations retain the *Davis* formulation of effective denial of equal access rather than the language used in Department guidance documents. While commenters correctly assert that the Department is not required to use the *Davis* standard, for the reasons explained in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the Department is persuaded that the Supreme Court's Title IX cases provide the appropriate backdrop for Title IX enforcement, and the Department has intentionally adapted that framework for administrative enforcement to provide additional protections to complainants (and respondents) not required in private Title IX litigation. With respect to the denial of equal access

element, neither the *Davis* Court nor the Department's final regulations require complete exclusion from an education, but rather denial of "equal" access. Signs of enduring *unequal* educational access due to severe, pervasive, and objectively offensive sexual harassment may include, as commenters suggest, skipping class to avoid a harasser, a decline in a student's grade point average, or having difficulty concentrating in class; however, no concrete injury is required to conclude that serious harassment would deprive a reasonable person in the complainant's position of the ability to access the recipient's education program or activity on an equal basis with persons who are not suffering such harassment. This clarification addresses the concerns of some commenters that a rule requiring total denial of access would harm international students whose student visas may be in jeopardy if their academic performance suffers, and the similar concerns from commenters that waiting to help until an elementary school student has dropped out of school would irreparably damage the student's educational pathways. For the same reasons, § 106.30 does not raise the issue identified by a commenter as to whether a school would be violating Title IX by requiring a student to suffer total exclusion before responding to sexual harassment as compared to other types of misconduct.

For reasons described above, the Department is persuaded by Supreme Court reasoning that different standards for actionable harassment are appropriate under Title IX (for educational environments) and Title VII (for the workplace). However, neither law requires "tangible adverse action or psychological harm" before the sexual harassment may be actionable, as a commenter feared would be required under these final regulations.

The Department agrees that the Supreme Court used a variety of phrasing through the majority opinion to describe the "denial of equal access" element. However, the Department does not agree with the commenter who suggested that using "effectively bars access to an

educational opportunity or benefit " instead of "effectively denies equal access to an education program or activity" yields a broader or better formulation, and in fact, the Department believes that under the *Davis* Court's reasoning, denial of "equal access" to a recipient's education program or activity reflects a broad standard that appropriately captures situations of unequal access due to sex discrimination, in conformity with Title IX's non-discrimination mandate, and § 106.30 reflects this standard by using the phrase "effectively denies a person equal access."

The Department disputes that § 106.30 eliminates the concept of hostile environment "without anything in its place." While the concept of a hostile environment originated under Title VII to describe sexual harassment creating a hostile or abusive workplace environment altering the conditions of a complainant's job, when interpreting Title IX the Supreme Court carefully applied a standard tailored to address the particular discriminatory ill addressed by Title IX: denying a person "the equal access to education that Title IX is designed to protect."[756] Contrary to the contention of some commenters that all unwelcome conduct must be covered by Title IX even if it does not interfere with education, Title IX is concerned with sex discrimination in an education program or activity, but as discussed above, does not stand as a Federal civility code that requires schools, colleges, and universities to prohibit every instance of unwelcome or undesirable behavior. The Department acknowledges that the 2001 Guidance and 2017 Q&A use the phrase "hostile environment" to describe sexual harassment that is not *quid*

[756] *Id.* at 652 (holding schools liable where the sexual harassment "denies its victims the equal access to education that Title IX is designed to protect.").

pro quo harassment[757] and that these final regulations depart from those guidance documents by describing sexual harassment as actionable when it effectively denies a person equal access to education rather than when the sexual harassment creates a hostile environment. While the two concepts may overlap, for reasons discussed above, the denial of equal access to education element is more precisely tailored to serve the purpose of Title IX (which bars discrimination in education programs or activities) than the hostile environment concept, which originated to describe the kind of hostile or abusive *workplace* environment sexual harassment may create under Title VII.[758] Under these final regulations, where sexual harassment effectively denies a person "equal access" to education, recipients must offer the complainant supportive measures (designed to restore or preserve the complainant's equal educational access)[759] and, where a fair grievance process finds the respondent to be responsible for sexually harassing the complainant,

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[757] 2001 Guidance at 5 ("By contrast, sexual harassment can occur that does not explicitly or implicitly condition a decision or benefit on submission to sexual conduct. Harassment of this type is generally referred to as hostile environment harassment."); 2017 Q&A at 1. The withdrawn 2011 Dear Colleague Letter and withdrawn 2014 Q&A similarly relied on a hostile environment theory of sexual harassment. 2011 Dear Colleague Letter at 15; 2014 Q&A at 1.

[758] To the extent that the Supreme Court in *Davis* cited to Title VII cases as authority for its formulation of the "effectively denied equal access" element for actionable sexual harassment under Title IX, we believe that such citations indicate that the Title IX focus on "effectively denied equal access" element is the educational equivalent of the workplace doctrine of "hostile environment." *E.g.*, *Davis*, 526 U.S. at 651 ("Rather, a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities. *Cf. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. at 67*."); *id.* ("Whether gender-oriented conduct rises to the level of actionable 'harassment' thus 'depends on a constellation of surrounding circumstances, expectations, and relationships,' *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 82, 140 L. Ed. 2d 201, 118 S. Ct. 998 (1998)."). Even though these final regulations do not rely on a "hostile environment" theory of sexual harassment, a recipient may choose to deliver special training to a class, disseminate information, or take other steps that are designed to clearly communicate the message that the school does not tolerate harassment and will be responsive to any student who reports sexual harassment, as described in the 2001 Guidance, so that no person is effectively denied equal access to education. 2001 Guidance at 16.

[759] Section 106.44(a) (requiring that with or without a grievance process, the recipient's response to sexual harassment must include promptly offering supportive measures to the complainant); § 106.30 (defining "supportive measures" as individualized services provided without fee or charge to complainants or respondents, designed to restore or preserve equal access to education without unreasonably burdening the other party).

the recipient must effectively implement remedies designed to restore or preserve the complainant's equal educational access.[760]

The Department appreciates commenters' pointing out that the NPRM inconsistently used the phrases "equal access" and "access" and has revised the final regulations to ensure that all provisions referencing denial of access, or preservation or restoration of access, include the important modifier "equal." This will ensure that the appropriate interpretation of this element is better understood by students, employees, and recipients: that Title IX is concerned with "equal access," not just total denial of access.

Changes: We have revised several provisions to ensure the word "equal" appears before "access" (e.g., "effectively denies equal access" or "restore or preserve equal access") to mirror the use of "equal access" in § 106.30 defining "sexual harassment," so that the terminology and interpretation is consistent throughout the final regulations.

Prong (3) Sexual Assault, Dating Violence, Domestic Violence, Stalking

Comments: Some commenters approved of the third prong of the § 106.30 definition's reference to the Clery Act's definition of sexual assault as part of the overall definition of "sexual harassment."

Many commenters supported the reference to "sexual assault" but contended that the third prong of the definition should also reference the other VAWA crimes included in the Clery Act regulations, namely, dating violence, domestic violence, and stalking. A few commenters

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[760] Section 106.45(b)(1)(i) (requiring the recipient to provide remedies to a complainant where a respondent is found responsible following a grievance process that complies with § 106.45 and stating that remedies may consist of individualized services similar to those that meet the definition in § 106.30 of supportive measures except that remedies (unlike supportive measures) may be punitive or disciplinary against the respondent, and need not avoid burdening the respondent)); § 106.45(b)(7)(iv) (stating that the Title IX Coordinator is responsible for the effective implementation of remedies).

requested clarification as to whether dating violence, domestic violence, and stalking would only count as sexual harassment under § 106.30 if such crimes met the second prong (severe, pervasive, and objectively offensive), and expressed concern that a single instance of an offense such as dating violence or domestic violence might fail to be included because it would not be considered "pervasive." A few commenters asserted that the proposed regulations would leave dating violence, domestic violence, and stalking in an educational civil rights gray area. Many commenters urged the Department to bring the third prong of the § 106.30 definition into line with the Clery Act, as amended by VAWA, by expressly including dating violence, domestic violence, and stalking.

Several commenters argued that dating violence, domestic violence, and stalking are just as serious as sexual harassment and sexual assault.[761] A few commenters recounted working with victims where domestic violence or stalking escalated beyond the point of limiting educational access even tragically ending up in homicides. A few commenters noted that dating violence was recently added as a reportable crime under the Clery Act in part because 90 percent of all campus rapes occur via date rapes,[762] and dating violence should be included in the § 106.30 definition.

Some commenters asserted that domestic violence is prevalent among youth, and that the highest rate of dating violence and domestic violence against females occurs between the ages of

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[761] Commenters cited, *e.g.*: National Association of Student Affairs Administrators in Higher Education (NASPA) & Education Commission of the States, *State Legislative Developments on Campus Sexual Violence: Issues in the Context of Safety* 7-8 (2015); Wendy Adele Humphrey, *"Let's Talk About Sex": Legislating and Educating on the Affirmative Consent Standard*, 50 UNIV. OF S.F. L. REV. 35, 49, 58-60, 62-64, 71 (2016); Emily A. Robey-Phillips, *Federalism in Campus Sexual Violence: How States Can Protect Their Students When a Trump Administration Will Not*, 29 YALE J. OF L. & FEMINISM 373, 393-414 (2018).

[762] Commenters cited: Health Research Funding, *39 Date Rape Statistics on College Campuses*, https://healthresearchfunding.org/39-date-rape-statistics-college-campuses/.

16-24,[763] precisely when victims are likely to be in high school and college, needing Title IX protections. Commenters argued that if a school fails to properly respond to a student's domestic violence situation, the student's health and school performance may suffer and even lead to the victim dropping out of school, and that a significant number of female homicide victims of college age were killed by an intimate partner.[764]

Many commenters asserted that stalking presents a unique risk to the health and safety of college students due to the significant connection between stalking and intimate partner violence[765] insofar as stalking often occurs in the context of dating violence and sexual violence. Many commenters asserted that stalking is very common on college campuses and within the college population; persons aged 18-24 (the average age of most college students) experience the highest rates of stalking victimization of any age group;[766] and college-aged women are stalked at higher rates than the general population and that one study showed that over 13 percent of college women had experienced stalking in the academic year prior to the study.[767] One commenter cited a study that showed that in ten percent of stalking situations the victim reported that the stalker committed, or attempted, forced sexual contact.[768] At least one commenter cited research showing that sexual assault perpetrators often employed classic stalking strategies (e.g.,

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[763] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Factbook: Violence by Intimates* (1998).
[764] Commenter cited: U.S. Dep't. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Factbook: Violence by Intimates* (1998); U.S. Dep't. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Patterns and Trends: Homicide Trends in the United States, 1980-2008* (Nov. 2011); Katie J. M. Baker, *Domestic Violence on Campus is the Next Big College Controversy*, BUZZFEED NEWS (Jun. 9, 2015).
[765] Commenters cited: Judith McFarlane *et al.*, *Stalking and Intimate Partner Femicide*, 3 HOMICIDE STUDIES 300 (1999).
[766] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Special Report: Stalking Victimization in the United States* (2009).
[767] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, National Institute of Justice, *Research Report: The Sexual Victimization of College Women* (2000).
[768] Commenters cited: *Id*.

surveillance and information-gathering) to select victims.[769] A few commenters provided examples of the kind of stalking behaviors that commonly victimize college students, including following a victim to and from classes, repeatedly contacting a student despite requests to cease communication, and threats of self-harm if a student does not pay attention to the stalker. Several commenters expressed concern that without express recognition of stalking as a sexual harassment violation, the discrete incidents involved in a typical stalking pattern might not meet the *Davis* standard and thus would not be reportable under Title IX. One commenter elaborated on an example of typical stalking behavior that would fall through the cracks of effective response under the proposed rules, where the stalking behavior is pervasive but arguably not serious (when each incident is considered separately) and the complainant declines a no-contact order because the locations where the complainant encounters the respondent are places the complainant needs to access to pursue the complainant's own educational activities. This commenter argued that failure to address sex-based stalking may have dire consequences; the commenter stated that several tragic homicides of female students[770] were preceded by this fairly standard stalking-turned-violent pattern.

Discussion: The Department appreciates commenters' support for including "sexual assault" referenced in the Clery Act as an independent category of sexual harassment in § 106.30 and we are persuaded by the many commenters who asserted that the other Clery Act/VAWA sex-based

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[769] Commenters cited: David Lisak & Paul Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 1 (2002).

[770] Commenters described three such homicide situations: the 2010 murder of University of Virginia fourth-year student, Yeardley Love, by her boyfriend who was also a fourth-year student; the 2018 murder of University of Utah student Lauren McCluskey, by her ex-boyfriend; the 2018 murder of 16 year old Texas high schooler Shana Fisher – the first victim of the 17 year old shooter who killed ten students, beginning with Shana who had recently rejected him romantically.

offenses (dating violence, domestic violence, and stalking) also should be included in the same category as sexual assault. Commenters correctly pointed out that without specific inclusion of dating violence, domestic violence, and stalking in the third prong of § 106.30, those offenses would need to meet the *Davis* standard set forth in the second prong of the § 106.30 definition. While the NPRM assumed that many such instances would meet the elements of severity and pervasiveness (as well as objective offensiveness and denial of equal access), commenters reasonably expressed concerns that these offenses may not always meet the *Davis* standard.[771] The Department agrees with commenters who urged that because these offenses concern non-expressive, often violent conduct, even single instances should not be subjected to scrutiny under the *Davis* standard. Dating violence, domestic violence, and stalking are inherently serious sex-based offenses[772] that risk equal educational access, and failing to provide redress for even a single incident does, as commenters assert, present unnecessary risk of allowing sex-based violence to escalate. The Department is persuaded by commenters' arguments and data showing that dating violence, domestic violence, and stalking are prevalent, serious problems affecting students, especially college-age students. The Department believes that a broad rule prohibiting those offenses appropriately falls under Title IX's non-discrimination mandate without raising any First Amendment concerns. The Department therefore revises the final regulations to include dating violence, domestic violence, and stalking as defined in the Clery Act and VAWA.

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[771] As commenters noted, dating violence and domestic violence may fail to meet the *Davis* standard because although a single instance is severe it may not be pervasive, while a course of conduct constituting stalking could fail to meet the *Davis* standard because the behaviors, while pervasive, may not independently seem severe.

[772] Stalking may not always be "on the basis of sex" (for example when a student stalks an athlete due to celebrity worship rather than sex), but when stalking is "on the basis of sex" (for example, when the stalker desires to date the victim) stalking constitutes "sexual harassment" under § 106.30. Stalking that does not constitute sexual harassment because it is not "on the basis of sex" may be prohibited and addressed under a recipient's non-Title IX codes of conduct.

Changes: We have revised the third prong of the final § 106.30 definition of sexual harassment to add, after sexual assault, dating violence, domestic violence, and stalking as defined in VAWA.

Comments: One commenter objected to the reference to "sexual assault" in the third prong of the § 106.30 definition by asserting that the definition seemed to be just for the purpose of having sexual assault in the proposed regulations without any intent to enforce it. A few commenters believed that the third prong's reference to "sexual assault" will not prevent sexual assault even though reported numbers of rapes might decline, because certain situations would no longer be considered rape.

A few commenters objected to the reference to the Clery Act definition of "sexual assault," asserting that the definition of "sexual assault" is too narrow because it fails to capture sex-based acts such as administration of a date rape drug, attempted rape, a respondent forcing a complainant to touch the respondent's genitals, the touching of a complainant's non-private body part (e.g., face) with the respondent's genitals, or an unwanted and unconsented-to kiss on the cheek (even if coupled with forcing apart the complainant's legs).

One commenter believed the definition of sexual assault is too narrow because it does not include a vast number of "ambiguous" sexual assaults; the commenter argued that coercive sexual violence often includes a layer of guilt-inducing ambiguity that may arise from explicit or implied threats used by the perpetrator as a means of compelling nominal (but not genuine) consent. One commenter stated that from December of 2017 to December of 2018, 2,887 people in the United States Googled the question "was I raped?" and according to the same data from Google Trends, in the same time span, 2,311 people Googled "rape definition" and over the last five years, 10,781 and 12,129 people have searched for the question and definition respectively.

This commenter argued that these numbers reflect a lack of certainty surrounding what constitutes rape and demonstrate the need for clarity and better education rather than a vague reference to "sexual assault." Another commenter stated that sexual assault cases often fit within a certain "gray area" often centered on consent issues, and that most sexual violence situations are not black and white; the commenter opined that Title IX should be available to help complainants whose experience is "a little grayer" because otherwise people will continue to pressure and coerce partners into having sex that is not truly consensual, creating more and more trauma.

At least one commenter asserted that historically, courts have considered conduct that meets any reasonable definition of criminal sexual assault, including rape, as sex-based harm under Title IX,[773] and thus a separate reference to "sexual assault" in the § 106.30 definition is unnecessary and only serves to blur the distinction between school-based administrative processes and criminal justice standards. Several other commenters, by contrast, pointed to at least one Federal court opinion holding that a rape failed to meet the "severe and pervasive" standard in private litigation under Title IX.[774]

At least one commenter expressed concern that using the Clery Act's definition of sexual assault (which includes "fondling" under the term "sexual assault") would encompass "butt slaps" (as "fondling") yet this misbehavior occurs with such frequency especially in elementary and secondary schools that school districts will be overwhelmed with needing to investigate

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[773] Commenters cited: *Soper v. Hoben*, 195 F.3d 845, 855 (6th Cir. 1999) (assertion that victim was raped, sexually abused, and harassed obviously qualifies as severe, pervasive, and objectively offensive sexual harassment).
[774] Commenters cited: *Ross v. Corp. of Mercer Univ.*, 506 F. Supp. 2d 1325, 1358 (M.D. Ga. 2007) (finding that a single instance of rape was not pervasive under the *Davis* standard).

those incidents under the strictures of the Title IX grievance process. Another commenter expressed concern that including sexual assault (particularly fondling) in the third prong of the § 106.30 definition is too broad, and wondered whether this definition could encompass innocent play by small children, such as "playing doctor." This commenter argued that where the conduct at issue does not bother the participants it cannot create a subjectively hostile environment or interfere with equal access to an education, regardless of lack of consent based on being under the age of majority.[775]

One commenter argued that because the Clery Act definition of "sexual assault" includes incest and statutory rape, such a definition will encompass incidents that are consensual when Title IX should be focused on discriminatory conduct, which should be restricted to nonconsensual or unwanted conduct; the commenter asserted that where a half-brother and half-sister, or a 13 year old and an 18 year old, engage in consensual sexual activity the Title IX process should not be used to intervene, even if such conduct may constitute criminal offenses that can be addressed through a criminal justice system. Another commenter argued that the inclusion of statutory rape sweeps up sexual conduct by underage students no matter how consensual, welcome, and reciprocated the conduct might be, and asserted that this over-inclusion threatens to turn Title IX into enforcement of high school and first-year college

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[775] Commenters cited: *Newman v. Federal Express*, 266 F.3d 401 (6th Cir. 2001) (racial harassment claim fails when victim is not seriously offended); *Jadon v. French*, 911 P.2d 20, 30-31 (Alaska 1996) (conduct that does not seriously offend the victim does not create a subjectively hostile environment and thus is not sexually harassing). Conduct must be not just "unwelcome," *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67-68 (1986), but also subjectively hostile and annoying to constitute sexual harassment. This commenter argued that "sexual assault" must include both subjective unwelcomeness and objective interference with access to education to be actionable and also cited: *Gordon v. England*, 612 F. App'x 330 (6th Cir. 2015) ("extreme groping" did not create an objectively hostile environment, by itself, and thus did not violate Title VII); *Brooks v. City of San Mateo*, 229 F.3d 917 (9th Cir. 2000) (holding misdemeanor sexual assault involving touching of breast did not create objectively hostile environment, by itself, and thus did not violate Title VII).

students through repressive administrative monitoring of youth sexuality in instances that are not severe, not pervasive, and do not impede educational access.

One commenter described a particular institution of higher education's sexual misconduct policy as defining sexual assault broadly to include "any other intentional unwanted bodily contact of a sexual nature," a standard the commenter argued is ambiguous and overbroad; the commenter argued that the final regulations should clarify that schools cannot apply a definition of "sexual assault" that equates all unwanted touching (such as a kiss on the cheek) with groping or penetration because it is unfair to treat kissing without verbal consent the same as a sex crime and, in the long run, makes it less likely that women will be taken seriously when sex crimes occur. This commenter also asserted that vague, overbroad definitions of sexual assault disproportionately harm students of color.[776]

Some commenters believed that the final regulations should include sexual assault in the definition but should use a definition of sexual assault different from the proposed rules' reference to "sexual assault" under the Clery Act regulations. One commenter believed that laypersons reading the regulation should not have to refer to yet another Federal regulation in

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[776] Commenters cited: Ben Trachtenberg, *How University Title IX Enforcement and Other Discipline Processes (Probably) Discriminate Against Minority Students*, 18 NEV. L. J. 107 (2017); Emily Yoffe, *The Question of Race in Campus Sexual-Assault Cases: Is the system biased against men of color?*, THE ATLANTIC (September 2017) (noting that male students of color are "vastly overrepresented" in the cases Yoffe has tracked and arguing that as "the definition of sexual assault used by colleges has become broader and blurrier, it certainly seems possible that unconscious biases might tip some women toward viewing a regretted encounter with a man of a different race as an assault. And as the standards for proving assault have been lowered, it seems likely that those same biases, coupled with the lack of resources common among minority students on campus, might systematically disadvantage men of color in adjudication, whether or not the encounter was interracial."); Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. FORUM 103, 106-08 (2015) ("American racial history is laced with vendetta-like scandals in which black men are accused of sexually assaulting white women" followed by revelations "that the accused men were not wrongdoers after all . . . . morning-after remorse can make sex that seemed like a good idea at the time look really alarming in retrospect; and the general social disadvantage that black men continue to carry in our culture can make it easier for everyone in the adjudicative process to put the blame on them . . . . Case after Harvard case that has come to my attention . . . has involved black male respondents.").

order to know the definition of "sexual assault." Another commenter stated that by including a cross-reference to the Clery Act regulation, this Title IX regulation could have its definition of sexual assault changed due to regulatory changes under the Clery Act, and that sexual assault should be explicitly defined rather than relying on a cross-reference to a different regulation. One commenter, supportive of the three-prong definition of sexual harassment in § 106.30, suggested that the provision should include a full definition of sexual assault to better clarify prohibited conduct rather than a cross-reference to the Clery Act.

A few other commenters asserted that the Clery Act definition of sexual assault poses problems; they argued that reference to the Clery Act regulations should be replaced by inserting a definition of sexual assault directly into § 106.30. One such commenter argued that the Clery Act definition of sexual assault is biased against men because under the definitions of rape and fondling, a male who performs oral sex on a female victim likely commits "rape" while a female who performs oral sex on a male victim at most commits "fondling," but not the more serious-sounding offense of rape.

One commenter proposed an alternate definition of sexual assault that would define sexual assault by reference to crimes under each State law as classified under the FBI Uniform Crime Reporting Program's ("FBI UCR") National Incident-Based Reporting System (NIBRS). This commenter asserted that this alternative definition of sexual assault would better serve the Department's purpose because it does not require the Department to issue new definitions for Title IX purposes of the degree of family connectedness for incest, the statutory age of consent for statutory rape, consent and incapacity for consent for rape, and other elements in the listed sex offenses. This commenter further asserted that the commenter's alternative definition would not use the definition of rape in the FBI UCR's Summary Reporting System (SRS), because the

FBI has announced that it is retiring the SRS on January 1, 2021 and will collect crime data only through NIBRS thereafter.

Another commenter asserted that the reference in § 106.30 to 34 CFR 668.46(a) for a definition of sexual assault fails to provide meaningful guidance on what conduct recipients must include under Title IX, because the Clery Act regulation relies on the FBI UCR, which is a reporting system designed to aggregate crime data across the Nation, not intended to provide guidance about what conduct is acceptable or unacceptable for enforcement purposes. Under the Clery Act regulation, this commenter points out that "rape" and "fondling" do not define what consent (or lack of consent) means, and "fondling" does not identify which body parts are considered "private." This commenter argued that the need for clarity about what constitutes sexual assault is too important to leave recipients to muddle through vague definitions, and proposed that the third prong of § 106.30 use the following alternative definition of sexual assault: the penetration or touching of another's genitalia, buttocks, anus, breasts, or mouth without consent; a person acts without consent when, in the context of all the circumstances, the person should reasonably be aware of a substantial risk that the other person is not voluntarily and willingly engaging in the conduct at the time of the conduct; sexual assault must effectively deny a person equal access to the recipient's education program or activity.

Discussion: The Department emphasizes that including sexual assault as a form of sexual harassment is not an empty reference; the Department will enforce each part of the § 106.30 definition, including requiring recipients to respond to sexual assault, vigorously for the benefit of all persons in a recipient's education program or activity. The Department believes that the Clery Act's reference to sexual assault is appropriately broad and thus does not agree with the

commenter's contention that the sexual assault reference excludes acts that should be considered rape or sexual assault.

The Department acknowledges commenters' concerns that not every act related to or potentially involved in a sexual assault would meet the Clery Act definition of sexual assault. With respect to violative acts such as commenters' examples of administration of a date rape drug, touching a non-private body part with the perpetrator's private body part, and so forth, such acts constitute criminal acts and/or torts under State laws and likely constitute separate offenses under recipients' own codes of conduct. Therefore, such egregious acts can be addressed even if they do not constitute sexual harassment under Title IX. With respect to an attempted rape, we define "sexual assault" in § 106.30 by reference to the Clery Act,[777] which in turn defines sexual assault by reference to the FBI UCR,[778] and the FBI has stated that the offense of rape includes attempts to commit rape.[779]

The Department disputes a commenter's contention that the sexual assault definition in § 106.30 lacks sufficient precision to capture sexual assault that occurs under what the commenter called "guilt-inducing ambiguity" or "gray areas" often centered around whether the complainant genuinely consented or only consented due to coercion. For reasons explained in the "Consent" subsection of the "Section 106.30 Definitions" section of this preamble, the Department intentionally leaves recipients flexibility and discretion to craft their own definitions of consent (and related terms often used to describe the absence or negation of consent, such as coercion).

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[777] Section 106.30 (defining "sexual harassment" to include "Sexual assault" as "defined in 20 U.S.C. 1092(f)(6)(A)(v)").
[778] 20 U.S.C. 1092(f)(6)(A)(v) ("The term 'sexual assault' means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.").
[779] U.S. Dep't. of Justice, Federal Bureau of Investigation, *UCR Offense Definitions* (with respect to rape, "Attempts or assaults to commit rape are also included"), https://ucrdatatool.gov/offenses.cfm.

The Department believes that a recipient should select a definition of sexual consent that best serves the unique needs, values, and environment of the recipient's own educational community. So long as a recipient is required to respond to sexual assault (including offenses such as rape, statutory rape, and fondling, which depend on lack of the victim's consent), the Department believes that recipients should retain flexibility in this regard. The Department has revised the final regulations to state that it will not require recipients to adopt a particular definition of consent.[780] With respect to the commenter's point regarding a lack of certainty about what constitutes rape, the Department believes that including sexual assault in these Title IX regulations will contribute to greater societal understanding of what sexual assault is and why every person should be protected against it.

Because Federal courts applying the *Davis* standard have reached different conclusions about whether a single rape has constituted "severe and pervasive" sexual harassment sufficient to be covered under Title IX, we are including single instances of sexual assault as actionable under the § 106.30 definition. We believe that sexual assault inherently creates the kind of serious, sex-based impediment to equal access to education that Title IX is designed to prohibit, and decline to require "denial of equal access" as a separate element of sexual assault.

The Department understands the concerns of some commenters that including "fondling" under the term sexual assault poses a perceived challenge for recipients, particularly elementary and secondary schools, where, for instance, "butt slaps" may be a common occurrence. The Department appreciates the opportunity to clarify that under the Clery Act, fondling is a sex offense defined (by way of reference to the FBI UCR) as the touching of a person's private body

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[780] Section 106.30 (entry for "consent").

parts without the consent of the victim *for purposes of sexual gratification*. This "purpose" requirement separates the sex offense of fondling from the touching described by commenters as "children playing doctor" or inadvertent contact with a person's buttocks due to jostling in a crowded elevator, and so forth. Where the touching of a person's private body part occurs *for the purpose of sexual gratification*, that offense warrants inclusion as a sexual assault, and if the "butt slaps" described by one commenter as occurring frequently in elementary and secondary schools do constitute fondling, then those elementary and secondary schools must respond to knowledge of those sex offenses for the protection of students. The definition of fondling, properly understood, appropriately guides schools, colleges, and universities to consider fondling as a sex offense under Title IX, while distinguishing touching that does not involve the requisite "purpose of sexual gratification" element, which still may be addressed by a recipient outside a Title IX process. The Department notes that recipients may find useful guidance in State law criminal court decisions that often recognize the principle that, with respect to juveniles, a sexualized purpose should not be ascribed to a respondent without examining the circumstances of the incident (such as the age and maturity of the parties).[781] The Department declines to create an exception for fondling that occurs where both parties engage in the conduct willingly even though they are underage, because of an underage party's inability to give legal consent to sexual activity, and as discussed above the "for the purposes of sexual gratification" element of fondling

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[781] *See, e.g.*, *In re* K.C., 226 N.C. App. 452, 457 (N.C. App. 2013) ("On the question of sexual purpose, however, this Court has previously held – in the context of a charge of indecent liberties between children – that such a purpose does not exist without some evidence of the child's maturity, intent, experience, or other factor indicating his purpose in acting[.] . . . Otherwise, sexual ambitions must not be assigned to a child's actions. . . . The element of purpose may not be inferred solely from the act itself. . . . Rather, factors like age disparity, control by the juvenile, the location and secretive nature of the juvenile's actions, and the attitude of the juvenile should be taken into account. . . . The mere act of touching is not enough to show purpose.") (internal quotation marks and citations omitted).

protects against treating innocuous, non-sexualized touching between children as sexual harassment under Title IX.

For similar reasons, the Department declines to exclude incest and statutory rape from the definition of sexual assault. The Department understands commenters' concerns, but will not override the established circumstances under which consent cannot legally be given (e.g., where a party is under the age of majority) or under which sexual activity is prohibited based on familial connectedness (e.g., incest). The Department notes that where sexual activity is not unwelcome, but still meets a definition of sexual assault in § 106.30, the final regulations provide flexibility for how such situations may be handled under Title IX. For instance, not every such situation will result in a formal complaint requiring the recipient to investigate and adjudicate the incident;[782] the recipient has the discretion to facilitate an informal resolution after a formal complaint is filed;[783] the final regulations remove the NPRM's previous mandate that a Title IX Coordinator must file a formal complaint upon receipt of multiple reports against the same respondent;[784] the final regulations allow a recipient to dismiss a formal complaint where the complainant informs the Title IX Coordinator in writing that the complainant wishes to withdraw the formal complaint;[785] and the final regulations do not require or prescribe disciplinary

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[782] Section 106.30 (defining "formal complaint" to mean a document "filed by a complainant or signed by a Title IX Coordinator" and defining "complainant" to mean "an individual who is alleged to be the victim of conduct that could constitute sexual harassment"). Situations where an individual does not view themselves as a "victim" likely will not result in the filing of a formal complaint triggering a § 106.45 grievance process.
[783] Section 106.45(b)(9) (permitting a recipient to facilitate informal resolution, with the voluntary written consent of both parties, of any formal complaint except those alleging that an employee sexually harassed a student).
[784] *See* the "Proposed § 106.44(b)(2) Reports by Multiple Complainants of Conduct by Same Respondent [removed in final regulations]" subsection of the "Recipient's Response in Specific Circumstances" section of this preamble.
[785] Section 106.45(b)(3)(ii).

sanctions.[786] Thus, the final regulations provide numerous avenues to avoid situations where a recipient is placed in a position of feeling compelled to drag parties through a grievance process where no party found the underlying incident unwelcome, offensive, or impeding access to education, and recipients should not feel incentivized by the final regulations to become repressive monitors of youth sexuality.[787]

The Department understands a commenter's concern that some recipients have defined sexual misconduct very broadly, including labeling a wide range of physical contact made without verbal consent as "sexual assault." For reasons described above and in the "Consent" subsection of the "Section 106.30 Definitions" section of this preamble, the Department declines to require recipients to adopt particular definitions of consent, and declines to prohibit recipients from addressing conduct that does not meet the § 106.30 definition of sexual harassment under non-Title IX codes of conduct. The Department believes that recipients should retain flexibility to set standards of conduct for their own educational communities that go beyond conduct prohibited under Title IX (or, in the case of defining consent, setting standards for that element of sexual assault). The Department notes that many commenters submitted information and data showing that conduct "less serious" than that constituting § 106.30 sexual harassment can still

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[786] *See* the "Deliberate Indifference" subsection of the "Adoption and Adaptation of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, noting that the final regulations intentionally refrain from second guessing recipients' decisions with respect to imposition of disciplinary sanctions following an accurate, reliable determination reached by following a § 106.45 grievance process. This leaves recipients flexibility to decide appropriate sanctions in situations where behavior constituted sexual harassment under § 106.30 yet did not subjectively offend or distress the complainant.

[787] *See* the "Formal Complaint" subsection of the "Section 106.3 Definitions" section of this preamble, discussing the reasons why these final regulations permit a formal complaint (which triggers a recipient's grievance process) to be filed only by a complainant (i.e., the alleged victim) or by the Title IX Coordinator, and explaining that a Title IX Coordinator's decision to override a complainant's wishes by initiating a grievance process when the complainant does not desire that action will be evaluated by whether the Title IX Coordinator's decision was clearly unreasonable in light of the known circumstances (that is, under the general deliberate indifference standard described in § 106.44(a)).

have negative impacts on victims, and can escalate into actionable harassment or assault when left unaddressed[788] and therefore recipients should retain discretion to decide how to address student and employee misconduct that is not actionable under Title IX. The Department shares commenters' concerns that vague, ambiguously-worded sexual misconduct policies have resulted in some respondents being punished unfairly. The Department is equally concerned that complainants, too, have often been denied opportunity to understand and participate in Title IX grievance processes to vindicate instances of sexual violation. These concerns underlie the § 106.45 grievance process prescribed in the final regulations, for the benefit of each complainant and each respondent, regardless of race or other demographic characteristics. Thus, even if a recipient chooses a definition of "consent" that results in a broad range of conduct prohibited as sexual assault, the recipient's students and employees will be aware of the breadth of conduct encompassed and benefit from robust procedural protections to further each party's respective views and positions with respect to particular allegations.

The Department appreciates commenters' concerns about including sexual assault by reference to the Clery Act regulations at 34 CFR 668.46(a). Postsecondary institutions are already familiar with the Clery Act[789] and the Department's implementing regulations, and although the Clery Act does not apply to elementary and secondary schools, requiring schools,

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[788] *E.g.*, Rachel E. Gartner & Paul R. Sterzing, *Gender Microaggressions as a Gateway to Sexual Harassment and Sexual Assault: Expanding the Conceptualization of Youth Sexual Violence*, 31 AFFILIA: J. OF WOMEN & SOCIAL WORK 491 (2016); Dorothy Espelage *et al*., *Longitudinal Associations Among Bullying, Homophobic Teasing, and Sexual Violence Perpetration Among Middle School Students*, 30 JOURNAL OF INTERPERSONAL VIOLENCE 14 (2014); Eduardo A. Vasquez *et al.*, *The sexual objectification of girls and aggression towards them in gang and non-gang affiliated youth*, 23 PSYCHOL., CRIME & LAW 5 (2016); National Academies of Science, Engineering, and Medicine, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* (Frasier F. Benya *et al.* eds., 2018).

[789] The Clery Act applies to institutions of higher education that receive Federal student financial aid under Title IV of the Higher Education Act of 1965, as amended; *see* discussion under the "Clery Act" subsection of the "Miscellaneous" section of this preamble.

colleges, and universities to reference the same range of sex offenses under both the Clery Act and Title IX will harmonize compliance obligations under both statutes (for postsecondary institutions) while providing elementary and secondary school recipients with a preexisting Federal reference to sex offenses rather than a new definition created by the Department solely for Title IX purposes. In response to commenters' concerns that reference to the Clery Act regulations leaves these final regulations subject to changes to the Clery Act regulations, the final regulations now reference sexual assault by citing to the Clery Act statute (and as to dating violence, domestic violence, and stalking, the VAWA statute[790]), rather than to the Clery Act regulations. The Clery Act statute references sex offenses as defined in the FBI UCR,[791] a national crime reporting program designed to standardize crime statistics across jurisdictions. At the same time, this modification preserves the benefit of harmonizing Clery Act and Title IX obligations that arise from a recipient's awareness of sex offenses.

The Department disagrees that the Clery Act's definition of sexual assault is biased or discriminatory against men. Although under the FBI UCR definitions it is possible that, for example, oral sex performed on an unconscious woman may be designated as a different offense

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[790] VAWA at 34 U.S.C. 12291(a)(10), (a)(8), and (a)(30), defines dating violence, domestic violence, and stalking, respectively.

[791] The Clery Act, 20 U.S.C. 1092(f)(6)(A)(v) defines "sexual assault" to mean an "offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation." The FBI UCR, in turn, consists of two crime reporting systems: The Summary Reporting System (SRS) and the National Incident-Based Reporting System (NIBRS). U.S. Dep't. of Justice, Criminal Justice Information Services, *SRS to NIBRS: The Path to Better UCR Data* (Mar. 28, 2017). The current Clery Act regulations, 34 CFR 668.46(a), direct recipients to look to the SRS for a definition of rape and to NIBRS for a definition of fondling, statutory rape, and incest as the offenses falling under "sexual assault." The FBI has announced it will retire the SRS and transition to using only the NIBRS in January 2021. Federal Bureau of Investigation, Criminal Justice Information Services, Uniform Crime Reporting (UCR) Program, *National Incident-Based Reporting System* (NIBRS), https://www.fbi.gov/services/cjis/ucr/nibrs. NIBRS' forcible and nonforcible sex offenses consist of: rape, sodomy, and sexual assault with an object (as well as fondling, statutory rape, and incest, as noted above). Thus, reference to the Clery Act will continue to cover the same range of sex offenses under the FBI UCR regardless of whether or when the FBI phases out the SRS.

than oral sex performed on an unconscious man, the difference is not discriminatory or unfairly biased against men, because any such difference results from differentiation between a penetrative versus non-penetrative act, yet under the FBI UCR both offenses fall under the term sexual assault, and further, penetrative acts against both men and women (and touching the genitalia of men, and of women) all fall under FBI UCR sex offenses. While conduct might be classified differently based on whether the victim was male or female, such offenses would fall under the term sexual assault. All the sex offenses designated under the Clery Act as sexual assault represent serious violations of a person's bodily and emotional autonomy, regardless of whether a particular sexual assault is categorized as rape, fondling, or other forcible or non-forcible sex offense under the FBI UCR.

For similar reasons, the Department declines to adopt the alternative definitions of sexual assault proposed by commenters. The Department believes that, with the final regulations' modification to reference the Clery Act and VAWA statutes rather than solely the Clery Act regulations, "sexual assault" under § 106.30 is appropriately broad, capturing all conduct falling under forcible and non-forcible sex offenses determined by reference to the FBI UCR, while facilitating postsecondary institution recipients' understanding of their obligations under both the Clery Act and Title IX and providing an appropriate reference for elementary and secondary schools to protect students from sex offenses under Title IX.

The Department disagrees that the definitions of rape and fondling in the FBI UCR are too narrow. The violative sex acts covered by offenses described in the FBI UCR were designed to cover a broad range of sexual misconduct regardless of how different jurisdictions have

defined such offenses under State criminal laws,[792] an approach that lends itself to the purpose of these final regulations, which is to ensure that recipients across all jurisdictions include a variety of sex offenses as discrimination under Title IX.

The Department disagrees that including statutory rape and incest makes the sexual assault category too broad, and declines to adopt the specific alternative definitions of sexual assault proposed by commenters. The Department believes that, in response to commenters' concerns, the final regulations appropriately capture a broad range of sex offenses referenced in the Clery Act and VAWA (which refer to the FBI UCR without specifying whether to look to the SRS or NIBRS, foreclosing any problem resulting from the FBI's transition from the SRS to the NIBRS system) while leaving recipients the discretion to select particular definitions of consent (and what constitutes a lack of consent) that best reflect each recipient's values and community standards and adopt a broader or narrower definition of, e.g., fondling by specifying which body parts are considered "private" or whether the touching must occur underneath or over a victim's clothing. Regardless of how narrowly or broadly a recipient defines "consent" with respect to the FBI UCR's categories of forcible and nonforcible sex offenses, the Department believes that any such offenses would constitute conduct jeopardizing equal access to education in violation of Title IX without raising constitutional concerns, and that the § 106.45 grievance process gives complainants and respondents opportunity to fairly resolve factual allegations of such conduct.

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[792] In explaining one of the two systems used in the FBI UCR, the FBI has stated: "the definitions used in the NIBRS [National Incident-Based Reporting System] must be generic in order not to exclude varying state statutes relating to the same type of crime. Accordingly, the offense definitions in the NIBRS are based on common-law definitions found in *Black's Law Dictionary*, as well as those used in the *Uniform Crime Reporting Handbook* and the NCIC Uniform Offense Classifications. Since most state statutes are also based on common-law definitions, even though they may vary as to the specifics, most should fit into the corresponding NIBRS offense classifications." U.S. Dep't. of Justice, Uniform Crime Reporting System, *National Incident-Based Reporting System* (2011), https://ucr.fbi.gov/nibrs/2011/resources/nibrs-offense-definitions.

Changes: The third prong of the § 106.30 definition of sexual harassment now references "sexual assault" per the Clery Act at 20 U.S.C. 1092(f)(6)(A)(v) (instead of referencing the Clery Act regulations at 34 CFR 668.46); and adds reference to VAWA to include "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), and "stalking" as defined in 34 U.S.C. 12291(a)(30).

Gender-based harassment

Comments: A number of commenters discussed issues related to gender-based harassment, sexual orientation, and gender identity.

Some commenters expressed the general view that LGBTQ individuals need to be protected and were concerned that the proposed rules would make campuses even more unsafe for LGBTQ students and have a negative impact on addressing issues of gender-based discrimination and harassment.

Several commenters stated the LGBTQ community experiences sexual violence at much higher rates.

Some commenters expressed specific concerns about the impact of the proposed rules, including the definition of sexual harassment, on transgender individuals.

A few commenters also stated that transgender students should be treated consistent with their gender identity. Some commenters specifically asked the Department to maintain protections presumably found in the withdrawn Letter from James A. Ferg-Cadima, Acting Deputy Assistant Secretary for Policy, Office for Civil Rights at the Department of Education regarding transgender students' access to facilities such as restrooms dated January 7, 2015, and "Dear Colleague Letter on Transgender Students" jointly issued by the Civil Rights Division of

the Department of Justice and the Office for Civil Rights of the Department of Education, dated May 13, 2016.[793]

Some commenters expressed concern that the proposed rules promote heterosexuality as the normal or preferred sexual orientation and therefore fail to recognize and capture the identities and experiences of the LGBTQ community and recommended that the Department explicitly state that Title IX protections apply to members of the LGBTQ community.

One commenter believed that all public school districts should adopt and enforce policies stating that harassment for any reason, including on the basis of gender identity, will not be tolerated and that appropriate disciplinary measures will be taken and urged the Department to add language to the proposed rules making clear that such harassment is within the meaning of Title IX.

Some commenters urged the Department to include specific language referring to sexual harassment based on gender identity, including transgender and gender-nonconforming identities or expressions and expressed concern about the lack of such language in the proposed rules. Some of these commenters noted that some courts have interpreted Title IX, Title VII, and similar statutes to prohibit discrimination on the basis of gender identity and sexual orientation because discrimination on either of these bases of discrimination is discrimination on the basis of sex. One commenter acknowledged that contrary case law exists, but asserted Title IX clearly

[793] *See* U.S. Department of Education & U.S. Department of Justice, Dear Colleague Letter (Feb. 22, 2017) (withdrawing letters), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf.

prohibits discrimination on the basis of sex stereotyping which underlies discrimination, harassment, and assaults against LGBTQ people.[794]

On the other hand, one commenter stated that Title IX is about sex and not gender identity and urged the Department to make clear that biology, not gender identity, determines the definition of men and women.

Another commenter asserted that the Department's use of the phrase "on the basis of sex" in defining sexual harassment is limiting. This commenter asserted that the phrase "on the basis of sex" minimizes and confines experiences of gender discrimination and gender-based violence to a binary understanding by aligning it with sex assigned at birth.

Another commenter urged the Department to keep transgender males out of female sports categories as it is unfair to women and girls in competitions.

One commenter stated that OCR has long understood that gender-based discrimination, even where discrimination is not sexual in nature, might also fall under Title IX by creating a hostile environment for students. The commenter expressed concern that the term gender only appears once in a footnote in the proposed rules and asked how students' gender presentation, gender identity, and sexual orientation can be considered under the proposed rules and whether the Department made a conscious decision not to include gender and sexual orientation.

Another commenter asked the Department to clarify whether gender-based harassment is still covered under Title IX and whether incidents of sexual exploitation are to be included in these grievance procedures.

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[794] Commenters cited, *e.g.*: *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Comm'n*, 884 F.3d 560 (6th Cir.), appeal docketed, No. 18-107 (U.S. August 16, 2019); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir.), appeal docketed, No. 17-1623 (U.S. June 1, 2018).

Other commenters were generally concerned that the proposed rules would discourage participation of women and gender nonconforming students in academia. One commenter asserted that the single greatest danger to women's health is men. The commenter reminded the Department that Title IX helps protect women (as well as those who have been harassed or assaulted) and asked the Department not to endanger women.

Another commenter recommended that the Department add language stating that sexual harassment is bi-directional (male-to-female and female-to-male).

Discussion: The Department appreciates the concerns of the commenters. Prior to this rulemaking, the Department's regulations did not expressly address sexual harassment. We believe that sexual harassment is an important issue, meriting regulations with the force and effect of law rather than mere guidance documents, which cannot create legally binding obligations.[795]

Title IX, 20 U.S.C. 1681(a), expressly prohibits discrimination "on the basis of sex," which is why the Department incorporates the phrase "on the basis of sex" in the definition of sexual harassment in § 106.30. The word "sex" is undefined in the Title IX statute. The Department did not propose a definition of "sex" in the NPRM and declines to do so in these final regulations.

The focus of these regulations remains prohibited conduct. For example, the first prong of the Department's definition of sexual harassment concerns an employee of the recipient conditioning the provision of an educational aid, benefit, or service on an individual's participation in unwelcome sexual conduct, which is commonly referred to as *quid pro quo*

[795] *Perez v. Mortgage Bankers Ass'n*, 525 U.S. 92, 96-97 (2015).

sexual harassment. Any individual may experience *quid pro quo* sexual harassment. The second prong of the § 106.30 definition of sexual harassment involves unwelcome conduct on the basis of sex determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; any individual may experience this form of harassment, as well. The third prong of the sexual harassment definition in these final regulations is sexual assault, dating violence, domestic violence, or stalking on the basis of sex as defined in the Clery Act and VAWA, respectively, and again, any individual may be sexually assaulted or experience dating violence, domestic violence, or stalking on the basis of sex. Thus, any individual – irrespective of sexual orientation or gender identity – may be victimized by the type of conduct defined as sexual harassment to which a recipient must respond under these final regulations.

Title IX and its implementing regulations include provisions that presuppose sex as a binary classification, and provisions in the Department's current regulations, which the Department did not propose to revise in this rulemaking, reflect this presupposition. For example, 20 U.S.C. 1681(a)(2), which concerns educational institutions commencing planned changes in admissions, refers to "an institution which admits only students of one sex to being an institution which admits students of both sexes." Similarly, 20 U.S.C. 1681(a)(6)(B) refers to "men's" and "women's" associations as well as organizations for "boys" and "girls" in the context of organizations "the membership of which has traditionally been limited to persons of one sex." Likewise, 20 U.S.C. 1681(a)(7)(A) refers to "boys'" and "girls'" conferences. Title IX does not prohibit an educational institution "from maintaining separate living facilities for the different sexes" pursuant to 20 U.S.C. 1686. Additionally, the Department's current Title IX regulations expressly permit sex-specific housing in 34 CFR 106.32 ("[h]ousing provided by a

recipient to students of one sex, when compared to that provided to students of the other sex"), separate intimate facilities on the basis of sex in 34 CFR 106.33 ("separate toilet, locker room, and shower facilities on the basis of sex" with references to "one sex" and "the other sex"), separate physical education classes on the basis of sex in 34 CFR 106.34 ("[t]his section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact"), separate human sexuality classes on the basis of sex in 34 CFR 106.34 ("[c]lasses or portions of classes in elementary and secondary schools that deal primarily with human sexuality may be conducted in separate sessions for boys and girls"), and separate teams on the basis of sex for contact sports in 34 CFR 106.41 ("a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport"). In promulgating regulations to implement Title IX, the Department expressly acknowledged physiological differences between the male and female sexes. For example, the Department's justification for not allowing schools to use "a single standard of measuring skill or progress in physical education classes . . . [if doing so] has an adverse effect on members of one sex"[796] was that "if progress is measured by determining whether an individual can perform twenty-five push-ups, the standard may be virtually out-of-reach for many more women than men because of the difference in strength between average persons of each sex."[797]

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[796] 34 CFR 106.43.

[797] U.S. Dep't. of Health, Education, and Welfare, General Administration, Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 40 FR 24128, 24132 (June 4, 1975). Through that rulemaking, the Department promulgated § 86.34(d), which is substantially similar to the Department's current regulation 34 CFR 106.43.

The Department declines to take commenters' suggestions to include a definition of the word "sex" in these final regulations because defining sex is not necessary to effectuate these final regulations and has consequences that extend outside the scope of this rulemaking. These final regulations primarily address a form of sex discrimination – sexual harassment – that does not depend on whether the definition of "sex" involves solely the person's biological characteristics (as at least one commenter urged) or whether a person's "sex" is defined to include a person's gender identity (as other commenters urged). Anyone may experience sexual harassment, irrespective of gender identity or sexual orientation. As explained above, the Department acknowledged physiological differences based on biological sex in promulgating regulations to implement Title IX with respect to physical education. Defining "sex" will have an effect on Title IX regulations that are outside the scope of this rulemaking, such as regulations regarding discrimination (e.g., different treatment) on the basis of sex in athletics. The scope of matters addressed by the final regulations is defined by the subjects presented in the NPRM, and the NPRM did not propose to define sex. The Department declines to address that matter in these final regulations. The Department will continue to look to the Title IX statute and the Department's Title IX implementing regulations with respect to the meaning of the word "sex" for Title IX purposes.

To address a commenter's assertion that Title IX prohibits sex stereotyping that underlies discrimination against LGBTQ individuals, the Department notes that some of the cases the commenter cited are cases under Title VII and are on appeal before the Supreme Court of the United States. The most recent position of the United States in these cases is (1) that the ordinary public meaning of "sex" at the time of Title VII's passage was biological sex and thus the appropriate construction of the word "sex" does not extend to a person's sexual orientation or

transgender status, and (2) that discrimination based on transgender status does not constitute sex stereotyping but a transgender plaintiff may use sex stereotyping as evidence to prove a sex discrimination claim if members of one sex (e.g., males) are treated less favorably than members of the other sex (e.g., females).[798] Although the U.S. Attorney General and U.S. Solicitor General interpret the word "sex" solely within the context of Title VII, the current position of the United States may be relevant as to the public meaning of the word "sex" in other contexts as well. As explained above, the Department does not define "sex" in these final regulations. These final regulations focus on prohibited conduct, irrespective of a person's sexual orientation or gender identity. Whether a person has been subjected to the conduct defined in § 106.30 as sexual harassment does not necessarily require reliance on a sex stereotyping theory. Nothing in these final regulations, or the way that sexual harassment is defined in § 106.30, precludes a theory of sex stereotyping from underlying unwelcome conduct on the basis of sex that constitutes sexual harassment as defined in § 106.30.

With respect to sexual harassment as a form of sex discrimination in these final regulations, the Department's position in these final regulations remains similar to its position in the 2001 Guidance, which provides:

> Although Title IX does not prohibit discrimination on the basis of sexual orientation, sexual harassment directed at gay or lesbian students that is sufficiently

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[798] *See* Brief of Respondent Equal Employment Opportunity Commission at 16, 22-27, 50-53, *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Comm'n*, 884 F.3d 560 (6th Cir.), appeal docketed, No. 18-107 (U.S. August 16, 2019), https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf; *accord* Amicus Curiae Brief for the United States in *Bostock* and *Zarda*, https://www.supremecourt.gov/DocketPDF/17/17-1618/113417/20190823143040818_17-1618bsacUnitedStates.pdf, *Bostock v. Clayton County, Ga.*, 723 F. App'x 964 (11th Cir.), appeal docketed, No. 17-1618 (U.S. June 1, 2018); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir.), appeal docketed, No. 17-1623 (U.S. June 1, 2018); *see also* Memorandum from the U.S. Attorney General to the U.S. Attorneys & Heads of Department Components, "*Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964*" (Oct. 4, 2017) https://www.justice.gov/ag/page/file/1006981/download ("Attorney General's Memorandum").

> serious to limit or deny a student's ability to participate in or benefit from the school's program constitutes sexual harassment prohibited by Title IX under the circumstances described in this guidance. For example, if a male student or a group of male students target a gay student for physical sexual advances, serious enough to deny or limit the victim's ability to participate in or benefit from the school's program, the school would need to respond promptly and effectively, as described in this guidance, just as it would if the victim were heterosexual. On the other hand, if students heckle another student with comments based on the student's sexual orientation (e.g., "gay students are not welcome at this table in the cafeteria"), but their actions do not involve conduct of a sexual nature, their actions would not be sexual harassment covered by Title IX.[799]
>
> …[G]ender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, but not involving conduct of a sexual nature, is also a form of sex discrimination to which a school must respond[.] For example, the repeated sabotaging of female graduate students' laboratory experiments by male students in the class could be the basis of a violation of Title IX.

These final regulations provide a definition of sexual harassment that differs in some respects from the definition of sexual harassment in the 2001 Guidance, as explained in more detail in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section, the "Sexual Harassment" subsection in the "Section 106.30 Definitions" section, and throughout this preamble. These final regulations include sexual harassment as unwelcome conduct on the basis of sex that a reasonable person would determine is so severe, pervasive, and objectively offensive that it denies a person equal educational access; this includes but is not limited to unwelcome conduct of a sexual nature, and may consist of unwelcome conduct based on sex or sex stereotyping. The Department will not tolerate sexual harassment as defined in § 106.30 against any student, including LGBTQ students.

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[799] 2001 Guidance at 3.

For similar reasons to those discussed above, the Department declines to address discrimination on the basis of gender identity or other issues raised in the Department's 2015 letter regarding transgender students' access to facilities such as restrooms and the 2016 "Dear Colleague Letter on Transgender Students."

These final regulations concern sexual harassment and not the participation of individuals, including transgender individuals, in sports or other competitive activities. We do not believe these final regulations serve to discourage the participation of women in a recipient's education programs and activities, including sports or other competitive activities.

These final regulations address sexual exploitation to the extent that sexual exploitation constitutes sexual harassment as defined in § 106.30, and the grievance process in § 106.45 applies to all formal complaints alleging sexual harassment.

Sexual harassment is not limited to being bi-directional (male-to-female and female-to-male). As explained above, these final regulations focus on prohibited conduct, irrespective of the identity of the complainant and respondent. As explained above, any person may experience sexual harassment as a form of sex discrimination, irrespective of the identity of the complainant or respondent.

Changes: None.

Comments: One commenter urged the Department to require that all policies, information, education, training, reporting options, and adjudication processes be accessible and fair and balanced to all students regardless of race, ethnicity, disability, sexual orientation, or other potentially disenfranchising characteristics. One commenter recommended that the Department remove "sex discrimination issues" from the summary section of the preamble because the scope is too narrow and inconsistent with the spirit of Title IX and discrimination in higher education

extends beyond sex discrimination. This commenter also stated that the proposed rules refer to recipients' responsibilities related to actionable harassment under Title IX, but the commenter suggested that the term discrimination would be more appropriate because sex- and gender-based harassment is only one form of discrimination that Title IX prohibits. One commenter stated that if the scope of the proposed rules must be limited to sexual harassment, this scope should be clearly stated in the preamble to not give the impression that other forms of discrimination included in Title IX do not require due process.

Discussion: Title IX expressly prohibits discrimination on the basis of sex and not race, disability, or other protected characteristics, and the Department does not have the legal authority to promulgate regulations addressing discrimination on the basis of protected characteristics, other than sex, under Title IX. The Department enforces other statutes such as Title VI, which prohibits discrimination on the basis of race, color, and national origin. The Department's other regulations specifically address discrimination based on these and other protected characteristics.

These final regulations require that all policies, information, education, training, reporting options, and adjudication processes be accessible and fair for all students. For example, any complainant will be offered supportive measures, even if that person does not wish to file a formal complaint under § 106.44(a). Any respondent will receive the due process protections in the § 106.45 grievance process before the imposition of any disciplinary sanctions for sexual harassment under § 106.44(a). Additionally, the recipient's non-discrimination statement, designation of a Title IX Coordinator, policy, grievance procedures, and training materials should be readily accessible to all students pursuant to § 106.8 and § 106.45(b)(10)(i)(D).

For the reasons previously explained, the Department does not define sex in these final regulations, as these final regulations focus on prohibited conduct, namely sexual harassment as

a form of sex discrimination. As previously explained, the Department's definition of sexual harassment applies for the protection of any person who experiences sexual harassment, regardless of sexual orientation or gender identity.

Although these final regulations constitute the Department's first promulgation of regulations that address sexual harassment, these final regulations also make revisions to pre-existing regulations and regulations such as regulations in subpart A and subpart B of Part 106 that generally address sex discrimination but do not specifically address sexual harassment. For example, the Department revises § 106.8, which concerns the designation of a Title IX Coordinator who will address all forms of discrimination on the basis of sex and not just sexual harassment. The Department clarifies in § 106.8(c) that a recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints, alleging any action that would be prohibited by Part 106 of Title 34 of the Code of Federal Regulations, and also a grievance process that complies with § 106.45 for formal complaints of sexual harassment as defined in § 106.30. Section 106.8(c) thus clarifies that a recipient does not need to apply or use the grievance process in § 106.45 for complaints alleging sex discrimination that does not constitute sexual harassment.

Changes: None.

Supportive Measures

Overall Support and Opposition

Comments: Many commenters supported the definition of "supportive measures" in § 106.30 because the provision states that supportive measures may be offered to complainants and respondents; commenters asserted that supportive measures should be offered on an equal basis to all parties, except to the extent public safety concerns would require different treatment,

stressing that respondents deal with their own strife as a result of going through the Title IX process. These commenters viewed the § 106.30 definition of supportive measures as appropriately requiring measures that do not disproportionately punish, discipline, or unreasonably burden either party. Many commenters appreciated that the § 106.30 definition of supportive measures included a list illustrating the range of services that could be offered to both parties, and several of these commenters specifically expressed strong support for mutual no-contact orders as opposed to one-way no-contact orders.

Many commenters opposed the § 106.30 definition of supportive measures because, while neither party should be presumed to be at fault before an investigation had been completed commenters argued that this provision will cause an overall decrease in the availability of support services and accommodations to victims. Commenters argued that the requirement that supportive measures be "non-disciplinary, non-punitive," "designed [but not required] to restore access," and not unreasonably burdensome to the non-requesting party, significantly limits the universe of supportive measures schools could offer to victims by prohibiting any measure reasonably construed as negative towards a respondent. These commenters believed the supportive measures definition was too respondent-focused and effectively prioritized the education of respondents over complainants. Several commenters identified the clause "designed to effectively restore or preserve" and questioned how OCR would review and determine whether a supportive measure met this requirement. One commenter asserted that supportive measures designed to restore "access," as opposed to *equal* access, contradicted the proposed definition of "sexual harassment" in § 106.30 as well as the Supreme Court's holding in *Davis* because restoring *some* access is an incomplete remedy for a denial of *equal* access.

Several commenters requested clarification that colleges and universities have flexibility and discretion to approve or disapprove requested supportive measures, including one-way no-contact orders, according to the unique considerations of each situation. Another commenter argued that § 106.30 should be modified to expressly state that schedule and housing adjustments, or removing a respondent from playing on a sports team, do not constitute an unreasonable burden on the respondent when those measures do not separate the respondent from academic pursuits. Commenters argued that § 106.30 should clarify what kind of burdens will be considered "unreasonable." Commenters urged the Department to modify the definition of supportive measures to require that all such measures be proportional to the alleged harm and the least burdensome measures that will protect safety, preserve equal educational access, and deter sexual harassment.

Many commenters suggested that the final regulations should require schools to implement a process through which the parties can seek and administrators can consider appropriate supportive measures, and at least one commenter suggested that a hearing similar to a preliminary injunction hearing under Federal Rule of Civil Procedure 65 should be used, particularly in cases where one party seeks the other party's removal from certain facilities, programs, or activities. At least one commenter asked the Department to specify that any interim measures must be lifted if the respondent is found not responsible.

Many commenters requested clarification as to what types of supportive measures are allowable in the elementary and secondary school context or requested that the Department expand the supportive measures safe harbor and definition to apply in the elementary and secondary school context. Other commenters asserted that there may be a greater need for supportive measures in cases involving international students, women in career preparatory

classes such as construction, manufacturing, and wielding, and lower-income students, for whom dropping out of school could have more drastic and long-lasting consequences.

Many commenters requested that the Department reconsider or clarify the requirement in § 106.30 that the Title IX Coordinator is responsible for effective implementation of supportive measures, arguing that Title IX Coordinators cannot fulfill all the duties assigned to them under the proposed rules (especially if a recipient has only designated one individual as a Title IX Coordinator) and asserting that the responsibility to implement supportive measures could be easily delegated to other offices on campus.

Discussion: The Department appreciates commenters' support for the § 106.30 definition of supportive measures, and we acknowledge commenters' arguments that the language employed in the proposed definition of the term "supportive measures" is too respondent-focused or lessens the availability of measures to assist victims. The Department disagrees that this provision prioritizes the needs of one party over the other. For example, the § 106.30 definition states that the individualized services can be offered "to the complainant or respondent"[800] free of charge, that the services shall not "unreasonably" burden either party, and may include services to protect the safety "of all parties" as well as the recipient's educational environment, or to deter sexual harassment. The Department disagrees that the requirements for supportive measures to be non-disciplinary, non-punitive, and not unreasonably burdensome to the other party indicate a preference for respondents over complainants or prioritize the education of respondents over that

[800] We emphasize that a "complainant" is any individual who has been alleged to be the victim of conduct that could constitute sexual harassment, and a "respondent" is any individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment, so a person may be a complainant or a respondent regardless of whether a formal complaint has been filed or a grievance process is pending (and irrespective of who reported the alleged sexual harassment – the alleged victim themselves, or a third party). *See* § 106.30 defining "complainant" and defining "respondent."

of complainants. These requirements protect complainants and respondents from the other party's request for supportive measures that would unreasonably interfere with either party's educational pursuits. The plain language of the § 106.30 definition does not state that a supportive measure provided to one party cannot impose *any* burden on the other party; rather, this provision specifies that the supportive measures cannot impose an *unreasonable* burden on the other party. Thus, the § 106.30 definition of supportive measures permits a wide range of individualized services intended to meet any of the purposes stated in that provision (restoring or preserving equal access to education, protecting safety, deterring sexual harassment).

We do not believe that it would be appropriate to specify, list, or describe which measures do or might constitute "unreasonable" burdens because that would detract from recipients' flexibility to make those determinations by taking into the account the specific facts and circumstances and unique needs of the parties in individual situations.[801] For similar reasons, we decline to require that supportive measures be "proportional to the harm alleged" and constitute the "least burdensome measures" possible, because we believe that the § 106.30 definition appropriately allows recipients to select and implement supportive measures that meet one or more of the stated purposes (e.g., restoring or preserving equal access; protecting safety; deterring sexual harassment) within the stated parameters (e.g., without being disciplinary or

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[801] The recipient must document the facts or circumstances that render certain supportive measures appropriate or inappropriate. Under § 106.45(b)(10)(ii), a recipient must create and maintain for a period of seven years records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment and must document the basis for its conclusion that its response was not deliberately indifferent. Specifically, that provision states that if a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. Thus, if a recipient determines that a particular supportive measure was not appropriate even though requested by a complainant, the recipient must document why the recipient's response to the complainant was not deliberately indifferent.

punitive, without unreasonably burdening the other party). The "alleged harm" in a situation alleging conduct constituting sexual harassment as defined in § 106.30 is serious harm and the definition of supportive measures already accounts for the seriousness of alleged sexual harassment while effectively ensuring that supportive measures are not unfair to a respondent; even if a supportive measure implemented by a recipient arguably was not the "least burdensome measure" possible, in order to qualify as a supportive measure under § 106.30 the measure cannot punish, discipline, or unreasonably burden the respondent.

To the extent that commenters are advocating for wider latitude for recipients to impose *interim* suspensions or expulsions of respondents, the Department believes that without a fair, reliable process the recipient cannot know whether it has interim-expelled a person who is actually responsible or not. Where a respondent poses an immediate threat to the physical health or safety of the complainant (or anyone else), § 106.44(c) allows emergency removals of respondents prior to the conclusion of a grievance process (or even where no grievance process is pending), thus protecting the safety of a recipient's community where an immediate threat exist. The Department believes that the § 106.30 definition of "supportive measures" in combination with other provisions in the final regulations results in effective options for a recipient to support and protect the safety of a complainant while ensuring that respondents are not prematurely punished.[802]

In response to commenters' concerns that omission of the word "equal" before "access" in the § 106.30 definition of supportive measures creates confusion about whether the purpose of

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[802] Section 106.44(c) (governing the emergency removal of a respondent who poses an immediate threat to any person's physical health or safety); § 106.44(d) (permitting the placement of non-student employees on administrative leave during a pending grievance process).

supportive measures is intended to remediate the same denial of "equal access" referenced in the § 106.30 definition of sexual harassment, we have added the word "equal" before "access" in the definition of supportive measures, and into § 106.45(b)(1)(i) where similar language is used to refer to remedies. The Department appreciates the opportunity to clarify that whether or not a recipient has implemented a supportive measure "designed to effectively restore or preserve" equal access is a fact-specific inquiry that depends on the particular circumstances surrounding a sexual harassment incident. Section 106.44(a) requires a recipient to offer supportive measures to every complainant irrespective of whether a formal complaint is filed, and if a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances under § 106.45(b)(10)(ii).[803]

In order to ensure that the definition of supportive measures in § 106.30 is read broadly we have also revised the wording of this provision to more clearly state that supportive measures must be designed to restore or preserve equal access to education without unreasonably burdening the other party, which may include measures designed to protect the safety of parties or the educational environment, or deter sexual harassment. The Department did not wish for the prior language to be understood restrictively to foreclose, for example, a supportive measure in the form of an extension of an exam deadline which helped preserve a complainant's equal access to education and did not unreasonably burden the respondent but could not necessarily be considered designed to protect safety or deter sexual harassment.

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[803] *See* discussion in the "Section 106.44(a) Deliberate Indifference Standard" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble.

The Department was persuaded by the many commenters who requested that the Department expand provisions that incentivize and encourage supportive measures. As previously noted, we have revised § 106.44(a) to require recipients to offer supportive measures to complainants. As explained in the "Proposed § 106.44(b)(3) Supportive Measures Safe Harbor in Absence of a Formal Complaint [removed in final regulations]" subsection of the "Recipient's Response in Specific Circumstances" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble, we have eliminated the proposed safe harbor regarding supportive measures altogether and, thus, we do not extend this safe harbor to elementary and secondary schools. As all recipients (including elementary and secondary school recipients) are now required to offer complainants supportive measures as part of their non-deliberately indifference response under § 106.44(a), the proposed safe harbor regarding supportive measures is unnecessary. The Department agrees that the need to offer supportive measures in the absence of, or during the pendency of, an investigation is equally as important in elementary and secondary schools as in postsecondary institutions. The final regulations revise the § 106.30 definition of supportive measures to use the word "recipient" instead of "institution" to clarify that this definition applies to all recipients, not only to postsecondary institutions.

To preserve discretion for recipients, the Department declines to impose additional suggested changes that would further restrict or prescribe the supportive measures a recipient may or must offer, including requiring supportive measures that "do" restore or preserve equal access rather than supportive measures "designed" to restore or preserve equal access. Requiring supportive measures to be "designed" for that purpose rather than insisting that such measures actually accomplish that purpose protects recipients against unfair imposition of liability where,

despite a recipient's implementation of measures intended to help a party retain equal access to education, underlying trauma from a sexual harassment incident still results in a party's inability to participate in an education program or activity. To the extent that commenters desire for the final regulations to specify that certain populations (such as international students) may have a greater need for supportive measures, the Department declines to revise this provision in that regard because the determination of appropriate supportive measures in a given situation must be based on the facts and circumstances of that situation. Supportive measures must be offered to every complainant as a part of a recipient's response obligations under § 106.44(a).

The Department declines to include an explicit statement that schedule and housing adjustments, or removals from sports teams or extracurricular activities, do not unreasonably burden the respondent as long as the respondent is not separated from the respondent's academic pursuits, because determinations about whether an action "unreasonably burdens" a party are fact-specific. The unreasonableness of a burden on a party must take into account the nature of the educational programs, activities, opportunities, and benefits in which the party is participating, not solely those educational programs that are "academic" in nature. On the other hand, the Department appreciates the opportunity to clarify that, contrary to some commenters' concerns, schedule and housing adjustments do not necessarily constitute an "unreasonable" burden on a respondent, and thus the § 106.30 definition of supportive measures continues to require that recipients consider each set of unique circumstances to determine what individualized services will meet the purposes, and conditions, set forth in the definition of

supportive measures.[804] Removal from sports teams (and similar exclusions from school-related activities) also require a fact-specific analysis, but whether the burden is "unreasonable" does not depend on whether the respondent still has access to academic programs; whether a supportive measure meets the § 106.30 definition also includes analyzing whether a respondent's access to the array of educational opportunities and benefits offered by the recipient is unreasonably burdened. Changing a class schedule, for example, may more often be deemed an acceptable, reasonable burden than restricting a respondent from participating on a sports team, holding a student government position, participating in an extracurricular activity, and so forth.

The final regulations require a recipient to refrain from imposing disciplinary sanctions or other actions that are not supportive measures, against a respondent, without following the § 106.45 grievance process, and also require the recipient's grievance process to describe the range, or list, the disciplinary sanctions that a recipient might impose following a determination of responsibility, and describe the range of supportive measures available to complainants and respondents.[805] The possible disciplinary sanctions described or listed by the recipient in its own grievance process therefore constitute actions that the recipient itself considers "disciplinary" and thus would not constitute "supportive measures" as defined in § 106.30. If a recipient has listed ineligibility to play on a sports team or hold a student government position, for example, as a possible disciplinary sanction that may be imposed following a determination of responsibility, then the recipient may not take that action against a respondent without first following the §

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[804] The 2001 Guidance at 16 takes a similar approach to the final regulations' approach to supportive measures, by stating that it "may be appropriate for a school to take interim measures during the investigation of a complaint" and for instance, "the school may decide to place the students immediately in separate classes or in different housing arrangements on a campus, pending the results of the school's investigation" or where the alleged harasser is a teacher "allowing the student to transfer to a different class may be appropriate."

[805] Section 106.44(a); § 106.45(b)(1)(i); § 106.45(b)(1)(vi); § 106.45(b)(1)(ix).

106.45 grievance process. If, on the other hand, the recipient's grievance process does not describe or list a specific action as a possible disciplinary sanction that the recipient may impose following a determination of responsibility, then whether such an action (for example, ineligibility to play on a sports team or hold a student government position) may be taken as a supportive measure for a complainant is determined by whether that the action is not disciplinary or punitive and does not unreasonably burden the respondent. Certain actions, such as suspension or expulsion from enrollment, or termination from employment, are inherently disciplinary, punitive, and/or unreasonably burdensome and so will not constitute a "supportive measure" whether or not the recipient has described or listed the action in its grievance process pursuant to § 106.45(b)(1)(vi).

The Department reiterates that a recipient may remove a respondent from all or part of a recipient's education program or activity in an emergency situation pursuant to § 106.44(c) (with or without a grievance process pending) and may place a non-student employee respondent on administrative leave during a grievance process, pursuant to § 106.44(d).[806] Further, a recipient is obligated to conclude a grievance process within a reasonably prompt time frame, thus limiting the duration of time for which supportive measures are serving to maintain a status quo balancing the rights of both parties to equal educational access in an interim period while a grievance process is pending.

With respect to supportive measures in the elementary and secondary school context, many common actions by school personnel designed to quickly intervene and correct behavior

[806] For further discussion see the "Additional Rules Governing Recipients' Responses to Sexual Harassment" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble.

are not punitive or disciplinary and thus would not violate the § 106.30 definition of supportive measures or the provision in § 106.44(a) that prevents a recipient from taking disciplinary actions or other measures that are "not supportive measures" against a respondent without first following a grievance process that complies with § 106.45. For example, educational conversations, sending students to the principal's office, or changing student seating or class assignments do not inherently constitute punitive or disciplinary actions and the final regulations therefore do not preclude teachers or school officials from taking such actions to maintain order, protect student safety, and counsel students about inappropriate behavior. By contrast, as discussed above, expulsions and suspensions would constitute disciplinary sanctions (and/or constitute punitive or unreasonably burdensome actions) that could not be imposed without following a grievance process that complies with § 106.45. The Department emphasizes that these final regulations apply to conduct that constitutes sexual harassment as defined in § 106.30, and not to every instance of student misbehavior.

These final regulations do not expressly require a recipient to continue providing supportive measures upon a finding of non-responsibility, and the Department declines to require recipients to lift, remove, or cease supportive measures for complainants or respondents upon a finding of non-responsibility. Recipients retain discretion as to whether to continue supportive measures after a determination of non-responsibility. A determination of non-responsibility does not necessarily mean that the complainant's allegations were false or unfounded but rather could mean that there was not sufficient evidence to find the respondent responsible. A recipient may choose to continue providing supportive measures to a complainant or a respondent after a determination of non-responsibility. This is not unfair to either party because by definition, "supportive measures" do not punish or unreasonably burden the other party, whether the other

party is the complainant or respondent. There may be circumstances where the parties want supportive measures to remain in place or be altered rather than removed following a determination of non-responsibility, and the final regulations leave recipients flexibility to implement or continue supportive measures for one or both parties in such a situation.

The Department also declines to add an additional requirement that schools implement a process by which supportive measures are requested by the parties and granted by recipients, because we wish to leave recipients flexibility to develop processes consistent with each recipient's administrative structure rather than dictate to every recipient how to process requests for supportive measures. Although we do not dictate a particular process, these final regulations specify in § 106.44(a) that the Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. Complainants will know about the possible supportive measures available to them[807] and will have the opportunity to express what they would like in the form of supportive measures, and the Title IX Coordinator will take into account the complainant's wishes in determining which supportive measures to offer. The final regulations do prescribe that a recipient's Title IX Coordinator must remain responsible for coordinating the effective implementation of supportive measures, so that the burden of arranging and enforcing the supportive measures in a given circumstance remains on the

[807] Section 106.45(b)(1)(ix) requires the recipient's grievance process to describe the range of supportive measures available to complainants and respondents. Additionally, the Title IX Coordinator must contact an individual complainant to discuss the availability of supportive measures, under § 106.44(a).

recipient, not on any party. We acknowledge commenters' concerns that these final regulations place many responsibilities on a Title IX Coordinator, and a recipient has discretion to designate more than one employee as a Title IX Coordinator if needed in order to fulfill the recipient's Title IX obligations.[808]

With respect for a process to remove a respondent from a recipient's education program or activity, these final regulations provide an emergency removal process in § 106.44(c) if there is an immediate threat to the physical health or safety of any students or other individuals arising from the allegations of sexual harassment. A recipient must provide a respondent with notice and an opportunity to challenge the emergency removal decision immediately following the removal. Additionally, the grievance process in § 106.45 provides robust due process protections for both parties, and before imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent, a recipient must follow a grievance process that complies with § 106.45.

We acknowledge commenters' concerns regarding the provision in the § 106.30 definition supportive measures that the Title IX Coordinator must coordinate the effective implementation of supportive measures. However, we believe it is important that students know they can work with the Title IX Coordinator to select and implement supportive measures rather than leave the burden on students to work with various other school administrators or offices. The Department recognizes that many supportive measures involve implementation through various offices or departments within a school. When supportive measures are part of a school's

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[808] *See* discussion in the "Section 106.8(a) Designation of Coordinator" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

Title IX obligations, the Title IX Coordinator must serve as the point of contact for the affected students to ensure that the supportive measures are effectively implemented so that the burden of navigating paperwork or other administrative requirements within the recipient's own system does not fall on the student receiving the supportive measures. The Department recognizes that beyond coordinating and serving as the student's point of contact, the Title IX Coordinator will often rely on other campus offices to actually provide the supportive measures sought, and the Department encourages recipients to consider the variety of ways in which the recipient can best serve the affected student(s) through coordination with other offices while ensuring that the burden of effectively implementing supportive measures remains on the Title IX Coordinator and not on students.

Changes: We have revised the definition for supportive measures in § 106.30 to refer to "recipients" instead of "institutions" which clarifies that the definition of supportive measures is applicable in the context of elementary and secondary schools as well as in the context of postsecondary institutions. We have added "equal" before "access" in the description of supportive measures designed to restore or preserve equal access to the recipient's education program or activity. We have revised the second sentence of this provision to clarify that supportive measures must be designed to restore or preserve equal access and must not unreasonably burden the other party, which may include measures also designed to protect safety or the recipient's educational environment, or deter sexual harassment.

No-Contact Orders

Comments: Several commenters focused on the list of possible supportive measures included in the definition of supportive measures in § 106.30 and viewed the express inclusion of mutual no-contact orders as a general prohibition on one-way no-contact orders, and asked the Department

to clarify whether one-way no-contact orders were prohibited. Other commenters assumed one-way no-contact orders were prohibited, and expressed concern that by disallowing one-way no-contact orders, the onus would be placed on the victim to take extreme measures to provide for their own accommodations and prevent victims from getting the support they needed, or would discourage victims from reporting in the first place. Many commenters asserted that a victim would be forced to face or interact with their alleged harasser in class, in dorms, or elsewhere on campus if one-way no-contact orders were prohibited. Other commenters argued that a victim would have to win an administrative proceeding in order to be granted a one-way no-contact order. Many commenters called for the Department to remove the "mutual restrictions on contact" provision from the list entirely because it is not a victim-focused supportive measure. Additionally, some commenters expressed the belief that mutual no-contact orders are not enforceable because it is hard to determine which party has the burden to comply with the no-contact order if both parties are present in the same location. A few commenters believed that mutual no-contact orders would constitute unlawful retaliation against the victim since such an order would necessarily restrict the victim's own participation in programs or activities as well as the participation of the respondent. Some commenters argued that mutual no-contact orders were contrary to the public policies underlying VAWA and various State laws, and that mutual no-contact orders are analogous to reciprocal protective or restraining orders, which have been invalidated by at least one State Supreme Court.[809]

[809] Commenters cited: *Bays v. Bays*, 779 So.2d 754 (La. 2001).

Other commenters asked the Department to expand the list in the § 106.30 definition of supportive measures to include a greater variety of allowable supportive measures. Some commenters argued that the list of possible supportive measures only included prospective measures (that might preserve access going forward) as opposed to remedial measures (that might restore access that had already been lost), and argued that the Department should explicitly mention measures aimed at restoring equal access, such as opportunities to repeat a class or retake an exam or attaching an addendum to a transcript to explain a low grade.

Discussion: We acknowledge commenters' concerns related to the inclusion of mutual no-contact orders on the non-exhaustive list of possible supportive measures in § 106.30, but the Department declines to exclude this example from the list of supportive measures. The list of possible supportive measures included in the § 106.30 definition is illustrative, not exhaustive. The inclusion of "mutual restrictions on contact between the parties" on the illustrative list of possible supportive measures in § 106.30 does not mean that one-way no-contact orders are never appropriate. A fact-specific inquiry is required into whether a carefully crafted no-contact order restricting the actions of only one party would meet the § 106.30 definition of supportive measures. For example, if a recipient issues a one-way no-contact order to help enforce a restraining order, preliminary injunction, or other order of protection issued by a court, or if a one-way no-contact order does not unreasonably burden the other party, then a one-way no-contact order may be appropriate. The Department also reiterates that sexual harassment allegations presenting a risk to the physical health or safety of a person may justify emergency removal of a respondent in accordance with the § 106.44(c) emergency removal provision, which could include a no-trespass or other no-contact order issued against a respondent.

The inclusion of mutual no-contact orders on an illustrative list does not mean the final regulations require complainants to face their respondents on campus, in classrooms, or in dorms. Rather, the express inclusion of mutual no-contact orders suggests that recipients can offer measures – tempered by the requirements that they are not punitive, disciplinary, or unreasonably burdensome to the other party – to limit the interactions, communications, or contact, between the parties. The final regulations do not require recipients to initiate administrative proceedings (i.e., a grievance process) in order to determine and implement appropriate supportive measures. Contrary to the arguments of commenters, the Department believes that mutual no-contact may constitute reasonable restrictions imposed on both parties, because under certain circumstances such a measure serves the purposes of protecting each party's right to pursue educational opportunities, protecting the safety of all parties, and deterring sexual harassment. The Department believes that "mutual restrictions on contact between the parties" may in many circumstances provide benefits to the complainant, for example, where such a mutual no-contact order serves the interest of protecting safety or deterring sexual harassment by forbidding communication between the parties, which might not require either party to change dorm rooms or even re-arrange class schedules. Further restrictions, such as avoiding physical proximity between the parties, will require a fact-specific analysis to determine the scope of a no-contact order that may be appropriate under § 106.30; for example, where both parties are athletes and sometimes practice on the same field, consideration must be given to the scope of a no-contact order that deters sexual harassment, without unreasonably burdening the other party, with the goal of restricting contact between the parties without requiring either party to forgo educational activities. It may be unreasonably burdensome to prevent respondents from attending extra-curricular activities that a recipient offers as a result of

a one-way no contact order prior to being determined responsible; similarly, it may be unreasonably burdensome to restrict a complainant from accessing campus locations in order to prevent contact with the respondent. In some circumstances, for example, a complainant might be offered a supportive measure consisting of a mutual no-contact order restricting either party from *communicating* with the other (which measure likely would not unreasonably burden either party). If, however, the complainant wishes to avoid all physical sightings of a respondent and not only an order prohibiting communications, if appropriate the complainant may receive a supportive measure in the form of an alternate housing assignment (without fee or cost to the complainant). The Department does not view such a supportive measure in such a circumstance as unreasonably burdening the complainant, because alternate supportive measures also would have prevented sexual harassment (by prohibiting all communication between the parties). Under § 106.44(a), a Title IX Coordinator must consider a complainant's wishes with respect to supportive measures, and if a complainant would like a different housing arrangement as part of a supportive measure, then a Title IX Coordinator should consider offering such a supportive measure.

The Department does not believe that "mutual restrictions on contact between the parties" could constitute unlawful retaliation by restricting the complainant's own participation in certain programs or activities of the recipient as well as that of the respondent. Such a supportive measure would simply treat both parties equally, and "restrictions on contact" could be limited in scope to prohibiting communications between the parties, which may not affect the complainant's ability to participate in classes or activities. The Department notes that the § 106.30 definition's requirements that supportive measures be non-disciplinary and non-punitive apply equally to protect complainants against a recipient taking action that punishes or sanctions

a complainant. In response to commenters' concerns about complainants being unfairly punished in the wake of reporting sexual harassment, the Department added § 106.71 prohibiting retaliation. Actions taken by a recipient under the guise of "supportive measures" that actually have the purpose and effect of penalizing the complainant for the purpose of discouraging the complainant from exercising rights under Title IX would constitute unlawful retaliation.

We also acknowledge the various other suggested modifications to the list of supportive measures offered by commenters, but we decline to expand this list. The Department encourages recipients to broadly consider what measures they can reasonably offer to individual students to ensure continued equal access to a recipient's education program and activities for a complainant, irrespective of whether a complainant files a formal complaint, and for a respondent, when a formal complaint is filed. The Department has provided a list to illustrate the range of possible supportive measures, but the list of supportive measures is not intended to be exhaustive. Nothing in § 106.30 precludes recipients from considering and providing supportive measures not listed in the definition, including measures designed to retrospectively "restore" or prospectively "preserve" a complainant's equal educational access. We note that the § 106.30 already includes the example of "course-related adjustments" which could encompass several suggested measures identified by commenters, such as opportunities to retake classes or exams, or adjusting an academic transcript.

Changes: None.

Other Language/Terminology Comments

Comments: One commenter expressed concern that the terms "survivor" and "victim" used in the NPRM to describe a person who merely alleges something has happened to them are prejudicial and anti-male. Other commenters asserted that the Department's proposed regulations

are biased in favor of males partly due to the use of neutral terms such as "complainant" and "respondent" instead of "survivor" or "perpetrator." One commenter suggested that, instead of using the term "complainant," the final regulations should refer to "student survivors" or "those who face harassment." The commenter further recommended that the final regulations use the term "perpetrator" instead of "respondent," saying that the use of the term "respondent" is confusing, and fails to account for perpetrators who are never formally investigated, and therefore are never in a formal respondent role (i.e., because they have not responded to anything).

Discussion: The Department disagrees that the use of the term survivor or victim in the NPRM is biased, anti-male, or pro-male. The term "survivor" was used five times in the preamble to refer generally to individuals who have been victims of sexual harassment. The Department listened to advocates for these individuals, as we listened to other stakeholders. The use of the term survivor or victim in that context takes no position on the veracity of any particular complainant or respondent, or complainants or respondents in general. The final regulations are intended to be objective and do not use the term "survivor" or "victim" in the regulatory text, instead using the more neutral terms "complainant" and "respondent." The final regulations are intended to be fair, unbiased, and impartial toward both complainants and respondents. When a determination of responsibility is reached against a respondent, the Department's interest is in requiring remedies for the complainant, to further the goal of Title IX by providing remedies to victims of sexual harassment aiming to restore their equal educational access. Although the final regulations do not need to use the word "victim," once a reliable outcome has determined that a complainant was victimized by sexual harassment, the final regulations mandate that remedies be provided to that

complainant precisely because after such a determination has been made, that complainant has been fairly, reliably shown to have been the victim of sexual harassment.

Changes: None.

Comments: One commenter expressed concern that the terms used in the NPRM reveal a clear preference in protecting the interests of a school and effectively limiting a school's liability rather than protecting the equal right for all students to have access to higher education free from discrimination.

Discussion: The Department does not have, nor does the terminology in the final regulations reflect, any preference for protecting the interests of a school or effectively limiting a school's liability rather than protecting the equal right of all students to have access to higher education free from discrimination. Although the Department is not required to adopt the deliberate indifference standard articulated by the Supreme Court, we are persuaded by the policy rationales relied on by it and believes it is the best policy approach. As the Court reasoned in *Davis*, a recipient acts with deliberate indifference only when it responds to sexual harassment in a manner that is "clearly unreasonable in light of the known circumstances."[810] The Department believes this standard holds recipients accountable without depriving them of legitimate and necessary flexibility to make disciplinary decisions and to provide supportive measures that might be necessary in response to sexual harassment. Moreover, the Department believes that teachers and local school leaders with unique knowledge of the school climate and student body are best positioned to make disciplinary decisions; thus, unless the recipient's response to sexual harassment is clearly unreasonable in light of known circumstances, the Department will not

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[810] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648-49 (1999).

second guess such decisions. In addition, the final regulations impose obligations on recipients that go beyond the deliberate indifference standard as set forth in *Davis*; for example, by requiring that recipients' non-deliberately indifferent response must include offering supportive measures to a complainant under § 106.44(a). Additionally, as explained in more detail in the "Section 106.44(b) Proposed 'Safe Harbors,' generally" subsection in the "Recipient's Response in Specific Circumstances" section, these final regulations do not include any of the proposed safe harbors in the NPRM for recipients.

Changes: None.

Comments: One commenter opposed the use of criminal terms since many of the terms that relate to the findings have legal definitions in criminal law, for which due process protections already exist, and the use of such language suggests that colleges do not want the overall Title IX process to be an educational experience and not a criminal justice proceeding.

Discussion: The Department disagrees with the commenter's contention. The Department has in no way implied that these proceedings are criminal in nature and the final regulations use terms such as "complainant" and "respondent," "decision-maker" and "determination regarding responsibility" to describe features of the grievance process, language intentionally adopted to avoid reference to terms used in civil courts or criminal proceedings (e.g., plaintiff, defendant, prosecutor, judge, verdict). In this way, the final regulations acknowledge that the resolution of allegations of Title IX sexual harassment in an education program or activity serves a different purpose and occurs in a different context from a civil or criminal court. As explained in the "Role of Due Process in the Grievance Process" section of this preamble, the § 106.45 grievance process is rooted in principles of due process to create a process fair to all parties and likely to result in reliable outcomes, and while the Department believes that the grievance process is

consistent with constitutional due process, the § 106.45 grievance process is independent from constitutional due process because it is designed to effectuate the purposes of Title IX as a civil rights statute. The Department understands the concerns expressed by some commenters that colleges want the overall Title IX process to be an educational experience and that the outcome is administrative and believes the final regulations prescribe a consistent grievance process appropriate for administratively resolving allegations of sexual harassment in an education program or activity.

Changes: None.

Comments: One commenter suggested using the word "discrimination" instead of "harassment" in places where the NPRM describes actionable behavior because harassment does not have to occur for there to be discrimination.

Discussion: The Department declines to adopt the word "discrimination" instead of "harassment" in these final regulations. The Department's Title IX regulations already address sex discrimination, and these final regulations intend to address sexual harassment as a particular form of sex discrimination under Title IX. Complaints of sex discrimination that do not constitute sexual harassment may be made to a recipient for handling under the prompt and equitable grievance procedures that recipients must adopt under § 106.8(c). When the sex discrimination complained of constitutes sexual harassment as defined in § 106.30, these final regulations govern how recipients must respond to that form of sex discrimination.

Changes: None.

Comments: One commenter expressed concern that the NPRM used the term "guilt," which equates school conduct processes to the court system and seems contrary to the NPRM's goals of distinguishing between school conduct processes and the judicial system. The commenter argued

that instead, the final regulations should use the terms "found responsible" and "not responsible," and should only draw comparisons with civil, rather than criminal, case law.

Discussion: The Department disagrees with the concern that the NPRM inappropriately used the term "guilt." The word "guilt" appears only in two instances in the NPRM, and neither of those occurrences is in the text of the proposed regulations. In the first instance, the NPRM notes that "Secretary DeVos stated that in endeavoring to find a 'better way forward' that works for all students, 'non-negotiable principles' include the right of every survivor to be taken seriously and the right of every person accused to know that guilt is not predetermined."[811] Second, the NPRM states that "[a] fundamental notion of a fair proceeding is that a legal system does not prejudge a person's guilt or liability."[812] In both contexts, the NPRM was using the term guilt generally to refer to culpability for an offense. The Department also declines to revise the final regulations to use the terms "found responsible" and "not responsible" because it has already utilized similar language; for example, § 106.45(b)(1)(vi) uses "determination of responsibility" in the context of finding a respondent responsible and § 106.45(b)(7) employs the term "determination regarding responsibility" in the context of a determination that could either find the respondent responsible or non-responsible. The NPRM uses the same or similar terms.[813]

Changes: None.

Comments: Several commenters suggested that the term "equitable" should be used instead of "equal" because the two terms have different meanings, and Title IX focuses on educational

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[811] 83 FR 61464.
[812] 83 FR 61473.
[813] *See, e.g.*, 83 FR 61466, 61470.

equity. Without citing a specific provision, one commenter argued that "equal" would assume that if a translator were provided for one party, a translator must be provided for the other party.

Discussion: The Department understands commenters' concerns that "equal" and "equitable" have different implications, and the final regulations use both terms with such a distinction in mind. Where parties are given "equal" opportunity, for example, both parties must be treated the same. By contrast, where parties must be treated "equitably," the final regulations explain what equitable means for a complainant and for a respondent. The Department disagrees that the use of "equal" in these final regulations is inappropriate. The equal opportunity for both parties to receive a disability accommodation does not mean that both parties *must* receive a disability accommodation or that they must receive the *same* disability accommodation. Similarly, both parties may not need a translator, and a recipient need not provide a translator for a party who does not need one, even if it provides a translator for the party who needs one.

Changes: None.

Comments: One commenter suggested using the term "education program or activity" instead of "schools" to be more consistent with statute and case law. The commenter asserted that use of the word "schools" may limit the ability to investigate issues that arise during sporting activities, afterschool programs, on field trips, etc.

Discussion: Although the Department declines to remove reference to "schools," the Department provides a definition for "elementary and secondary schools" as well as "postsecondary institutions" in § 106.30. The Department believes that it is important to distinguish between these types of recipients as the type of hearing that a recipient must provide under § 106.45(b)(6) may be different if the recipient is an elementary or secondary school as opposed to a postsecondary institution.

To address the commenter's concerns, the Department notes that § 106.2(h) provides a definition of "program or activity" as all of the operations of elementary and secondary schools and postsecondary institutions. Additionally, the Department has revised § 106.44(a) to specify that for purposes of §§ 106.30, 106.44, and 106.45, an education program or activity includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs. This definition aligns with the Supreme Court's opinion in *Davis*[814] and clarifies when sporting activities, afterschool programs, or field trips constitute part of the recipient's education program or activity. The Department also revised § 106.44(a) to state that for purposes of §§ 106.30, 106.44, and 106.45, an "education program or activity" also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. The revisions to § 106.44(a) to help better define "education program or activity" are explained more fully in the "Section 106.44(a) 'education program or activity'" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section.

Changes: The Department has revised § 106.44(a) to specify that an education program or activity includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

Comments: One commenter expressed concern that the NPRM's use of the term "students" is too narrow in light of the language of Title IX and current Title IX regulations, as well as the

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[814] *Davis*, 526 U.S. at 645.

Supreme Court's repeated determinations that Title IX encompasses all individuals participating in education programs and activities. Another commenter suggested that the term "student" in the NPRM should be replaced with "person" consistent with statute and case law and because the term "student" may be restrictive because it does not encompass employees, volunteers, parents, and community members. One commenter expressed concern that the definition of "student" as a person who has gained admission is problematic because institutions of higher education, particularly those who do not have open enrollment, typically consider an applicant a student once they have submitted a deposit, indicating their acceptance of an admission offer and commitment to attend.

Discussion: The Department disagrees with the commenters who opposed the use of the term "students." Title IX provides that a recipient of Federal funding may not discriminate on the basis of sex in the education program or activity that it operates and extends protections to any "person." The final regulations similarly use "person" or "individual" to ensure that the Title IX non-discrimination mandate applies to anyone in a recipient's education program or activity. For example, § 106.30 defines sexual harassment as conduct that deprives "a person" of equal access; § 106.30 defines a "complainant" as an "individual" who is alleged to be the victim of sexual harassment. Where the final regulations use the phrase "students and employees" or "students," such terms are used not to narrow the application of Title IX's non-discrimination mandate but to require particular actions by the recipient reasonably intended to benefit students, employees, or both; for example, § 106.8(a) requires recipients to notify "students and employees" of contact information for the Title IX Coordinator. Where the final regulations intend to include "applicants for admission" in addition to "students" the phrase "applicants for admission" is used; for example, § 106.8(b)(2)(ii) precludes recipients from using publications

that state that the recipient treats applicants for admission (or employment), students, or employees differently on the basis of sex (unless permitted under Title IX). Both Title IX and existing Title IX regulations use the term "student" ubiquitously.[815] The existing Title IX regulations, in 34 CFR 106.2(r), define "student" as "a person who has gained admission." "Admission", as defined in34 CFR 106.2(q), "means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient." The Department disagrees with the commenter's concern that the definition of "student" as a person who has gained admission is problematic. The Department does not believe the term "student" should be changed to reflect other persons who are not enrolled in the recipient's education program or activity. The term "student" as defined in 34 CFR 106.2(r) aligns with the definition of "formal complaint" in §106.30 that provides at the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.[816] A student who has applied for admission and has been admitted is attempting to participate in the education program or activity of the recipient.

Changes: None.

Comments: One commenter expressed concern that equating "trauma-informed" and "impartial" is a false equivalency that threatens to undermine the quality and efficacy of the Title IX process. The commenter argued that "trauma-informed" refers to a body of research, practice, and theory that teaches professionals who interact with victims to recognize that all individuals process

[815] *E.g.*, 20 U.S.C. 1681(a)(2); 34 CFR 106.36.
[816] *See* the "Formal Complaint" subsection in the "Section 106.30 Definitions" section of this preamble.

trauma differently, to understand different responses to trauma, and to recognize ways in which we can avoid further traumatization of involved parties through sensitive questioning, mindfulness-based practices, and avoiding potentially triggering situations such as unnecessarily repetitive questioning. Further, equating these two terms is dismissive of decades of research and best practices concerning gender and sexual-based violence and harassment prevention and response.

Discussion: The Department disagrees that the final regulations equate "trauma-informed" and "impartial" in a manner that undermines the quality and efficacy of the Title IX process. It appears that the commenter prefers the Department to adopt a trauma-informed approach as a best practice. The Department understands from personal anecdotes and research studies that sexual violence is a traumatic experience for survivors. The Department is aware that the neurobiology of trauma and the impact of trauma on a survivor's neurobiological functioning is a developing field of study with application to the way in which investigators of sexual violence offenses interact with victims in criminal justice systems and campus sexual misconduct proceedings.[817] The final regulations require impartiality on the part of Title IX personnel (i.e., Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions)[818] to reinforce the truth-seeking purpose of a grievance process. The Department wishes to emphasize that treating all parties with dignity, respect, and sensitivity without bias, prejudice, or stereotypes infecting interactions with parties fosters impartiality and truth-seeking.

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[817] *E.g.*, Jeffrey J. Nolan, *Fair, Equitable Trauma-Informed Investigation Training* (Holland & Knight updated July 19, 2019) (white paper summarizing trauma-informed approaches to sexual misconduct investigations, identifying scientific and media support and opposition to such approaches, and cautioning institutions to apply trauma-informed approaches carefully to ensure impartial investigations).

While the final regulations do not use the term "trauma-informed," nothing in the final regulations precludes a recipient from applying trauma-informed techniques, practices, or approaches so long as such practices are consistent with the requirements of § 106.45(b)(1)(iii) and other requirements in § 106.45.

Changes: None.

Comments: One commenter requested clarification of the numerous provisions of the proposed regulations that refer to specific time frames, such as ten "days." The commenter suggested that the Department clarify whether these are "calendar" days or "working" days.

Discussion: The Department appreciates the commenter's request for clarification as to how to calculate "days" with respect to various time frames referenced in the proposed regulations and appreciates the opportunity to clarify that because the Department does not require a specific method for calculating "days," recipients retain the flexibility to adopt the method that works best for the recipient's operations; for example, a recipient could use calendar days, school days, or business days, or a method the recipient already uses in other aspects of its operations.

Changes: None.

Comments: One commenter asserted that it is unclear whether § 106.6(d) intended to cover recipients that are not government actors. The commenter suggested adding "whether or not that recipient is a government actor" after "recipient."

Discussion: As explained in the "Role of Due Process in the Grievance Process" section of this preamble, the Department recognizes that some recipients are State actors with responsibilities to provide due process of law and other rights to students and employees under the U.S. Constitution, while other recipients are private institutions that do not have constitutional obligations to their students and employees. The final regulations apply to all recipients covered

by Title IX because fair, reliable procedures that best promote the purposes of Title IX are as important in public schools, colleges, and universities as in private ones. The grievance process prescribed in the final regulations is important for effective enforcement of Title IX and is thus consistent with, but independent of, constitutional due process. Where enforcement of Title IX's non-discrimination mandate is likely to present potential intersections with a public recipient's obligation to respect the constitutional rights of students and employees, the final regulations caution recipients that nothing in these final regulations requires a recipient to restrict constitutional rights.[819] Similarly, the Department, as an agency of the Federal government, cannot require private recipients to restrict constitutional rights. The Department will not require private recipients to abide by restrictions in the U.S. Constitution that do not apply to them. The Department, as a Federal agency, however, must interpret and enforce Title IX in a manner that does not require or cause any recipient, whether public or private, to restrict or otherwise abridge any person's constitutional rights.

Changes: None.

Comments: One commenter encouraged the Department to explicitly state that Title IX and the Title IX regulations do not apply to schools that do not receive Federal financial assistance to help protect their autonomy and Constitutional rights, which would promote diversity in education by protecting the autonomy and freedom of private and religious schools to thrive according to their stated mission and purpose. The commenter stated that their schools are committed to providing safe and equal learning opportunities for each student that they serve and

[819] *E.g.,* § 106.6(d); § 106.44(a) (stating that the Department may not deem a recipient to have satisfied the recipient's duty to not be deliberately indifferent based on the recipient's restriction of rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment).

noted that such language has been included in reauthorizations of the Elementary and Secondary Education Act (ESEA) and that the Every Student Succeeds Act, the most recent reauthorization passed in 2015, contains Section 8506 which specifically states, "Nothing in this Act shall be construed to affect any private school that does not receive funds or services under this Act" [20 U.S.C. 7886(a)]."

Discussion: The Department does not believe it is necessary to further explain in the final regulations that Title IX applies only to recipients of Federal financial assistance; the text of Title IX, 20 U.S.C. 1681, clearly states that the Title IX non-discrimination mandate applies to education programs or activities that receive Federal financial assistance, and expressly exempts educational institutions controlled by religious organizations from compliance with Title IX to the extent that compliance with Title IX is inconsistent with the religious tenets of the religious organization even if the educational institution does receive Federal financial assistance.[820] Existing Title IX regulations already sufficiently mirror that Title IX statutory language by defining "recipient"[821] and affirming the Title IX exemption for educational institutions controlled by religious organizations.[822]

Changes: None.

Comments: One commenter stated that the proposed regulations were not easy to understand because the "Summary" section of the NPRM contained too little information. The commenter asserted that although the proposed regulations were intended to protect young people, young people would not be able to understand them. Another commenter opposed the NPRM because,

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[820] 20 U.S.C. 1681(a); 20 U.S.C. 1681(a)(3).
[821] 34 CFR 106.2(i) (defining "recipient").
[822] 34 CFR 106.12(a).

the commenter asserted, the details were perplexing, vague, and did not tell in sufficient detail, how the proposed rules would be implemented in terms of the behavior, conditions, and situations involved. Another commenter expressed concern that the "sloppy and biased language" in the NPRM needed to be corrected, pointing specifically to the summary comments at 83 FR 61462 and elsewhere in the NPRM.

Discussion: The Department acknowledges the concern from the commenter that the proposed regulations are not easy enough to understand. However, the purpose of the NPRM is to provide a basic overview of the Department's proposed actions and reasons for the proposals. The Department believes that the NPRM accomplished this purpose by providing not only a summary section but also a background section and specific discussions of each proposed provision.

The Department acknowledges the concern of the commenter that opposed the NPRM because the commenter believed the language was too vague and does not provide sufficient detail as to how the proposed rules would be implemented in specific situations. The Department believes that both the NPRM, and now these final regulations, strike an appropriate balance between containing sufficient details as to a recipient's legal obligations without improperly purporting to specify outcomes for all scenarios and situations many of which will turn on particular facts and circumstances. The Department wishes to emphasize that when determining how to comply with these final regulations, recipients have flexibility to employ age-appropriate methods, exercise common sense and good judgment, and take into account the needs of the parties involved.

The Department disagrees that any of the language in the proposed rules or final regulations is biased, and notes that the Department's choice of language throughout the text of

the final regulations is neutral, impartial, and unbiased with respect to complainants and respondents.

Changes: None.

Comments: One commenter expressed concern that the final regulations should not emphasize the view that schools are in a unique position to make disciplinary decisions based on school climate because all decisions, including disciplinary decisions, should be made congruent with the intent and spirit of the proposed rules. Stating that schools are in a unique position regarding decision making invites many forms of prejudice and renders decisions less reliable.

Discussion: The Department disagrees with the position that the final regulations should not emphasize the view that schools are in a unique position to make disciplinary decisions based on school climate. The Department disagrees with the commenter's conclusory assertion that by acknowledging schools are in a unique position to make such decisions that the Department invites prejudice that renders decisions less reliable. As the Supreme Court reasoned in *Davis*, Title IX must be interpreted in a manner that leaves flexibility in schools' disciplinary decisions and that does not place courts in the position of second guessing the disciplinary decisions made by school administrators.[823] As a matter of policy, the Department believes that these same principles should govern administrative enforcement of Title IX.

Changes: None.

Comments: One commenter suggested including a full list of stakeholders who were interviewed and involved in the process of developing the NPRM to establish credibility (with aliases

[823] *Davis*, 626 U.S. at 648.

provided to protect the privacy of individual participants), as well as the meeting minutes included as an appendix.

Discussion: The Department does not believe it is necessary to publish a full list of stakeholders who were interviewed and involved in the process of developing the NPRM to establish credibility or publish meeting minutes included as an appendix. The Department noted in the NPRM that it conducted listening sessions and discussions with stakeholders expressing a variety of positions for and against the status quo, including advocates for survivors of sexual violence; advocates for accused students; organizations representing schools and colleges; scholars and experts in law, psychology, and neuroscience; and numerous individuals who have experienced school-level Title IX proceedings as a complainant or respondent; school and college administrators; child and sex abuse prosecutors.[824] The Department believes this level of detail is sufficient to support the Department's contention that the Department conducted wide outreach in developing the NPRM.

Changes: None.

Comments: One commenter suggested including an index of terms that define legal terminology, including "respondeat superior, "reasonableness standard," "deliberate indifference standard," "constructive notice," and so forth because the use of legal terminology throughout these regulations without accompanying layperson's commentary or clear definition of the terminology applied throughout the proposed revisions confuse and divert attention from the actual meaning of the proposed rules.

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[824] 83 FR 61463-64.

Discussion: The Department does not believe it is necessary to include an index of terms that define legal terminology. The Department has defined key terms as necessary in § 106.30, and § 106.2 also provides relevant definitions. The remainder of the language used in the final regulations should be interpreted both in the context of the final regulations and in accordance with its ordinary public meaning.

The Department agrees that the term "respondeat superior" is a legal term of art that may be confusing in light of the final regulations' frequent use of the word "respondent" which looks very similar to the word "respondeat" as used in the phrase "respondeat superior" in the § 106.30 definition of "actual knowledge." To address this concern, the Department has revised the definition of "actual knowledge" in § 106.30 to use the term "vicarious liability" instead of "respondeat superior." Although "vicarious liability" is a legal term, "vicarious liability" more readily conveys the concept of being liable for the actions or omissions of another, without causing unnecessary confusion with the word "respondent."

Changes: Partly in response to commenters' concerns that the phrase "respondeat superior" was not recognizable as a legal term or was too easily confused with use of the word "respondent" throughout the final regulations, we have revised the definition of "actual knowledge" in § 106.30 by replacing term "respondeat superior" with "vicarious liability."

Comments: One commenter suggested including support and context for the Department's contention in the NPRM that the proposed rules will give sexual harassment complainants greater confidence to report and expect their school to respond in a meaningful way by separating a recipient's obligation to respond to a report of sexual harassment from the recipient's obligation to investigate formal complaints of sexual harassment; the commenter argued that the NPRM thus implies that either complainants do not currently have a clear

understanding of their Title IX rights and a school's obligation to respond or that complainants are under the misconception that all complaints are considered formal complaints under the current Title IX guidance and regulations.

Discussion: The Department's past guidance required recipients to *always* investigate any report of sexual harassment, even when the complainant only wanted supportive measures and did not want an investigation, which necessarily results in some intrusion into the complainant's privacy.[825] This guidance combined a recipient's obligation to respond to a report of sexual harassment with the recipient's obligation to investigate formal complaints of sexual harassment. This guidance also did not distinguish between an investigation which resulted in the imposition of disciplinary sanctions and an inquiry into a report of sexual harassment.[826] The Department's past guidance did not specifically provide both parties the opportunity to know about an investigation and participate in such an investigation, when the investigation may lead to the imposition of disciplinary sanctions against the respondent and the provision of remedies. Through §§ 106.44 and 106.45, these final regulations clarify when a recipient has the affirmative obligation to conduct an investigation that may lead to the imposition of disciplinary sanctions, requires the recipient to notify both parties of such an investigation, and requires the recipient to provide both parties the opportunity to participate in the process. Irrespective of whether a recipient conducts an investigation under § 106.45, a recipient may inquire about a report of sexual harassment and must offer supportive measures in response to such a report under § 106.44(a). If a recipient does not provide a complainant with supportive measures, then

[825] 2001 Guidance at 13, 15, 18; 2011 Dear Colleague Letter at 4.
[826] 2001 Guidance at 13, 15, 18.

the recipient must document the reasons why such a response as not clearly unreasonable in light of the known circumstances under § 106.45(b)(10)(ii).

Under the Department's past guidance, some students did not know that reporting sexual harassment always would lead to an investigation, even when the student did not want the recipient to investigate. A rigid requirement such as an investigation in every circumstance may chill reporting of sexual harassment, which is in part why these final regulations separate the recipient's obligation to respond to a report of sexual harassment from the obligation to investigate a formal complaint of sexual harassment. Under these final regulations, a student may receive supportive measures irrespective of whether the student files a formal complaint, which results in an investigation. In this manner, these final regulations encourage students to report sexual harassment while allowing them to exercise some control over their report. If students would like supportive measures but do not wish to initiate an investigation under § 106.45, they may make a report of sexual harassment. If students would like supportive measures and also would like the recipient to initiate an investigation under § 106.45, they may file a formal complaint.

The Department disagrees with the premise that separating a recipient's obligation to respond to each known report of sexual harassment from the recipient's obligation to investigate formal complaints of sexual harassment implies that all complainants suffer misconceptions; rather, the Department believes that distinguishing between a recipient's obligation to respond to a report, on the one hand, and a recipient's obligation to investigate a formal complaint on the other hands, provides clarity that benefits complainants, respondents, and recipients.

Changes: None.

Comments: One commenter suggested adding prevention and community educational programming as a possible option schools can utilize as one of the remedies provided following a formal complaint, as well as adding a requirement of educational outreach and prevention programming elsewhere within the final regulations.

Discussion: The Department declines to list prevention and community educational programming as a possible option schools can utilize as a remedy after the conclusion of a grievance process, or to add a requirement of educational outreach and prevention programming elsewhere within the final regulations. The Department notes that nothing in the final regulations prevents recipients from undertaking such efforts. With respect to remedies, the final regulations require a recipient to provide remedies to a complainant where a respondent has been found responsible, and notes that such remedies may include the type of individualized services non-exhaustively listed in the § 106.30 definition of "supportive measures." Whether or not the commenter's understanding of prevention and community education programming would be part of an appropriate remedy for a complainant, designed to restore or preserve the complainant's equal access to education, is a fact-specific matter to be considered by the recipient. With respect to a general requirement that recipients provide prevention and community education programming, the final regulations are focused on governing a recipient's response to sexual harassment incidents, leaving additional education and prevention efforts within a recipient's discretion.

Changes: None.

Section 106.44 Recipient's Response to Sexual Harassment, Generally

Section 106.44(a) "actual knowledge"

The Recipient's Self-Interest

Comments: Many commenters expressed concerns about the actual knowledge requirement in § 106.44(a), citing examples of instances in which schools sought to avoid addressing sexual harassment and assault, including high-profile sexual abuse scandals at universities where some university employees failed to report abuse that was reported to them. One commenter asserted that schools discourage sexual harassment and assault reports because the number of reported instances of sexual violence at an institution is publicly available (which harms or is perceived to harm the recipient's reputation), and alleged perpetrators are often prominent members of college communities, including star athletes, fraternity members, leading actors, and promising filmmakers. Commenters argued that, by using an actual knowledge requirement that fails to make employees mandatory reporters, schools will continue to ignore cases of sexual violence and will investigate fewer harassment complaints, resulting in less justice and fewer services for victims of sexual harassment.

Discussion: The Department incorporates here its discussion under the "Actual Knowledge" subsection of the "Section 106.30 Definitions" section of this preamble. As discussed in that section, and in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, we believe that the final regulations appropriately hold recipients liable for responding to every allegation of sexual harassment of which the recipient is aware, ensure that elementary and secondary school students may report to any school employee, and respect the autonomy of complainants at postsecondary institutions to choose whether, and when, the complainant desires to report sexual harassment. No recipient

may yield to institutional self-interest by ignoring known allegations of sexual harassment without violating the recipient's obligation to promptly respond as set forth in § 106.44(a).

Changes: None.

Burdening the Complainant

Comments: Numerous commenters argued that § 106.44(a) will have the effect of shifting the burden of each report onto the complainant, who, in addition to dealing with the harm to their mental health from harassment or assault, must also bear the responsibility of locating and reporting to the correct administrator. Several commenters also voiced concern that § 106.44(a) makes it more difficult for victims to know how or to whom to report harassment. Other commenters argued that complainants would be at a loss in instances where the school has not educated students and staff as to who the Title IX Coordinator is, where that person can be found, and what that person's responsibilities are. Several commenters asked what a complainant should do if a complainant has had a negative experience previously with the Title IX Coordinator, because the complainant would have no one else to whom to turn in order to report or file a formal complaint.

Many commenters asserted that § 106.44(a) would chill reports of sexual harassment and assault. Several commenters stated that 59.3 percent of survivors in one study confided in informal support sources while across several studies, fewer than one-third of victims reported to formal sources.[827] One commenter asserted that research has consistently reflected that survivors of campus sexual assault are more likely to disclose to someone with whom they have an

[827] Commenters cited: Charlotte Pierce-Baker, *Surviving the silence: Black women's stories of rape* (W.W. Norton 1998); Patricia A. Washington, *Disclosure Patterns of Black Female Sexual Assault Survivors*, 7 VIOLENCE AGAINST WOMEN 11 (2001).

existing relationship rather than a campus administrator. Commenters argued that fewer reports would reach the Title IX Coordinator, since the Title IX Coordinator lacks a preexisting personal relationship with survivors. Several commenters asserted that most school personnel do not know who the Title IX Coordinator is, and that these employees will therefore be unable to help complainants find the Title IX Coordinator.

Discussion: The Department incorporates here its discussion under the "Actual Knowledge" subsection of the "Section 106.30 Definitions" section of this preamble. As discussed in that section, and in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, we believe that the definition of actual knowledge in these final regulations has been revised to appropriately trigger a recipient's response obligations by notice to any elementary and secondary school employee, to any recipient's Title IX Coordinator, and to any official with authority to institute corrective measures on the recipient's behalf. The Department believes that respecting a complainant's autonomy is an important, desirable goal and that allowing complainants to discuss or disclose a sexual harassment experience with employees of postsecondary institutions without such confidential conversations automatically triggering the involvement of the recipient's Title IX office will give complainants in postsecondary institutions greater control and autonomy over the reporting process. The final regulations place the burden on recipients to ensure that all students and employees (as well as parents of elementary and secondary school students, and others) are notified of contact information for the Title IX Coordinator, so that when a complainant chooses to report, the complainant may easily locate the Title IX Coordinator's office location, telephone number, and e-mail address, and report using any of those methods, or any other means resulting in the Title IX Coordinator receiving the person's verbal or written report. Nothing in the final

regulations precludes a recipient, including a postsecondary institution, from instructing any or all of its employees to report sexual harassment disclosures and reports to the Title IX Coordinator, if the recipient believes that such a universal mandatory reporting system best serves the recipient's student and employee population. However, universal mandatory reporting systems have led to the unintended consequence of reducing options for complainants at postsecondary institutions to discuss sexual harassment experiences confidentially with trusted employees,[828] and the final regulations therefore do not impose a universal mandatory reporting system in the postsecondary institution context.

Changes: None.

Elementary and Secondary Schools

Comments: Many commenters stated that the actual knowledge requirement is inappropriate for elementary and secondary school students because, from a young child's perspective, there is no distinction between a teacher, teacher's aide, bus driver, cafeteria worker, school resource officer, or maintenance staff person; to a young child, they are all grown-ups. Commenters asserted that this is particularly true for adults such as bus drivers and school resource officers, who can take corrective measures (kicking a student off the bus, for example) but not necessarily "on behalf of" the school. Several commenters stated that often a peer seeking help for a friend brings an issue of sexual harassment or assault to the attention of teachers or other school personnel, and commenters asserted that these allegations should be formally addressed by the school. Numerous commenters asserted that all school employees, not just teachers, should be

[828] *E.g.*, Carmel Deamicis, *Which Matters More: Reporting Assault or Respecting a Victim's Wishes?*, THE ATLANTIC (May 20, 2013); Allie Grasgreen, *Mandatory Reporting Perils*, INSIDE HIGHER ED (Aug. 30, 2013).

responsible employees. By ensuring that a student can confide in counselors, aides, and coaches, commenters believed that students would be more likely to speak up and receive benefits to which they are entitled under Title IX. Commenters asserted that the proposed rules would conflict with other mandatory reporting requirements; for example, State laws requiring all school staff to notify law enforcement or child welfare agencies of child abuse. Another commenter stated that, by limiting the definition of complainant to only "the victim," the proposed regulations would not allow for parents to file complaints on behalf of their children, and would not contemplate a witness to sexual harassment making a complaint. One commenter asserted that the actual knowledge requirement may be in tension with the Every Student Succeeds Act (ESSA); the commenter asserted that under ESSA, a school district with probable cause to believe a teacher engaged in sexual misconduct is prohibited from helping that teacher from getting a new job yet, the commenter argued, under the proposed rules the school district would not need to take any action to address the teacher's sexual misconduct absent a formal complaint.

Discussion: The Department incorporates here its discussion under the "Actual Knowledge" subsection of the "Section 106.30 Definitions" section of this preamble. As discussed in that section, and in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, we believe that the final regulations appropriately hold recipients liable for responding to every allegation of sexual harassment of which the recipient is aware, ensure that elementary and secondary school students may report to any school employee, and ensure that every recipient's educational community understands that *any person* may report sexual harassment (whether they are the victim, or a witness, or any other third party), triggering the recipient's obligation to promptly respond. As discussed in the

"Complainant" subsection of the "Section 106.30 Definitions" section of this preamble, we have revised the definition of "complainant" to remove the inference that the alleged victim themselves must be the same person who reports the sexual harassment. Upon notice that any person has allegedly been victimized by conduct that could constitute sexual harassment as defined in § 106.30, a recipient must respond, including by promptly offering supporting measures to the alleged victim (i.e., the complainant).

The final regulations do not contravene or alter any Federal, State, or local requirements regarding other mandatory reporting obligations that school employees have. Those obligations are distinct from the obligations in these final regulations.

The Department acknowledges that the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the Every Student Succeeds Act (ESSA), may require a recipient subject to ESEA to take certain steps with respect to an employee who has been accused of sexual misconduct when a recipient has probable cause to believe the employee engaged in sexual misconduct.[829] We do not believe that the actual knowledge requirement in these final regulations is in tension with ESSA. The final regulations define actual knowledge to include notice of *allegations* of sexual harassment; a recipient cannot wait to respond to sexual harassment allegations until the recipient has *probable cause* that the sexual harassment occurred. Under revised § 106.44(a) the recipient's prompt response to allegations of sexual harassment must include offering the complainant supportive measures irrespective of whether the complainant files, or the Title IX Coordinator signs, a formal complaint. A recipient's obligations under ESSA may factor into a Title IX Coordinator's decision to sign a formal

[829] *E.g.*, https://www2.ed.gov/policy/elsec/leg/essa/section8546dearcolleagueletter.pdf.

complaint initiating a grievance process against an employee-respondent, even when the complainant (i.e., the alleged victim) does not wish to file a formal complaint, if, for example, the recipient wishes to investigate allegations in order to determine whether the recipient has probable cause of employee sexual misconduct that affect the recipient's ESSA obligations.

Changes: None.

Confusion for Employees

Comments: Numerous commenters expressed concern that resident assistants or resident advisors, professors, and coaches may not know how to respond to complainants appropriately if the proposed rules allow postsecondary institution employees to have discretion over whether to report sexual harassment to the Title IX Coordinator. Several commenters asked the Department to specify that all schools should be responsible for educating all employees about a variety of procedures for handling sexual harassment and violence. Another commenter suggested that deans, directors, department heads, or any supervisory employees should be held individually liable for having actual knowledge of a report of sexual misconduct. One commenter asserted that a greater number of employees should be required to inform students of their right to file a formal complaint and to obtain supportive measures. One commenter stated that schools following the proposed rules might be sued for inadequate reporting policies, since a recipient's failure to tell its employees to respond appropriately to disclosures arguably amounts to an intentional decision not to respond to third-party discrimination.

Discussion: The Department incorporates here its discussion under the "Actual Knowledge" subsection of the "Section 106.30 Definitions" section of this preamble. As discussed in that section, and in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the Department agrees with commenters' concerns

that a wider pool of trusted adults in elementary and secondary schools should trigger a recipient's obligations, and, thus, the final regulations expand the definition of actual knowledge to include notice to *any* employee of an elementary and secondary school. However, for reasons discussed in the aforementioned sections of this preamble, the Department disagrees that the pool of postsecondary institution employees to whom notice charges the recipient with actual knowledge needs to be expanded beyond the Title IX Coordinator and officials with authority to institute corrective measures on the recipient's behalf.

The Department disagrees that these final regulations increase liability for recipients with respect to inadequate reporting policies. These final regulations require recipients to respond to sexual harassment, or allegations of sexual harassment, when the recipient has actual knowledge, defined in part to include notice to an official with authority to institute corrective measures on behalf of the recipient. This requirement, and definition, are also used by Federal courts in applying the *Gebser/Davis* framework in private Title IX lawsuits.[830] These final regulations go beyond the *Gebser/Davis* framework by requiring recipients to have in place clear, accessible reporting options, and requiring recipients to notify its educational community of those reporting options. The recipient's educational community must be notified about how to report sexual harassment in person, by mail, telephone, or e-mail, and the final regulations specify that any person may report sexual harassment (whether the person reporting is the alleged victim themselves or any third party).

Changes: None.

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[830] *E.g.*, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

Intersection Between Actual Knowledge and Deliberate Indifference

Comments: One commenter asked, if a recipient has actual knowledge that a student or employee has been subjected to unwelcome conduct on the basis of sex, but the recipient does not know whether the misconduct effectively denied the victim equal access to the recipient's education program or activity, whether the recipient must respond under §§ 106.44(a) and 106.44(b)(2), to at least seek out the missing information and if not, whether the respondent has an obligation to inform the complainant of the nature of the missing and needed additional information regarding denial of equal access.

Discussion: The Department acknowledges the commenter's question about how much detail is needed in order for the recipient to have actual knowledge triggering the recipient's obligation to provide a non-deliberately indifferent response, and whether a recipient with partial information about a sexual harassment allegation has a responsibility to notify the complainant that additional information is needed to further evaluate or respond to the allegation. In response, the Department notes that the definition of "complainant" under § 106.30 is an individual who is alleged to be the victim of *conduct that could constitute sexual harassment*; thus, the recipient need not have received notice of facts that definitively indicate whether a reasonable person would determine that the complainant's equal access has been effectively denied in order for the recipient to be required to respond promptly in a non-deliberately indifferent manner under § 106.44(a). The definition of "actual knowledge," in § 106.30, also reflects this concept as actual knowledge means notice of sexual harassment or *allegations* of sexual harassment.

These final regulations, and § 106.44(a) in particular, incorporate principles similar to the principles in the Department's 2001 Guidance with respect to a recipient's response to a student's or parent's report of sexual harassment or sexual harassment allegations, or a

recipient's response to direct observation by a responsible employee of conduct that could constitute sexual harassment. The Department's 2001 Guidance states:

> If a student or the parent of an elementary or secondary student provides information or complains about sexual harassment of the student, the school should initially discuss what actions the student or parent is seeking in response to the harassment. The school should explain the avenues for informal and formal action, including a description of the grievance procedure that is available for sexual harassment complaints and an explanation of how the procedure works. If a responsible school employee has directly observed sexual harassment of a student, the school should contact the student who was harassed (or the parent, depending upon the age of the student), explain that the school is responsible for taking steps to correct the harassment, and provide the same information described in the previous sentence.[831]

Like the 2001 Guidance, these final regulations in § 106.6(g) recognize that a parent or guardian may have the legal right to act on behalf of a "complainant," "respondent," "party," or other individual. Section 106.44(a) also requires that the Title IX Coordinator promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain the process for filing a formal complaint. Thus, if a parent or guardian has a legal right to act on behalf of a student, the parent or guardian has the right to act on behalf of a Title IX complainant, including with respect to discussing supportive measures, or deciding to file a formal complaint.

Changes: None.

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[831] 2001 Guidance at 15.

Modeling Reporting on the Military System

Comments: Commenters argued that the reporting system used in the U.S. military to address sexual assault should be modified for use in Title IX reporting systems in order to best serve civil rights purposes. Commenters described the military reporting system as providing sexual assault victims with a two-track reporting system, under which a victim can choose a "restricted" or "unrestricted" report. Commenters described the military system's "restricted" report option as allowing the victim to report confidentially, for the purpose of receiving services, and no investigation is commenced unless the victim chooses an "unrestricted" reporting path whereby the victim's identity is not confidential and charges are initiated against the alleged perpetrator. Commenters asserted that giving victims these options for reporting helps address the well-known and well-researched fact that sexual assault is underreported throughout society, including in military and school environments, and that many survivors of sexual violence exercise the "victim's veto" whereby no investigation takes place, and no services are given to a victim, because the victim chooses not to report their experience in any official manner. Commenters asserted that the withdrawn 2014 Q&A essentially created this two-track model,[832] which best serves the needs of complainants, and argued that it best fits the purpose of civil rights protections, especially as compared to the traditional law enforcement model, under which a victim's only option is to report to police, and then police officers and prosecutors have sole discretion whether to investigate and whether to prosecute, and the victim has little or no control

[832] Commenters cited: 2014 Q&A at 21, 22, 24.

over those decisions, leading many victims to exercise the "victim's veto" and never report at all.[833]

Commenters described the approach of the withdrawn 2014 Q&A as giving survivors two choices of how to report, so survivors essentially would make the decision whether to initiate an investigation. Commenters asserted that the withdrawn 2014 Q&A ensured that if a survivor made an official report to a responsible employee or to the Title IX Coordinator the school must investigate unless the survivor explicitly requested that there be no investigation and the Title IX Coordinator granted that request after weighing multiple factors. On the other hand, commenters asserted, under that guidance a survivor could choose a "confidential path" and access services and accommodations for healing, without initiating an investigation unless or until the survivor changed their mind and officially reported to a responsible employee or to the Title IX Coordinator (which, commenters stated, is the equivalent in the military system as turning a restricted report into an unrestricted report, which is commonplace). Commenters urged the Department to reinstate the withdrawn 2014 Q&A, rather than keep the provisions in the proposed rules, regarding how complainants must report and what happens after a complainant reports.

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[833] Commenters cited, *e.g.*: Tamara F. Lawson, *A Shift Towards Gender Equality in Prosecutions: Realizing Legitimate Enforcement of Crimes Committed Against Women in Municipal and International Criminal Law*, 33 S. ILL. UNIV. L. J. 181, 188-90 (2008) (in instances of sexual violence, police and prosecutors decide to advance very few cases through the criminal system); Kimberly A. Lonsway & Joanne Archambault, *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 147 (2012) (finding that only five to 20 percent of victims will report a sexual assault to law enforcement); Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 306 (1999) (arguing that the "victim's veto" occurs when the victim does not even report the wrongdoing); Kimberly A. Lonsway & Joanne Archambault, *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 159 (2012) (explaining that factors such as "poor evidence gathering by police (especially victim interviews), intimidating defense tactics, incompetent prosecutors, and inappropriate decision making by jurors" result in low sexual assault conviction rates). Commenters asserted this leads to more victims deciding not to report at all.

Discussion: The Department is aware of the two-track reporting system used in the U.S. military,[834] and agrees that giving victims control over whether to report for purposes of receiving supportive services only, or also for the purpose of launching an official investigation into the alleged sexual assault, is beneficial to sexual assault victims. These final regulations share similarities with the military's two-track reporting system; the Department desires to respect the autonomy of each alleged victim to report for the purpose of receiving supportive measures, and to decide whether or not to also request an investigation into the allegations of sexual harassment. As commenters observed, the withdrawn 2014 Q&A's approach to what happens when an alleged victim reports sexual harassment also shares similarities with the two-track reporting system used in the military. These final regulations, too, are similar in some ways to the approach taken in the withdrawn 2014 Q&A. However, the Department believes that the additional precision, and obligatory nature, of these final regulations results in an approach superior to simply reinstating prior guidance.

Under the final regulations, any person may report[835] that any individual has allegedly been victimized by conduct that could constitute sexual harassment,[836] and the recipient must

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[834] *E.g.*, U.S. Dep't. of Defense, Sexual Assault Prevention and Response, "Reporting Options," https://sapr.mil/reporting-options ("Sexual assault is the most underreported crime in our society and in the Military. While the Department of Defense [DoD] prefers that sexual assault incidents are reported to the command to activate both victims' services and law enforcement actions, it recognizes that some victims desire only healthcare and advocacy services and do not want command or law enforcement involvement. The Department believes its first priority is for victims to be treated with dignity and respect and to receive the medical treatment, mental health counseling, and the advocacy services that they deserve. Under DoD's Sexual Assault Prevention and Response (SAPR) Policy, Service members . . . have two reporting options - Restricted Reporting and Unrestricted Reporting. Under Unrestricted Reporting, both the command and law enforcement are notified. With Restricted (Confidential) Reporting, the adult sexual assault victim can access healthcare, advocacy services, and legal services without the notification to command or law enforcement.").

[835] Section 106.8(a) ("any person" may report sexual harassment regardless of whether the person reporting is the alleged victim themselves, or any third party).

[836] Section 106.30 (defining "complainant" to mean an individual who is alleged to be the victim of conduct that could constitute sexual harassment).

respond promptly, including by offering supportive measures to the complainant (i.e., the alleged victim) and telling the complainant about the *option* of also filing a formal complaint that starts an investigation.[837] The only persons who can initiate an investigation are the complainant themselves, or the Title IX Coordinator.[838] Thus, if a complainant wants a report to remain confidential (in the sense of the complainant's identity not being disclosed to the alleged perpetrator, and not launching an investigation), the complainant may receive supportive measures without an investigation being conducted – unless the Title IX Coordinator, after having considered the complainant's wishes, decides that it would be clearly unreasonable for the school *not* to investigate the complainant's allegations. On the other hand, if the complainant chooses to file a formal complaint, the school *must* initiate a grievance process and investigate the complainant's allegations.[839] These final regulations preserve the benefits of allowing third party *reporting* while still giving the complainant as much control as reasonably possible over whether the school investigates, because under the final regulations a third party can report – and trigger the Title IX Coordinator's obligation to reach out to the complainant and offer supportive measures – but the third party cannot trigger an investigation.[840] Further, the final regulations allow a complainant to initially report for the purpose of receiving supportive measures, and to later decide to file a formal complaint.

Changes: None.

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[837] Section 106.44(a).
[838] Section 106.30 (defining "formal complaint" as a document filed by a complainant or signed by a Title IX Coordinator).
[839] Section 106.44(b)(1).
[840] *Cf.* § 106.6(g) (If a parent or guardian has a legal right to act on a complainant's behalf, the parent or guardian may file a formal complaint on behalf of the complainant).

Section 106.44(a) "education program or activity"

General Support and Opposition for "Education Program or Activity" as a Jurisdictional Condition

Comments: Several commenters expressed support for the NPRM's approach to the "education program or activity" condition, stating that it is consistent with the Title IX statute and case law. Commenters asserted that the Department has appropriately recognized that whether misconduct occurs on campus or off campus is not dispositive, and that courts have similarly applied a multi-factor test to deciding whether conduct occurred in an education program or activity. One commenter cited Federal cases suggesting that sexually hostile conduct itself, and not just its consequences, must occur on campus or at a school-sponsored or supervised event for Title IX to apply.[841] One commenter expressed support for the NPRM's approach to education program or activity because it is consistent with the Department's past practice. The commenter cited Departmental determination letters involving institutions of higher education in 2004 and 2008 that stated recipients do not have a Title IX duty to address alleged misconduct that occurs off campus and that does not involve the recipient's programs or activities. A few commenters expressed support for the NPRM's approach to education program or activity, asserting that it imposes reasonable limits on recipient responsibility. One commenter asserted that schools are not the sex police and that expecting schools to have jurisdiction over activity in off-campus

[841] Commenters cited: *Doe v. Brown Univ*., 896 F.3d 127, 132 fn. 6 (1st Cir. 2018); *Yeasin v. Durham*, 719 F. App'x 844 (10th Cir. 2018); *Roe v. St. Louis Univ*., 746 F.3d 874 (8th Cir. 2014); *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist*., 511 F.3d 1114, 1121 fn.1 (10th Cir. 2008); *Ostrander v. Duggan*, 341 F.3d 745 (8th Cir. 2003); *Farmer v. Kan. State Univ*., No. 16-CV-2256, 2017 WL 980460, at *8 (D. Kan. Mar. 14, 2017), *aff'd by Farmer v. Kan. State Univ*., 918 F.3d 1094 (10th Cir. 2019); Stephanie Ebert, THE BOSTON GLOBE (Dec. 8, 2018) (Harvard student suing Harvard University in Federal court for investigating the student for rape allegation by non-student far from campus).

apartments, at a parent's house, a local bar, or nearby hotel, is unrealistic. One commenter expressed support for the NPRM's approach to including "education program or activity" as a condition triggering a recipient's response obligations, but urged the Department to go further and explicitly exclude from Title IX allegations made by or against someone who has no relationship with the recipient, and allegations involving students but occurring in a time or place totally unrelated to school activities such as during summer vacation hundreds of miles away from campus.

Other commenters asserted that the NPRM's approach to education program or activity was unclear. Commenters stated that the NPRM's preamble mentioned several factors, such as recipient ownership of the premises, endorsement, oversight, supervision, and disciplinary power, but argued that this multi-factor test may be confusing and make it difficult for students and schools to understand their Title IX rights and obligations. One commenter argued that the practical application of the Department's approach to misconduct that has both on-campus and off-campus elements would be challenging; for example, the commenter stated, if a sexual misconduct complaint involved a series of actions occurring on campus and off campus then the recipient may have to sift through evidence to identify and ignore events not "in" a program or activity.

Many commenters expressed concern that the NPRM's approach to the education program or activity condition would increase danger to students and others. Commenters cited studies and scholarly articles suggesting that sexual assault can cause lasting psychological damage to victims, including increasing suicide rates and substantially impacting victims' academic career, retention, graduation, and grade point average, regardless of whether the sexual

assault occurred off campus or on campus.[842] Commenters argued that not addressing off-campus misconduct may chill reporting, make it harder for the community to know the nature of threats facing them, and even discourage young women from attending college. Commenters expressed concern that the NPRM would cause victims to leave school, asserting that over one-third of sexual harassment or assault victims drop out of school.[843] Commenters argued that because a significant number of sexual assaults occur off campus,[844] not requiring schools to respond to those assaults will only lead to more college students dropping out. Several commenters emphasized that the reality is that off-campus life is often an essential part of the educational experience, such as off-campus travel for conferences and networking events, and that off-campus living for students is quite common.[845] Commenters argued that the Department should not give a free pass to perpetrators whose abusive conduct occurs off campus. Commenters expressed concern that repeat offenders could systematically target victims, knowing they will get away with it.

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[842] *See* data cited by commenters in the "Impact Data" subsection of the "General Support and Opposition" section of this preamble.

[843] Commenters cited: Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18 JOURNAL OF COLL. STUDENT RETENTION: RESEARCH, THEORY & PRACTICE 2, 234, 244 (2015).

[844] Commenters cited: EduRisk by United Educators, *Confronting Campus Sexual Assault: An Examination of Higher Education Claims* at 6 (2015) ("In 41 percent of claims, the victim and perpetrator attended the same off-campus party before going back to campus, where the sexual assault occurred. These off-campus parties included institution-recognized sorority and fraternity houses, athletic team houses, and students' off-campus residences."); U.S. Dep't. of Justice, Bureau of Justice Statistics, *Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013* at 6 (2014) (95 percent of sexual assaults of female students ages 18-24 occur outside of school).

[845] Commenters cited: American Association of University Women, *Crossing the Line: Sexual Harassment at School* (2011); Rochelle Sharp, *How Much Does Living Off Campus Cost? Who Knows?*, THE NEW YORK TIMES (Aug. 5, 2016) (87 percent of college students and even more elementary and secondary school students reside off campus).

Commenters raised concerns about off-campus Greek life as hotbeds of sexual misconduct not covered by the NPRM, arguing that students are more likely to experience sexual assault if in a fraternity or sorority, and that men in fraternities are more likely than other male students to be perpetrators of sexual misconduct.[846] Commenters expressed concern that recipients might interpret the NPRM as preventing them from addressing sexual misconduct in fraternities, sororities, and social clubs the recipient does not recognize,[847] or perversely encourage recipients not to recognize Greek letter associations, but that the Department should encourage such relationships because they often entail mandatory insurance, risk management standards, and training requirements to reduce incidents of sexual misconduct.

Commenters asserted that the NPRM especially increases risks to community college and vocational school students because such students generally live off campus, to students of color and other already marginalized students who may not be able to afford to live on campus, to elementary and secondary school students with disabilities who may be separated from their peers and removed to off-site services, and to LGBTQ students because it may be harder for them to find adequate outside support services. One commenter argued that the Department's exclusion of off-campus assaults will hinder Federal background check processes, potentially harming our national security and exposing co-workers to danger. Another commenter stated that the corporate world does not exclude out-of-office misconduct from company codes of conduct,

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[846] Commenters cited: Jacqueline Chevalier Minow & Christopher J. Einolf, *Sorority Participation and Sexual Assault Risk*, 15 VIOLENCE AGAINST WOMEN 7 (2009); Jennifer Fleck, *Sexual assault more prevalent in fraternities and sororities, study finds*, UWIRE.COM (Oct. 16, 2014); Claude A. Mellins *et al.*, *Sexual Assault Incidents Among College Undergraduates: Prevalence and Factors Associated with Risk*, 13 PLOS ONE 1 (2017).

[847] Commenters cited: Jacquelyn D. Weirsma-Mosely *et al., An Empirical Investigation of Campus Demographics and Reported Rapes*, 65 JOURNAL OF AM. COLL. HEALTH 4 (2017); Cortney A. Franklin, *Sorority Affiliation and Sexual Assault Victimization*, 22 VIOLENCE AGAINST WOMEN 8 (2016).

and so the Department should not set young people up to fail by not showing them early in life that misconduct is unacceptable and will lead to consequences.

Commenters argued that Federal courts have been supportive of universities applying student codes of conduct to misconduct occurring off campus and outside the school's programs or activities.[848] Commenters argued that courts have recognized that an assailant's mere presence on campus creates a hostile environment for sexual harassment victims, exposing recipients to Title IX liability under a deliberate indifference standard if the recipient fails to redress the hostile environment even where the underlying sexual harassment or assault occurred off campus and outside the recipient's education program or activity. Commenters asserted that the proposed rules would leave recipients vulnerable to private Title IX lawsuits because recipients would not need to address the continuing effects of sexual assault that occurred outside the recipient's program or activity under the Department's regulations yet a Federal court may hold otherwise.[849] Commenters argued that Federal courts have determined that regardless of where a sexual assault occurred, where both parties are in the same education program or activity a recipient should be held liable under a deliberate indifference standard based on the recipient's response to the alleged incident, even if the incident happened under circumstances outside the

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[848] Commenters cited: *Slaughter v. Brigham Young Univ.*, 514 F.2d 622 (10th Cir. 1975); *Due v. Fla. Agric. & Mech. Univ.* (N.D. Fla. 1963); *Hill v. Bd. of Trustees of Mich. State Univ.*, 182 F. Supp. 2d 621 (W.D. Mich. 2001); *Gomes v. Univ. of Me. Sys.*, 304 F.Supp. 2d 117 (D. Me. 2004).

[849] Commenters cited: *Lapka v. Chertoff*, 517 F.3d 974 (7th Cir. 2008); 477 F.3d 1282, 1298 (11th Cir. 2007); *Doe v. East Haven Bd. of Educ.*, 200 F. App'x 46 (2d Cir. 2006); *Butters v. James Madison Univ.*, 145 F. Supp. 3d 610 (W.D. Va. 2015), *dismissed on summary judgment in Butters v. James Madison Univ.*, 208 F. Supp. 3d 745 (W.D. Va. 2016); *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, *Doe ex rel. Doe v. Derby Bd. of Educ.*, 451 F. Supp. 2d 438 (D. Conn. 2006); *Crandell v. New York Coll. of Osteopathic Med.*, 87 F. Supp. 2d 304, 316 (S.D.N.Y. 2000); *Kinsman v. Fla. State Univ. Bd. of Trustees*, No. 4:15-CV-235, 2015 WL 11110848 (N.D. Fla. Aug. 12, 2015); *McGinnis v. Muncie Cmty. Sch. Corp.*, 1:11-CV-1125, 2013 WL 2456067 (S.D. Ind. June 5, 2013); *C.S. v. S. Columbia Sch. Dist.*, No. 4:1-CV-1013, WL 2371413 (M.D. Pa. May 21, 2013); *Kelly v. Yale Univ.*, No. 3:01-CV-1591, 2003 WL 1563424 (D. Conn. Mar. 26, 2003).

recipient's control.[850] Commenters argued that courts have allowed Title IX private causes of action for sexual misconduct to proceed even where some or all of alleged misconduct occurred in a location outside the recipient's control so long as there was "some nexus between the out-of-school conduct and the school"[851] and that the proposed rules should take the same approach. Commenters argued that the Supreme Court's *Gebser* decision involved sexual activity between a teacher and student where the sexual activity did not take place on school grounds, yet the Supreme Court did not consider that sexual harassment to be outside the purview of Title IX.[852]

Commenters argued that the 2001 Guidance and 2017 Q&A require recipients to address sexual harassment that occurs off campus where the underlying sexual harassment or assault causes the complainant to experience a hostile environment on campus, and urged the Department to ensure that the final regulations impose similar obligations for recipients to address the continuing effects of sexual harassment that occurs off campus.

Another commenter contended that the NPRM conflicts with recent Department actions under the Trump Administration, such as cutting off partial funding to the Chicago Public School system for failing to address two reports of off-campus sexual assault.

Discussion: The Department appreciates the general support for our approach to including the concept of a recipient's "education program or activity" in these final regulations. The "education program or activity" language in the Title IX statute[853] provides context for the scope

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[850] Commenters cited: *Spencer v. Univ. of N.M. Bd. of Regents*, No. 15-CV-141, 2016 WL 10592223 (D. N.M. Jan. 11, 2016).
[851] Commenters cited: *Weckhorst v. Kan. State Univ.*, 241 F. Supp. 3d 1154, 1168-69 (D. Kan. 2017); *Rost ex rel. KC v. Steamboat Springs RE -2 School Dist.*, 511 F.3d 1114, 1121 fn.1 (10th Cir. 2008).
[852] Commenters cited: *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 278 (1998).
[853] 20 U.S.C. 1681(a).

of Title IX's non-discrimination mandate, which ensures that Federal funds are not used to support discriminatory practices in education programs or activities.[854]

In *Davis*, the Supreme Court framed the question in that case as whether a recipient of Federal financial assistance may be liable for damages under Title IX, for failure to respond to peer-on-peer sexual harassment in the recipient's program or activity.[855] The Supreme Court in *Davis* continued to reference the statutory "program or activity" language throughout its decision[856] and refuted dissenting justices' arguments that the majority's approach permitted too much liability against recipients in part by reasoning: "Moreover, because the harassment must occur 'under' 'the operations of' a funding recipient, *see* 20 U.S.C. § 1681(a); § 1687 (defining 'program or activity'), the harassment must take place in a context subject to the school district's control. . . . These factors combine to limit a recipient's damages liability to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs."[857]

The Department's regulatory authority must emanate from Federal law.[858] Congress, in enacting Title IX, has conferred on the Department the authority to regulate under Federal law. The appropriate place to start is the statutory text of Title IX, for "[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning."[859] Title

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[854] *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979) (the objectives of Title IX are two-fold: first, to "avoid the use of Federal resources to support discriminatory practices" and second, to "provide individual citizens effective protection against those practices").
[855] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 639 (1999).
[856] *Id.* at 652 ("Moreover, the provision that the discrimination occur 'under any education program or activity' suggests that the behavior be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity").
[857] *Id.* at 645.
[858] *See Stark v. Wickard*, 321 U.S. 288, 309 (1944).
[859] *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006) (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

IX's text, 20 U.S.C. 1681(a) (emphasis added), states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under *any education program or activity* receiving Federal financial assistance[.]" The Department's authority to regulate sexual harassment as a form of sex discrimination pursuant to Title IX is clear; the Supreme Court has held that sexual harassment is a form of sex discrimination, and has confirmed that Congress has directed the Department, as a Federal agency that disburses funding to education programs or activities, to establish requirements to effectuate Title IX's non-discrimination mandate.[860] The Department's authority to regulate sexual harassment depends on whether sexual harassment occurs in "any education program or activity" because the Department's regulatory authority is co-extensive with the scope of the Title IX statute. Title IX does not authorize the Department to regulate sex discrimination occurring *anywhere* but only to regulate sex discrimination in education programs or activities.[861] Congress, in the Title IX statute, provided definitions of "program or activity" that are reflected in the Department's current Title IX regulations.[862]

The Supreme Court has applied the "program or activity" language in the Title IX statute in the context of judicial enforcement of Title IX. The Department does not believe that the Supreme Court's application of "program or activity" in the context of sexual harassment as a form of sex discrimination is an unreasonable interpretation of the Title IX statute, because the Supreme Court applied the language of the statute including the definitions of "program or

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[860] *Gebser v. Lago Vista Ind. Sch. Dist*., 524 U.S. 274, 280-81 (1998) (quoting 20 U.S.C. 1682).
[861] *See* the "Section 106.44(a) 'against a person in the U.S.'" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section this preamble, for discussion of the other jurisdictional limitation on the scope of Title IX – that the statute protects any person "in the United States."
[862] 20 U.S.C. 1687; 34 CFR 106.2(h).

activity" provided in the statute. The Department thus concludes that we should align these final regulations with the Supreme Court's approach to "education program or activity" in the context of Title IX sexual harassment.[863] By contrast, as explained in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment," the three parts of the *Gebser/Davis* framework (i.e., definition of sexual harassment, actual knowledge, deliberate indifference) do *not* appear in the text of the Title IX statute, and the Department believes that it may promulgate regulatory requirements that differ in significant ways from the *Gebser/Davis* framework, to best effectuate the purposes of Title IX's non-discrimination mandate in the context of administrative enforcement, and we have done so in these final regulations.

The Department acknowledges the concerns of many commenters who argued that with respect to sexual harassment, whether the alleged conduct occurred in the recipient's education program or activity might have been understood too narrowly under the NPRM (e.g., to exclude all off-campus conduct) or at least created potential confusion for complainants and recipients. In response to commenters' concerns, the Department believes that providing additional clarification as to the scope of a recipient's education program or activity for purposes of Title IX sexual harassment is necessary, and, therefore, adds to § 106.44(a) in the final regulations language similar to language used by the Court in *Davis*: For purposes of § 106.30, § 106.44, and

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[863] The Supreme Court's analysis of the "program or activity" statutory language was in the context of judicial enforcement, but the Department does not believe a different analysis is necessary or advisable for administrative enforcement, where the Department – like the Supreme Court – is constrained to interpret and apply the text of the statute including the definitions of "program or activity" provided in the statute. Consistent with this position, and as discussed throughout this preamble, we have revised § 106.44(a) to clarify that "education program or activity" for purposes of these sexual harassment regulations includes circumstances wherein the recipient exercises substantial control over both the harasser and the context of the harassment – the same conclusion reached by the *Davis* Court when it applied the "program or activity" statutory language to the context of a school's response to sexual harassment. *Davis*, 526 U.S. at 645.

§ 106.45, the phrase "education program or activity" includes "locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs" and also includes "any building owned or controlled by a student organization that is officially recognized by a postsecondary institution." The Title IX statute[864] and existing Title IX regulations,[865] already contain detailed definitions of "program or activity" that, among other aspects of such definitions, include "all of the operations of" a postsecondary institution or local education agency. The Department will interpret "program or activity" in these final regulations in accordance with the Title IX statutory (20 U.S.C. 1687) and regulatory definitions (34 CFR 106.2(h)), guided by the Supreme Court's language applied specifically for use in sexual harassment situations under Title IX regarding circumstances over which a recipient has control and (for postsecondary institutions) buildings owned or controlled by student organizations if the student organization is officially recognized by the postsecondary institution. [866]

While "all of the operations of" a recipient (per existing statutory and regulatory provisions), and the additional "substantial control" language in these final regulations, clearly include all incidents of sexual harassment occurring on a recipient's campus, the statutory and regulatory definitions of program or activity along with the revised language in § 106.44(a) clarify that a recipient's Title IX obligations extend to sexual harassment incidents that occur off

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[864] 20 U.S.C. 1687.
[865] 34 CFR 106.2(h); 34 CFR 106.2(i) (defining "recipient"); 34 CFR 106.31(a) (referring to "any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance").
[866] Section 106.44(a) (adding "For purposes of this section, § 106.30, and § 106.45, 'education program or activity' includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.").

campus if any of three conditions are met: if the off-campus incident occurs as part of the recipient's "operations" pursuant to 20 U.S.C. 1687 and 34 CFR 106.2(h); if the recipient exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus pursuant to § 106.44(a); or if a sexual harassment incident occurs at an off-campus building owned or controlled by a student organization officially recognized by a postsecondary institution pursuant to §106.44(a).

The NPRM cited to Federal court opinions that have considered whether sexual harassment occurred in a recipient's education program or activity by examining factors such as whether the recipient funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred. While it may be helpful or useful for recipients to consider factors applied by Federal courts to determine the scope of a recipient's program or activity, no single factor is determinative to conclude whether a recipient exercised substantial control over the respondent and the context in which the harassment occurred, or whether an incident occurred as part of "all of the operations of" a school, college, or university.

The revised language in § 106.44(a) also specifically addresses commenters' concerns about recognized student organizations that own and control buildings such as some fraternities and sororities operating from off-campus locations where sexual harassment and assault may occur with frequency. The revised language further addresses commenters' questions regarding whether postsecondary institutions' Title IX obligations are triggered when sexual harassment occurs in an off-campus location not owned by the postsecondary institution but that is in use by a student organization that the institution chooses to officially recognize such as a fraternity or sorority. The revisions to § 106.44(a) clarify that where a postsecondary institution has officially recognized a student organization, the recipient's Title IX obligations apply to sexual harassment

that occurs in buildings owned or controlled by such a student organization, irrespective of whether the building is on campus or off campus, and irrespective of whether the recipient exercised substantial control over the respondent and the context of the harassment outside the fact of officially recognizing the fraternity or sorority that owns or controls the building. The Department makes this revision to promulgate a bright line rule that decisively responds to commenters and provides clarity with respect to recipient-recognized student organizations that own or control off-campus buildings. Official recognition of a student organization, alone, does not conclusively determine whether all the events and actions of the students in the organization become a part of a recipient's education program or activity; however, the Department believes that a reasonable, bright line rule is that official recognition of a student organization brings buildings owned or controlled by the organization under the auspices of the postsecondary institution recipient and thus within the scope of the recipient's Title IX obligations. As part of the process for official recognition, a postsecondary institution may require a student organization that owns or controls a building to agree to abide by the recipient's Title IX policy and procedures under these final regulations, including as to any misconduct that occurs in the building owned or controlled by a student organization. Accordingly, postsecondary institutions may not ignore sexual harassment that occurs in buildings owned or controlled by recognized student organizations. The Department acknowledges that even though postsecondary institutions may not always control what occurs in an off campus building owned or controlled by a recognized student organization, such student organizations and the events in their buildings often become an integral part of campus life. The Department also acknowledges that a postsecondary institution may be limited in its ability to gather evidence during an investigation if the incident occurs off campus on private property that a student organization (but not the

institution) owns or controls. A postsecondary institution, however, may still investigate a formal complaint arising from sexual harassment occurring in a building owned or controlled by a recognized student organization (whether the building is on campus or off campus), for instance by interviewing students who were allegedly involved in the incident and who are a part of the officially recognized student organization. Thus, under the final regulations (e.g., § 106.44(b)(1)) a postsecondary institution must investigate formal complaints alleging sexual harassment that occurred in a fraternity or sorority building (located on campus, or off campus) owned by the fraternity or sorority, if the postsecondary institution has officially recognized that Greek life organization. Further, under § 106.44(a) the recipient must offer supportive measures to a complainant alleged to be the victim of sexual harassment occurring at a building owned or controlled by an officially recognized student organization. Where a postsecondary institution has officially recognized a student organization, and sexual harassment occurs in an off campus location *not* owned or controlled by the student organization yet involving members of the officially recognized student organization, the recipient's Title IX obligations will depend on whether the recipient exercised substantial control over the respondent and the context of the harassment, or whether the circumstances may otherwise be determined to have been part of the "operations of" the recipient.

We note that the revision in § 106.44(a) referencing a "building owned or controlled by a student organization that is officially recognized by a postsecondary institution" is not the same as, and should not be confused with, the Clery Act's use of the term "noncampus building or property," even though that phrase is defined under the Clery Act in part by reference to student

organizations officially recognized by an institution.[867] For example, "education program or activity" in these final regulations includes buildings within the confines of the campus on land owned by the institution that the institution may rent to a recognized student organization.[868] As discussed in the "Clery Act" subsection of the "Miscellaneous" section of this preamble, the Clery Act and Title IX serve distinct purposes, and Clery Act geography is not co-extensive with the scope of a recipient's education program or activity under Title IX.

With respect to commenters who suggested that the final regulations should not apply to sexual misconduct by or against an individual with no relationship to the recipient, the Department believes that the framework adopted in the final regulations appropriately effectuates the broad non-discrimination mandate of Title IX (which protects any "person" from discrimination in an education program or activity) while also ensuring that recipients are responsible for addressing sexual harassment occurring in an educational institution's "operations," or when the recipient has control over the situation, or where a postsecondary institution has recognized a student organization thereby lending the recipient's implicit extension of responsibility over circumstances involving sexual harassment that occurs in buildings owned or controlled by such a student organization. Like the "no person" language in the Title IX statute, the final regulations place no restriction on the identity of a complainant (§

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[867] *See* 20 U.S.C. 1092(f)(6)(iii) (defining "noncampus building or property" in part as "any building or property owned or controlled by a student organization recognized by the institution"). The Clery Act regulations, 34 CFR 668.46(a), include "noncampus building or property" as part of an institution's Clery geography and define "noncampus building or property" as "[a]ny building or property owned or controlled by a student organization that is officially recognized by the institution; or [a]ny building or property owned or controlled by an institution that is used in direct support of, or in relation to, the institution's educational purposes, is frequently used by students, and is not within the same reasonably contiguous geographic area of the institution.").

[868] *But see* U.S. Dep't. of Education, Office of Postsecondary Education, *The Handbook for Campus Safety and Security Reporting*, 2-18 to 2-19 (2016), https://www2.ed.gov/admins/lead/safety/handbook.pdf.

106.30 defines complainant to mean "an individual who is alleged to be the victim of conduct that could constitute sexual harassment"), obligating a recipient to respond to such a complainant regardless of the complainant's relationship to the recipient. Similarly, reflecting that the Title IX statute does not limit commission of prohibited discrimination only to certain individuals affiliated with a recipient, the final regulations define a respondent to mean "an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment" without restricting a respondent to being a person enrolled or employed by the recipient or who has any other affiliation or connection with the recipient.

However, the final regulations do require that in order to file a formal complaint, the complainant must be "participating in or attempting to participate in" the recipient's education program or activity at the time the formal complaint is filed.[869] This prevents recipients from being legally obligated to investigate allegations made by complainants who have no relationship with the recipient, yet still protects those complainants by requiring the recipient to respond promptly in a non-deliberately indifferent manner. For similar reasons, the final regulations provide in § 106.45(b)(3)(ii) that a recipient *may* in its discretion dismiss a formal complaint if the respondent is no longer enrolled or employed by the recipient, recognizing that a recipient's general obligation to provide a complainant with a prompt, non-deliberately indifferent response might not include completing a grievance process in a situation where the recipient lacks any disciplinary authority over the respondent.

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[869] A complainant may be "attempting to participate" in the recipient's education program or activity, for example, where the complainant has applied for admission, or where the complainant has withdrawn but indicates a desire to re-enroll if the recipient appropriately responds to sexual harassment allegations.

In response to commenters' concerns that practical application of the "education program or activity" condition might be challenging in situations that, for example, involve some conduct occurring in the recipient's education program or activity and some conduct occurring outside the recipient's education program or activity, the Department reiterates that "off campus" does not automatically mean that the incident occurred outside the recipient's education program or activity. The Department agrees that recipients are obliged to think through the scope of each recipient's own education program or activity in light of the statutory and regulatory definitions of "program or activity" (20 U.S.C. 1687 and 34 CFR 106.2(h)) and the statement in § 106.44(a) that "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs as well as buildings owned or controlled by student organizations officially recognized by a postsecondary institution.

To ensure that recipients adequately consider the resulting coverage of Title IX to each recipient's particular circumstances, the final regulations require that every Title IX Coordinator, investigator, decision-maker, and person who facilitates an informal resolution process, must be trained on (among other things) "the scope of the recipient's education program or activity."[870] We have also revised § 106.45(b)(10)(i)(D) so that materials used to train Title IX personnel must be posted on a recipient's website. These revisions ensure that a recipient's students and employees, and the public, understand the scope of the recipient's education program or activity for purposes of Title IX. Under Title IX, recipients must operate education programs or activities free from sex discrimination, and the Department will enforce these final regulations vigorously

[870] Section 106.45(b)(1)(iii).

with respect to a recipient's obligation to respond to sexual harassment that occurs in the recipient's education program or activity.

In situations involving some allegations of conduct that occurred in an education program or activity, and some allegations of conduct that did not, the recipient must investigate the allegations of conduct that occurred in the recipient's education program or activity, and nothing in the final regulations precludes the recipient from choosing to also address allegations of conduct outside the recipient's education program or activity.[871] For example, if a student is sexually assaulted outside of an education program or activity but subsequently suffers Title IX sexual harassment in an education program or activity, then these final regulations apply to the latter act of sexual harassment, and the recipient may choose to address the prior assault through its own code of conduct. Nothing in the final regulations prohibits a recipient from resolving allegations of conduct outside the recipient's education program or activity by applying the same grievance process required under § 106.45 for formal complaints of Title IX sexual harassment, even though such a process would not be required under Title IX or these final regulations. Thus, a recipient is not required by these final regulations to inefficiently extricate conduct occurring outside an education program or activity from conduct occurring in an education program or activity arising from the same facts or circumstances in order to meet the recipient's obligations with respect to the latter.

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[871] Section 106.45(b)(3) (revised in the final regulations to expressly state that although a recipient must dismiss allegations about conduct that did not occur in the recipient's education program or activity, such a mandatory dismissal is "for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct.").

The Department appreciates the various concerns raised by many commenters regarding the extent to which students reside or spend time off campus and how the application of the "education program or activity" condition may affect students who experience sexual harassment and sexual assault in off-campus situations, including community college students, vocational school students, and students who belong to marginalized demographic groups. The Department reiterates that the final regulations do not impose a geographic test or draw a distinction between on-campus misconduct and off-campus misconduct. As discussed above, whether conduct occurs in a recipient's education program or activity does not necessarily depend on the geographic location of the incident. Instead, "education program or activity" relies on statutory and regulatory definitions of "program or activity,"[872] on the statement adapted from the Supreme Court's language in *Davis* added to § 106.44(a) that education program or activity includes locations, events, or circumstances over which the recipient exercised substantial control over the respondent and over the context in which the sexual harassment occurred, and includes on-campus and off-campus buildings owned or controlled by a student organization officially recognized by a postsecondary institution. If a sexual assault occurs against a student outside of an education program or activity, and the student later experiences Title IX sexual harassment in an education program or activity, then a recipient with actual knowledge of such sexual harassment in the recipient's education program or activity must respond pursuant to § 106.44(a).

The final regulations' approach reduces confusion for recipients and students as to the scope of Title IX's protective coverage and recognizes the Department's administrative role in

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[872] *E.g.*, 20 U.S.C. 1687; 34 CFR 106.2(h).

enforcing this important civil rights law according to the statute's plain terms. Furthermore, as noted previously, nothing in the final regulations prevents recipients from initiating a student conduct proceeding or offering supportive measures to students affected by sexual harassment that occurs outside the recipient's education program or activity. Title IX is not the exclusive remedy for sexual misconduct or traumatic events that affect students. As to misconduct that falls outside the ambit of Title IX, nothing in the final regulations precludes recipients from vigorously addressing misconduct (sexual or otherwise) that occurs outside the scope of Title IX or from offering supportive measures to students and individuals impacted by misconduct or trauma even when Title IX and its implementing regulations do not require such actions.[873] The Department emphasizes that sexual misconduct is unacceptable regardless of the circumstances in which it occurs, and recognizing jurisdictional limitations on the purview of a statute does not equate to condoning any form of sexual misconduct.

The Department believes a commenter's concern regarding the negative effect of the final regulations on the Federal background check process and our national security to be speculative. The final regulations would not categorically exclude off-campus assaults. As discussed previously, the final regulations applies to off-campus sexual harassment that occurs under "the operations of" the recipient, or where the recipient exercised substantial control over the respondent and the context in which the sexual harassment occurred, or in a building owned or

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[873] As discussed in the "Directed Question 5: Individuals with Disabilities" subsection of the "Directed Questions" section of this preamble, nothing in these final regulations affects a recipient's obligations to comply with all applicable disability laws, such as the ADA. Thus, for example, if a recipient's student (or employee) has a disability caused or exacerbated by, or arising from, sexual harassment, a recipient must comply with applicable disability laws (including with respect to providing reasonable accommodations) irrespective of whether the sexual harassment that caused or exacerbated the individual's disability constitutes Title IX sexual harassment to which the recipient must respond under these final regulations.

controlled by a student organization officially recognized by a postsecondary institution. This commenter appears to have made a series of assumptions that may not be true, including that a significant number of off-campus assaults not covered by the final regulations would involve perpetrators subjected to a Federal background check in the future, and that a significant number of background checks would fail to uncover relevant information about sexual misconduct solely because the perpetrator's misconduct was not covered under Title IX. Again, the Department emphasizes that nothing in the final regulations prevents recipients from addressing sexual misconduct that occurs outside their education programs or activities, nor do the final regulations discourage or prevent a victim from reporting sexual misconduct to law enforcement or from filing a civil lawsuit; therefore, numerous avenues exist through which misconduct not covered under Title IX would be revealed during a Federal background check of the perpetrator.

With respect to a commenter's assertion that the final regulations may perversely incentivize recipients to not recognize fraternities and sororities, the Department believes this conclusion would require assuming that recipients will make decisions affecting the quality of life of their students based solely on whether or not recipient recognition of a student organization such as a fraternity or sorority would result in sexual harassment that occurs at locations affiliated with that organization falling under Title IX's scope. The Department does not make such an assumption, believing instead that recipients take many factors into account in deciding whether, and under what conditions, a recipient wishes to officially recognize a student organization. Whether or not these final regulations alter postsecondary institutions' decisions about recognizing Greek life organizations, the Department has determined that the scope of Title IX extends to the entirety of a recipient's education program and activity, and with respect to postsecondary institutions, the Department is persuaded by commenters' contentions that

when a postsecondary institution chooses to officially recognize a student organization, the recipient has implied to its students and employees that locations owned by such a student organization are under the imprimatur of the recipient, whether or not the recipient otherwise exercises substantial control over such a location.

The Department believes there is a fundamental distinction between Title IX, and workplace policies that may exist in the corporate world. Title IX has clear jurisdictional application to education programs or activities, and the Department does not have authority to extend Title IX's application. By contrast, corporations may have more flexibility in crafting their own rules and policies to reflect their values and the needs of their employees and customers. Further, Title VII does not necessarily deem actionable all sexual harassment committed by employees regardless of the location or context of the harassment.[874] These final regulations tether sexual harassment to a recipient's education program or activity in a similar manner to the way courts tether sexual harassment to a workplace under an employer's control.[875] Regardless of any differences between analyses under Title VII and Title IX, we emphasize that recipients retain discretion under the final regulations to address sexual misconduct that falls outside the recipient's education program or activity through their own

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[874] *See, e.g.*, *Lapka v. Chertoff*, 517 F.3d 974, 982-83 (7th Cir. 2008).

[875] The Department adds to § 106.44(a) the statement that "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs. This helps clarify that even if a situation arises off campus, it may still be part of the recipient's education program or activity if the recipient exercised substantial control over the context and the alleged harasser. While such situations may be fact specific, recipients must consider whether, for example, a sexual harassment incident between two students that occurs in an off-campus apartment (i.e., not a dorm room provided by the recipient) is a situation over which the recipient exercised substantial control; if so, the recipient must respond when it has actual knowledge of sexual harassment or allegations of sexual harassment that occurred there. At the same time, the Title IX statute and existing regulations broadly define a recipient's "program or activity" to include (as to schools) "all of the operations" of the school, such that situations that arise on campus are already part of a school's education program or activity. 20 U.S.C. 1687.

disciplinary system and by offering supportive measures to complainants reporting such misconduct.

The Department acknowledges commenters' citations to Federal court opinions for the proposition that a recipient may be deliberately indifferent to sexual harassment that occurred outside the recipient's control where the complainant has to interact with the respondent in the recipient's education program or activity, or where the effects of the underlying sexual assault create a hostile environment in the complainant's workplace or educational environment. However, with the changes to the final regulations made in response to commenters' concerns, the Department believes that we have clarified that sexual harassment incidents occurring off campus may fall under Title IX. The statutory and regulatory definitions of "program or activity" and the statements regarding "substantial control" and "buildings owned or controlled by" student organizations officially recognized by postsecondary institutions in § 106.44(a) do not state or imply that off-campus incidents necessarily fall outside a recipient's education program or activity. Moreover, complainants can request supportive measures or an investigation into allegations of conduct that do not meet Title IX jurisdictional conditions, under a recipient's own code of conduct.[876]

Some of the situations in Federal cases cited to by commenters may have reached similar outcomes under the final regulations. For example, in *Doe v. East Haven Board of Education*,[877]

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[876] The Department also notes that § 106.45(b)(8) in the final regulations permits complainants and respondents equally to appeal a recipient's determination that allegations were subject to mandatory dismissal under § 106.45(b)(3)(i).

[877] 200 F. App'x 46, 48 (2d Cir. 2006); *Lapka v. Chertoff*, 517 F.3d 974, 982-83 (7th Cir. 2008) (the Seventh Circuit reasoned that the plaintiff sufficiently alleged workplace harassment even though the alleged rape occurred while the

the Second Circuit held that the plaintiff sufficiently alleged sexual harassment to which the school was deliberately indifferent where the harassment consisted of on-campus taunts and name-calling directed at the plaintiff after she had reported being raped off campus by two high-school boys. The final regulations would similarly analyze whether sexual harassment (i.e., unwelcome conduct on the basis of sex so severe, pervasive, and objectively offensive that it effectively deprives a complainant of equal access to education) *in the recipient's program or activity* triggered a recipient's response obligations regardless of whether such sexual harassment stemmed from the complainant's allegations of having suffered sexual assault (e.g., rape) *outside* the recipient's program or activity. Further, whether or not the off-campus rape in that case was in, or outside, the school's education program or activity, would depend on the factual circumstances, because as explained above, not all off-campus sexual harassment is excluded from Title IX coverage.

Contrary to commenters' assertions, the Supreme Court in *Gebser* did not dispense with the program or activity limitation or declare that where the harassment occurred did not matter. The facts at issue in the *Gebser* case involved teacher-on-student harassment that consisted of both in-class sexual comments directed at the plaintiff as well as a sexual relationship that began

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plaintiff and assailant were socializing after hours in a private hotel room, because the bar was part of the training facility where the plaintiff and assailant were required to attend work-related training sessions and thus were on "official duty" while at that facility, including the bar located in the facility, "so the event could be said to have grown out of the workplace environment" and the plaintiff and assailant were trainees expected to eat and drink at the facility and "return to dormitories and hotel rooms provided by" the employer such that "[e]mployees in these situations can be expected to band together for society and socialize as a matter of course" justifying the Court's conclusion that the plaintiff had alleged sexual harassment (rape) that arose in the context of a workplace environment and to which the employer had an obligation to respond). Although *Lapka* was a case under Title VII, the final regulations would similarly analyze whether sexual harassment occurred in the school's program or activity by inquiring whether the school exercised substantial control over the context of the harassment and the alleged harasser.

when the respondent-teacher visited the plaintiff's home ostensibly to give her a book.[878] The Supreme Court in *Gebser* emphasized that a school district needs to be aware of discrimination (in the form of sexual harassment) "in its programs" and emphasized that a *teacher's* sexual abuse of a student "undermines the basic purposes of the educational system"[879] thereby implicitly recognizing that a teacher's sexual harassment of a student is likely to constitute sexual harassment "in the program" of the school even if the harassment occurs off campus. Nothing in the final regulations contradicts this premise or conclusion; § 106.44(a) clarifies that a recipient's education program or activity includes circumstances over which a recipient has substantial control over the context of the harassment and the respondent, and a teacher employed by a recipient who visits a student's home ostensibly to give the student a book but in reality to instigate sexual activity with the student could constitute sexual harassment "in the program" of the recipient such that a recipient with actual knowledge of that harassment would be obligated under the final regulations to respond. Similarly, the Supreme Court in *Davis* viewed the perpetrator's status as a teacher in *Gebser* as relevant to concluding that the sexual

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[878] *Gebser*, 524 U.S. at 277-78.

[879] *Gebser*, 524 U.S. at 286 ("As a general matter, it does not appear that Congress contemplated unlimited recovery in damages against a funding recipient where the recipient is unaware of *discrimination in its programs*.") (emphasis added); *id.* at 289 (reasoning that a school's liability in a private lawsuit should give the school opportunity to know of the violation and correct it voluntarily similarly to the way the Title IX statute directs administrative agencies to give a school that opportunity to voluntarily correct violations, and the Court stated "Presumably, a central purpose of requiring notice of the violation 'to the appropriate person' and an opportunity for voluntary compliance before administrative enforcement proceedings can commence is to avoid diverting education funding from beneficial uses where a recipient was unaware of *discrimination in its programs* and is willing to institute prompt corrective measures.") (emphasis added); *id.* at 290 ("we hold that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of *discrimination in the recipient's programs* and fails adequately to respond.") (emphasis added); *id.* at 292 ("No one questions that a student suffers extraordinary harm *when subjected to sexual harassment and abuse by a teacher*, and that *the teacher's conduct is reprehensible and undermines the basic purposes of the educational system*.") (emphasis added).

harassment was happening "under" the recipient's education program or activity.[880] We reiterate that the final regulations do not distinguish between sexual harassment occurring "on campus" versus "off campus" but rather state that Title IX covers sexual harassment that occurs in a recipient's education program or activity. The final regulations follow the *Gebser/Davis* approach to Title IX's statutory reference to discrimination in an education program or activity; sexual harassment by a teacher as opposed to harassment by a fellow student may, as indicated in *Gebser* and *Davis*, affect whether the sexual harassment occurred "under any education program or activity."[881] This is a matter that recipients must consider when training Title IX personnel on the "scope of the recipient's education program or activity" pursuant to § 106.45(b)(1)(iii).

Both the 2001 Guidance and 2017 Q&A recognize the statutory language of "education program or activity" as a limitation on sexual harassment to which a recipient must respond. For example, the 2001 Guidance notes that "Title IX applies to all public and private educational institutions that receive Federal funds" and states that the "education program or activity of a school includes all of the school's operations" which means "that Title IX protects students in connection with all of the academic, educational, extra-curricular, athletic, and other programs of the school, whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere."[882] Similarly, the

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[880] *Davis*, 526 U.S. at 652-53 ("Moreover, the provision that the discrimination occur 'under any education program or activity' suggests that the behavior be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity. . . . The fact that it was a teacher who engaged in harassment in *Franklin* and *Gebser* is relevant. The relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX's guarantee of equal access to educational benefits and to have a systemic effect on a program or activity.").
[881] *Id.* at 652.
[882] 2001 Guidance at 2-3 (internal quotation marks omitted) (citing to 20 U.S.C. 1687, codification of the amendment to Title IX regarding scope of jurisdiction, enacted by the Civil Rights Restoration Act of 1987, and to 65 FR 68049 (November 13, 2000), the Department's amendment of the Title IX regulations to incorporate the statutory definition of "program or activity.").

2017 Q&A expressly acknowledges that a recipient's obligation to respond to sexual harassment is confined to harassment that occurs in the recipient's education program or activity, citing statutory and regulatory definitions of "recipient," "operations," and "program or activity."[883] The final regulations similarly rely on preexisting statutory and regulatory definitions of a recipient's "program or activity" and add a statement that "education program or activity" includes circumstances over which the recipient exercised substantial control. The withdrawn 2011 Dear Colleague Letter departed from the Department's longstanding acknowledgement that a recipient's response obligations are conditioned on sexual harassment that occurs in the recipient's education program or activity;[884] these final regulations return to the Department's approach in the 2001 Guidance, which mirrors the Supreme Court's approach to "education program or activity" as a jurisdictional condition that promotes a recipient's obligation under Title IX to provide education programs or activities free from sex discrimination. Like the 2001 Guidance, the final regulations approach the "education program or activity" condition as extending to circumstances over which recipients have substantial control, and not only to incidents that occur "on campus." We reiterate that nothing in the final regulations precludes a recipient from offering supportive measures to a complainant who reports sexual harassment that

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[883] 2017 Q&A at 1, fn. 3.

[884] 2011 Dear Colleague Letter at 4 ("Schools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school's education program or activity. If a student files a complaint with the school, *regardless of where the conduct occurred*, the school must process the complaint in accordance with its established procedures. Because students often experience the continuing effects of off-campus sexual harassment in the educational setting, schools should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus. For example, if a student alleges that he or she was sexually assaulted by another student off school grounds, and that upon returning to school he or she was taunted and harassed by other students who are the alleged perpetrator's friends, the school should take the earlier sexual assault into account in determining whether there is a sexually hostile environment. The school also should take steps to protect a student who was assaulted off campus from further sexual harassment or retaliation from the perpetrator and his or her associates.") (emphasis added); *see also* the withdrawn 2014 Q&A at 29-30.

occurred outside the recipient's education program or activity, and any sexual harassment that does occur in an education program or activity must be responded to even if it relates to, or happens subsequent to, sexual harassment that occurred outside the education program or activity.

Although the 2001 Guidance and 2017 Q&A frame actionable sexual harassment as harassment that creates a "hostile environment,"[885] the final regulations utilize the more precise interpretation of Title IX's scope articulated by the Supreme Court in *Davis*: that a recipient must respond to sexual harassment that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education.[886] The use of the phrase "hostile environment" in the 2001 Guidance and 2017 Q&A does not mean that those guidance documents ignored the "education program or activity" limitation referenced in the Title IX statute; whether framed as a "hostile environment" (as in Department guidance) or as "effective denial of a person's equal access" to education (as in these final regulations), sexual harassment is a form of sex discrimination actionable under Title IX when it occurs in an education program or activity.

Because the final regulations do not exclude "off campus" sexual harassment from coverage under Title IX and instead take the approach utilized in the 2001 Guidance and applied

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[885] 2001 Guidance at 3; 2017 Q&A at 1. Although footnote 3 of the 2017 Q&A states that "[s]chools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities," this statement was intended to convey that a recipient may not ignore sexual harassment that occurs *in its program or activity* just because the parties involved may also have experienced an incident of sexual harassment *outside its program or activity*. *See also Doe v. East Haven Bd. of Educ.*, 200 F. App'x 46, 48 (2d Cir. 2006) (holding that plaintiff sufficiently alleged sexual harassment to which the school was deliberately indifferent where the harassment consisted of on-campus, sexualized taunts and name-calling directed at the plaintiff after she had reported being raped by two high-school boys outside the school's program or activity).

[886] *See also* the "Sexual Harassment" subsection of the "Section 106.30 Definitions" section of this preamble for further discussion of the "effective denial of equal access" element in the final regulations' definition of sexual harassment and the relationship between that element and the concept of hostile environment.

by the Supreme Court in *Davis*, under which off campus sexual harassment may be in the scope of a recipient's education program or activity, the Department disagrees that these final regulations conflict with the Department's recent enforcement action with respect to holding Chicago Public Schools accountable for failure to appropriately respond to certain off-campus sexual assaults.

Changes: Section 106.44(a) is revised to state that "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. Section 106.45(b)(1)(iii) is revised to include training for Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions on "the scope of the recipient's education program or activity." Section 106.45(b)(3)(i) is revised to expressly provide that a mandatory dismissal of allegations in a formal complaint about conduct not occurring in the recipient's education program or activity is "for purposes of title IX or [34 CFR part 106]; such a dismissal does not preclude action under another provision of the recipient's code of conduct." Section 106.45(b)(10)(i)(D) is revised to require recipients to post materials used to train Title IX personnel on the recipient's website, or if the recipient does not have a website, to make such materials available for inspection and review by members of the public.

Online Sexual Harassment

Comments: One commenter cited case law for the proposition that Title IX does not cover online or digital conduct.[887] Other commenters cited cases holding that recipients may be liable under Title IX for failing to adequately address online harassment.[888] A few commenters argued that the NPRM's approach to education program or activity is inconsistent with the Department's past practice and guidance documents, such as guidance issued in 2010 which acknowledged that cell phone and internet communications may constitute actionable harassment. Many commenters were concerned the NPRM would exclude online sexual harassment due to the education program or activity condition in § 106.44(a), and cited studies showing the prevalence and effects of online harassment and cyber-bullying on victims.[889] Commenters argued that it was unclear to what extent the NPRM would cover online harassment and suggested that the Department more broadly define "program or activity" to include student interactions that are enabled by recipients, such as online harassment between students using internet access provided by the recipient. Commenters argued that the final regulations should explicitly address cyber-bullying and electronic speech. Some commenters suggested that excluding online misconduct may conflict with State law; for example, commenters stated that New Jersey law includes harassment occurring online.

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[887] Commenters cited, *e.g.*: *Yeasin v. Durham*, 719 F. App'x 844 (10th Cir. 2018); *Gordon v. Traverse City Area Pub. Sch.*, 686 F. App'x 315, 324 (6th Cir. 2017).
[888] Commenters cited: *Feminist Majority Found. v. Hurley*, 911 F.3d 674 (4th Cir. 2018); *S.J.W. v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 777 (8th Cir. 2012); *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 220-221 (3d Cir. 2011); *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 573 (4th Cir. 2011); *Sypniewski v. Warren Hill Reg'l Bd. of Educ.*, 307 F.3d 243, 257 (3d Cir. 2002).
[889] Commenters cited, *e.g.*: American Association of University Women, *Crossing the Line: Sexual Harassment at School* (2011).

Discussion: The Department appreciates commenters' concerns about whether Title IX applies to sexual harassment that occurs electronically or online. We emphasize that the education program or activity jurisdictional condition is a fact-specific inquiry applying existing statutory and regulatory definitions of "program or activity" to the situation; however, for recipients who are postsecondary institutions or elementary and secondary schools as those terms are used in the final regulations, the statutory and regulatory definitions of "program or activity" encompass "all of the operations of" such recipients, and such "operations" may certainly include computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, the recipient.[890] Furthermore, the final regulations revise § 106.44(a) to specify that an education program or activity includes circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurred, such that the factual circumstances of online harassment must be analyzed to determine if it occurred in an education program or activity. For example, a student using a personal device to perpetrate online sexual harassment during class time may constitute a circumstance over which the recipient exercises substantial control.

Contrary to the claims made by some commenters, the approach to "education program or activity" contained in the final regulations, and in particular its potential application to online harassment, would not necessarily conflict with the Department's previous 2010 Dear Colleague Letter addressing bullying and harassment. The Department's 2010 guidance made a passing reference that harassing conduct may include "use of cell phones or the internet," and the

[890] 20 U.S.C. 1687; 34 CFR 106.2(h).

Department's position has not changed in this regard.[891] These final regulations apply to sexual harassment perpetrated through use of cell phones or the internet if sexual harassment occurred in the recipient's education program or activity. As explained in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, these final regulations adopt and adapt the *Gebser/Davis* framework of actual knowledge and deliberate indifference, in contrast to the rubric in the 2010 Dear Colleague Letter on bullying and harassment; however, these final regulations appropriately address electronic, digital, or online sexual harassment by not making sexually harassing conduct contingent on the *method* by which the conduct is perpetrated. Additionally, even if a recipient is not required to address certain misconduct under these final regulations, these final regulations expressly allow a recipient to address such misconduct under its own code of conduct.[892] Accordingly, there may not be any conflict between these final regulations with respect to State laws that explicitly cover online harassment.

Changes: None.

Consistency with Title IX Statutory Text

Comments: Some commenters opposed the NPRM's approach to "education program or activity" by arguing that it conflicts with Title IX's statutory text. Commenters contended that the NPRM is an unambiguously incorrect interpretation of Title IX under the deference doctrine articulated by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council,*

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[891] U.S. Dep't. of Education, Office for Civil Rights, *Dear Colleague Letter: Harassment and Bullying* at 2 (Oct. 26, 2010), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.
[892] *E.g.*, § 106.45(b)(3)(i).

Inc.,[893] and will thus be given no judicial deference. One such commenter asserted that the Title IX statute has three distinctive protective categories, such that no person on the basis of sex can be: (1) excluded from participation in; (2) denied the benefits of; or (3) subjected to discrimination under any education program or activity. The commenter argued that the first clause includes off-campus conduct, such as male students on a public street blocking female students from accessing campus. This commenter argued that the third clause prohibits discrimination "under," and not "in" or "within," a recipient's education program or activity and is violated whenever women or girls are subjected to more adverse conditions than males. This commenter asserted that the Title IX statutory text does not depend on where the underlying conduct occurs, but rather focuses on the subsequent hostile educational environment that such misconduct can cause.

Another commenter argued that requiring recipients to treat off-campus sexual misconduct differently from on-campus sexual misconduct can itself violate Title IX.

Discussion: The Department acknowledges the analysis offered by at least one commenter that the Title IX statute, by its own text, has three distinct protective categories and the commenter's argument that the "subjected to discrimination" prong is violated whenever females are subjected to more adverse conditions than males. As explained below, the Department elects to adopt the analysis applied by the Supreme Court rather than the analysis provided by the commenter.

In *Davis*, the Supreme Court acknowledged that Title IX protects students from "discrimination" and from being "excluded from participation in" or "denied the benefits of" any

[893] 467 U.S. 837 (1984).

education program or activity receiving Federal financial assistance.[894] The *Davis* Court characterized sexual harassment as a form of sex *discrimination* under Title IX,[895] and reasoned that whether a recipient is liable for sexual harassment thus turns on whether the recipient can be said to have "subjected" students to sex discrimination in the form of sexual harassment.[896] The *Davis* Court further reasoned, "Moreover, because the harassment must occur 'under' 'the operations of' a funding recipient, *see* 20 U.S.C. § 1681(a); § 1687 (defining 'program or activity'), the harassment must take place in a context subject to the school district's control. . . . These factors combine to limit a recipient's damages liability to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs."[897]

Adopting the Supreme Court's analysis of the appropriate application of the Title IX statute's "program or activity" language in the context of sexual harassment, the final regulations treat sexual harassment as a form of sex discrimination under Title IX and hold recipients accountable for responding to sexual harassment that took place in a context under the recipient's control. In interpreting "education program or activity" in the final regulations, the Department will look to the definitions of "program or activity" provided by Title IX[898] and existing Title IX

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[894] *Davis*, 526 U.S. at 650.
[895] *Id.* ("Having previously determined that 'sexual harassment' is 'discrimination' in the school context under Title IX, we are constrained to conclude that student-on-student sexual harassment, if sufficiently severe, can likewise rise to the level of discrimination actionable under the statute.").
[896] *Id.* ("The statute's plain language confirms the scope of prohibited conduct based on the recipient's degree of control over the harasser and the environment in which the harassment occurs. If a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference 'subjects' its students to harassment. That is, the deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it.") (internal citations to dictionary references omitted).
[897] *Id.* at 644-45.
[898] 20 U.S.C. 1687 (defining "program or activity").

regulations,[899] and has revised § 106.44(a) of the final regulations to clarify that "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs, as well as on-campus and off-campus buildings owned or controlled by student organizations officially recognized by postsecondary institutions. The Department notes that the commenter's hypothetical, concerning male students on a public street blocking female students from accessing campus, would require a fact-specific analysis but could constitute sexual harassment in the recipient's education program or activity if such an incident occurred in a location, event, or circumstance over which the recipient exercised substantial control.

Contrary to the claims made by some commenters, and as discussed above, the final regulations would not necessarily require recipients to treat off-campus misconduct differently from on-campus misconduct. Title IX does not create, nor did Congress intend for it to create, open-ended liability for recipients in addressing sexual harassment. Rather, the statute imposed an important jurisdictional limitation through its reference to education programs or activities. Recipients are responsible under Title IX for addressing sex discrimination, including sexual harassment, in their "education program or activity," but a recipient's education program or activity may extend to locations, events, and circumstances "off campus."

Changes: We have revised § 106.44(a) to state that for purposes of §§ 106.30, 106.44, and 106.45, "education program or activity" includes locations, events, or circumstances over which

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[899] 34 CFR 106.2(h) (defining "program or activity"); 34 CFR 106.2(i) (defining "recipient"); 34 CFR 106.31(a) (referring to "any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance").

the respondent had substantial control over both the respondent and the context in which the sexual harassment occurred, and also includes buildings owned or controlled by student organizations that are officially recognized by a postsecondary institution.

Constitutional Equal Protection

Comments: One commenter contended that the NPRM's approach to "education program or activity" may violate the Fourteenth Amendment because experiencing off-campus or online sexual victimization detrimentally affects student-survivors' education, and the Fourteenth Amendment guarantees these students equal protection, yet, the commenter argued, the NPRM would leave these students outside Title IX's reach and deprived of equal protection.

Discussion: We disagree with the contention that the application in the final regulations of "education program or activity" as a jurisdictional condition may violate the Equal Protection Clause of the Fourteenth Amendment. The Department reiterates that the "education program or activity" limitation in the final regulations does not create or apply a geographic test, does not draw a line between "off campus" and "on campus," and does not create a distinction between sexual harassment occurring in person versus online. Moreover, under these final regulations, any individual alleged to be a victim of conduct that could constitute sexual harassment is a "complainant"[900] to whom the recipient must respond in a prompt, non-deliberately indifferent manner; in that manner, all students are treated equally without distinction under the final regulations based on, for example, where a student resides or spends time. The distinction of which some commenters are critical, then, is not a distinction drawn among groups or types of

[900] Section 106.30 (defining a "complainant" as any individual who is alleged to be the victim of conduct that could constitute sexual harassment).

students, but rather is a distinction drawn (for reasons explained previously) between incidents that are, or are not, under the control of the recipient. The Department further notes that even if commenters correctly characterize the distinction as being made between some students (who suffer harassment in an education program or activity) and other students (who suffer harassment outside an education program or activity), the applicable level of scrutiny under the Equal Protection Clause to any differential treatment under such circumstances would be the rational basis test.[901] A heightened level of scrutiny would apply where a suspect or quasi-suspect classification is involved, such as race or sex.[902] But, as here, where no such suspect or quasi-suspect classification is involved, the final regulations may treat students differently due to the circumstances in which the misconduct occurred, and the rational basis test applies. Under the rational basis test, a law or governmental action is valid under the Equal Protection Clause so long as it is rationally related to a legitimate government interest.[903] With Title IX, Congress made a rational determination that recipients should be held liable for misconduct over which they had some level of control. The statute's reference to "education program or activity" reflects this important limitation. To expose recipients to liability for misconduct wholly unrelated to circumstances over which they have control would contravene congressional intent and lead to potentially unlimited exposure to loss of Federal funds. The Department believes that the use of "education program or activity" in § 106.44(a) appropriately reflects both statutory text and

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[901] *See F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993).
[902] *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (applying strict scrutiny under the Equal Protection Clause to assess classifications based on race); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (applying intermediate scrutiny under the Equal Protection Clause to assess classifications based on sex).
[903] *See Beach Commc'ns, Inc.*, 508 U.S. at 313 (holding that in areas of social and economic policy, statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide rational basis for classification).

congressional intent, and furthers the legitimate government interest of ensuring liability is not open-ended and has reasonable jurisdictional limitations.

Changes: None.

Institutional Autonomy and Litigation Risk

Comments: A number of commenters stated that the Department's approach to "education program or activity" would undermine recipient autonomy and expose recipients to litigation risk. Commenters argued that recipients should have the right to determine the standards of behavior to which their students must adhere, both on campus and off campus, and that the NPRM would infringe on institutional academic prerogatives and independence. Commenters expressed concern that the NPRM would make recipients vulnerable to litigation from students seeking damages for off-campus assaults, including because recipients could be accused of arbitrarily deciding which cases to investigate and which cases to declare outside their jurisdiction.

Discussion: We acknowledge the importance of recipient discretion and flexibility to determine the recipient's own standards of conduct. However, Congress created a clear mandate in Title IX and vested the Department with the authority to administratively enforce Title IX to effectuate the statute's twin purposes: to "avoid the use of Federal resources to support discriminatory practices" and to "provide individual citizens effective protection against those practices."[904] Importantly, nothing in the final regulations prohibits recipients from using their own disciplinary processes to address misconduct occurring outside their education program or

[904] *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979).

activity.[905] Indeed, this flexibility for recipients to address sexual misconduct that falls outside the scope of Title IX, including sexual misconduct that is outside the recipient's education program or activity, permits recipients to reduce the litigation risk perceived by some commenters. As discussed above, and contrary to the claims made by many commenters, the final regulations do not distinguish between on-campus misconduct and off-campus misconduct. Off-campus sexual harassment is not categorically excluded from Title IX coverage. Recipients' decisions to investigate formal complaints regarding allegations of sexual harassment cannot be arbitrary under the final regulations; rather, a recipient *must* investigate a formal complaint where the alleged sexual harassment (meeting the definition in § 106.30) occurred in the recipient's education program or activity, against a person in the United States.

Changes: None.

Requests for Clarification

Comments: Commenters raised questions regarding the Department's approach to the "education program or activity" condition. Commenters requested clarity as to events that begin off campus but have effects on campus, such as interaction among students, faculty, and staff outside formal professional or academic activities. These commenters were concerned that, in such circumstances, it may be challenging for an institution to clearly and consistently identify what conduct has occurred strictly within its education program and which conduct is beyond its educational program. One commenter sought clarification as to what, if any, are the

[905] In response to many commenters' concerns that § 106.45(b)(3) was understood to prevent recipients from addressing misconduct that occurred outside an education program or activity, the Department has revised § 106.45(b)(3)(i) in the final regulations to expressly state that mandatory dismissal due to the alleged conduct occurring outside an education program or activity is only a dismissal for purposes of Title IX and does not preclude the recipient from addressing the conduct through other codes of conduct.

Department's expectations for a recipient's conduct processes that address off-campus sexual misconduct. This commenter asserted that Title IX prohibits discrimination "under" an education program or activity, but that § 106.44(a) and proposed § 106.44(b)(4) referred to sexual harassment "in" an education program or activity, while proposed § 106.45(b)(3) referred to sexual harassment "within" a program or activity. The commenter inquired as to whether "in" differs from "within" in those proposed sections, and whether those terms mean something different than "under" used in the Title IX statute, and if so what are the differences in meaning. The commenter asserted that Title IX prohibits "discrimination" under an education program or activity and that § 106.44(a) and proposed § 106.44(b)(2) refer to "sexual harassment" in an education program or activity, and asked if recipients would be required to respond where sexual harassment occurred outside an education program or activity but resulted in discrimination under the education program or activity. This commenter stated that under Title IX an individual may not be "excluded" from a federally-assisted program or activity on the basis of sex, and asked whether recipients must address sexual harassment that did not occur "in" its education program or activity but nevertheless effectively excluded the victim from equal access to it.

Discussion: The Department appreciates the questions raised by commenters regarding the application of "education program or activity" in § 106.44(a) of the final regulations. The final regulations do not impose requirements on a recipient's code of conduct processes addressing misconduct occurring outside the recipient's education program or activity, and do not govern the recipient's decisions to address or not address such misconduct. The Department's regulatory authority is limited to the scope of Title IX: ensuring that recipients of Federal funding operate education programs or activities free from sex discrimination. For the final regulations to apply, sexual harassment (a form of sex discrimination) must occur in the recipient's education program

or activity. As explained previously, nothing in the final regulations precludes a recipient from offering supportive measures to a complainant who reports sexual harassment that occurred outside the recipient's education program or activity, and any sexual harassment or sex discrimination that does occur in an education program or activity must be responded to even if it relates to, or happens subsequent to, sexual harassment that occurred outside the education program or activity.

Whether sexual harassment occurs in a recipient's education program or activity is a fact-specific inquiry. The key questions are whether the recipient exercised substantial control over the respondent and the context in which the incident occurred. There is no bright-line geographic test, and off-campus sexual misconduct is not categorically excluded from Title IX protection under the final regulations.[906] Recognizing that recipients need to carefully consider this matter, the Department revised § 106.45(b)(1)(iii) to require training for Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolution processes on "the scope of the recipient's education program or activity."

In response to a commenter's question regarding the NPRM's use of the terms "in," "within," and "under" an education program or activity, and whether those terms are intended to have different meanings, the Department has replaced "within" with "in" throughout the final regulations, thus making all provisions consistent with the reference to "in" contained in § 106.44(a). We also wish to clarify that the final regulations' use of the term "in" is meant to be

[906] *See* the "Clery Act" subsection of the "Miscellaneous" section of this preamble for discussion regarding the distinctive purposes of Clery Act geography versus Title IX coverage of education programs or activities; *see also* revised § 106.44(a) including in an "education program or activity" any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

interchangeable with the Title IX statute's use of "under"; the Department gives the same meaning to these prepositions, and notes that the Supreme Court in *Davis* referenced harassment "under" the operations of (i.e., the program or activity of) a recipient and harassment that occurred "in" a context subject to the recipient's control seemingly interchangeably.[907]

Changes: The final regulations consistently use "in" an education program or activity rather than "within."

Section 106.44(a) "against a person in the U.S."

Impact on Study Abroad Participants

Comments: Several commenters asserted that the NPRM would endanger students studying abroad, because the final regulations apply only to sexual harassment that occurs against a person in the United States. Commenters argued that when recipients offer students study abroad opportunities, recipients should still have responsibility to ensure student safety and well-being. Commenters acknowledged that Congress may not have contemplated studying abroad or recipients having satellite campuses across the globe when drafting Title IX in the 1970s. However, commenters argued that international experiences are increasingly common and critical components of education today, particularly in higher education, and that some schools require students in certain academic programs to study abroad. Commenters noted that even the Federal government, on the U.S. State Department website, encourages students to have international exposure to compete in a globalized society. Commenters argued that it would be absurd for the Federal government to encourage international exposure for students and not

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[907] *Davis*, 526 U.S. at 645 ("Moreover, because the harassment must occur *under* the operations of' a funding recipient . . . the harassment must take place *in* a context subject to the school district's control") (internal quotation marks and citations omitted; emphasis added).

protect them in the process because studying abroad is necessary for some majors and to prepare for certain careers. Commenters cited studies suggesting study abroad increases the risk for sexual misconduct against female students and showing how students had to alter their career paths in the aftermath of sexual misconduct experienced abroad.[908] One commenter stated that harassment abroad, such as by institution-employed chaperones, can derail victims' ability to complete their education at their home institution in the United States. This commenter stated that for the Department to interpret Title IX as providing no recourse for such students is impossible to imagine. Commenters asserted that the NPRM tells bad actors they can get away with sexual misconduct in foreign programs. Commenters asserted that study abroad students are already uniquely vulnerable and less likely to report to foreign local authorities because, for example, they may be unfamiliar with the foreign legal system, they share housing with the perpetrators, and there may be language barriers, fear of retaliation or social isolation, and fewer available support services. Commenters further argued that because crime occurring overseas cannot be prosecuted in the U.S, filing a Title IX report with the recipient might be the survivor's only option. Commenters contended that the NPRM may have the effect of discouraging students from studying abroad and learning about foreign cultures and languages which would run contrary to the fundamental purpose of education to foster curiosity and discovery.

Discussion: We acknowledge the concerns raised by many commenters that the final regulations would not extend Title IX protections to incidents of sexual misconduct occurring against persons outside the United States, and the impact that this jurisdictional limitation might have on

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[908] Commenters cited, *e.g.*: Matthew Kimble, *et al.*, *Study Abroad Increases Risk for Sexual Assault in Female Undergraduates: A Preliminary Report*, 5 PSYCHOL. TRAUMA: THEORY, RESEARCH, PRACTICE, & POL'Y 5 (2013).

the safety of students participating in study abroad programs. However, by its plain text, the Title IX statute does not have extraterritorial application. Indeed, Title IX states that "*[n]o person in the United States* shall, on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]"[909] The Department believes a plain meaning interpretation of a statute is most consistent with fundamental rule of law principles, ensures predictability, and gives effect to the intent of Congress. Courts have recognized a canon of statutory construction that "Congress ordinarily intends its statutes to have domestic, not extraterritorial, application."[910] This canon rests on presumptions that Congress is mainly concerned with domestic conditions and seeks to avoid unintended conflicts between our laws and the laws of other nations.[911] If Congress intended Title IX to have extraterritorial application, then it could have made that intention explicit in the text when it was passed in 1972, and Congress could amend Title IX to apply to a recipient's education programs or activities located outside the United States if Congress so chooses. The Federal government's encouragement of international experiences, such as study abroad, is not determinative of Title IX's intended scope. The U.S. Supreme Court most recently acknowledged the presumption against extraterritoriality in *Kiobel v. Royal Dutch Petroleum*[912] and *Morrison v. National Australian Bank*.[913] In *Morrison*, the Court reiterated the "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United

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[909] 20 U.S.C. 1681(a) (emphasis added).
[910] *Small v. United States*, 544 U.S. 385, 388-89 (2005).
[911] *Smith v. United States*, 507 U.S. 197, 204 (1993).
[912] 133 S. Ct. 1659 (2013).
[913] 561 U.S. 247 (2010).

States."[914] The Court concluded that "[w]hen a statute gives no clear indication of extraterritorial application, it has none."[915]

Very few Federal cases have addressed whether Title IX applies extraterritorially to allegations of sex discrimination occurring abroad, and Federal district courts have reached different results in these cases.[916] To date, no Federal circuit has addressed this issue. Commenters noted that the court in *King v. Board of Control of Eastern Michigan University*[917] applied Title IX to a claim of sexual harassment occurring overseas during a study abroad program; the Federal district court reasoned that study abroad programs are educational operations of the recipient that "are explicitly covered by Title IX and which necessarily require students to leave U.S. territory in order to pursue their education." The court emphasized that Title IX's scope extends to "any education program or activity" of a recipient, which presumably would include the recipient's study abroad programs. While the Department agrees that a recipient's study abroad programs may constitute education programs or activities of the recipient, the Department agrees with the rationale applied by a Federal district court in *Phillips v. St. George's University*[918] that regardless of whether a study abroad program is part of a recipient's education program or activity, Title IX does not have extraterritorial application. The court in *Phillips* noted that nothing in the Title IX statute's plain language indicates that Congress intended it to apply outside the U.S. and that the plain meaning of "person in the United States" suggests that Title IX only applies to persons located in the United States, even

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[914] *Id.* at 255.
[915] *Id.*
[916] *See* Robert J. Aalberts *et al.*, *Studying is Dangerous? Possible Federal Remedies for Study Abroad Liability*, 41 JOURNAL OF COLL. & UNIV. L. 189, 210-13 (2015).
[917] 221 F. Supp. 2d 783 (E.D. Mich. 2002).
[918] No. 07-CV-1555, 2007 WL 3407728 (E.D.N.Y. Nov. 15, 2007).

when that person is participating in a recipient's education program or activity outside the United States.

Both *Phillips* and *King* were decided before the Supreme Court's *Morrison* and *Kiobel* opinions, and the Department doubts that the rationale applied by the court in *King* would survive analysis under those Supreme Court decisions, which emphasized the importance of the presumption against extraterritoriality of statutes passed by Congress. We find the *Phillips* Court's reasoning to be well-founded, especially in light of the later-decided Supreme Court cases regarding extraterritoriality, and we believe the jurisdictional limitation on extraterritoriality contained in the final regulations is wholly consistent with the text of the Title IX statute and with the presumption against extraterritoriality recognized numerous times by the Supreme Court. We further note that the Supreme Court acknowledges that where Congress intends for its statutes to apply outside the United States, Congress knows how to codify that intent.[919] When Congress has codified such intent in other Federal civil rights laws, Congress has addressed issues that arise with extraterritorial application such as potential conflicts with foreign laws and procedures.[920] Based on the presumption against extraterritoriality reinforced by Supreme Court decisions and the plain language in the Title IX statute limiting protections to persons "in the United States," the Department believes that the Department does not have authority to declare that the presumption against extraterritoriality has been overcome, absent further congressional or Supreme Court direction on this issue.

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[919] *E.g.*, *Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co.* (*Aramco*), 499 U.S. 244, 258 (1991) ("Congress's awareness of the need to make a clear statement that a statute applies overseas is amply demonstrated by the numerous occasions on which it has expressly legislated the extraterritorial application of a statute.").
[920] *E.g.*, Older Americans Act Amendments of 1984, Pub. L. No. 98-459, § 802, 98 Stat. 1767, 1792 (codified at 29 U.S.C. 623, 630 (amending the Age Discrimination Employment Act of 1967 to apply outside the United States)); 29 U.S.C. 623(f) (addressing potential conflicts of laws issues).

As a practical matter, we also note that schools may face difficulties interviewing witnesses and gathering evidence in foreign locations where sexual misconduct may have occurred. Recipients may not be in the best position to effectively investigate alleged sexual misconduct in other countries. Such practical considerations weigh in favor of the Department looking to Congress to expressly state whether Congress intends for Title IX to apply in foreign locations.

We emphasize that nothing in these final regulations prevents recipients from initiating a student conduct proceeding or offering supportive measures to address sexual misconduct against a person outside the United States. We have revised § 106.45(b)(3) to explicitly state that even if a recipient must dismiss a formal complaint for Title IX purposes because the alleged sexual harassment did not occur against a person in the U.S., such a dismissal is only for purposes of Title IX, and nothing precludes the recipient from addressing the alleged misconduct through the recipient's own code of conduct. Contrary to claims made by some commenters, it is not true that the final regulations leave students studying abroad with no recourse in the event of sexual harassment or sexual assault. Recipients remain free to adopt disciplinary systems to address sexual misconduct committed outside the United States, to protect their students from such harm, and to offer supportive measures such as mental health counseling or academic adjustments for students impacted by misconduct committed abroad. As such, we believe the final regulations will not discourage students from participating in study abroad programs that may enrich their educational experience.

Changes: None.

Consistency with Federal Law and Departmental Practice

Comments: Some commenters asserted that excluding extraterritorial application of Title IX would conflict with other Federal laws and past practice of the Department. One commenter stated that the NPRM is inconsistent with the Department's own interpretation of the VAWA amendments to the Clery Act, and argued that carving out conduct occurring abroad conflicts with Clery Act language regarding geographical jurisdiction. This commenter argued that if a postsecondary institution has a separate campus abroad or owns or controls a building or property abroad that is used for educational purposes and used by students, the postsecondary institution must disclose the Clery Act crimes that occur there. The commenter suggested it would be illogical to require recipients to make such disclosures and yet not address the same underlying misconduct and that this puts recipients in a precarious position. Other commenters argued that the Department should interpret Title IX as protecting persons enrolled in education programs or activities the recipient conducts or sponsors abroad, as this interpretation would be consistent with application of other Federal civil rights laws, such as Title VI, and that the proposed rules' approach conflicts with the Department's past approach of requiring recipients to address sexual misconduct that could limit participation in education programs or activities overseas.

Discussion: We disagree with the commenters who contended that excluding application of Title IX to sexual misconduct committed outside the United States raises untenable conflict with the past practice of the Department and other Federal laws. With respect to past practice of the Department, OCR has never explicitly addressed in any of its guidance whether Title IX has extraterritorial application. For example, though the withdrawn 2014 Q&A stated that "[u]nder Title IX, a school must process all complaints of sexual violence, *regardless of where the*

conduct occurred, to determine whether the conduct occurred in the context of an education program or activity,"[921] it included an illustrative list of covered "[o]ff-campus education programs and activities" such as activities occurring at fraternity or sorority houses and school-sponsored field trips; none of these examples involved an education program or activity outside the United States.[922] However, to the extent that application of the "person in the United States" language in the final regulations departs from past Department guidance or practice, the Department believes that the jurisdictional limitation on extraterritoriality contained in the final regulations is reasonable and wholly consistent with the plain text of the Title IX statute and with the presumption against extraterritoriality recognized numerous times by the U.S. Supreme Court.

With respect to other Federal law, we acknowledge that certain misconduct committed overseas is reportable under the Clery Act where, for example, the misconduct occurs in a foreign location that a U.S. institution owns and controls. However, the two laws (Title IX and the Clery Act) do not have the same scope or purpose,[923] even though the two laws often intersect for postsecondary institution recipients who are also subject to the Clery Act. The Department does not perceive a conflict between a recipient's obligation to comply with reporting obligations under the Clery Act and response obligations under Title IX. As discussed above, both the text of the Title IX statute and case law on the topic of extraterritoriality make it clear that Title IX does not apply to sex discrimination against a person outside the United States.

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[921] *See* 2014 Q&A at 29.
[922] *Id.*
[923] *See* "Background" subsection in "Clery Act" subsection of the "Miscellaneous" section of this preamble.

With respect to Title VI, this statute, like Title IX, expressly limits its application to domestic discrimination with its opening words "No person in the United States . . ." and commenters provided no example of a Federal court or Department application of Title VI to conduct occurring outside the United States. Nonetheless, the final regulations are focused on administrative enforcement of Title IX, and for reasons discussed previously, the Department does not believe that the statutory text or judicial interpretations of Title IX overcome the presumption against extraterritoriality that applies to statutes passed by Congress.

Changes: None.

Constitutional Equal Protection

Comments: One commenter asserted that excluding extraterritorial application of Title IX may raise Constitutional issues under the Fourteenth Amendment Equal Protection Clause. This commenter argued that experiencing sexual victimization in study abroad programs detrimentally affects the student-survivor's education, and the Fourteenth Amendment guarantees these students equal protection, yet the NPRM would leave these students outside the scope of Title IX protection and deprive them of equal protection.

Discussion: We disagree with the contention that excluding extraterritorial application of Title IX may violate the Fourteenth Amendment Equal Protection Clause. As an initial matter, the applicable level of scrutiny under the Equal Protection Clause to any differential treatment of students under the § 106.44(a) "against a person in the United States" limitation would be the rational basis test. A heightened level of scrutiny would apply where a suspect or quasi-suspect classification is involved, such as race or sex. But, as here, where no such suspect or quasi-suspect classification is involved and the final regulations may treat students differently due to the geographic location of misconduct occurring outside the United States, the rational basis test

applies. Under the rational basis test, a law or governmental action is valid under the Equal Protection Clause so long as it is rationally related to a legitimate government interest.[924] With respect to Title IX, Congress made a rational determination that recipients should only be held liable for misconduct that occurs within the United States. The statute's explicit reference to "[n]o person in the United States" in 20 U.S.C. 1681(a) reflects this jurisdictional limitation. To hold recipient responsible for misconduct that took place outside the country could be unrealistically demanding and lead to open-ended liability, and if Congress intended that result, then Congress could have expressly stated its intent for Title IX to apply overseas when enacting Title IX, and can amend Title IX to so state. The Department believes that the reference to "against a person in the United States," in § 106.44(a), appropriately reflects both the plain meaning of the statutory text and congressional intent that Title IX is focused on eradicating sex discrimination in domestic education programs or activities. The Department reiterates that recipients remain free under the final regulations to use their own disciplinary codes to address sexual harassment committed abroad and to extend supportive measures to students affected by sexual misconduct outside the United States.

Changes: None.

Impact on International or Foreign Exchange Students in the U.S.

Comments: A few commenters asserted the proposed rules' limitation with respect to persons "in the United States" may be detrimental to survivors who are international students whose visa

[924] *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (holding that in areas of social and economic policy, statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide rational basis for classification).

status depends on academic performance. One commenter expressed concern that § 106.44(a) would exclude foreign exchange students in the U.S. from Title IX coverage, arguing that the Department should not treat foreign exchange students as undeserving of the same protection as students born in the United States.

Discussion: The jurisdictional limitation that sexual harassment occurred against "a person in the United States" is not a limitation that protects only U.S. citizens; international students or foreign students studying in the United States are entitled to the same protections under Title IX as any other individuals. Title IX states that "[n]o person in the United States" shall be subject to discrimination based on sex. It is well-settled that the word "person" in this context includes citizens and non-citizens alike. Title IX protects every individual in the U.S. against discrimination on the basis of sex in education programs or activities receiving Federal financial assistance, regardless of citizenship or legal residency.

Changes: None.

Section 106.44(a) Deliberate Indifference Standard

Comments: Many commenters were supportive of the deliberate indifference standard and several argued that it is a sufficient standard to hold institutions accountable for failing to address allegations of sexual misconduct in an appropriate manner. Many commenters favored the deliberate indifference standard because it affords institutions greater discretion to handle Title IX cases in a manner that is most consistent with the institution's educational mission and level of resources.

In contrast, other commenters advocated for the Department to return to the "reasonableness" standard because it affords recipients less discretion in their handling of Title IX complaints. These commenters argued that the reasonableness standard strikes the necessary

balance between forcing schools to make certain policy changes, such as adopting due process protections in their grievance procedures, and granting deference. Other commenters argued that because the deliberate indifference standard is couched in terms of a safe harbor and coupled with "highly prescriptive mechanism[s]" under § 106.44 and § 106.45 it actually provides recipients with very little to no discretion in practice.

Many commenters expressed the general concern that lowering the "reasonableness" standard to the "deliberate indifference" standard allows schools to investigate fewer allegations, punish fewer bad actors, and would shield schools from administrative accountability even in cases where schools mishandle complaints, fail to provide effective support, and wrongly determine against the weight of the evidence that the accused was not responsible for the misconduct. One commenter compared the deliberate indifference standard in the proposed rules to the application of the deliberate indifference standard in the prison context under the Eighth Amendment,[925] arguing that if finalized the deliberate indifference standard would apply more stringently in the Title IX context and provide greater institutional protection to schools because it would be difficult to imagine any scenario where an institution could be found deliberately indifferent.

Some commenters argued that the deliberate indifference standard is only appropriate in actions for private remedies rather than public remedies, and asserted that the 2001 Guidance acknowledged this difference. Some commenters contended that the deliberate indifference standard is wholly inappropriate in the context of administrative enforcement, arguing that because the Department only demands equitable remedies of schools, in the form of policy

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[925] Commenter cited: *Farmer v. Brennan*, 511 U.S. 825 (1994).

changes, schools do not require the additional protection afforded by the deliberate indifference standard that applies in private lawsuits for money damages against schools. Other commenters noted that the deliberate indifference standard has not been adopted in the context of any of the other civil rights statutes OCR is charged with enforcing.

Various commenters indicated that more clarity is needed with respect to what the deliberate indifference standard requires of recipients in the absence of a formal complaint of sexual harassment. Some commenters requested that the Department include a definition for deliberate indifference. Many commenters critiqued the language used to convey the standard, expressing the concern that a school's response could be indifferent or unreasonable and not be in violation of Title IX so long as they were not *deliberately* indifferent or *clearly* unreasonable. Some commenters expressed the concern that the word "deliberate" implies an intentionality element, asserting that intent is difficult to prove. Other commenters believed the standard was too vaguely worded, provided too much deference to the institutions, and would always be interpreted in favor of the schools. Some commenters argued that the deliberate indifference standard would effectively deny the complainant any meaningful process because an institution could dismiss a complaint after determining that the alleged conduct does not fall within its interpretation of the sexual harassment definition.

Some suggested the Department revise the proposed rules to impose a different standard on schools in circumstances where the schools are responding to allegations against someone in a position of authority, pointing to the misconduct of Larry Nassar at Michigan State University.

Discussion: The Department appreciates the commenters' support of the deliberate indifference standard and agrees that the deliberate indifference standard affords recipients an appropriate amount of discretion to address sexual misconduct in our Nation's schools while holding

recipients accountable if their response is clearly unreasonable in light of the known circumstances. The Department, however, also recognizes that too much discretion can result in unintended confusion and uncertainty for both complainants who deserve a meaningful response and careful consideration of their reports, and for respondents who should be punished only after they are determined to be responsible through a fair process. Since the implementing regulations were first issued in 1975, the Department has observed, and many stakeholders, including complainants and respondents, have informed the Department through public comment, that complainants and respondents have experienced various pitfalls and implementation problems from a lack of clarity with respect to recipients' obligations under Title IX. As stated in the proposed regulations, the lack of clear regulatory standards has contributed to processes that have not been fair to the parties involved, have lacked appropriate procedural protections, and have undermined confidence in the reliability of the outcomes of investigations of sexual harassment complaints. For the reasons stated in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the Department will maintain the deliberate indifference standard in the final regulations, with revisions to § 106.44(a) that specify certain actions a recipient must take in order to not be deliberately indifferent.

In response to commenters' concerns that the deliberate indifference standard leaves recipients too much leeway to decide on an appropriate response, the Department revises § 106.44(a) to include specific actions that a recipient must take as part of its non-deliberately indifferent response. Section 106.44(a) requires that a recipient's response treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the

imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.[926] As commenters have stated, many complainants would like supportive measures and do not necessarily wish to pursue a formal complaint and grievance process, although they should be informed of the process for filing a formal complaint. The Department wishes to respect the autonomy and wishes of a complainant throughout these final regulations, and recipients should also respect a complainant's wishes to the degree possible. Respondents also should not be punished for allegations of sexual harassment until after a grievance process that complies with § 106.45, as such a grievance process provides notice of the allegations to both complainants and respondents as well as a meaningful opportunity for both complainants and respondents to be heard. Additionally, the Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. A recipient should engage in a meaningful dialogue with the complainant to determine which supportive measures may restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment. A recipient must offer each complainant supportive measures, and a

[926] For discussion of what is intended by refraining from imposing disciplinary sanctions and other actions that are "not supportive measures" against a respondent, see the "Supportive Measures" subsection of the "Section 106.30 Definitions" section of this preamble. We use the same language to describe refraining from punishing a respondent with following the § 106.45 grievance process, in § 106.45(b)(1)(i).

recipient will have sufficiently fulfilled its obligation to offer supportive measures as long as the offer is not clearly unreasonable in light of the known circumstances, and so long as the Title IX Coordinator has contacted the complainant to engage in the interactive process also described in revised § 106.44(a). The Department acknowledges that there may be specific instances in which it is impossible or impractical to provide supportive measures. For example, the recipient may have received an anonymous report or a report from a third party and cannot reasonably determine the identity of the complainant to promptly contact the complainant. Similarly, if a complainant refuses the supportive measures that a recipient offers (and the supportive measures offered are not clearly unreasonable in light of the known circumstances) and instead insists that the recipient take punitive action against the respondent without a formal complaint and grievance process under § 106.45, the Department will not deem the recipient's response to be clearly unreasonable in light of the known circumstances. If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response is not clearly unreasonable in light of the known circumstances, pursuant to revised § 106.45(b)(10)(ii). Offering supportive measures to every complainant and documenting why *not* providing supportive measures is *not* clearly unreasonable in light of the known circumstances are some of the actions required under these final regulations but not expressly required under case law describing the deliberate indifference standard. These actions are required as part of the Department's administrative enforcement of the deliberate indifference standard.

Although we acknowledge the concerns of commenters urging the Department to abandon the deliberate indifference standard and return to the reasonableness standard, the Department disagrees for various reasons. As more fully explained in the "Deliberate Indifference" subsection of the "Adoption and Adaption of the Supreme Court's Framework to

Address Sexual Harassment" section, the Department departs from its prior guidance that set forth a standard more like reasonableness, or even strict liability, instead of deliberate indifference. The Department's past guidance and enforcement practices have taken the position that a recipient's response to sexual harassment should be judged under a standard that expected the recipient's response to effectively stop harassment and prevent its recurrence.[927] This approach did not provide recipients adequate flexibility to make decisions affecting their students. For example, the Department's guidance required recipients to always investigate any report of sexual harassment, even when the complainant only wanted supportive measures and did not want an investigation.[928] Such a rigid requirement to investigate every report of sexual harassment in every circumstance intrudes into complainants' privacy without concern for complainants' autonomy and wishes and, thus, may chill reporting of sexual harassment. Additionally, the Department's past guidance did not distinguish between an investigation that leads to the imposition of discipline and an inquiry to learn more about a report of sexual harassment.[929] Deliberate indifference provides appropriate flexibility for recipients while holding recipients accountable for meaningful responses to sexual harassment that prioritize complainants' wishes.[930]

The Department disagrees that these final regulations are highly or overly prescriptive such that recipients have no discretion. Recipients retain discretion to determine which supportive measures to offer and must document why providing supportive measures is not

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[927] 2001 Guidance at iv, vi.
[928] 2001 Guidance at 13, 15, 18; 2011 Dear Colleague Letter at 4.
[929] 2001 Guidance at 13, 15, 18; 2011 Dear Colleague Letter at 4.
[930] The final regulations specify that a recipient's non-deliberately indifferent response must include investigating and adjudicating sexual harassment allegations, when a formal complaint is filed by a complainant or signed by the recipient's Title IX Coordinator. § 106.44(b)(1); § 106.30 (defining "formal complaint"); § 106.45(b)(3)(i).

clearly unreasonably in light of the known circumstances, if the recipient does not provide any supportive measures. The Department will not second guess the supportive measures that a recipient offers as long as these supportive measures are not clearly unreasonable in light of the known circumstances. Similarly, the Department believes that the grievance process prescribed by § 106.45 creates a standardized framework for resolving formal complaints of sexual harassment under Title IX while leaving recipients discretion to adopt rules and practices not required under § 106.45.[931] The Department notes that these final regulations do not include the safe harbor provisions proposed in the NPRM, and the Department explains its decision for not including these safe harbors in the "Recipient's Response in Specific Circumstances" section of this preamble.

Contrary to some commenters' concerns, the deliberate indifference standard does not relieve recipients of their obligation to respond to every known allegation of sexual harassment. The deliberate indifference standard would also not allow recipients to investigate fewer allegations of sexual harassment or punish fewer respondents after a finding of responsibility. Rather, under these final regulations, recipients are specifically required to investigate allegations in a formal complaint (and must explain to each complainant the option of filing a formal complaint), and must provide a complainant with remedies any time a respondent is

[931] The revised introductory sentence in § 106.45(b) provides that any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties. The final regulations grant flexibility to recipients in other respects; *see* the discussion in the "Other Language/Terminology Comments" subsection of the "Section 106.30 Definitions" section of this preamble (noting that recipients may decide whether to calculate time frames using calendar days, school days, or other method); § 106.45(b)(6)(i) (allowing, but not requiring, live hearings to be held virtually through use of technology); § 106.45(b)(5)(vi) (removing the requirement that evidence gathered in the investigation be provided to the parties using a file-sharing platform); §§ 106.45(b)(1)(vii), 106.45(b)(7)(i) (giving recipients a choice between using the preponderance of the evidence standard or the clear and convincing evidence standard).

found responsible for sexual harassment pursuant to § 106.45(b)(1)(i). Even where a formal investigation is not required (because neither the complainant nor the Title IX Coordinator has filed or signed a formal complaint, or because a complainant is not participating in or attempting to participate in the recipient's education program or activity at the time of filing), the deliberate indifference standard requires that a recipient's response is not clearly unreasonable in light of known circumstances. Contrary to commenters' arguments, this standard requires more than for a recipient to respond in some minimal or ineffective way because minimal and ineffective responses would inevitably qualify as "clearly unreasonable" and because as revised, § 106.44(a) imposes specific, mandatory obligations on a recipient with respect to a recipient's response to each complainant. Given that the deliberate indifference standard involves an analysis of whether a response was clearly unreasonable in light of the known circumstances, there are many different factual circumstances under which a recipient's response may be deemed deliberately indifferent.

Section 106.44(a) requires a recipient to respond promptly where the recipient has actual knowledge of sexual harassment; a recipient may have actual knowledge of sexual harassment even where no person has reported or filed a formal complaint about the sexual harassment. For example, employees in an elementary or secondary school may observe sexualized insults scrawled on school hallways, and even where no student has reported the incident, the school employees' notice of conduct that could constitute sexual harassment as defined in § 106.30 (i.e., unwelcome conduct that a reasonable person would conclude is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education) charges the recipient with actual knowledge, and the recipient must respond in a manner that is not clearly unreasonable in light of the known circumstances, which could include the recipient removing

the sexually harassing insults and communicating to the student body that sexual harassment is unacceptable. By way of further example, if a Title IX Coordinator were to receive multiple reports of sexual harassment against the same respondent, as part of a non-deliberately indifferent response the Title IX Coordinator may sign a formal complaint to initiate a grievance process against the respondent, even where no person who alleges to be the victim wishes to file a formal complaint. The deliberate indifference standard does not permit recipients to ignore or respond inadequately to sexual harassment of which the recipient has become aware, but the deliberate indifference standard appropriately recognizes that a recipient's prompt response will differ based on the unique factual circumstances presented in each instance of sexual harassment.

In response to comments that the *Gebser/Davis* liability standard (i.e., deliberate indifference) is and should be used only for monetary damages in private litigation, the Department notes that courts have used the *Gebser/Davis* standard in considering and awarding injunctive relief.[932] Additionally, in *Gebser*, the Supreme Court acknowledged that the Department of Education has the authority to "promulgate and enforce requirements that effectuate [Title IX's] non-discrimination mandate."[933] In promulgating these final regulations, the Department is choosing to do just that. The Department is not required to adopt identical

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[932] *Fitzgerald v. Barnstable Sch. Dist.*, 555 U.S. 246, 255 (2009) ("In addition, this Court has recognized an implied private right of action . . . In a suit brought pursuant to this private right, *both injunctive relief and damages are available*.") (internal citations omitted; emphasis added); *Hill v. Cundiff*, 797 F.3d 948, 972-73 (11th Cir. 2015) (reversing summary judgment against plaintiff's claims for injunctive relief because a jury could find that the alleged conduct was "severe, pervasive, and objectively offensive" under *Davis*); *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 322-23 (3d Cir. 2013) (upholding preliminary injunction against school for banning students from wearing bracelets because the school failed to show that the "bracelets would breed an environment of pervasive and severe harassment" under *Davis*); *Haidak v. Univ. of Mass. at Amherst*, 299 F. Supp. 3d 242, 270 (D. Mass. 2018) (denying plaintiff's request for a preliminary injunction because he failed to show that the school was deliberately indifferent to an environment of severe and pervasive discriminatory conduct under *Davis*), *aff'd in part, vacated in part, remanded by Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56 (1st Cir. 2019).
[933] *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998).

standards for all civil rights laws under the Department's enforcement authority, and after carefully considering the rationale relied upon by the Supreme Court in the context of sexual harassment under Title IX, the Department adopts the deliberate indifference standard articulated by the Supreme Court, tailored for administrative enforcement of recipients' responses to sexual harassment. The Department believes it would be beneficial for recipients and students alike if the administrative standards governing recipients' responses to sexual harassment were aligned with the standards developed by the Supreme Court in private actions, while ensuring that through administrative enforcement the Department holds recipients accountable for taking specific actions that the *Gebser/Davis* framework does not require.[934]

The Department also believes that the language used to describe the deliberate indifference standard is sufficiently clear. The Department defines the standard according to the conventional understanding of the standard, that is, to be deliberately indifferent means to have acted in a way that is "clearly unreasonable in light of the known circumstances" consistent with the formulation of the deliberate indifference standard offered by the Supreme Court in *Davis.*[935] The Department appreciates the opportunity to clarify that the term "deliberate" as used in the standard does not require an element of subjective intent to harm, or bad faith, or similar mental state, on the part of a recipient's officials, administrators, or employees. Rather, the final regulations clearly state in § 106.44(a) that a recipient with actual knowledge of sexual harassment against a person in the United States occurring in its education program or activity

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[934] *E.g.*, § 106.44(a) specifically requires that a recipient's mandatory response to each report of sexual harassment must include promptly offering supportive measures to the complainant, and must avoid imposing disciplinary sanctions against a respondent without following the § 106.45 grievance process; § 106.44(b)(1) requires a recipient to investigate sexual harassment allegations made in a formal complaint; § 106.45 prescribes specific procedural protections for complainants, and respondents, when a recipient investigates and adjudicates formal complaints.
[935] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648-49 (1999); § 106.44(a).

must respond in a manner that is "not clearly unreasonable," including by taking certain specific steps such as offering supportive measures to a complainant. Accordingly, the Department will hold a recipient responsible for compliance regardless of whether acting in a clearly unreasonable way, in light of the known circumstances, is the result of malice, incompetence, ignorance, or other mental state of the recipient's officials, administrators, or employees. As adapted for administrative enforcement, the deliberate indifference standard sufficiently ensures that a recipient takes steps to address student safety and provides equal access to the recipient's education program or activity while preserving a recipient's discretion to address the unique facts and circumstances presented by any particular situation (for example, a recipient's offer of supportive measures as required in § 106.44(a) will be evaluated based on whether the recipient offered supportive measures to the complainant that, under the facts and circumstances presented in an individual complainant's situation, were in fact designed to restore or preserve the complainant's equal educational access).

The Department is persuaded by commenters' suggestions that the Department should impose stricter, more specific obligations on recipients' responses to sexual harassment or sexual harassment allegations, including allegations against employees in positions of authority. Rather than abandoning the deliberate indifference liability standard, the Department adapts that standard for administrative enforcement in ways that preserve the benefits of aligning judicial and administrative enforcement rubrics, preserve the benefit of the "not clearly unreasonable in light of the known circumstances" standard's deference to unique factual circumstances, yet imposes mandatory obligations on every recipient to respond in specific ways to each complainant alleged to be victimized by sexual harassment. Adopting the Supreme Court's formulation of the deliberate indifference standard, while adapting that standard to specify what

a recipient *must* do every time the recipient knows of sexual harassment (or allegations of sexual harassment), addresses commenters' concerns that the deliberate indifference standard as presented in the NPRM did not impose strict enough requirements on a recipient to ensure the recipient responds supportively and fairly to sexual harassment in its education programs or activities.

In the interest of providing greater clarity, consistency, and transparency as to a recipient's obligations under Title IX and what students can expect, the Department does not want to overcomplicate the regulatory scheme in the final regulations by establishing separate standards for when a recipient is handling complaints involving different classes of respondents (for example, allegations against students, versus allegations against employees). The Department believes that expecting a recipient to respond in a manner that is not clearly unreasonable in light of the known circumstances appropriately requires a recipient to take into account whether the respondent holds a position of authority.

Changes: The Department revised § 106.44(a) to provide that a recipient's response must be prompt, and must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Section § 106.44(a) is also revised to provide that the Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.

Recipient's Response in Specific Circumstances

Section 106.44(b) Proposed "Safe harbors," generally

Comments: Some commenters praised the safe harbor provisions generally for giving colleges and universities the discretion to respond to sexual harassment complaints outside the formal grievance process. Some commenters also praised the safe harbor provisions for identifying specific circumstances under which a recipient can conform its response to legal requirements and avoid a finding of deliberate indifference.

Some commenters, although supportive of the safe harbors generally, requested that the Department clarify how the safe harbors would work.

Many commenters disagreed with the Department's use of the term "safe harbor" in the NPRM, because the provisions that provided a "safe harbor" also include mandatory requirements. These commenters argued that a safe harbor is conventionally understood as a provision that a regulated party can take advantage of to shield itself from administrative action, as opposed to something a regulated party is required to do. Commenters asserted that "safe harbors" are options rather than obligations and pointed to the mandatory language contained in proposed § 106.44(b)(2) under which the Title IX Coordinator would have been required to file a formal complaint upon receiving multiple reports against a respondent,[936] as fundamentally inconsistent with the idea of a safe harbor.

[936] Proposed § 106.44(b)(2) has been removed in the final regulations; see discussion under the "§ Proposed 106.44(b)(2) Reports by Multiple Complainants of Conduct by Same Respondent [removed in final regulations]" subsection of the "Recipient's Response in Specific Circumstances" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble.

Some commenters criticized the safe harbor provisions as rules intended to immunize recipients from a finding of deliberate indifference but requiring no more than a minimal response to allegations of sexual harassment, contrary to Title IX's express intent. Commenters argued that the safe harbor provisions, combined with the deliberate indifference standard, curtail the Department's ability to independently and comprehensively review a recipient's response to sexual harassment allegations, amounting to an abdication of the Department's role to enforce Title IX.

Discussion: The Department appreciates comments in support of the two proposed safe harbors. Upon further consideration, the Department decided not to include the two proposed safe harbors in these final regulations.

One of the proposed safe harbor provisions provided that if the recipient followed a grievance process (including implementing any appropriate remedy as required) that complies with § 106.45 in response to a formal complaint, the recipient's response to the formal complaint would not be deliberately indifferent and would not otherwise constitute discrimination under Title IX. The proposed provision was meant to provide an assurance that the recipient's response (only as to the formal complaint) would not be deemed deliberately indifferent as long as a recipient complies with § 106.45. This proposed safe harbor left open the possibility that other aspects of the recipient's response may be deliberately indifferent. The Department understands commenters' concerns that this safe harbor provision may have been confusing or misleading by somehow suggesting that compliance with § 106.45 is not required, or by suggesting that compliance with § 106.45 would have excused a recipient from providing a non-deliberately indifferent response with respect to matters other than conducting a grievance process. The Department is not including this proposed safe harbor provision in the final regulations to make

it clear that recipients are always required to comply with § 106.45 in response to a formal complaint, and are always required to comply with all the obligations specified in § 106.44(a), with or without a formal complaint being filed. Indeed, the Department retains the mandate in § 106.45(b)(1) and revises this mandate for clarity to state: "In response to a formal complaint, a recipient must follow a grievance process that complies with § 106.45." The Department did not intend to leave the impression that it was immunizing recipients with respect to their obligations to address sexual harassment. These final regulations require a meaningful response to allegations of sexual harassment of which a recipient has notice, when the sexual harassment occurs in a recipient's education program or activity against a person in the United States.

The second proposed safe harbor provided that a recipient would not be deliberately indifferent when in the absence of a formal complaint the recipient offers and implements supportive measures designed to effectively restore or preserve the complainant's access to the recipient's education program or activity, and the recipient also informs the complainant in writing of the right to file a formal complaint. This safe harbor is now unworkable and unnecessary in light of other revisions made to the proposed regulations, specifically a recipient's obligations in § 106.44(a) and § 106.45(b)(10)(ii). Under § 106.44(a), a recipient's response must treat complainants and respondents equitably by offering the complainant supportive measures as defined in § 106.30, and a Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. The Department revised § 106.45(b)(1) to add a mandate that with or without a formal complaint, a recipient must comply with §

106.44(a), emphasizing that recipients must offer supportive measures to a complainant regardless of whether a complainant chooses to file a formal complaint, and recipients must investigate any formal complaint that a complaint does choose to file. Additionally, under § 106.45(b)(10)(ii), if a recipient does not provide a complainant with supportive measures, then the recipient must document why such a response was not clearly unreasonable in light of the known circumstances. As recipients are now required to offer supportive measures to a complainant (not only incentivized to do so by the proposed safe harbor) and to document why not providing a complainant with supportive measures was not clearly unreasonable in light of the known circumstances, the final regulations removes safe harbors and instead, the Department will enforce the mandates and requirements in the final regulations, including those specified in §§ 106.44(a) and 106.44(b).

Despite the absence of these safe harbor provisions, recipients still have discretion with respect to how to respond to sexual harassment allegations in a way that takes into account factual circumstances. The final regulations, like the proposed regulations, require a recipient to begin the § 106.45 grievance process in response to a formal complaint. A recipient retains significant discretion under these final regulations, yet must meet specific, mandatory obligations that ensure a recipient responds supportively and fairly to every allegation of Title IX sexual harassment. For example, a recipient may decide which supportive measures to offer a complainant, whether to offer an informal resolution process under § 106.45(b)(9), whether to allow all parties, witnesses, and other participants to appear at the live hearing virtually under § 106.45(b)(6)(i), and whether to take action under another provision of the recipient's code of conduct even if the recipient must dismiss allegations in a formal complaint under § 106.45(b)(3)(i), among other areas of discretion.

These final regulations also provide sufficient clarity as to how a recipient must respond to sexual harassment, rendering the proposed safe harbors unnecessary. For example, § 106.44(a) specifically addresses how a recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a respondent. Section § 106.44(b)(1) also clearly mandates that in response to a formal complaint a recipient must follow a grievance process that complies with § 106.45, and with or without a formal complaint, a recipient must comply with § 106.44(a). The Department clearly addresses specific circumstances throughout these final regulations. For example, the Department addresses when a recipient must or may dismiss a formal complaint under §106.45(b)(3) for purposes of sexual harassment under Title IX or this part, when a recipient may consolidate formal complaints as to allegations of sexual harassment under § 106.45(b)(4), and when an informal resolution process may be offered under § 106.45(b)(9), among other matters.

The elimination of the safe harbor provisions proposed in the NPRM alleviates and addresses the concerns of commenters who opposed these safe harbor provisions.

Changes: The Department does not include the two safe harbor provisions from the NPRM, in proposed § 106.44(b)(1) and proposed § 106.44(b)(3).

Section 106.44(b)(1) Mandate to Investigate Formal Complaints and Safe Harbor

Comments: Several commenters supported § 106.44(b)(1), asserting that this provision places control in the hands of the victims, and prevents victims from having to participate in a grievance process against their will. Other commenters opposed this provision, arguing that it relieves institutions of the obligation to address sexual harassment claims of which they have actual

knowledge by discouraging institutions from investigating allegations in the absence of a formal complaint.

Many commenters expressed concern that institutions will merely "check" the procedural "boxes" outlined in § 106.45 without regard for the substantive outcomes of formal grievance processes. Many commenters asserted that this proposed safe harbor would only benefits respondents, and would provide no benefit to complainants. Other commenters asserted that if a recipient fails to follow procedural requirements in § 106.45, the safe harbor in § 106.44(b)(1) would only hold recipients to the standard of deliberate indifference, which commenters argued was too low a standard to ensure that recipients comply with the § 106.45 grievance process.

Many commenters argued that the safe harbor in § 106.44(b)(1) provided too little flexibility for institutions to develop their own grievance process. Some commenters expressed concern that a recipient would not have the flexibility to forgo a grievance process in a situation where the recipient determined that the allegations contained in a formal complaint were without merit, frivolous, or that the allegations had already been investigated. Some commenters asked the Department to clarify whether satisfying § 106.45 is the only way, or one of many ways, to comply with the proposed rules and receive the safe harbor protections of § 106.44(b)(1).

Another commenter suggested that the Department add a timeliness requirement to § 106.44(b)(1) so that a formal complaint must be filed within a certain time frame, in order to avoid prejudice or bias against a respondent.

Discussion: As explained in the "Section 106.44(b) Proposed 'Safe harbors,' generally," subsection of the "Recipient's Response in Specific Circumstances" section of this preamble, these final regulations do not include the safe harbor provision that if the recipient follows a grievance process (including implementing any appropriate remedy as required) that complies

with § 106.45 in response to a formal complaint, the recipient's response to the formal complaint is not deliberately indifferent and does not otherwise constitute discrimination under Title IX. The Department understands commenters' concerns that this safe harbor provision may have been confusing or misleading by somehow suggesting that full compliance with § 106.45 is not required – that is, by suggesting that a recipient must only follow § 106.45 in a way that is not deliberately indifferent. The Department is not including this proposed safe harbor provision in the final regulations to make it clear that recipients are always required to fully comply with § 106.45 in response to a formal complaint. Indeed, the Department retains the mandate in § 106.45(b)(1) and revises this mandate for clarity to state: "In response to a formal complaint, a recipient must follow a grievance process that complies with § 106.45." The Department also recognizes, as many commenters stated, that a complainant may not wish to initiate or participate in a grievance process for a variety of reasons, including fear of re-traumatization, and the Department affirms the autonomy of complainants by making it clear that a recipient *must* investigate and adjudicate when a complainant has filed a formal complaint. At the same time, the final regulations ensure that complainants must be offered supportive measures with or without filing a formal complaint, thus respecting the autonomy of complainants who do not wish to initiate or participate in a grievance process by ensuring that such complainants receive a supportive response from the recipient regardless of also choosing to file a formal complaint. For this reason, the Department revised § 106.44(b)(1) to expressly state: "With or without a formal complaint, a recipient must comply with § 106.44(a)." Section 106.44(a) requires a recipient to offer a complainant supportive measures as part of its prompt, non-deliberately indifferent response, whether or not the complainant chooses to file a formal complaint.

The Department disagrees that these final regulations discourage recipients from investigating allegations. As explained previously, a recipient *must* investigate a complainant's allegations when the complainant chooses to file a formal complaint, and a recipient *may* choose to initiate a grievance process to investigate the complainant's allegations even when the complainant chooses not to file a formal complaint, if the Title IX Coordinator signs a formal complaint, after having considered the complainant's wishes and evaluated whether an investigation is not clearly unreasonable in light of the specific circumstances. A recipient, however, cannot impose any disciplinary sanctions or other actions that are not supportive measures against a respondent until after the recipient follows a grievance process that complies with § 106.45. The recipient's Title IX Coordinator may always sign a formal complaint, as defined in § 106.30, to initiate an investigation. The formal complaint triggers the grievance process in § 106.45, which provides notice to both parties of the investigation and provides them an equal opportunity to participate and respond to the allegations of sexual harassment. These final regulations protect both complainants and respondents from the repercussions of an investigation that they do not know about and cannot participate in, and the complainant as well as the respondent may choose whether to participate in the grievance process.[937]

By eliminating § 106.44(b)(1), the Department makes it clear that recipients will not be able to merely "check boxes" or escape liability just for having a process that appears "on paper" to comply with § 106.45. We appreciate the opportunity to clarify that the Department will evaluate a recipient's compliance with § 106.45 without regard to whether the recipient was

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[937] Section 106.71 (added in the final regulations, prohibiting retaliation against any individual for exercising rights under Title IX, including an individual's right to participate, or to choose not to participate, in a Title IX grievance process). *See* the "Retaliation" section of this preamble for further discussion.

"deliberately indifferent" in failing to comply with those provisions. In other words, the Department may find that the recipient violated any of the requirements in § 106.45, whether or not the recipient believes that failure to comply was "not clearly unreasonable." As explained throughout this preamble, including in the "Role of Due Process in the Grievance Process" section of this preamble, the Department has selected all the provisions of the § 106.45 grievance process as those provisions needed to improve the fairness, reliability, predictability, and legitimacy of Title IX grievance processes, and expects recipients to comply with the entirety of § 106.45. For example, the Department may find that a recipient violated § 106.45(b)(2) if the recipient did not provide the requisite written notice of allegations to both parties, even if the recipient believes that the recipient had a good reason for refusing to send that initial written notice. Similarly, a recipient may violate § 106.45(b)(5)(ii) if the recipient does not provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence as part of the investigation, even if the recipient believes that refusing to do so was not clearly unreasonable.

The Department disagrees that the grievance process prescribed by § 106.45 favors respondents or provides no benefits to complainants. For reasons explained throughout this preamble, including in the "Role of Due Process in the Grievance Process" section and the "General Support and Opposition to the § 106.45 Grievance Process" section of this preamble, the Department believes that the § 106.45 grievance process gives complainants and respondents clear, strong procedural rights and protections that foster a fair process leading to reliable outcomes. For example, a complainant whose allegations of sexual harassment in a formal complaint are dismissed may appeal such a dismissal on specific grounds under § 106.45(b)(8)(i). The grievance process in § 106.45 provides consistency, predictability, and

transparency as to a recipient's obligations and what students can expect when a formal complaint is filed. As many commenters appreciated, under the final regulations, if the complainant decides to file a formal complaint, this will trigger a grievance process that includes the procedural safeguards set forth in § 106.45.

The Department understands commenters' arguments that § 106.44b)(1) does not afford recipients flexibility to select a grievance process that the recipient prefers over the process prescribed in § 106.45. For reasons described in the "Role of Due Process in the Grievance Process" section of this preamble, and in the "General Support and Opposition to the § 106.45 Grievance Process" section of this preamble, the Department believes that the grievance process prescribed by § 106.45 creates a standardized framework for resolving formal complaints of sexual harassment under Title IX while leaving recipients discretion to adopt rules and practices not required under § 106.45.[938] We reiterate that the § 106.45 grievance process applies only to formal complaints alleging sexual harassment as defined in § 106.30, that occurred in the recipient's education program or activity against a person in the United States. These final regulations do not dictate what kind of process a recipient should or must use to resolve allegations of other types of misconduct. Because a recipient's response to Title IX sexual harassment is part of a recipient's obligation to protect every student's Federal civil right to

[938] The revised introductory sentence in § 106.45(b) provides that any provisions, rules, or practices other than those required by § 106.45 that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties. The final regulations grant flexibility to recipients in other respects. The discussion in the "Other Language/Terminology Comments" subsection of the "Section 106.30 Definitions" section of this preamble notes that recipients may decide whether to calculate time frames using calendar days, school days, or other method. *See also* § 106.45(b)(6)(i) (allowing, but not requiring, live hearings to be held virtually through use of technology); § 106.45(b)(5)(vi) (removing the requirement that evidence in the investigation be provided to the parties using a file-sharing platform); § 106.45(b)(7)(i) (giving recipients a choice between using the preponderance of the evidence standard or the clear and convincing evidence standard).

participate in education programs and activities free from sex discrimination a recipient's response is not simply a matter of the recipient's own codes of conduct or policies; a recipient's response is a matter of fulfilling obligations under a Federal civil rights law. The Department has carefully crafted a standardized grievance process for resolving allegations of Title IX sexual harassment so that every student (and employee) receives the benefit of transparent, predictable, consistent resolution of formal complaints that allege sex discrimination in the form of sexual harassment under Title IX.

The Department acknowledges commenters' concerns that recipients do not have the discretion to forgo a formal grievance process in a situation where the recipient determined the allegations were without merit, frivolous, or had already been investigated, but we decline to grant that kind of discretion because the Department believes that, where a complainant chooses to file a formal complaint and initiate a recipient's formal grievance process, that formal complaint should be taken seriously and not prejudged or subjected to cursory or conclusory evaluation by a recipient's administrators. The purpose of the § 106.45 grievance process is to resolve allegations of sexual harassment impartially, without conflicts of interest or bias, and to objectively examine relevant evidence before reaching a determination regarding responsibility. Permitting a recipient to deem allegations meritless or frivolous without following the § 106.45 grievance process would defeat the Department's purpose in providing both parties with a consistent, transparent, fair process, would not increase the reliability of outcomes, and would increase the risk that victims of sexual harassment will not be provided remedies. The Department notes that the final regulations give recipients discretion to offer informal resolution processes to resolve formal complaints (§ 106.45(b)(9)) and permit discretionary dismissal of a

formal complaint (or allegations therein) by a recipient under limited circumstances (§ 106.45(b)(3)(ii)).[939]

We have also considered commenters' suggestion that the Department add a requirement limiting the amount of time a complainant has for filing a formal complaint, but the Department declines to revise the final regulations to include a statute of limitations or similar time limit.[940] However, we have revised § 106.30 defining "formal complaint" to specify that at the time of filing a formal complaint, the complainant must be participating in or attempting to participate in the recipient's education program or activity. In addition, § 106.45(b)(3)(ii) allows a discretionary dismissal of a formal complaint where the complainant wishes to withdraw the formal complaint (if the complainant notifies the Title IX Coordinator, in writing, of this wish), where the respondent is no longer enrolled or employed by the recipient, or where specific circumstances prevent the recipient from meeting the recipient's burden of collecting evidence sufficient to reach a determination regarding responsibility. The length of time elapsed between an incident of alleged sexual harassment, and the filing of a formal complaint, may, in specific circumstances, prevent a recipient from collecting enough evidence to reach a determination, justifying a discretionary dismissal under § 106.45(b)(3)(ii).

Changes: The Department does not include the safe harbor provision regarding the § 106.45 grievance process that was proposed in § 106.44(b)(1) in the NPRM. Section 106.44(b)(1) in the

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[939] *See* the "Dismissal and Consolidation of Formal Complaints" section of this preamble. We note that one of the bases for discretionary dismissal of a formal complaint (or allegations therein) is where specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination. When a formal complaint contains allegations that are precisely the same as allegations the recipient has already investigated and adjudicated, that circumstance could justify the recipient exercising discretion to dismiss those allegations, under § 106.45(b)(3)(ii).
[940] For further discussion, see the "Formal Complaint" subsection of the "Section 106.30 Definitions" section of this preamble.

final regulations retains the mandate to follow a grievance process that complies with § 106.45 in response to a formal complaint, and adds a mandate that the recipient must comply with § 106.44(a) with or without a formal complaint.

Proposed § 106.44(b)(2) Reports by Multiple Complainants of Conduct by Same Respondent [removed in final regulations]

Comments: A number of commenters expressed opposition to proposed § 106.44(b)(2), which would have required Title IX Coordinators to file a formal complaint upon receiving reports from multiple complainants that a respondent engaged in conduct that could constitute sexual harassment. Commenters opposed this proposed provision due to concerns that the provision could place the safety of victims at risk by requiring a grievance process against a respondent over the wishes of the complainant and could place victims in harm's way without the victim's knowledge or input because nothing in the proposed provision required the Title IX Coordinator to first alert or warn the victim that the Title IX Coordinator would file a formal complaint. Commenters argued that this proposed provision implied that Title IX Coordinators could not file a formal complaint unless a respondent was a repeat offender.

A number of commenters expressed concern that the proposed provision would pose a particular risk in cases dealing with dating violence, domestic violence, or stalking. Commenters argued that survivors often choose not to report intimate partner violence or stalking to authorities for a multitude of reasons, one of which is fear that the perpetrator will retaliate or escalate the violence.

A number of commenters expressed concern that the mandatory filing requirement in proposed § 106.44(b)(2) would violate survivor autonomy. Commenters argued that the proposed provision would violate autonomy principles embedded elsewhere in the proposed

rules. Commenters argued the Department's contradictory statements regarding the importance of survivor autonomy were arbitrary and capricious. Commenters argued that requiring schools to trigger formal grievance procedures when the school has received multiple reports of harassment by the same perpetrator would violate survivor autonomy and discourage reporting. One commenter asserted that the proposed provision would retraumatize victims by forcing an investigation when no victim wants to testify against the perpetrator. One commenter asserted that this provision would exacerbate survivors' feelings of powerlessness. Commenters asserted that students should be able to discuss a situation without the Title IX office initiating a formal process without the complainant's permission. Commenters stated that sometimes a student may want advice, or want supportive measures, without desiring a formal process.

A number of commenters expressed concern that requiring Title IX Coordinators to file formal complaints against the wishes of complainants will lead to violations of confidentiality of survivors who already do not want to come forward, and may not come forward at all if there is a risk that the school will violate their wishes by investigating. Commenters argued that victims who report but do not wish to pursue a formal complaint would be forced into potentially dangerous situations unknowingly, since nothing in the proposed rules imposed a duty on the institution to offer safety measures or accommodations. Other commenters asserted that litigation arising out of Title IX proceedings is common, and that requiring a recipient to pursue a grievance proceeding against a respondent invites the respondent to then name the complainant as a party to subsequent litigation even when the complainant did not want to initiate an investigation in the first place.

A number of commenters expressed concern that deeming the Title IX Coordinator as a complainant (by requiring them to file a formal complaint) creates a significant conflict of

interest by placing the Title IX Coordinator in an adversarial position against the respondent. Other commenters argued that asking the Title IX Coordinator to sign and file a formal complaint in cases where complainants are unwilling to participate would make it impossible for the Title IX Coordinator to maintain the appearance of neutrality, even if they are in fact unbiased in all other ways. Other commenters expressed concern that if the person who reported the incident is reluctant to come forward, it would place the Title IX Coordinator, who should be an impartial resource, into a role of advocating for a specific person's report.

A number of commenters argued that the proposed provision would chill reporting of sexual harassment because victims would fear being drawn involuntarily into a formal process. Commenters suggested that, if institutions file formal complaints without the willing, informed participation of the victim, some requirements, including the cross-examination requirement, should be adjusted, to protect victims who did not consent to participate in a grievance process from negative consequences that commenters argued may possibly result from participating in a grievance process, especially a live hearing. Commenters argued that these consequences might include fear of re-traumatization from being cross-examined, questions perceived as invasions of privacy, and lawsuits filed by respondents based on testimony given during a Title IX hearing.

Commenters argued that this provision would depart from best practices for helping victims. Commenters asserted that in order to effectively address sex discrimination, educational institutions must be able to cultivate relationships of trust with community members with regard to reporting systems, and that this proposed provision would mean that recipients would violate the wishes of reporting parties, thereby betraying and violating their trust. Commenters asserted that the ability of a complainant to seek supportive measures without risking public exposure is foundational to creating conditions under which community members are more willing to avail

themselves of institutional support, including formal grievance proceedings. Commenters expressed concern that, in the absence of supportive measures, many survivors cannot keep up with the demands of rigorous schoolwork while dealing with the impacts of trauma, and this proposed provision would leave complainants in a position of never knowing whether the complainant's report of sexual harassment would result in a formal process, because the complainant would have no way of knowing whether another complainant's report would trigger proposed § 106.44(b)(2).

Commenters expressed concern that proposed § 106.44(b)(2) would conflict with or be in tension with the requirement in § 106.45(b)(6)(i) that schools disregard statements provided by witnesses or parties who do not submit to cross-examination at a hearing, because if alleged victims are unwilling to participate in the process and be subject to cross-examination, then the adjudicator is not permitted to consider the complainant's statements, rendering the filing of a formal complaint by a Title IX Coordinator potentially futile. Commenters argued that there was a conflict between proposed § 106.44(b)(2) and the proposed requirement in § 106.45(b)(3) that a recipient must dismiss a complaint if the alleged harassment did not occur within the recipient's education program or activity; commenters questioned how the recipient should respond when multiple reports are made against the same respondent, but one or more of the reported incidents did not take place within the education program or activity of the school and suggested that to solve this conflict, recipients should make a good faith investigation into all reports of sexual harassment, regardless of the location of the incident, when one or more parties involved in the report are under the "purview" of the recipient.

A number of commenters argued that proposed § 106.44(b)(2) would not meet its stated goal of protecting students because the provision would not be limited only to stopping serial

predators. Commenters argued that the proposed provision would incentivize schools to bring weak cases against serial perpetrators that may allow the predators to escape responsibility. Commenters expressed concern if schools are forced to move forward without the participation of complainants in every case where there are multiple reports of sexual harassment against the same respondent, then this may lead to dismissals or inaccurate findings of non-responsibility. Other commenters expressed concern that this proposed provision was designed to help recipients, not protect victims. Commenters argued the proposed provision was a designed-to-fail framework that would protect a recipient from a claim by another victim who is attacked by the same perpetrator, since all the recipient would be required to do is show that it made a *pro forma* attempt to comply with its obligations, to qualify for the safe harbor. Other commenters expressed concern that a recipient impermissibly motivated by sex stereotypes could exploit this proposed provision to engage in discriminatory practices that would otherwise constitute a violation of Title IX.

Commenters argued that this proposed provision could put a recipient in the untenable situation of being required to apply the formal grievance processes to a situation the recipient does not believe it can adequately investigate or that the recipient reasonably believes can be addressed through other appropriate means. A number of commenters expressed concern that this proposed provision would remove the Title IX Coordinator's discretion; commenters asserted that instead, Title IX Coordinators should evaluate what the appropriate response is, whether it be a formal investigation or putting the respondent on notice of the behavior complained about. Commenters argued that, consistent with the 2001 Guidance, recipients should continue to have discretion in determining whether or how to address multiple reports

involving a single respondent in cases where complainants wish to remain anonymous or for other reasons are unwilling to participate in formal proceedings.

A number of commenters argued that proposed § 106.44(b)(2) would alter and harm the valuable function of the Title IX Coordinator. Other commenters expressed concern that this proposed provision would complicate the role of the Title IX Coordinator because if the Title IX Coordinator receives a report from a resident advisor or faculty member (rather than from the victim themselves), and then subsequently receives a report from a victim alleging a similar incident involving the same perpetrator, the Title IX Coordinator might be confused about whether or not the proposed provision requires the Title IX Coordinator to file a formal complaint.

One commenter asserted that proposed § 106.44(b)(2) would put schools at risk for liability for monetary damages in private Title IX lawsuits, as well as other State tort actions.

Commenters asserted that sometimes a third party reports an alleged sexual harassment situation, but the alleged victim insists that there was no violation and in cases like that, the recipient should be required to make a report that is not attached to either party's transcript, but that can be referenced if the alleged victim later wishes to file a formal complaint.

Discussion: Despite the intended benefits of proposed § 106.44(b)(2) described in the NPRM, the Department is persuaded by the many commenters who expressed a variety of concerns about requiring the Title IX Coordinator to file a formal complaint after receiving multiple reports about the same respondent. In addition to raising serious concerns about the potential effects on complainants, commenters also described practical problems with proposed § 106.44(b)(2) in

relation to the rest of the final regulations. As a result, the Department is removing proposed § 106.44(b)(2) entirely.[941]

The Department is persuaded by commenters who argued that this proposed provision would have removed the Title IX Coordinator's discretion without necessary or sufficient reason to do so. The Department agrees that the Title IX Coordinator should have the flexibility to evaluate and determine an appropriate response under pertinent facts and circumstances. The Department agrees with commenters who argued that institutions should continue to have discretion in determining whether or how to address multiple reports involving a single respondent in cases where complainants wish to remain anonymous or otherwise are unwilling to participate in a formal process. Removing this proposed provision means that Title IX Coordinators retain discretion, but are not required, to sign formal complaints after receiving multiple reports of potential sexual harassment against the same respondent. We believe that this approach properly balances complainant autonomy, campus safety, and recipients' use of resources that would otherwise be required to be used to institute a potentially futile grievance process. The Department was persuaded by commenters' concerns that under the proposed rules, filing a formal complaint might have resulted in a Title IX Coordinator becoming a "complainant" during the grievance process, or creating a conflict of interest or lack of neutrality. We have revised the definitions of "complainant" and "formal complaint" in § 106.30 to clarify that when a Title IX Coordinator chooses to sign a formal complaint, that action is not taken "on behalf of" the complainant; the "complainant" is the person who is alleged to be the

[941] The section number, 106.44(b)(2), now refers to the provision discussed in the "Section 106.44(b)(2) OCR Will Not Re-weigh the Evidence" subsection of the "Recipient's Response in Specific Circumstances" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble.

victim of conduct that could constitute sexual harassment. Those revisions further clarify that when a Title IX Coordinator signs a formal complaint, the Title IX Coordinator does not become a complainant or otherwise a party to the grievance process, and must abide by § 106.45(b)(1)(iii), which requires Title IX personnel to be free from conflicts of interest and bias, and serve impartially. We do not believe that signing a formal complaint that initiates a grievance process inherently creates a conflict of interest between the Title IX Coordinator and the respondent; in such a situation, the Title IX Coordinator is not advocating for or against the complainant or respondent, and is not subscribing to the truth of the allegations, but is rather instituting a grievance process (on behalf of the recipient, not on behalf of the complainant) based on reported sexual harassment so that the recipient may factually determine, through a fair and impartial grievance process, whether or not sexual harassment occurred in the recipient's education program or activity.

The Department is persuaded by commenters' concerns that the proposed provision would have created tension with § 106.45(b)(6)(i), which mandates that if a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility. The Department is persuaded by commenters' arguments that the proposed provision would have incentivized or forced recipients to file futile complaints against respondents with no complaining witness willing to testify at a live hearing. Whether or not proposed § 106.44(b)(2) would have conflicted with § 106.45(b)(3), the proposed provision § 106.44(b)(2) has been removed from the final regulations, and we have revised § 106.45(b)(3) to clarify that a recipient may choose to address allegations of sexual harassment that occurred outside the recipient's education program or activity, through non-Title IX codes of conduct. Where a complainant does

not wish to participate in a grievance process, including being cross-examined at a live hearing, the recipient is not permitted to threaten, coerce, intimidate, or discriminate against the complainant in an attempt to secure the complainant's participation.[942] Thus, even if a Title IX Coordinator has signed a formal complaint, the complainant is not obligated to participate in the ensuing grievance process and need not appear at a live hearing or be cross-examined. We have added § 106.71 prohibiting retaliation and expressly protecting any person's right *not* to participate in a Title IX proceeding.

The Department is also persuaded that a chilling effect on victim reporting can be avoided by eliminating this proposed provision. The Department is persuaded by commenters' concerns that complainants who are unwilling to file a formal complaint should be able to confidentially seek supportive measures without fear of being drawn into a formal complaint process whenever the Title IX Coordinator receives a second report from another complainant about the same respondent. The Department is persuaded by commenters' arguments that students should be able to discuss a situation with a Title IX Coordinator without the Title IX Coordinator being required to initiate a grievance process against the complainant's wishes, and by commenters' assertions that it is not uncommon for respondents filing private lawsuits against the recipient to include the complainant as a party to such lawsuits, so dragging a complainant into a grievance process against the complainant's wishes exposes the complainant to potential involvement in private litigation as well.

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[942] Section 106.71(a).

The Department appreciates commenters' suggestions for specific changes and clarifications to proposed § 106.44(b)(2); however, there is no need to consider such changes or clarifications because we are removing this proposed provision from the final regulations.

Changes: The Department has not included proposed § 106.44(b)(2) in the final regulations.

Comments: Some commenters expressed support for proposed § 106.44(b)(2), asserting that it would be valuable for the protection of sexual assault victims on university campuses. Other commenters argued that it is common sense for the Title IX Coordinator to be able to file complaints against bad actors. Some commenters argued that the provision would improve the responsiveness of university Title IX Coordinators to sexual assault or harassment allegations at institutions around the country. Other commenters supported this proposed provision so that Title IX Coordinators would file a complaint against repeat sexual offenders even when no victim was willing to file a formal complaint because this would protect a complainant's confidentiality.

Discussion: For the reasons discussed above, the Department is persuaded that eliminating proposed § 106.44(b)(2) better serves the Department's goals of ensuring that recipients respond adequately to reports of sexual harassment without infringing on complainant autonomy. Elimination of this proposed provision leaves Title IX Coordinators discretion to sign a formal complaint initiating a grievance process, when doing so is not clearly unreasonable in light of the known circumstances, without mandating such a response every time multiple reports against a respondent are received. We note that contrary to some commenters' belief, the proposed provision would not have protected complainants' confidentiality by requiring Title IX Coordinators to file formal complaints, because the recipient would still have been required

under § 106.45(b)(2) to send written notice of the allegations to both parties, and the written notice must include the complainant's identity, if known.

Changes: The Department has not included proposed § 106.44(b)(2) in the final regulations.

Comments: Some commenters suggested expanding or modifying proposed § 106.44(b)(2), for example by specifying factors to consider as to whether a pattern of behavior might present a potential threat to the recipient's community. Some commenters suggested specifying that a formal complaint must be filed where threats, serial predation, violence, or weapons were allegedly involved.

Commenters recommended adding a credibility threshold to proposed § 106.44(b)(2) specifying that a Title IX Coordinator would only be required to file a formal complaint upon receiving multiple *credible* reports against the same respondent, so that the Title IX Coordinator would not need to file a formal complaint where reports appeared frivolous or unfounded.

Commenters suggested that the Department adopt the model used by Harvard Law School for its Title IX compliance, which as described by commenters provides that (1) that there be a complainant willing to participate before the recipient will initiate a formal investigation and (2) the only time an action should be pursued without a willing complainant is if there is a serious risk to campus-wide safety and security. Several commenters suggested that, in instances where there are reports by multiple complainants but none are willing to participate in the proceedings, the Department could ensure accountability by requiring the recipient to document its reason for not initiating a formal complaint rather than requiring the recipient to file a formal complaint in every such situation.

Discussion: The Department appreciates commenters' suggestions for specific changes to proposed § 106.44(b)(2); however, we decline to make such changes because we are removing

this proposed provision from the final regulations for the reasons described above. The Department declines to adopt in these final regulations the suggestion that patterns of behavior be considered as a factor to determine whether possible future threats to the community warrant filing a formal complaint even where a complainant does not wish to file; however, as discussed above, elimination of proposed § 106.44(b)(2) leaves the Title IX Coordinator discretion to sign a formal complaint where doing so is not clearly unreasonable in light of the known circumstances. The Title IX Coordinator may consider a variety of factors, including a pattern of alleged misconduct by a particular respondent, in deciding whether to sign a formal complaint. By giving the recipient's Title IX Coordinator the discretion to sign a formal complaint in light of the specific facts and circumstances, the Department believes it has reached the appropriate balance between campus safety, survivor autonomy, and respect for the most efficient use of recipients' resources. We also note that under the final regulations, including revised § 106.44(a), a Title IX Coordinator's decision to sign a formal complaint may occur only after the Title IX Coordinator has promptly contacted the complainant (i.e., the person alleged to have been victimized by sexual harassment) to discuss availability of supportive measures, consider the complainant's wishes with respect to supportive measures, and explain to the complainant the process for filing a formal complaint. Thus, the Title IX Coordinator's decision to sign a formal complaint includes taking into account the complainant's wishes regarding how the recipient should respond to the complainant's allegations.

The Department disagrees with the suggestion to expand the proposed provision to cover other circumstances such as alleged use of threats, violence, or weapons, because we are persuaded by commenters that leaving the Title IX Coordinator discretion to sign a formal complaint is preferable to mandating circumstances under which a Title IX Coordinator must

sign a formal complaint. The final regulations give the Title IX Coordinator discretion to sign a formal complaint, and the Title IX Coordinator may take circumstances into account such as whether a complainant's allegations involved violence, use of weapons, or similar factors. The Department eliminated proposed § 106.44(b)(2) in part due to concerns expressed by commenters about survivor autonomy and safety; in some situations, the Title IX Coordinator may believe that signing a formal complaint is not in the best interest of the complainant and is not otherwise necessary for the recipient to respond in a non-deliberately indifferent manner. With the elimination of this provision, however, the Title IX Coordinator still possesses the discretion to sign formal complaints in situations involving threats, serial predation, violence, or weapons. Even in the absence of a formal complaint being filed, a recipient has authority under § 106.44(c) to order emergency removal of a respondent where the situation arising from sexual harassment allegations presents a risk to the physical health or safety of any person. Nothing in the final regulations prevents recipients, Title IX Coordinators, or complainants from contacting law enforcement to address imminent safety concerns.

Because the final regulations do not include this proposed provision, the Department does not further consider the commenter's suggestion to revise the eliminated provision by adding the word "credible" before "reports." As discussed previously, the Department has removed this provision to respect complainant autonomy and avoid chilling reporting by mandating that a Title IX Coordinator sign a formal complaint over a complainant's wishes; the commenter's suggestion for modifying this proposed § 106.44(b)(2) would not change the Department's belief that the proposed provision should be removed in its entirety, because narrowing the circumstances under which the Title IX Coordinator would be required to sign a formal complaint over the complainant's wishes would not address the concerns raised by many

commenters that persuaded the Department of the need to respect survivor autonomy by giving a Title IX Coordinator discretion (without making it mandatory) to sign a formal complaint. The Department further notes that one of the purposes of the § 106.45 grievance process is to ensure that determinations are reached only after objective evaluation of relevant evidence by impartial decision-makers, and therefore permitting or requiring a Title IX Coordinator to only respond to reports or formal complaints that the Title IX Coordinator deems "credible" would defeat the goal of following a grievance process to reach reliable outcomes. Similarly, the commenter's suggestion to require the recipient to document its reason for not initiating a formal complaint following reports by multiple complainants does not alter the Department's conclusion that the better way to respect survivor autonomy and the discretion of a Title IX Coordinator is to remove proposed § 106.44(b)(2) from the final regulations, so that a Title IX Coordinator retains the discretion to sign a formal complaint, but is not mandated to do so. We note that § 106.45(b)(10) does require a recipient to document the reasons for its conclusion that its response to any reported sexual harassment was not deliberately indifferent.

The Department declines to adopt the Harvard Law School model because we believe the final regulations provide the same or similar benefits with respect to requiring a grievance process only where a formal complaint has been filed by a complainant or signed by a Title IX Coordinator. For reasons discussed in the "Formal Complaint" subsection of the "Section 106.30 Definitions" section of this preamble, third parties are not allowed to file formal complaints.

Changes: None.

Proposed § 106.44(b)(3) Supportive Measures Safe Harbor in Absence of a Formal Complaint [removed in final regulations]

Comments: Many commenters appreciated that the proposed safe harbor regarding supportive measures would provide an incentive for institutions to offer supportive measures for both parties. Several commenters recounted personal stories of accused individuals being removed from classes and dorms before a determination had been made about pending allegations. Many commenters supported § 106.44(b)(2) for not requiring an individual to file a formal complaint in order to obtain supportive measures and for expressly including the requirement that, when offering supportive measures, recipients must notify a complainant of the right to file a formal complaint at a later date if they wish. Many commenters asserted that often, supportive measures are sufficient for both parties to deal with a situation without causing additional trauma to either party.

Some commenters expressed concern that the proposed safe harbor regarding supportive measures would effectively relieve institutions of the responsibility to hold respondents accountable and address sexual harassment on campuses. Many commenters argued that offering "meager" supportive measures to a student in lieu of investigating allegations would not satisfy a recipient's obligations under Title IX and asked the Department to clarify that the provision of supportive measures is not always adequate to satisfy the deliberate indifference standard.

Many commenters argued that the proposed safe harbor regarding supportive measures actually created a barrier to providing supportive measures for elementary and secondary school victims because the provision applied only to institutions of higher education, and asked the Department to modify the proposed rules to extend this supportive measures safe harbor to the elementary and secondary school context either by creating a separate safe harbor with nearly

identical language or by deleting the phrase "for institutions of higher education" in the proposed regulatory text. One commenter asserted that § 106.44(b)(3) is redundant because it merely repeats the standard of § 106.44(a). One commenter argued that, when combined with the Department's proposed definition of sexual harassment, this proposed provision would create a safe harbor for educational institutions to avoid liability.

Other commenters suggested that the Department modify the proposed safe harbor regarding supportive measures to expressly prohibit institutions from coercing a complainant into accepting supportive measures in lieu of filing a formal complaint. At least one commenter suggested adding an outer time limit to a party's right to file a formal complaint "at a later time," asserting that this proposed provision was inconsistent with the recordkeeping requirement in the proposed regulations, which would have allowed a record to be destroyed in three years (this retention period has been revised to seven years in § 106.45(b)(10) of the final regulations).

Discussion: As explained in the "Section 106.44(b) Proposed 'Safe harbors,' generally," subsection of the "Recipient's Response in Specific Circumstances" section of this preamble, these final regulations do not include the safe harbor provision that a recipient is not deliberately indifferent when in the absence of a formal complaint the recipient offers and implements supportive measures designed to effectively restore or preserve the complainant's access to the recipient's education program or activity, and the recipient also informs the complainant in writing of the right to file a formal complaint. This safe harbor is now unworkable and unnecessary in light of other revisions made to the proposed regulations, specifically a recipient's obligations in § 106.44(a) and § 106.45(b)(10)(ii). Under § 106.44(a), a recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30, and a Title IX Coordinator must promptly contact the complainant to

discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. As previously explained, § 106.45(b)(1) now contains an additional mandate that with or without a formal complaint, a recipient must comply with § 106.44(a), which places recipients on notice that it must offer supportive measures to a complainant. Additionally, under § 106.45(b)(10)(ii), if a recipient does not provide a complainant with supportive measures, then the recipient must document why such a response was not clearly unreasonable in light of the known circumstances. As recipients are now required to offer supportive measures to a complainant and to document why not providing a complainant with supportive measures was not clearly unreasonable in light of the known circumstances, the final regulations no longer provides a safe harbor. Recipients cannot receive a safe harbor for offering supportive measures because recipients are now required to offer supportive measures under these final regulations. Accordingly, the Department does not include the proposed safe harbor regarding supportive measures in these final regulations.

With respect to concerns that respondents may suffer disciplinary sanctions or punitive action stemming from pending allegations, the Department notes that § 106.44(a) expressly provides that a recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Additionally, supportive measures in § 106.30 are expressly defined as non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available,

and without fee or charge to the complainant or the respondent. Supportive measures must not have a punitive or disciplinary consequence for either complainants or respondents.

Even without the proposed safe harbor provision regarding supportive measures, the Department believes that these final regulations appropriately draw recipients' attention to the importance of offering supportive measures to all students, including students who do not wish to initiate a recipient's formal grievance process, and thus give complainants greater autonomy to decide if supportive measures, alone, represent the kind of school-level response that will best help the complainant heal after any trauma. The Department in part requires a recipient to offer supportive measures to all complainants under § 106.44(a) because the Department recognizes that, in many cases, a complainant's equal access to education can be effectively restored or preserved through the school's provision of supportive measures. Accordingly, the Department provides an additional mandate in § 106.44(b)(1), that with or without a formal complaint, a recipient must comply with § 106.44(a) (e.g., by offering the complainant supportive measures).

We are persuaded by commenters' assertions that providing supportive measures to a complainant does not always satisfy a recipient's obligation to respond in a non-deliberately indifferent manner to known sexual harassment. In some circumstances and depending on the unique facts, a non-deliberately indifferent response may require the recipient's Title IX Coordinator to sign a formal complaint as defined in § 106.30 so that the recipient initiates the grievance process in § 106.45. The Department acknowledges that a recipient should respect the complainant's autonomy and wishes with respect to a formal complaint and grievance process to the extent possible.

As the proposed safe harbor regarding supportive measures is no longer included in these final regulations, we do not revisit whether excluding elementary and secondary school

recipients from this safe harbor was preferable to modifying the proposed safe harbor to also apply to elementary and secondary schools. Revised § 106.44(a) requires every recipient (including elementary and secondary schools) to offer supportive measures to complainants.

The Department understands the concern that a recipient may coerce potential complainants into accepting supportive measures in lieu of a formal grievance process. Partly in response to these concerns, the Department revised § 106.44(a) to require that a Title IX Coordinator promptly contact a complainant not only to discuss supportive measures but also to explain to the complainant the process for filing a formal complaint. Accordingly, a complainant will know how to file a formal complaint, if the complainant wishes to do so. We have also added § 106.71 to expressly forbid a recipient from threatening, intimidating, coercing, or discriminating against any complainant for the purpose of chilling the complainant's exercise of any rights under Title IX, which includes the right to file a formal complaint, and to receive supportive measures even if the complainant chooses not to file a formal complaint.

The Department agrees that the safe harbor, as proposed, is redundant, especially in light of the revisions to § 106.44(a), requiring a recipient to offer supportive measures to a complainant. As this safe harbor is not included in these final regulations, this safe harbor does not provide a way for a recipient to avoid responsibility.

For reasons discussed above, the Department declines to revise the final regulations to include a statute of limitations or similar time limit on filing a formal complaint but as discussed in the "Formal Complaint" subsection of the "Section 106.30 Definitions" section of this preamble, the Department has revised the final regulations to provide that at the time of filing a formal complaint, the complainant must be participating in or attempting to participate in the recipient's education program or activity. This provides a reasonable condition on a

complainant's ability to require a recipient to investigate, based on the complainant's connection to the recipient's education program or activity rather than by imposing a statute of limitations or similar time-based deadline. A complainant may be "attempting to participate" in the recipient's education program or activity in a broad variety of circumstances that do not depend on a complainant being, for instance, enrolled as a student or employed as an employee. A complainant may be "attempting to participate," for example, where the complainant has withdrawn from the school due to alleged sexual harassment and expresses a desire to re-enroll if the recipient responds appropriately to the sexual harassment allegations, or if the complainant has graduated but would like to participate in alumni events at the school, or if the complainant is on a leave of absence to seek counseling to recover from trauma. In addition, the Department has also revised the final regulations to provide in § 106.45(b)(3)(ii) that a recipient has the discretion to dismiss a formal complaint against a respondent who is no longer enrolled or employed by the recipient. While these provisions are not an express limit on the amount of time a complainant has to file a formal complaint, the Department believes these provisions help address commenters' concerns about being forced to expend resources investigating situations where one or both parties have no affiliation with the recipient, without arbitrarily or unreasonably imposing a deadline on complainants, in recognition that complainants sometimes do not report or desire to pursue a formal process in the immediate aftermath of a sexual harassment incident.

Changes: The Department does not include the safe harbor provision proposed in the NPRM as § 106.44(b)(3). The Department adds a mandate to § 106.44(b)(1) that the recipient must comply with § 106.44(a), with or without a formal complaint.

Section 106.44(b)(2) OCR Will Not Re-weigh the Evidence

Comments: Some commenters appreciated that the proposed rules contained an express guarantee that an institution will not be deemed deliberately indifferent solely because the Assistant Secretary would have reached a different determination regarding responsibility based on an independent weighing of the evidence. Some commenters expressed concerns that § 106.44(b)(2) would result in a lack of accountability or oversight for how schools or colleges handle sexual harassment complaints. Other commenters contended that this provision would unjustifiably reduce the Department's oversight unless a school's actions are clearly unreasonable. Some commenters asserted that the provision would improperly defer to a school district's determination, which commenters argued is not always the appropriate way to ensure Title IX accountability. A number of commenters felt that § 106.44(b)(2) would spur more civil lawsuits to hold schools accountable, because the Department would no longer be holding schools accountable.

Several commenters argued that the proposed provision would negatively impact OCR's ability to investigate non-compliance under Title IX, which would dangerously lower the bar of compliance and signal that a bare, minimal response to sexual harassment would suffice. Other commenters warned that the provision would limit OCR's ability to evaluate a school's response to sexual harassment, which would effectively narrow over 20 years of Title IX enforcement standards. Several commenters expressed their belief that OCR plays a key role as an independent, impartial investigator. For example, one commenter argued that OCR, as an independent entity, is more qualified than a school to perform an impartial investigation because the school has its own financial interests at stake and is thus less likely to identify inaccuracies in its own procedures. Another commenter asserted that OCR's independent weighing of evidence

is a relevant factor because it may allow OCR to identify patterns or practices of shielding respondents or favoring complainants; the commenter argued that OCR should, after a thorough investigation, have discretion to decide if a school's determination regarding responsibility was discriminatory.

Some commenters expressed concern that proposed § 106.44(b)(2) was one-sided in a way that favored only respondents, because the language in the proposed provision would give deference to the school's determinations only where a respondent has been found not responsible. Commenters argued that as proposed, § 106.44(b)(2) would require OCR investigators to close investigations even if OCR found gross or malicious procedural violations affecting the determination reached by the school, as long as the school had determined the respondent to be not responsible. Another commenter expressed concern that a deferential procedural review by OCR may incentivize schools to find in favor of respondents so as to avoid OCR scrutiny; commenters argued that this would be perceived as biased against complainants, may chill reporting of sexual harassment at the school level, and would discourage complainants from filing OCR complaints alleging procedural defects that led to erroneous findings of non-responsibility.

Another commenter asserted that proposed § 106.44(b)(2) was inconsistent with Equal Employment Opportunity Commission (EEOC) practices with respect to employee sexual harassment claims; the commenter stated that the EEOC never defers to an employer's conclusion but conducts its own investigation and makes an independent assessment of the facts so that employers do not avoid liability merely by conducting exculpatory internal investigations. The commenter also asserted that applying § 106.44(b)(2) to employee sexual harassment claims would conflict with U.S. Department of Justice equal employment opportunity coordination

regulations' requirement that a referring agency must give due weight to an EEOC determination of reasonable cause to believe that Title VII has been violated,[943] which OCR could not give if it instead gave conclusive weight to a recipient's contrary factual determination.

Conversely, some commenters expressed support for § 106.44(b)(2). Commenters asserted that this provision, combined with other provisions in the proposed rules, would assist colleges and universities in ensuring an impartial, transparent, and fair process for both complainants and respondents, while also providing institutions flexibility reflecting their unique attributes (e.g., size, student population, location, mission). Several commenters expressed support for OCR not "second guessing" a school's response to incidents of sexual harassment. One commenter asserted that the provision was reasonable because OCR should not intrude into a school's decision making based on OCR's own weighing of the evidence.

One commenter expressed confusion as to whether OCR would defer to schools' determinations about sex discrimination not involving sexual harassment, or in instances when a person who filed a complaint with a recipient could have filed directly with OCR. Another commenter suggested clarifying that further scrutiny by OCR is not barred by this provision and may be called for if a responsibility determination seems to hold little basis.

Discussion: We appreciate commenters' concerns about, and support of, § 106.44(b)(2). The intent of this provision is to convey that the Department will not overturn the outcome of a Title IX grievance process solely based on whether the Department might have weighed the evidence in the case differently from how the recipient's decision-maker weighed the evidence.

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[943] 28 CFR 42.610(a).

This provision does not limit OCR's ability to evaluate a school's response to sexual harassment, and it does not narrow Title IX enforcement standards; OCR retains its full ability, and responsibility, to oversee recipients' adherence to the requirements of Title IX, including requirements imposed under these final regulations. The Department agrees with commenters who stated that OCR has special qualifications that enable OCR to perform independent, impartial investigations into whether recipients have violated Title IX and Title IX regulations. The Department will continue to vigorously enforce recipients' Title IX obligations.[944] The Department believes that the § 106.45 grievance process prescribes fair procedures likely to result in reliable outcomes; however, when a recipient does not comply with the requirements of § 106.45, nothing in § 106.44(b)(2) precludes the Department from holding the recipient accountable for violating these final regulations. Refraining from second guessing the determination reached by a recipient's decision-maker solely because the evidence could have been weighed differently does not prevent OCR from identifying and correcting any violations the recipient may have committed during the Title IX grievance process. The deference given to the recipient's determination regarding responsibility in § 106.44(b)(2) does not preclude OCR from overturning a determination regarding responsibility where setting aside the recipient's determination is necessary to remedy a recipient's violations of these final regulations. Rather, § 106.44(b)(2) promotes finality for parties and recipients by stating that OCR will not overturn determinations just because OCR would have weighed the evidence in the case differently. To clarify this point, we have revised § 106.44(b)(2) to use the phrase "solely because" instead of

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[944] *See* further discussion in the "Section 106.3(a) Remedial Action" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble, regarding remedies the Department may pursue in administrative enforcement actions against recipients.

"merely because." Nothing about § 106.44(b)(2) prevents OCR from taking into account the determination regarding responsibility as *one of* the factors OCR considers in deciding whether a recipient has complied with these final regulations, and whether any violations of these final regulations may require setting aside the determination regarding responsibility in order to remediate a recipient's violations.

If a recipient has not complied with any provision of the final regulations, nothing in § 106.44(b)(2) prevents OCR from holding the recipient accountable for non-compliance. The intent of the provision is to assure recipients that because the § 106.45 grievance process contains robust procedural and substantive requirements designed to produce reliable outcomes, OCR will not substitute its judgment for that of the recipient's decision-maker with respect to weighing the relevant evidence at issue in a particular case.

We believe that this limited deference also serves the interests of complainants and respondents in resolving sexual harassment allegations, by limiting the circumstances under which a "final" determination reached by the recipient may be subject to being setting aside and requiring the parties to go through a grievance process for a second time. As an example, if a decision-maker evaluates the relevant evidence in a case and judges one witness to be more credible than another witness, or finds one item of relevant evidence to be more persuasive than another item of relevant evidence, § 106.44(b)(2) provides that OCR will not set aside the determination regarding responsibility solely because OCR would have found the other witness more credible or the other item of evidence more persuasive. It does not mean that OCR would refrain from holding the recipient accountable for violations of the decision-maker's obligations, for instance to avoid basing credibility determinations on a party's status as a complainant,

respondent, or witness.[945] This provision does not meant that OCR would refrain from, for instance, independently determining that evidence deemed relevant by the decision-maker was in fact irrelevant and should not have been relied upon.[946] Violations of these final regulations may indeed result in a recipient's determination regarding responsibility being set aside by OCR, but determinations will not be overturned "solely" because OCR would have weighed the evidence differently.

Some commenters understood this provision to work in a one-sided way, giving recipients' determinations regarding responsibility deference only where a respondent has been found not responsible; one commenter reached this conclusion based on the provision's reference to "deliberate indifference" which is a theory usually only raised by complainants challenging the sufficiency of a recipient's response to sexual harassment. The Department appreciates these commenters' concerns; we intend this provision to apply equally to all outcomes, regardless of whether the determination found a respondent responsible or not responsible. For this reason, the provision uses the phrase "determination *regarding* responsibility" (emphasis added) and not determination *of* responsibility.[947] However, to clarify that this provision applies to all determinations of the outcome of a Title IX grievance process regardless of whether the respondent was found responsible or not responsible, we have revised § 106.44(b)(2) by adding "or otherwise evidence of discrimination under title IX by the recipient" so that the reference in

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[945] Section 106.45(b)(1)(ii).
[946] *E.g.,* § 106.45(b)(6) (deeming questions and evidence about a complainant's prior sexual history to be irrelevant, with limited exceptions); § 106.45(b)(1)(x) (barring use of privileged information in the grievance process).
[947] We use the phrase "determination *of* responsibility" (emphasis added) to describe a finding that the respondent is responsible for perpetrating sexual harassment, and "determination *regarding* responsibility" to describe a determination irrespective of whether that determination has found the respondent responsible, or not responsible. *E.g., compare* §§ 106.45(b)(1)(i) and 106.45(b)(1)(vi) *with* §§ 106.45(b)(1)(iv), 106.45(b)(2), 106.45(b)(5)(i), 106.45(b)(5)(vi)-(vii), 106.45(b)(6) through 106.45(b)(10).

this provision to "deliberate indifference" is not misunderstood to exclude theories of sex discrimination commonly raised by respondents after being found responsible. This additional phrase in § 106.44(b)(2) clarifies that this provision operates neutrally to all determinations regarding responsibility. The Department will not overturn the recipient's finding solely because the Department would have reached a different determination based on an independent weighing of the evidence, irrespective of whether the recipient found in favor of the complainant or the respondent. Whether the recipient found the respondent not responsible (and thus a complainant might allege deliberate indifference) or the recipient found the respondent responsible (and thus a respondent might allege sex discrimination under Title IX on a theory such as selective enforcement or erroneous outcome), this provision would equally apply to give deference to the recipient's determination where the challenge to the determination is solely based on whether the Department might have weighed the evidence differently.

In no manner does this limited deference by the Department restrict the Department's ability to identify patterns or practices of sex discrimination, or to investigate allegations of a recipient committing gross or malicious violations of Title IX or these final regulations. This provision gives a recipient deference *only* as to the decision-maker's weighing of evidence with respect to a determination regarding responsibility. Section 106.44(b)(2) simply clarifies OCR's role and standard of review under these final regulations, by providing that OCR will not conduct *de novo* reviews of determinations absent allegations that the recipient failed in some way to comply with Title IX or these final regulations. The provision is intended to alleviate potential confusion recipients may feel about needing to successfully predict how the Department would make factual determinations "in the shoes" of the recipient's decision-maker.

Indeed, it would be impractical and unhelpful, for all parties, if the Department conducted *de novo* reviews of all recipient determinations. Doing so would contravene the Department's goal of providing consistency, predictability, transparency, and reasonably prompt resolution, in Title IX grievance processes. The Department disagrees that § 106.44(b)(2) "dangerously" lowers the bar of compliance by signaling that recipients need only provide a "bare minimum response" to sexual harassment. The requirements of the final regulations do not constitute a low bar; rather, these final regulations expect – and the Department will hold recipients accountable for – responses to sexual harassment allegations that support complainants and treat both parties fairly by complying with specific, mandatory obligations. For instance, under the final regulations recipients are required to offer supportive measures to every complainant regardless of whether a grievance process is ever initiated.[948] When a recipient does investigate a complainant's sexual harassment allegations, the final regulations prescribe a grievance process that lays out clear, practical steps for processing a formal complaint of Title IX sexual harassment, including requirements that recipients: treat complainants and respondents equitably by providing remedies for complainants when a respondent is found responsible, and a grievance process prior to imposing disciplinary sanctions or other actions that are not supportive measures, against a respondent;[949] objectively evaluate all relevant evidence and give both parties equal opportunity to present witnesses and evidence;[950] not harbor a bias or conflict of interest against either party;[951] and resolve the allegations under designated, reasonably prompt

[948] Section 106.44(a).
[949] Section 106.45(b)(1)(i).
[950] Section 106.45(b)(1)(ii); § 106.45(b)(5)(ii).
[951] Section 106.45(b)(1)(iii).

time frames.[952] The Department will hold recipients accountable to follow these, and all the other, requirements set forth in § 106.45, whether failure to comply affected the complainant, the respondent, or both parties.

The Department does not agree that § 106.44(b)(2) will lead to increased litigation. The final regulations require recipients to protect complainants' equal educational access, while at the same time providing both parties due process protections throughout any grievance process, and § 106.44(b)(2) does not impair the Department's ability to hold recipients accountable for meeting these obligations. The Department does not believe that courts are inclined through private lawsuits to second guess a recipient's determinations regarding responsibility absent allegations that the recipient arrived at a determination due to discrimination, bias, procedural irregularity, deprivation of constitutionally guaranteed due process protections, or other defect that affected the outcome; in other words, the limited deference in § 106.44(b)(2) is no greater than the deference courts generally also give to recipients' determinations.[953] As discussed in the "Litigation Risk" subsection of the "Miscellaneous" section of this preamble, the Department

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

[953] *E.g., Wood v. Strickland*, 420 U.S. 308, 326 (1975), *overruled on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (absent "errors in the exercise of school officials' discretion" that "rise to the level of violations of specific constitutional guarantees" – as would reaching a determination in the complete "absence of evidence" which would be arbitrary and capricious – 42 U.S.C. 1983 "does not extend that right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings"); *Nicholas B. v. Sch. Comm. of Worcester*, 412 Mass. 20, 23-24 (1992) (rejecting a student's claim that the student is "entitled to an independent judicial determination of the facts" concerning the school's finding that the student committed battery") (holding that "In deciding whether the discipline imposed was lawful, no *de novo* judicial fact-finding is required" and rejecting the contention that the State legislature, in enacting the State Civil Rights Act "intended a *de novo* review of the factual determinations of a school committee in an action challenging school discipline") (citing *Wood*, 420 U.S. at 326). The Department's view of restraint from conducting *de novo* review of recipient determinations regarding responsibility is consistent with judicial views recognizing that this type of limited restraint in no way impairs the ability of the courts to effectuate the purposes of Federal and State civil rights statutes. Similarly, § 106.44(b)(2) in no way impairs the Department's ability to effectuate the purposes of Title IX.

believes that these final regulations may have the effect of reducing litigation arising out of recipients' responses to sexual harassment.

These final regulations do not apply to the EEOC and do not dictate how the EEOC will administer Title VII or its implementing regulations. If the Assistant Secretary refers a complaint filed with OCR to the EEOC under Title VII or 28 CFR 42.605, then the EEOC will make a determination under its own regulations and not the Department's regulations. Even if the Department is required to give due weight to the EEOC's determination regarding Title VII under 28 CFR 42.610(a), the Department does not have authority to administer or enforce Title VII. There may be incidents of sexual harassment that implicate both Title VII and Title IX, and this Department will continue to administer Title IX and its implementing regulations and to defer to the EEOC to administer Title VII and its implementing regulations. Nothing in these final regulations precludes the Department from giving due weight to the EEOC's determination regarding Title VII under 28 CFR 42.610(a).[954] The Department recognizes that employers must fulfill their obligations under Title VII and also under Title IX. There is no inherent conflict between Title VII and Title IX, and the Department will construe Title IX and its implementing regulations in a manner to avoid an actual conflict between an employer's obligations under Title VII and Title IX.

The Department wishes to clarify that § 106.44(b)(2) applies only to determinations regarding responsibility reached in a § 106.45 grievance process, which in turn applies only to

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[954] 28 CFR 42.610(c) also states: "If the referring agency determines that the recipient has not violated any applicable civil rights provision(s) which the agency has a responsibility to enforce, the agency shall notify the complainant, the recipient, and the Assistant Attorney General and the Chairman of the EEOC in writing of the basis of that determination." Accordingly, these regulations contemplate that each agency enforces the civil rights provisions that the agency has the responsibility to enforce.

formal complaints (defined in § 106.30 to mean allegations of sexual harassment); the § 106.45 grievance process does not apply to complaints about other types of sex discrimination. Complaints about sex discrimination that is not sexual harassment may be filed with the recipient for processing under the prompt and equitable grievance procedures that recipients must adopt under § 106.8. We appreciate the opportunity to clarify that no regulation or Department practice precludes a person from filing a complaint with OCR, whether or not the person also could have filed, or did file, a complaint with the school.

Changes: Section 106.44(b)(2) is revised to reference not only deliberate indifference but also other sex discrimination under Title IX, and to replace the word "merely" with "solely" in the phrase describing situations in which the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.

Additional Rules Governing Recipients' Responses to Sexual Harassment

Section 106.44(c) Emergency Removal

Overall Support and Opposition to Emergency Removals

Comments: Some commenters believed that § 106.44(c) provides due process protections for respondents while protecting campus safety. Some commenters supported this provision because it allows educational institutions to respond to situations of immediate danger, while protecting respondents from unfair or unnecessary removals. At least one commenter appreciated the latitude granted to educational institutions under § 106.44(c) to determine how to address safety emergencies arising from allegations of sexual harassment. Some commenters asserted that this provision appropriately reflects many schools' existing behavior risk assessment procedures. Several commenters supported § 106.44(c) and recounted personal stories of how a respondent was removed from classes, or from school, and the negative impact the removal had on that

student's professional, academic, or extracurricular life because the removal seemed to presume the "guilt" of the respondent without allegations ever being proved.

Some commenters wanted to omit the emergency removal provision entirely, arguing that if administrators at the postsecondary level have the power to preemptively suspend or expel a student, on the pretext of an emergency, then every sexual misconduct situation could be deemed an emergency and respondents would never receive the due process protections of the § 106.45 grievance process. One commenter suggested that instead of permitting removals, all allegations of sexual harassment should simply go through a more rapid investigation so that the respondent may remain in school and victims are protected, while any falsely accused respondent is quickly exonerated. Some commenters requested that this removal power be limited because of the negative consequences of involuntary removal; one commenter suggested the provision be modified so that the removal must be "narrowly tailored" and "no more extensive than is strictly necessary" to mitigate the health or safety risk. One commenter asserted that this provision should also require that interim emergency removals be based on objective evidence and on current medical knowledge where appropriate, made by a licensed, qualified evaluator.

Some commenters asserted that emergency removals should not be used just because sexual harassment or assault has been alleged, and that § 106.44(c) should more clearly define what counts as an emergency. Some commenters argued that emergency removals should be allowed if the sexual harassment allegation involves rape, but no emergency removal should be allowed if the sexual harassment allegation involves offensive speech.

Commenters argued that § 106.44(c) is unclear as to what constitutes an immediate threat to health or safety. Several commenters argued that emergency removals should be restricted to instances where there is "an immediate threat to safety" (not health), while other commenters

argued this provision must be limited to "physical" threats to health or safety. Commenters argued that a "threat to health or safety" is too nebulous a concept to justify immediate removal from campus. According to one commenter, even speaking on campus in favor of the NPRM could be construed by schools or student activists as a threat to the emotional or mental "health or safety" of survivors, even though discussion of public policy is core political speech protected by the First Amendment.

One commenter stated that the use of the plural "students and employees" in § 106.44(c) may preclude an institution from taking emergency action when the immediate threat is to a *single* student or employee. Commenters argued that postsecondary institutions need the flexibility to address immediate threats to the safety of one student or employee in the same manner as threats to multiple students or employees. Some commenters asserted that § 106.44(c) would unreasonably limit a postsecondary institution's ability to protect persons and property, or to protect against potential disruption of the educational environment, and argued that an institution should have the discretion to invoke an emergency removal under circumstances beyond those listed in § 106.44(c). Commenters argued that § 106.44(c) is too limiting because it does not allow recipients to pursue an emergency removal where the respondent poses a threat of illegal conduct that is not about a health or safety emergency; commenters contended this will subject the complainant or others to ongoing illegal conduct just because it does not constitute a threat to health or safety. Commenters argued that in addition to a health or safety threat, this provision should consider the need to restore or preserve equal access to education as justification for emergency removals. One commenter asserted that a legitimate reason to institute an emergency removal of a respondent is a threat that the respondent may obstruct the collection of relevant information regarding the sexual harassment allegations at issue.

One commenter cited New York Education Law Article 129-B as an example of a detailed framework under which campus officials may conduct an individualized threat assessment, order an interim suspension, and provide due process; commenters asserted that courts hold that the due process required for an interim suspension does not need to consist of a full hearing.[955] Another commenter argued that this provision would constitute an unprecedented Federal preemption of Oregon's existing State and local student discipline rules, which establish the due process requirements for emergency removals from school. Commenters argued that § 106.44(c) would create a higher level of due process for emergency removals in situations that involve alleged sexual harassment than for any other behavioral violation, and that the proposed rules are unclear whether this heightened procedural requirement is triggered only when a complainant alleges sexual harassment as defined in § 106.30, or is also triggered in any case where a complainant alleges sexual harassment that meets a State law definition or school code of conduct that may define sexual harassment more broadly than conduct meeting the § 106.30 definition.

Some commenters suggested that § 106.44(c) be modified to require periodic review of any emergency removal decision, to promote transparency and eliminate the possibility of leaving a respondent on interim suspension indefinitely. Commenters argued that immediate removal is very traumatic, and respondents who have been removed have a significant potential to react by harming themselves or others thus recipients should reduce these risks by ensuring a safe exit plan with adequate support for the respondent in place.

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[955] Commenters cited: *Haidak v. Univ. of Mass. at Amherst*, 299 F. Supp. 3d 242, 265-66 (D. Mass. 2018), *aff'd in part, vacated in part, remanded by Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56 (1st Cir. 2019).

Commenters asserted that the goal should be to preserve educational opportunities for all parties involved to the extent possible, so § 106.44(c) should require recipients to provide alternative academic accommodations for respondents who are removed. Some commenters suggested that this provision should address a respondent's access to a recipient's program or activity, post-removal. Because emergency removal is not premised on a finding of responsibility and occurs *ex parte*, commenters argued that the recipient should be required to provide a respondent with alternative access to the respondent's academic classes during the period of removal and that failure to do so would be sex discrimination against the respondent. Some commenters argued that as to a respondent who is removed on an emergency basis and later found to be not responsible, the final regulations should require the recipient to mitigate the damage caused by the removal, for example, by allowing the respondent to retake classes or exams missed during the removal. One commenter suggested that a recipient should secure the personal property of the removed person (such as the respondent's vehicle) and be responsible for any loss or damage occurring to personal property during a removal.

Other commenters asserted that an individualized risk assessment should be required after every report of sexual assault. Commenters argued that because insurance statistics show a high degree of recidivism among college rapists, and because Title IX is also supposed to deter discrimination based on sex, schools should be required to consider the safety of other students on their campus if they know there is a possible sexual assailant in their midst.

One commenter suggested that licensing board procedures provide the best model for campus procedures because they offer the closest parallel to the types of behavior evaluated and issues at stake for respondents such as reputation, future livelihood, and future opportunities; the commenter asserted that court precedents hold that both public and private recipients must

follow principles of fundamental due process and fundamental fairness in disciplinary processes,[956] and professional licensing board procedures adequately protect due process. One commenter applauded the Department for proposing to provide greater due process protections than what current procedures typically provide; however, this commenter asserted that Native American students attending institutions funded by the Bureau of Indian Affairs receive strong due process protections, including greater due process with respect to emergency removals than what § 106.44(c) provides, and the commenter contended that the stronger due process protections should be extended to non-Native American institutions.[957] According to this commenter, unlike Native American students attending schools funded by the Bureau of Indian Affairs, non-Native American students are at risk for permanent removal from campus with potentially devastating consequences.

One commenter asserted that § 106.44(c) should explicitly require the recipient to comply with the Clery Act, notify appropriate authorities, and provide any necessary safety interventions. Another commenter stated that recipients should be required to publicly report the annual number of emergency removals the recipient conducts under § 106.44(c).

Some commenters asserted that recipients need to do more than simply remove a respondent from its education program or activity. Commenters argued that trauma from sexual assault may cause a complainant to withdraw from an education program or activity, including due to fear of seeing the respondent, suggested that more resources should be made available to

[956] Commenter cited: *Boehm v. Univ. of Pa. Sch. of Veterinary Med.,* 573 A.2d 575, 578 (Pa. Super. Ct. 1990).
[957] Commenters cited: 25 CFR 42.1-42.10.

complainants, and asserted that the final regulations should specify best practices addressing how a recipient should respond to immediate threats.

Discussion: We appreciate commenters' support for the emergency removal provision in § 106.44(c). Revised in ways explained below, § 106.44(c) provides that in situations where a respondent poses an immediate threat to the physical health and safety of any individual before an investigation into sexual harassment allegations concludes (or where no grievance process is pending), a recipient may remove the respondent from the recipient's education programs or activities. A recipient may need to undertake an emergency removal in order to fulfill its duty not to be deliberately indifferent under § 106.44(a) and protect the safety of the recipient's community, and § 106.44(c) permits recipients to remove respondents in emergency situations that arise out of allegations of conduct that could constitute sexual harassment as defined in § 106.30. Emergency removal may be undertaken in addition to implementing supportive measures designed to restore or preserve a complainant's equal access to education.[958] While we recognize that emergency removal may have serious consequences for a respondent, we decline to remove this provision because where a genuine emergency exists, recipients need the authority to remove a respondent while providing notice and opportunity for the respondent to challenge that decision.

The Department does not believe that rushing all allegations of sexual harassment or sexual assault through expedited grievance procedures adequately promotes a fair grievance process, and forbidding an emergency removal until conclusion of a grievance process (no matter

[958] Section 106.44(a) requires a recipient to offer supportive measures to every complainant, including by having the Title IX Coordinator engage with the complainant in an interactive process that takes into account the complainant's wishes regarding available supportive measures.

how expedited such a process reasonably could be) might impair a recipient's ability to quickly respond to an emergency situation. The § 106.45 grievance process is designed to provide both parties with a prompt, fair investigation and adjudication likely to reach an accurate determination regarding the responsibility of the respondent for perpetrating sexual harassment. Emergency removal under § 106.44(c) is not a substitute for reaching a determination as to a respondent's responsibility for the sexual harassment allegations; rather, emergency removal is for the purpose of addressing imminent threats posed to any person's physical health or safety, which might arise out of the sexual harassment allegations. Upon reaching a determination that a respondent is responsible for sexual harassment, the final regulations do not restrict a recipient's discretion to impose a disciplinary sanction against the respondent, including suspension, expulsion, or other removal from the recipient's education program or activity. Section 106.44(c) allows recipients to address emergency situations, whether or not a grievance process is underway, provided that the recipient first undertakes an individualized safety and risk analysis and provides the respondent notice and opportunity to challenge the removal decision. We do not believe it is necessary to restrict a recipient's emergency removal authority to removal decisions that are "narrowly tailored" to address the risk because § 106.44(c) adequately requires that the threat "justifies" the removal. If the high threshold for removal under § 106.44(c) exists (i.e., an individualized safety and risk analysis determines the respondent poses an immediate threat to any person's physical health or safety), then we believe the recipient should have discretion to determine the appropriate scope and conditions of removal of the respondent from the recipient's education program or activity. Similarly, we decline to require recipients to follow more prescriptive requirements to undertake an emergency removal (such as requiring that the assessment be based on objective evidence, current medical knowledge, or performed by a

licensed evaluator). While such detailed requirements might apply to a recipient's risk assessments under other laws, for the purposes of these final regulations under Title IX, the Department desires to leave as much flexibility as possible for recipients to address any immediate threat to the physical health or safety of any student or other individual. Nothing in these final regulations precludes a recipient from adopting a policy or practice of relying on objective evidence, current medical knowledge, or a licensed evaluator when considering emergency removals under § 106.44(c).

We agree that emergency removal is not appropriate in every situation where sexual harassment has been alleged, but only in situations where an individualized safety and risk analysis determines that an immediate threat to the physical health or safety of any student or other individual justifies the removal, where the threat arises out of allegations of sexual harassment as defined in § 106.30. Because all the conduct that could constitute sexual harassment as defined in § 106.30 is serious conduct that jeopardizes a complainant's equal access to education, we decline to limit emergency removals only to instances where a complainant has alleged sexual assault or rape, or to prohibit emergency removals where the sexual harassment allegations involve verbal harassment. A threat posed by a respondent is not necessarily measured solely by the allegations made by the complainant; we have revised § 106.44(c) to add the phrase "arising from the allegations of sexual harassment" to clarify that the threat justifying a removal could consist of facts and circumstances "arising from" the sexual harassment allegations (and "sexual harassment" is a defined term, under § 106.30). For example, if a respondent threatens physical violence against the complainant in response to the complainant's allegations that the respondent verbally sexually harassed the complainant, the immediate threat to the complainant's physical safety posed by the respondent may "arise from"

the sexual harassment allegations. As a further example, if a respondent reacts to being accused of sexual harassment by threatening physical self-harm, an immediate threat to the respondent's physical safety may "arise from" the allegations of sexual harassment and could justify an emergency removal. The "arising from" revision also clarifies that recipients do not need to rely on, or meet the requirements of, § 106.44(c) to address emergency situations that do not arise from sexual harassment allegations under Title IX (for example, where a student has brought a weapon to school unrelated to any sexual harassment allegations).

We are persuaded by commenters that § 106.44(c) should be clarified. The final regulations revise this provision to state that the risk posed by the respondent must be to the "physical" health or safety, of "any student or other individual," arising from the allegations of sexual harassment. These revisions help ensure that this provision applies to genuine emergencies involving the physical health or safety of one or more individuals (including the respondent, complainant, or any other individual) and not only multiple students or employees. We agree with commenters who asserted that adding the word "physical" before "health or safety" will help ensure that the emergency removal provision is not used inappropriately to prematurely punish respondents by relying on a person's mental or emotional "health or safety" to justify an emergency removal, as the emotional and mental well-being of complainants may be addressed by recipients via supportive measures as defined in § 106.30. The revision to § 106.44(c) adding the word "physical" before "health and safety" and changing "students or employees" to "any student or other individual" also addresses commenters' concerns that the proposed rules were not specific enough about what kind of threat justifies an emergency removal; the latter revision clarifies that the threat might be to the physical health or safety of one or more persons, including the complainant, the respondent themselves, or any other

individual. We decline to remove "health" from the "physical health or safety" phrase in this provision because an emergency situation could arise from a threat to the physical health, or the physical safety, of a person, and because "health or safety" is a relatively recognized term used to describe emergency circumstances.[959]

We decline to add further bases that could justify an emergency removal under § 106.44(c). We recognize the importance of the need to restore or preserve equal access to education, but disagree that it should be a justification for emergency removal; supportive measures are intended to address restoration and preservation of equal educational access, while § 106.44(c) is intended to apply to genuine emergencies that justify essentially punishing a respondent (by separating the respondent from educational opportunities and benefits) arising out of sexual harassment allegations without having fairly, reliably determined whether the respondent is responsible for the alleged sexual harassment. As explained above, we have revised § 106.44(c) to apply only where the immediate threat to a person's physical health or safety arises from the allegations of sexual harassment; this clarifies that where a respondent poses a threat of illegal conduct (perhaps not constituting a threat to physical health or safety) that does not arise from the sexual harassment allegations, this provision does not apply. Nothing in these final regulations precludes a recipient from addressing a respondent's commission of illegal conduct under the recipient's own code of conduct, or pursuant to other laws, where such illegal conduct does not constitute sexual harassment as defined in § 106.30 or is not "arising

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[959] *E.g.*, 20 U.S.C. 1232g(b)(1)(I) (allowing disclosure, without prior written consent, of personally identifiable information from a student's education records "subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons"); 34 CFR 99.31(a)(10) and 34 CFR 99.36 (regulations implementing FERPA).

from the sexual harassment allegations." We disagree that a recipient's assessment that a respondent poses a threat of obstructing the sexual harassment investigation, or destroying relevant evidence, justifies an emergency removal under this provision, because this provision is intended to ensure that recipients have authority and discretion to address health or safety emergencies arising out of sexual harassment allegations, not to address all forms of misconduct that a respondent might commit during a grievance process.

The Department appreciates commenters' concerns that State or local law may present other considerations or impose other requirements before an emergency removal can occur. To the extent that other applicable laws establish additional relevant standards for emergency removals, recipients should also heed such standards. To the greatest degree possible, State and local law ought to be reconciled with the final regulations, but to the extent there is a direct conflict, the final regulations prevail.[960] While commenters correctly note that a "full hearing" is not a constitutional due process requirement in all interim suspension situations, § 106.44(c) does not impose a requirement to hold a "full hearing" and in fact, does not impose any pre-deprivation due process requirements; the opportunity for a respondent to challenge an emergency removal decision need only occur post-deprivation. For reasons described in the "Role of Due Process in the Grievance Process" section of this preamble, the Department has determined that postsecondary institutions must hold live hearings to reach determinations regarding responsibility for sexual harassment. However, because § 106.44(c) is intended to give recipients authority to respond quickly to emergencies, and does not substitute for a

[960] *See* discussion under the "Section 106.6(h) Preemptive Effect" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble; *see also* discussion under the "Spending Clause" subsection of the "Miscellaneous" section of this preamble.

determination regarding the responsibility of the respondent for the sexual harassment allegations at issue, recipients need only provide respondents the basic features of due process (notice and opportunity), and may do so after removal rather than before a removal occurs. An emergency removal under § 106.44(c) does not authorize a recipient to impose an interim suspension or expulsion on a respondent *because* the respondent has been accused of sexual harassment. Rather, this provision authorizes a recipient to remove a respondent from the recipient's education program or activity (whether or not the recipient labels such a removal as an interim suspension or expulsion, or uses any different label to describe the removal) when an individualized safety and risk analysis determines that an imminent threat to the physical health or safety of any person, *arising from* sexual harassment allegations, justifies removal.

Section 106.44(c) expressly acknowledges that recipients may be obligated under applicable disability laws to conduct emergency removals differently with respect to individuals with disabilities, and these final regulations do not alter a recipient's obligation to adhere to the IDEA, Section 504, or the ADA. Due to a recipient's obligations under applicable State laws or disability laws, uniformity with respect to how a recipient addresses all cases involving immediate threats to physical health and safety may not be possible. However, the Department believes that § 106.44(c) appropriately balances the need for schools to remove a respondent posing an immediate threat to the physical health or safety of any person, with the need to ensure that such an ability is not used inappropriately, for instance to bypass the prohibition in § 106.44(a) and § 106.45(b)(1)(i) against imposition of disciplinary sanctions or other actions that are not supportive measures against a respondent without first following the § 106.45 grievance process. The Department does not believe that a lower threshold for an emergency removal appropriately balances these interests, even if this means that emergency removals arising from

allegations of sexual harassment must meet a higher standard than when a threat arises from conduct allegations unrelated to Title IX sexual harassment. In response to commenters' reasonable concerns about the potential for confusion, we have added the phrase "arising from the allegations of sexual harassment" (and "sexual harassment" is a defined term under § 106.30) into this provision to clarify that this emergency removal provision only governs situations that arise under Title IX, and not under State or other laws that might apply to other emergency situations.

The Department does not see a need to add language stating that the emergency removal must be periodically reviewed. Emergency removal is not a substitute for the § 106.45 grievance process, and § 106.45(b)(1)(v) requires reasonably prompt time frames for that grievance process. We acknowledge that a recipient could remove a respondent under § 106.44(c) without a formal complaint having triggered the § 106.45 grievance process; in such situations, the requirements in § 106.44(c) giving the respondent notice and opportunity to be heard post-removal suffice to protect a respondent from a removal without a fair process for challenging that outcome, and the Department does not believe it is necessary to require periodic review of the removal decision. We decline to impose layers of complexity onto the emergency removal process, leaving procedures in recipients' discretion; in many cases, recipients will develop a "safe exit plan" as part of implementing an emergency removal, and accommodate students who have been removed on an emergency basis with alternative means to continue academic coursework during a removal period or provide for a respondent to re-take classes upon a return from an emergency removal, or secure personal property left on a recipient's campus when a respondent is removed. We disagree that a recipient's failure to refusal to take any of the foregoing steps necessarily constitutes sex discrimination under Title IX, although a recipient

would violate Title IX by, for example, applying different policies to female respondents than to male respondents removed on an emergency basis. Nothing in the final regulations prevents students who have been removed from asserting rights under State law or contract against the recipient arising from a removal under this provision.

We decline to require an individualized safety and risk analysis upon every reported sexual assault, because the § 106.45 grievance process is designed to bring all relevant evidence concerning sexual harassment allegations to the decision-maker's attention so that a determination regarding responsibility is reached fairly and reliably. A recipient is obligated under § 106.44(a) to provide a complainant with a non-deliberately indifferent response to a sexual assault report, which includes offering supportive measures designed to protect the complainant's safety, and if a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances pursuant to § 106.45(b)(10)(ii). Emergency removals under § 106.44(c) remain an option for recipients to respond to situations where an individualized safety and risk analysis determines that a respondent poses an immediate threat to health or safety.

The Department appreciates commenters' assertions that § 106.44(c) should provide more due process protections, similar to those applied in professional licensing board cases or under Federal laws that apply to schools funded by the Bureau of Indian Affairs; however, we believe that § 106.44(c) appropriately balances a recipient's need to protect individuals from emergency threats, with providing adequate due process to the respondent under such emergency circumstances. Notice and an opportunity to be heard constitute the fundamental features of procedural due process, and the Department does not wish to prescribe specific procedures that a

recipient must apply in emergency situations. Accordingly, the Department does not wish to adopt the same due process protections that commenters asserted are applied in professional licensing revocation proceedings, or that are provided to Native American students in schools funded by the Bureau of Indian Affairs. The Department acknowledges that schools receiving funding from the Bureau of Indian Affairs must provide even greater due process protections than what these final regulations require, but these greater due process protections do not conflict with these final regulations. These final regulations govern a variety of recipients, including elementary and secondary schools and postsecondary institutions, but also recipients that are not educational institutions; for example, some libraries and museums are recipients of Federal financial assistance operating education programs or activities. These final regulations provide the appropriate amount of due process for a wide variety of recipients of Federal financial assistance with respect to a recipient's response to emergency situations.

As discussed in the "Clery Act" subsection of the "Miscellaneous" section of this preamble, postsecondary institutions subject to these Title IX regulations may also be subject to the Clery Act. We decline to state in § 106.44(c) that recipients must also comply with the Clery Act because we do not wish to create confusion about whether § 106.44(c) applies only to postsecondary institutions (because the Clery Act does not apply to elementary and secondary schools). We decline to require recipients to notify authorities, provide safety interventions, or annually report the number of emergency removals conducted under § 106.44(c), because we do not wish to prescribe requirements on recipients beyond what we have determined is necessary to fulfill the purpose of this provision: granting recipients authority and discretion to appropriately respond to emergency situations arising from sexual harassment allegations. Nothing in these final regulations precludes a recipient from notifying authorities, providing safety interventions,

or reporting the number of emergency removals, to comply with other laws requiring such steps or based on a recipient's desire to take such steps. For similar reasons, we decline to require recipients to adopt "best practices" for responding to threats. We note that these final regulations require recipients to offer supportive measures to every complainant, and do not preclude a recipient from providing resources to complainants or respondents.

Changes: We have revised § 106.44(c) so that a respondent removed on an emergency basis must pose an immediate threat to the "physical" health or safety (adding the word "physical") of "any student or other individual" (replacing the phrase "students or employees"). We have also revised the proposed language to clarify that the justification for emergency removal must arise from allegations of sexual harassment under Title IX.

Intersection with the IDEA, Section 504, and ADA

Comments: Some commenters applauded the "saving clause" in § 106.44(c) acknowledging that the respondent may have rights under the IDEA, Section 504, or the ADA. Several commenters asserted that § 106.44(c) would create uncertainty regarding the interplay between Title IX and relevant disabilities laws, which would further exacerbate the uncertainty regarding involuntary removal of students who pose a threat to themselves. Other commenters stated that the result of this provision would likely be different handling of Title IX cases for students with disabilities versus students without disabilities because of the requirements of the IDEA, Section 504, and the ADA. Some commenters believed this provision (and the proposed rules overall) appear to give consideration to the rights and needs of respondents with disabilities, without similar consideration for the rights of complainants or witnesses with disabilities. Commenters asserted that § 106.44(c) is subject to problematic interpretation because by expressly referencing the IDEA, Section 504, and the ADA this provision might wrongly encourage schools to remove

students with disabilities because of implicit bias against students with disabilities, especially students with intellectual disabilities.

One commenter suggested that § 106.44(c) should track the definition of "direct threat" used in the Equal Employment Opportunity Commission's (EEOC) regulations, upheld by the Supreme Court,[961] and as outlined in ADA regulations[962] because this would give recipients and respondents a clearer standard and reduce the chances that removal decisions will be based on generalizations, ignorance, fear, patronizing attitudes, or stereotypes regarding individuals with disabilities.

Some commenters argued that this provision conflicts with the IDEA, Section 504, and the ADA, and that removals are not as simple as conducting a mere risk assessment, because the IDEA governs emergency removal of students in elementary school who are receiving special education and related services.[963] Commenters asserted that under the IDEA, a school administrator cannot make a unilateral risk assessment, and placement decisions cannot be made by an administrator alone; rather, commenters argued, these decisions must be made by a team that includes the parent and relevant members of the IEP (Individualized Education Program) Team and if the conduct in question was a manifestation of a disability, the recipient cannot make a unilateral threat assessment and remove a child from school, absent extreme

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[961] Commenters cited: *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002).
[962] Commenters cited: 28 CFR 35.139(b) ("In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.").
[963] Commenters cited: *Glen by & through Glen v. Charlotte-Mecklenburg Sch. Bd. of Educ.*, 903 F. Supp. 918, 935 (W.D.N.C. 1995) ("[W]here student poses an immediate threat, [the school] may temporarily suspend up to 10 school days.").

circumstances. These commenters further argued that sometimes certain behaviors are the result or manifestation of a disability, despite being sexually offensive, e.g., a student with Tourette's syndrome blurting out sexually offensive language. Commenters argued that under disability laws schools cannot remove those students from school without complying with the IDEA, Section 504, and the ADA. One commenter recommended that § 106.44(c) require, at a minimum, training for Title IX administrators on the intersection among Title IX and applicable disability laws. In the college setting, the commenter further recommended that Title IX Coordinators not be permitted to impose supportive measures that involve removal without feedback from administrators from the institution's office of disability services, provided that the student is registered with the pertinent office. If a student has an Individualized Education Plan (IEP) in secondary school, commenters recommended that the administration immediately call for a team meeting to determine the next steps.

Other commenters asserted that any language under § 106.44(c) must make clear that the free appropriate public education (FAPE) to which students with disabilities are entitled must continue, even in circumstances when emergency removal is deemed necessary under Title IX. Given this, one commenter recommended that the language in § 106.44(c) clarify that this provision does not supersede rights under disability laws.

Some commenters, while expressing overall support for § 106.44(c), requested additional guidance on the intersection of Title IX, the IDEA, and the ADA, and how elementary and secondary schools would implement § 106.44(c). The commenters asserted that the final regulations should be explicit that regardless of a student's IEP or "504 plan" under the IDEA or Section 504, the student is not allowed to engage in threatening or harmful behavior and that this would be similar to the response a campus might have to any other serious violation, such as

bringing a firearm to class. Commenters also argued that the final regulations should clarify that separation of elementary and secondary school students with disabilities from classroom settings should be rare and only when done in compliance with the IDEA. Commenters argued that recipients must be made aware that a student with a disability does not have to be eligible for a free appropriate public education (FAPE) in order for § 106.44(c) to apply, and that recipients must not be misled into thinking there are different standards for elementary and secondary school and postsecondary education environments when it comes to equal access to educational opportunities.

Other commenters argued that § 106.44(c) may violate compulsory educational laws by removing elementary-age students from school on an emergency basis. When an elementary school student is removed under § 106.44(c), commenters wondered whether the school is supposed to have a designated site for housing or educating removed students during the investigation.

Discussion: Section 106.44(c) states that this provision does not modify any rights under the IDEA, Section 504, or the ADA. In the final regulations, we removed reference to certain titles of the ADA and refer instead to the "Americans with Disabilities Act" so that application of any portion of the ADA requires a recipient to meet ADA obligations while also complying with these final regulations. We disagree that this provision will create ambiguity or otherwise supersede rights that students have under these disability statutes. Additionally, we do not believe that expressly acknowledging recipients' obligations under disability laws incentivizes recipients to remove respondents with disabilities; rather, reference in this provision to those disability laws will help protect respondents from emergency removals that do not also protect the respondents' rights under applicable disability laws. With respect to implicit bias against

students with disabilities, recipients must be careful to ensure that all emergency removal proceedings are impartial, without bias or conflicts of interest[964] and the final regulations do not preclude a recipient from providing training to employees, including Title IX personnel, regarding a recipient's obligations under both Title IX and applicable disability laws. Any different treatment between students without disabilities and students with disabilities with respect to emergency removals, may occur due to a recipient's need to comply with the IDEA, Section 504, the ADA, or other disability laws, but would not be permissible due to bias or stereotypes against individuals with disabilities.

As explained in the "Directed Question 5: Individuals with Disabilities" subsection of the "Directed Questions" section of this preamble, recipients have an obligation to comply with applicable disability laws with respect to complainants as well as respondents (and any other individual involved in a Title IX matter, such as a witness), and the reference to disability laws in § 106.44(c) does not obviate recipients' responsibilities to comply with disability laws with respect to other applications of these final regulations.

The Department appreciates commenters' suggestion to mirror the "direct threat" language utilized in ADA regulations; however, we have instead revised § 106.44(c) to refer to the physical health or safety of "any student or other individual" because this language better aligns this provision with the FERPA health and safety emergency exception, and avoids the

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[964] Section 106.45(b)(1)(iii) requires all Title IX Coordinators (and investigators, decision-makers, and persons who facilitate informal resolution processes) to be free from conflicts of interest or bias against complainants and respondents generally or against an individual complainant or respondent, and requires training for such personnel that includes (among other things) how to serve impartially. A "respondent" under § 106.30 means any individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment; thus, a Title IX Coordinator interacting with a respondent undergoing an emergency removal must serve impartially, without conflict of interest or bias.

confusion caused by the "direct threat" language under ADA regulations because those regulations refer to a "direct threat to the health or safety *of others*"[965] which does not clearly encompass a threat to the respondent themselves (e.g., where a respondent threatens self-harm). By revising § 106.44(c) to refer to a threat to the physical health or safety "of any student or other individual" this provision does encompass a respondent's threat of self-harm (when the threat arises from the allegations of sexual harassment), and is aligned with the language used in FERPA's health or safety exception.[966] We note that recipients still need to comply with applicable disability laws, including the ADA, in making emergency removal decisions.

The Department appreciates commenters' varied concerns that complying with these final regulations, and with disability laws, may pose challenges for recipients, including specific challenges for elementary and secondary schools, and postsecondary institutions, because of the intersection among the IDEA, Section 504, the ADA, and how to conduct an emergency removal under these final regulations under Title IX. The Department will offer technical assistance to recipients regarding compliance with laws under the Department's enforcement authority. However, the Department does not believe that recipients' obligations under multiple civil rights laws requires changing the emergency removal provision in § 106.44(c) because this is an important provision to ensure that recipients have flexibility to balance the need to address

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[965] 28 CFR 35.139(b) ("In determining whether an individual *poses a direct threat to the health or safety of others*, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.") (emphasis added).

[966] *E.g.*, 20 U.S.C. 1232g(b)(1)(I) (allowing disclosure, without prior written consent, of personally identifiable information from a student's education records "subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons"); *see also* regulations implementing FERPA, 34 CFR 99.31(a)(10) and 99.36.

emergency situations with fair treatment of a respondent who has not yet been proved responsible for sexual harassment. The Department does not believe that applicable disability laws, or other State laws, render a recipient unable to comply with all relevant legal obligations. For instance, with respect to compulsory education laws, nothing in § 106.44(c) relieves a recipient from complying with State laws requiring that students under a certain age receive government-provided education services. As a further example, nothing in § 106.44(c) prevents a recipient from involving a student's IEP team before making an emergency removal decision, and § 106.44(c) does not require a recipient to remove a respondent where the recipient has determined that the threat posed by the respondent, arising from the sexual harassment allegations, is a manifestation of a disability such that the recipient's discretion to remove the respondent is constrained by IDEA requirements.

Changes: We have replaced the phrase "students or employees" with the phrase "any student or other individual" in § 106.44(c) and removed specification of certain titles of the ADA, instead referencing the whole of the ADA.

Post-Removal Challenges

Comments: Some commenters supported § 106.44(c) giving respondents notice and opportunity to challenge the removal immediately after the removal, because during a removal a respondent might lose a significant amount of instructional time while waiting for a grievance proceeding to conclude, and being out of school can harm the academic success and emotional health of the removed student. Other commenters asserted that respondents should not be excluded from a recipient's education program or activity until conclusion of a grievance process, and a post-removal challenge after the fact is insufficient to assure due process for respondents, especially

because § 106.44(c) does not specify requirements for the time frame or procedures used for a challenging the removal decision.

Some commenters argued that the ability of a removed respondent to challenge the removal would pose an unnecessary increased risk to the safety of the community, especially because § 106.44(c) already requires the recipient to determine the removal was justified by an individualized safety and risk analysis. Commenters argued that a school's emergency removal decision should stand until a threat assessment team has met and given a recommendation to affirm or overrule the decision.

Some commenters asserted that § 106.44(c) is ambiguous about the right to a post-removal challenge and argued that the failure to provide more clarity is problematic because it is unclear if the "immediate" challenge must occur minutes, hours, one day, or several days after the removal. Commenters argued that a plain language interpretation of "immediately" may require the challenge to occur minutes after the suspension, but this could jeopardize the safety of the complainant and the community, because the very point of an interim suspension is to remove a known risk from campus. Other commenters argued that requiring an "immediate" post-removal challenge could undermine the respondent's due process rights, because the respondent might not be physically present on campus when the interim suspension (e.g., removal) is issued. Some commenters argued that there should be a delay between when the removal occurred and when the opportunity to challenge occurs, because students and employees are often afraid of providing information to college administrations due to legitimate, reasonable fear for their own safety. Commenters requested that this provision be modified to give the respondent a challenge opportunity "as soon as reasonably practicable" rather than

"immediately." Commenters asked whether providing a challenge opportunity "immediately" must, or could, be the same as the "prompt" time frames required under § 106.45.

Discussion: The Department appreciates commenters' support of the post-removal challenge opportunity provided in § 106.44(c). The Department disagrees with commenters who suggested that no challenge to removals ought to be possible, and believes that § 106.44(c) appropriately balances the interests involved in emergency situations. We do not believe that prescribing procedures for the post-removal challenge is necessary or desirable, because this provision ensures that respondents receive the essential due process requirements of notice and opportunity to be heard while leaving recipients flexibility to use procedures that a recipient deems most appropriate.[967] These final regulations aim to improve the perception and reality of the fairness and accuracy by which a recipient resolves allegations of sexual harassment, and therefore the § 106.45 grievance process prescribes a consistent framework and specific procedures for resolving formal complaints of sexual harassment. By contrast, § 106.44(c) is not designed to resolve the underlying allegations of sexual harassment against a respondent, but rather to ensure that recipients have the authority and discretion to appropriately handle emergency situations that may arise from allegations of sexual harassment. As discussed above, the final regulations revise the language in § 106.44(c) to add the phrase "arising from the allegations of sexual harassment," which clarifies that the facts or circumstances that justify a removal might not be the same as the sexual harassment allegations but might "arise from" those allegations.

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[967] *E.g.*, *Goss v. Lopez*, 419 U.S. 565, 582-83 (1975) ("Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable").

The Department disagrees that a post-removal challenge is unnecessary because the individualized safety and risk analysis already determined that removal was justified; the purpose of a true emergency removal is to authorize a recipient to respond to immediate threats even without providing the respondent with pre-deprivation notice and opportunity to be heard because this permits a recipient to protect the one or more persons whose physical health or safety may be in jeopardy. The respondent's first opportunity to challenge the removal (e.g., by presenting the recipient with facts that might contradict the existence of an immediate threat to physical health or safety) might be after the recipient already reached its determination that removal is justified, and due process principles (whether constitutional due process of law, or fundamental fairness) require that the respondent be given notice and opportunity to be heard.[968] Section 106.44(c) does not preclude a recipient from convening a threat assessment team to review the recipient's emergency removal determination, but § 106.44(c) still requires the recipient to give the respondent post-removal notice and opportunity to challenge the removal decision.

The Department expects the emergency removal process to be used in genuine emergency situations, but when it is used, recipients must provide an opportunity for a removed individual to challenge their removal immediately after the removal. The term "immediately" will be fact-specific, but is generally understood in the context of a legal process as occurring without delay, as soon as possible, given the circumstances. "Immediately" does not require a time frame of "minutes" because in the context of a legal proceeding the term immediately is not

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[968] *Goss*, 419 U.S. at 580 ("At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing.").

generally understood to mean an absolute exclusion of any time interval. "Immediately" does not imply the same time frame as the "reasonably prompt" time frames that govern the grievance process under § 106.45, because "immediately" suggests a more pressing, urgent time frame than "reasonable promptness." This is appropriate because § 106.44(c) does not require a recipient to provide the respondent with any pre-deprivation notice or opportunity to be heard, so requiring post-deprivation due process protections "immediately" after the deprivation ensures that a respondent's interest in access to education is appropriately balanced against the recipient's interest in quickly addressing an emergency situation posed by a respondent's risk to the physical health or safety of any student or other individual. We decline to require the post-removal notice and challenge to be given "as soon as reasonably practicable" instead of "immediately" because that would provide the respondent less adequate post-deprivation due process protections.

Changes: None.

No Stated Time Limitation for the Emergency Removal

Comments: Some commenters viewed the absence of a time limitation with respect to how long an emergency removal could be as a source of harm to both respondents and complainants. Commenters asserted that, given how long the grievance process could take, students and employees removed from their education or employment until conclusion of the grievance process could experience considerable negative consequences. Commenters argued that the proposed rules should not encourage emergency removal, particularly not when other, less severe measures could be taken to ensure safety pending an investigation. Commenters proposed limiting an emergency removal to seven days, during which time an institution would determine in writing that an immediate threat to health or safety exists, warranting the emergency action, and if no such determination is reached, the respondent would be reinstated.

Discussion: The final regulations require schools to offer supportive measures to complainants and permit recipients to offer supportive measures to respondents. We decline to require emergency removals in every situation where a formal complaint triggers a grievance process. The grievance process is designed to conclude promptly, and the issue of whether a respondent needs to be removed on an emergency basis should not arise in most cases, since § 106.44(c) applies only where emergency removal is justified by an immediate threat to the physical health or safety of any student or other individual. Revised § 106.44(a), and revised § 106.45(b)(1)(i), prohibit a recipient from imposing against a respondent disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, without following the § 106.45 grievance process. Emergency removal under § 106.44(c) constitutes an exception to those prohibitions, and should not be undertaken in every situation where sexual harassment has been alleged. Rather, emergency removal is appropriate only when necessary to address imminent threats to a person's physical health or safety arising from the allegations of sexual harassment.

The Department declines to put any temporal limitation on the length of a valid emergency removal, although nothing in the final regulations precludes a recipient from periodically assessing whether an immediate threat to physical health or safety is ongoing or has dissipated.

Changes: None.

"removal"

Comments: Commenters requested clarification in the following regards: Would removing a respondent from a class, or changing the respondent's class schedule, before a grievance process is completed (or where no formal complaint has initiated a grievance process), require a recipient to undertake emergency removal procedures? Under § 106.44(c) must a recipient remove a

respondent from the entirety of recipient's education program or activity, or may a recipient choose to only remove the respondent to the extent the individual poses an emergency in a specific setting, i.e., a certain class, student organization, living space, athletic team, etc.?

Commenters argued that the § 106.30 definition of supportive measures and § 106.44(c) regarding emergency removal could lead to confusion among recipients about what steps they can take to protect a complainant's safety and access to education prior to conclusion of a grievance process, or where no formal complaint has initiated a grievance process. One commenter suggested modifying this provision to expressly permit partial exclusion from programs or activities by adding the phrase "or any part thereof."

Commenters argued that § 106.44(c) would make it too difficult to remove a respondent before the completion of a disciplinary proceeding absent an extreme emergency. Commenters suggested that the Department should consider a more nuanced approach that provides schools with a range of options, short of emergency removal, that are proportionate to the alleged misconduct and meet the needs of the victim. Commenters requested that § 106.44(c) be revised to allow an appropriate administrator (such as a dean of students), in consultation with the Title IX Coordinator, discretion to determine the appropriateness of an emergency removal based on a standard that is in the best interest of the institution.

Some commenters argued that even where an emergency threat exists, § 106.44(c) does not provide a time frame in which the recipient must make this emergency removal decision, leaving survivors vulnerable to daily contact with a dangerous respondent. Commenters asserted that recipients should be able to remove a respondent from a dorm or shared classes before conclusion of a disciplinary proceeding, particularly when it is clear that the survivor's education will be harmed otherwise. Commenters asserted that 80 percent of rapes and sexual assaults are

committed by someone known to the victim,[969] which means that it is highly likely that the victim and perpetrator share a dormitory, a class, or other aspect of the school environment and that § 106.44(c) (combined with the § 106.30 definition of "supportive measures") leaves victims in continual contact with their harasser, thereby prioritizing the education of accused harassers over the education of survivors. Commenters argued that survivors should not have to wait until the end of a grievance process to be protected from seeing a perpetrator in class or on campus, and this provision would pressure survivors to file formal complaints when many survivors do not want a formal process for valid personal reasons, because a formal process would be the only avenue for ensuring that a "guilty" respondent will be suspended or expelled. Commenters recommended adding language to clarify that nothing shall prevent elementary and secondary schools from implementing an "alternate assignment" during the pendency of an investigation, provided that the same is otherwise permitted by law.

One commenter suggested combining the emergency removal and supportive measures provisions into a single "interim measures" provision.

Discussion: The Department believes the § 106.30 definition of supportive measures, and § 106.44(c) governing emergency removals, in the context of the revised requirements in § 106.44(a) and § 106.45(b)(1)(i) (requiring recipients to offer supportive measures to complainants while not imposing against respondents disciplinary sanctions or other actions that are not "supportive measures") provide a wide range and variety of options for a recipient to

[969] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Special Report: Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013* (2014).

preserve equal educational access, protect the safety of all parties, deter sexual harassment, and respond to emergency situations.

Under § 106.30, a supportive measure must not be punitive or disciplinary, but may burden a respondent as long as the burden is not unreasonable. As discussed in the "Supportive Measures" subsection of the "Section 106.30 Definitions" section of this preamble, whether a certain measure unreasonably burdens a respondent requires a fact-specific inquiry. Changing a respondent's class schedule or changing a respondent's housing or dining hall assignment may be a permissible supportive measure depending on the circumstances. By contrast, removing a respondent from the entirety of the recipient's education programs and activities, or removing a respondent from one or more of the recipient's education programs or activities (such as removal from a team, club, or extracurricular activity), likely would constitute an unreasonable burden on the respondent or be deemed disciplinary or punitive, and therefore would not likely qualify as a supportive measure. Until or unless the recipient has followed the § 106.45 grievance process (at which point the recipient may impose any disciplinary sanction or other punitive or adverse consequence of the recipient's choice), removals of the respondent from the recipient's education program or activity[970] need to meet the standards for emergency removals under § 106.44(c).[971] Supportive measures provide one avenue for recipients to protect the safety of parties and

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[970] As discussed in the "Section 106.44(a) 'education program or activity'" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble, the Title IX statute and existing regulations provide definitions of "program or activity" that apply to interpretation of a recipient's "education program or activity" in these final regulations, and we have clarified in § 106.44(a) that for purposes of responding to sexual harassment a recipient's education program or activity includes circumstances over which the recipient exercised substantial control. 20 U.S.C. 1687; 34 CFR 106.2(h); 34 CFR 106.2(i) (defining "recipient"); 34 CFR 106.31(a) (referring to "any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance").

[971] *Cf.* § 106.44(d) (a non-student employee-respondent may be placed on administrative leave (with or without pay) while a § 106.45 grievance process is pending, without needing to meet the emergency removal standards in § 106.44(c)).

permissibly may affect and even burden the respondent, so long as the burden is not unreasonable. Supportive measures may include, for example, mutual or unilateral restrictions on contact between parties or re-arranging class schedules or classroom seating assignments, so complainants need not remain in constant or daily contact with a respondent while an investigation is pending, or even where no grievance process is pending.

Whether an elementary and secondary school recipient may implement an "alternate assignment" during the pendency of an investigation (or without a grievance process pending), in circumstances that do not justify an emergency removal, when such action is otherwise permitted by law, depends on whether the alternate assignment constitutes a disciplinary or punitive action or unreasonably burdens the respondent (in which case it would not qualify as a supportive measure as defined in § 106.30).[972] Whether an action "unreasonably burdens" a respondent is fact-specific, but should be evaluated in light of the nature and purpose of the benefits, opportunities, programs and activities, of the recipient in which the respondent is participating, and the extent to which an action taken as a supportive measure would result in the respondent forgoing benefits, opportunities, programs, or activities in which the respondent has been participating. An alternate assignment may, of course, be appropriate when an immediate threat justifies an emergency removal of the respondent because under the final regulations, emergency removal may justify total removal from the recipient's education program or activity, so offering the respondent alternate assignment is included within the potential scope of an emergency

[972] For discussion of alternate assignments when the respondent is a non-student employee, see the "Section 106.44(d) Administrative Leave" subsection of the "Additional Rules Governing Recipients' Responses to Sexual Harassment" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble.

removal. Under § 106.44(a), the recipient must offer supportive measures to the complainant, and if a particular action – such as alternate assignment – does not, under specific circumstances, meet the definition of a supportive measure, then the recipient must carefully consider other individualized services, reasonably available, designed to restore or preserve the complainant's equal educational access and/or protect safety and deter sexual harassment, that the recipient will offer to the complainant.

We do not believe that the final regulations incentivize complainants to file formal complaints when they otherwise do not wish to do so just to avoid contacting or communicating with a respondent, because supportive measures permit a range of actions that are non-punitive, non-disciplinary, and do not *unreasonably* burden a respondent, such that a recipient often may implement supportive measures that do meet a complainant's desire to avoid contact with the respondent. For example, if a complainant and respondent are both members of the same athletic team, a carefully crafted unilateral no-contact order could restrict a respondent from communicating directly with the complainant so that even when the parties practice on the same field together or attend the same team functions together, the respondent is not permitted to directly communicate with the complainant. Further, the recipient may counsel the respondent about the recipient's anti-sexual harassment policy and anti-retaliation policy, and instruct the team coaches, trainers, and staff to monitor the respondent, to help enforce the no-contact order and deter any sexual harassment or retaliation by the respondent against the complainant. Further, nothing in the final regulations, or in the definition of supportive measures in § 106.30, precludes a recipient from altering the nature of supportive measures provided, if circumstances change. For example, if the Title IX Coordinator initially implements a supportive measure prohibiting the respondent from directly communicating with the complainant, but the parties

later each independently decide to take the same lab class, the Title IX Coordinator may, at the complainant's request, reevaluate the circumstances and offer the complainant additional supportive measures, such as requiring the professor teaching the lab class to ensure that the complainant and respondent are not "teamed up" or assigned to sit near each other or assigned as to be "partners," during or as part of the lab class.

Commenters correctly observe that the final regulations prohibit suspending or expelling a respondent without first following the § 106.45 grievance process, or unless an emergency situation justices removal from the recipient's education program or activity (which removal may, or may not, be labeled a "suspension" or "expulsion" by the recipient). We do not believe this constitutes unfairness to survivors, or poses a threat to survivors' equal educational access, because there are many actions that meet the definition of supportive measures that may restore or preserve a complainant's equal access, protect a complainant's safety, and/or deter sexual harassment without punishing or unreasonably burdening a respondent. As discussed in the "Section 106.45(b)(1)(iv) Presumption of Non-Responsibility" subsection of the "General Requirements for § 106.45 Grievance Process" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, refraining from treating people accused of wrongdoing as responsible for the wrongdoing prior to evidence proving the person is responsible is a fundamental tenet of American justice. These final regulations appropriately ensure that respondents are not unfairly, prematurely *treated* as responsible before being proved responsible, with certain reasonable exceptions: emergency removals, administrative leave for employees, and informal resolution of a formal complaint that resolves the allegations without a full investigation and adjudication but may result in consequences for a respondent including suspension or expulsion. In this way, the final regulations ensure that every complainant is

offered supportive measures designed to preserve their equal educational access and protect their safety (even without any proof of the merits of the complainant's allegations) consistent with due process protections and fundamental fairness. As an example, a complainant understandably may desire as a supportive measure the ability to avoid being in the same classroom with a respondent, whether or not the complainant wants to file a formal complaint. A school may conclude that transferring the respondent to a different section of that class (e.g., that meets on a different day or different time than the class section in which the complainant and respondent are enrolled) is a reasonably available supportive measure that preserves the complainant's equal access and protects the complainant's safety or deters sexual harassment, while not constituting an unreasonable burden on the respondent (because the respondent is still able to take that same class and earn the same credits toward graduation, for instance). If, on the other hand, that class in which both parties are enrolled does not have alternative sections that meet at different times, and precluding the respondent from completing that class would delay the respondent's progression toward graduation, then the school may determinate that requiring the respondent to drop that class would constitute an unreasonable burden on the respondent and would not quality as a supportive measure, although granting the complainant an approved withdrawal from that class with permission to take the class in the future, would of course constitute a permissible supportive measure for the recipient to offer the complainant. Alternatively in such a circumstance (where the complainant, like the respondent, cannot withdraw from that class and take it later without delaying progress toward graduation), the school may offer the complainant as a supportive measure, for example, a one-way no contact order that prohibits the respondent from communicating with the complainant and assigns the respondent to sit across the classroom from the complainant. As such an example shows, these final regulations allow, and require, a

recipient to carefully consider the specific facts and circumstances unique to each situation to craft supportive measures to help a complainant without prematurely penalizing a respondent.

The Department does not believe it is necessary or appropriate to require a time frame for when a recipient must undertake an emergency removal, because the risk arising from the sexual harassment allegations that may justify a removal may arise at any time; further, § 106.44(a) requires a recipient to respond "promptly" to sexual harassment, and if an emergency removal is a necessary part of a recipient's non-deliberately indifferent response then such a response must be prompt. We reiterate that emergency removal is not about reaching factual conclusions about whether the respondent is responsible for the underlying sexual harassment allegations. Emergency removal is about determining whether an immediate threat arising out of the sexual harassment allegations justifies removal of the respondent.

We appreciate the opportunity to clarify that, where the standards for emergency removal are met under § 106.44(c), the recipient has discretion whether to remove the respondent from all the recipient's education programs and activities, or to narrow the removal to certain classes, teams, clubs, organizations, or activities. We decline to add the phrase "or any part thereof" to this provision because a "part of" a program may not be readily understood, and we believe the authority to exclude *entirely* includes the lesser authority to exclude partially.

Section 106.44(a) and § 106.45(b)(1)(i) forbid a recipient from imposing disciplinary sanctions (or other actions that are not supportive measures) on a respondent without first following a grievance process that complies with § 106.45. We reiterate that a § 106.44(c) emergency removal may be appropriate whether or not a grievance process is underway, and that the purpose of an emergency removal is to protect the physical health or safety of any student or other individual to whom the respondent poses an immediate threat, arising from allegations of

sexual harassment, not to impose an interim suspension or expulsion on a respondent, or penalize a respondent by suspending the respondent from, for instance, playing on a sports team or holding a student government position, while a grievance process is pending. The final regulations respect complainants' autonomy and understand that not every complainant wishes to participate in a grievance process, but a complainant's choice not to file a formal complaint or not to participate in a grievance process does not permit a recipient to bypass a grievance process and suspend or expel (or otherwise discipline, penalize, or unreasonably burden) a respondent accused of sexual harassment. An emergency removal under § 106.44(c) separates a respondent from educational opportunities and benefits, and is permissible only when the high threshold of an immediate threat to a person's physical health or safety justifies the removal.

Because the purposes of, and conditions for, "supportive measures" as defined in § 106.30 differ from the purposes of, and conditions for, an emergency removal under § 106.44(c), we decline to combine these provisions. Both provisions, and the final regulations as a whole, do not prioritize the educational needs of a respondent over a complainant, or vice versa, but aim to ensure that complainants receive a prompt, supportive response from a recipient, respondents are treated fairly, and recipients retain latitude to address emergency situations that may arise.

Changes: None.

"individualized safety and risk analysis"

Comments: Many commenters argued that the lack of guidance in § 106.44(c) on the requirements for conducting the "individualized safety and risk analysis" is confusing, and should be better defined because it could lead to inconsistent results from school to school, county to county, and State to State. Some commenters expressed overall support for this provision, but argued that the power of removal should not be wielded without careful

consideration, and requested clarity about who would undertake the risk analysis (e.g., an internal or external individual on behalf of a recipient). Other commenters stated that § 106.44(c) should list factors to consider in the required safety and risk analysis including: whether violence was alleged (which commenters asserted is rare in cases involving alleged incapacitation), how long the complainant took to file a complaint, whether the complainant has reported the allegations to the police, and whether there are other, less restrictive measures that could be taken. Commenters argued that the risk assessment requirement may prevent the removal of respondents who are in fact dangerous because context and other nuances may not be accounted for in the assessment. One commenter stated that the § 106.44(c) safety and risk analysis requirements are "good, but sometimes not realistic" because threat assessment teams do not meet daily, and it is sometimes necessary to decide a removal in a matter of hours. Other commenters stated some recipients have already incorporated this sort of threat assessment into their decision matrix because postsecondary institutions are obligated to take reasonable steps to address dangers or threats to their students.

Some commenters were concerned that institutions lack sufficient resources to properly conduct the required safety and risk analysis, that institutions lack the proper tools to conduct assessments calibrated to the age and developmental issues of the respondent, and that institutions lack the training and knowledge to properly implement such assessments. Commenters asserted that this provision would require institutions to train employees to conduct an individualized safety and risk analysis before removing students on an emergency basis, but that such assessments are rarely within the capacity or expertise of a single employee, and thus may require a committee or task force dedicated for this purpose.

Discussion: Recipients are entitled to use § 106.44(c) to remove a respondent on an emergency basis, only where there is an immediate threat to the physical health or safety of any student or other individual. The "individualized safety or risk analysis" requirement ensures that the recipient should not remove a respondent from the recipient's education program or activity pursuant to § 106.44(c) unless there is more than a generalized, hypothetical, or speculative belief that the respondent may pose a risk to someone's physical health or safety. The Department believes that the immediate threat to physical health or safety threshold for justifying a removal sufficiently restricts § 106.44(c) to permitting only emergency removals and believes that further describing what might constitute an emergency would undermine the purpose of this provision, which is to set a high threshold for emergency removal yet ensure that the provision will apply to the variety of circumstances that could present such an emergency. The Department also believes that the final regulations adequately protect respondents, since in cases where the recipient removes a respondent, the recipient must follow appropriate procedures, including bearing the burden of demonstrating that the removal meets the threshold specified by the final regulations, based on a factual, individualized safety and risk analysis. We understand commenters' concerns that the individualized, fact-based nature of an emergency removal assessment may lead to different results from school to school or State to State, but different results may be reasonable based on the unique circumstances presented in individual situations.

Because the safety and risk analysis under § 106.44(c) must be "individualized," the analysis cannot be based on general assumptions about sex, or research that purports to profile characteristics of sex offense perpetrators, or statistical data about the frequency or infrequency of false or unfounded sexual misconduct allegations. The safety and risk analysis must be individualized with respect to the particular respondent and must examine the circumstances

"arising from the allegations of sexual harassment" giving rise to an immediate threat to a person's physical health or safety. These circumstances may include factors such as whether violence was allegedly involved in the conduct constituting sexual harassment, but could also include circumstances that "arise from" the allegations yet do not constitute the alleged conduct itself; for example, a respondent could pose an immediate threat of physical self-harm in reaction to being accused of sexual harassment. For a respondent to be removed on an emergency basis, the school must determine that an immediate threat exists, and that the threat justifies removal. Section 106.44(c) does not limit the factors that a recipient may consider in reaching that determination.

We appreciate commenters' concerns that performing safety and risk analyses may require a recipient to expend resources or train employees, but without an individualized safety and risk analysis a recipient's decision to remove a respondent might be arbitrary, and would fail to apprise the respondent of the basis for the recipient's removal decision so that the respondent has an opportunity to challenge the decision. Procedural due process of law and fundamental fairness require that a respondent deprived of an educational benefit be given notice and opportunity to contest the deprivation;[973] without knowing the individualized reasons why a recipient determined that the respondent posed a threat to someone's physical health or safety, the respondent cannot assess a basis for challenging the recipient's removal decision. Recipients may choose to provide specialized training to employees or convene interdisciplinary threat assessment teams, or be required to take such actions under other laws, and § 106.44(c) leaves

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

recipients flexibility to decide how to conduct an individualized safety and risk analysis, as well as who will conduct the analysis.

Changes: None.

"provides the respondent with notice and an opportunity to challenge the decision immediately following the removal"

Comments: One commenter stated that during any emergency removal hearing, schools should be required to share all available evidence with the respondent, permit that person an opportunity to be heard, and allow the respondent's advisor to cross-examine any witnesses. According to the commenter, if these full procedural rights are not extended, this provision would create a loophole that allows emergency measures to effectively replace a full grievance process. Commenters also argued that a recipient's emergency removal decisions would often be hastily made, and that recipients would ignore requirements that a removed student be given the opportunity to review or challenge the decision made by the recipient. Commenters argued that § 106.44(c) should include express language safeguarding students against abusive practices during the challenge procedure. One commenter suggested adding the word "meaningful" so the respondent would have "a meaningful opportunity" to challenge the removal decision, asserting that certain institutions of higher education in California have not consistently given respondents meaningful opportunities to "make their case." While supportive of § 106.44(c), one commenter suggested modifying this provision to require the recipient to send the respondent written notice of the specific facts that supported the recipient's decision to remove the student, so the respondent can meaningfully challenge the removal decision.

Some commenters asserted that if the respondent has a right to challenge the emergency removal, the recipient must offer an equitable opportunity for the complainant to contest an

overturned removal or participate in the respondent's challenge process. Other commenters asked whether § 106.44(c) requires, or allows, a recipient to notify the complainant that a respondent has been removed under this provision, that a respondent is challenging a removal decision, or that a removal decision has been overturned by the recipient after a respondent's challenge.

Commenters argued that § 106.44(c) would also effectively mandate that an institution's employees must be trained to conduct hearings or other undefined post-removal procedures in the event that a respondent exercises the right to challenge the emergency removal. Commenters argued that this burden likely would require a dedicated officer or committee to carry out procedural obligations that did not previously exist, and these burdens were not contemplated at the time of the recipient's acceptance of the Federal funding. Commenters argued that § 106.44(c) would provide rights to at-will employees that are otherwise unavailable, restricting employment actions that are normally within the discretion of an employer.

Commenters requested clarification about the procedures for challenging a removal decision, such as: whether a respondent's opportunity challenge the emergency removal means the recipient must, or may, use processes under § 106.45 to meet its obligations, including whether evidence must be gathered, witnesses must be interviewed, or a live hearing with cross-examination must be held; whether the recipient, or respondent, will bear the burden of proof that the removal decision was correct or incorrect; whether the recipient must, or may, involve the complainant in the challenge procedure; whether the recipient must, or may, use the investigators and decision-makers that have been trained pursuant to § 106.45 to conduct the post-removal challenge procedure; and whether the determinations about an emergency removal

must, or may, influence a determination regarding responsibility during a grievance process under § 106.45.

Discussion: The Department disagrees that § 106.44(c) poses a possible loophole through which recipients may bypass giving respondents the due process protections in the § 106.45 grievance process. The threshold for an emergency removal under § 106.44(c) is adequately high to prevent recipients from using emergency removal as a pretense for imposing interim suspensions and expulsions. We do not believe it is necessary to revise § 106.44(c) to prevent recipients from imposing "abusive" procedures on respondents; recipients will be held accountable for reaching removal decisions under the standards of § 106.44(c), giving recipients adequate incentive to give respondents the immediate notice and challenge opportunity following a removal decision. We do not believe that recipients will make emergency removal decisions "hastily," and a respondent who believes a recipient has violated these final regulations may file a complaint with OCR.

The Department does not want to prescribe more than minimal requirements on recipients for purposes of responding to emergency situations. We decline to require written notice to the respondent because minimal due process requires some kind of notice, and compliance with a notice requirement suffices for a recipient's handling of an emergency situation.[974] We decline to add the modifier "meaningful" before "opportunity" because the basic due process requirement of an opportunity to be heard entails an opportunity that is appropriate under the circumstances,

[974] *E.g.*, *Goss*, 419 U.S. at 578-79 (holding that in the public school context "the interpretation and application of the Due Process Clause are intensely practical matters" that require at a minimum notice and "opportunity for hearing appropriate to the nature of the case") (internal quotation marks and citations omitted).

which ensures a meaningful opportunity.[975] While a recipient has discretion (subject to FERPA and other laws restricting the nonconsensual disclosure of personally identifiable information from education records) to notify the complainant of removal decisions regarding a respondent, or post-removal challenges by a respondent, we do not require the complainant to receive notice under § 106.44(c) because not every emergency removal directly relates to the complainant. As discussed above, circumstances that justify removal must be "arising from the allegations of sexual harassment" yet may consist of a threat to the physical health or safety of a person other than the complainant (for example, where the respondent has threatened self-harm).[976]

The Department disagrees that § 106.44(c) requires a recipient to go through excessively burdensome procedures prior to removing a respondent on an emergency basis. The seriousness of the consequence of a recipient's decision to removal of a student or employee, without a hearing beforehand, naturally requires the school to meet a high threshold (i.e., an individualized safety and risk assessment shows that the respondent poses an immediate threat to a person's physical health or safety justifying removal). At the same time, § 106.44(c) leaves recipients wide latitude to select the procedures for giving notice and opportunity to challenge a removal.

A recipient owes a general duty under § 106.44(a) to respond to sexual harassment in a manner that is not deliberately indifferent. Where removing an individual on an emergency basis

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[975] *Id.*

[976] As discussed in the "Section 106.6(e) FERPA" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble, the complainant has a right to know the nature of any disciplinary sanctions imposed on a respondent after the recipient has found the respondent to be responsible for sexual harassment alleged by the complainant, because the disciplinary sanctions are directly related to the allegations made by the complainant. By contrast, emergency removal of a respondent does not involve a recipient's determination that the respondent committed sexual harassment as alleged by the complainant, and information about the emergency removal is not necessarily directly related to the complainant. Thus, FERPA (or other privacy laws) may restrict a recipient's discretion to disclose information relating to the emergency removal.

is necessary to avoid acting with deliberate indifference, a recipient must meet the requirements in § 106.44(c). The Department disagrees that § 106.44(c) imposes requirements on recipients that violate the Spending Clause, because recipients understand that compliance with Title IX will require dedication of personnel, time, and resources.[977] Because this provision does not prescribe specific post-removal challenge procedures, we do not believe recipients face significant burdens in training personnel to comply with new or unknown requirements; this provision ensures that the essential features of due process of law, or fundamental fairness, are provided to the respondent (i.e., notice and opportunity to be heard), and we believe that recipients are already familiar with these basic requirements of due process (for public institutions) or fair process (for private institutions).

In response to commenters' clarification requests, the post-removal procedure may, but need not, utilize some or all the procedures prescribed in § 106.45, such as providing for collection and presentation of evidence. Nothing in § 106.44(c) or the final regulations precludes a recipient from placing the burden of proof on the respondent to show that the removal decision was incorrect. Section 106.44(c) does not preclude a recipient from using Title IX personnel trained under § 106.45(b)(1)(iii) to make the emergency removal decision or conduct a post-removal challenge proceeding, but if involvement with the emergency removal process results in bias or conflict of interest for or against the complainant or respondent, § 106.45(b)(1)(iii) would preclude such personnel from serving in those roles during a grievance process.[978] Facts and

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[977] *See* discussion under the "Spending Clause" subsection of the "Miscellaneous" section of this preamble.
[978] Section 106.45(b)(1)(iii) requires all Title IX Coordinators, investigators, decision-makers, and persons who facilitate an informal resolution to be free from bias or conflicts of interest for or against complainants or respondents generally, or for or against any individual complainant or respondent.

evidence relied on during an emergency removal decision and post-removal challenge procedure may be relevant in a § 106.45 grievance process against the respondent but would need to meet the requirements in § 106.45; for example, a witness who provided information to a postsecondary institution recipient for use in reaching an emergency removal decision would need to appear and be cross-examined at a live hearing under § 106.45(b)(6)(i) in order for the witness's statement to be relied on by the decision-maker.

Changes: None.

How OCR Will Enforce the Provision

Comments: Commenters requested clarification about how OCR would enforce § 106.44(c), including what standard OCR would use in deciding whether a removal was proper; whether OCR would only find a violation if the recipient violates § 106.44(c) with deliberate indifference; whether violating this provision constitutes a violation of Title IX; whether OCR would defer to the determination reached by the recipient even if OCR would have reached a different determination based on the independent weighing of the evidence; whether a harmless error standard would apply to OCR's evaluation of a proper removal decision and only require reversing the recipient's removal decision if OCR thinks the outcome was affected by a recipient's violation of § 106.44(c); and whether OCR, or the recipient, would bear the burden of showing the correctness or incorrectness of the removal decision or the burden of showing that any violation affected the outcome or not.

Discussion: OCR will enforce this provision fully and consistently with other enforcement practices. OCR will not apply a harmless error standard to violations of Title IX, and will fulfill its role to ensure compliance with Title IX and these final regulations regardless of whether a recipient's non-compliance is the result of the recipient's deliberate indifference or other level of

intentionality. Recipients whose removal decisions fail to comply with § 106.44(c) may be found by OCR to be in violation of these final regulations. As discussed above, a recipient may need to undertake an emergency removal under § 106.44(c) in order to meet its duty not to be deliberately indifferent to sexual harassment. However, OCR will not second guess the decisions made under a recipient's exercise of discretion so long as those decisions comply with the terms of § 106.44(c). For example, OCR may assess whether a recipient's failure to undertake an individualized risk assessment was deliberately indifferent under § 106.44(a), but OCR will not second guess a recipient's removal decision based on whether OCR would have weighed the evidence of risk differently from how the recipient weighed such evidence. While not every regulatory requirement purports to represent a definition of sex discrimination, Title IX regulations are designed to make it more likely that a recipient does not violate Title IX's non-discrimination mandate, and the Department will vigorously enforce Title IX and these final regulations.

Changes: None.

Section 106.44(d) Administrative Leave

Comments: Some commenters expressed support for § 106.44(d), asserting that this provision appropriately recognizes that cases involving employees as respondents, especially faculty or administrative staff, should have different frameworks than cases involving students.

Some commenters asserted that it is unclear what standard a recipient must satisfy before it may place an employee on administrative leave. Commenters recommended giving discretion to an elementary and secondary school recipient to implement an alternate assignment (such as administrative reassignment to home) for staff during the pendency of an investigation, provided the same is otherwise permitted by law.

Commenters wondered how the Department defines "administrative leave," whether § 106.44(d) applies to paid or unpaid leave, and whether that would depend on how existing recipient employee conduct codes or employment contracts address the issue of paid or unpaid leave. Commenters asked whether an employee-respondent placed on leave may collect back pay from the recipient, if the grievance process determines there was insufficient evidence of misconduct. One commenter argued that administrative leave must include pay and benefits, as well as lodging if the employee-respondent resided in campus housing.

One commenter asserted that treating non-student employees differently than students or student-employees under § 106.44(d) constitutes discrimination. Another commenter questioned why recipients can deny employees paychecks for months until the conclusion of a formal grievance process, but give immediate due process for students to challenge an emergency removal; the commenter asserted that the recipient could simply provide a free semester of college to cover any loss to a student yet the proposed rules do not require a recipient to give back pay to an employee. Some commenters argued that § 106.44(c) emergency removal requirements to undertake an individualized safety and risk analysis and provide notice and an opportunity to challenge should also apply to administrative leave so that employees receive the same due process protections as students. Commenters argued that school investigations can take several months and that being on leave, especially without pay, can be a severe hardship for many employees. Commenters asserted that the Department should explicitly require recipients to secure a removed employee's personal property and be responsible for any damage occurring to the property before the removed employee can regain custody.

Commenters asserted that § 106.44(d) should apply to student-employee respondents and should be revised to limit the provision to administrative leave "from the person's employment,"

so that a student-employee respondent could still have access to the recipient's educational programs but the recipient would not be forced to continue an active employment relationship with that respondent during the investigation. For example, commenters argued, a recipient should not be compelled to allow a teaching assistant who has been accused of sexual harassment to continue teaching while the accusations are being investigated.

Commenters argued that § 106.44(d) should reference disability laws that protect employees parallel to the references to disability laws in § 106.44(c).

Discussion: The Department appreciates the support from commenters for § 106.44(d), giving a recipient discretion to place respondents who are employees on administrative leave during the pendency of an investigation.

We acknowledge commenters' concerns that § 106.44(d) does not specify conditions justifying administrative leave; however, we desire to give recipients flexibility to decide when administrative leave is appropriate. If State law allows or requires a school district to place an accused employee on "reassignment to home" or alternative assignment, § 106.44(d) does not preclude such action while an investigation under § 106.45 into sexual harassment allegations against the employee is pending.

The Department does not define "administrative leave" in this provision, but administrative leave is generally understood as temporary separation from a person's job, often with pay and benefits intact. However, these final regulations do not dictate whether administrative leave during the pendency of an investigation under § 106.45 must be with pay (or benefits) or without pay (or benefits). With respect to the terms of administrative leave, recipients who owe obligations to employees under State laws or contractual arrangements may comply with those obligations without violating § 106.44(d). Similarly, these final regulations do

not require back pay to an employee when the pending investigation results in a determination that the employee was not responsible. Further, this provision does not require a recipient to cover the costs of lodging for, or to secure the personal property of, an employee placed on administrative leave, although the final regulations do not preclude a recipient from taking such actions. We note that these final regulations similarly allow – but do not require – a recipient to repay a respondent for expenses incurred as a result of an emergency removal or to take actions to secure personal property during a removal under § 106.44(c) (whether the removed respondent was a student, or an employee). We also note that § 106.6(f) provides that nothing in this part may be read in derogation of an individual's rights, including an employee's rights, under Title VII[979] and that other laws such as Title VII may dictate whether administrative leave should be paid or unpaid and whether a respondent should be repaid for expenses incurred as a result of any of the recipient's actions.

The Department acknowledges that being placed on administrative leave – especially if the leave is without pay – may constitute a hardship for the employee. However, no respondent who is an employee may be kept on administrative leave indefinitely, because § 106.44(d) does not authorize administrative leave unless a § 106.45 grievance process has been initiated, and § 106.45(b)(1)(v) requires the grievance process to be concluded within a designated reasonably prompt time frame. As proposed in the NPRM, § 106.44(d) provided that a recipient may place a non-student employee respondent on administrative leave during the pendency of an

[979] For discussion of the revision to language in § 106.6(f) (i.e., stating in these final regulations that nothing in this part may be read in derogation of *an individual's* rights instead of *an employee's* rights, under Title VII), see the "Section 106.6(f) Title VII and Directed Question 3 (Application to Employees)" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

investigation; this was intended to refer to an investigation conducted pursuant to the § 106.45 grievance process. To clarify this point, the Department replaces "an investigation" with "a grievance process that complies with § 106.45" in § 106.44(d) to make it clear that a recipient may place a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. The Department also revised § 106.44(d) to provide that "nothing in this subpart" instead of "nothing in this section" precludes a recipient from placing a non-student employee respondent on administrative leave to clarify that § 106.44(d) applies to subpart D of Part 106 of Title 34 of the Code of Federal Regulations. This revision makes it clear that nothing in subpart D of Part 106 of Title, which concerns nondiscrimination on the basis of sex in education programs or activities receiving Federal financial assistance and which includes other provisions such as § 106.44 and § 106.45, precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45.

The Department appreciates commenters' suggestions that the same due process protections (notice and opportunity to challenge a removal) that apply to respondents under § 106.44(c) should apply to an employee placed on administrative leave under § 106.44(d). This is unnecessary, because § 106.44(c) applies to an emergency removal of *any* respondent. Any respondent (whether an employee, a student, or other person) who poses an immediate threat to the health or safety of any student or other individual may be removed from the recipient's education program or activity on an emergency basis, where an individualized safety and risk analysis justifies the removal. Thus, respondents who are employees receive the same due process protections with respect to emergency removals (i.e., post-removal notice and opportunity to challenge the removal) as respondents who are students.

The Department also clarifies that pursuant to §106.44(d), a recipient may place a non-student employee respondent on administrative leave, even if the emergency removal provision in § 106.44(c) does not apply. With respect to student-employee respondents, we explain more fully, below, that these final regulations do not necessarily prohibit a recipient from placing a student-employee respondent on administrative leave if doing so does not violate other regulatory provisions. For example, placing a student-employee respondent on administrative leave with pay may be permissible as a supportive measure, defined in § 106.30, for a complainant (for instance, to maintain the complainant's equal educational access and/or to protect the complainant's safety or deter sexual harassment) as long as that action meets the conditions that a supportive measure is not punitive, disciplinary, or unreasonably burdensome to the respondent. Whether a recipient considers placing a student-employee respondent on administrative leave as part of a non-deliberately indifferent response under § 106.44(a) is a decision that the Department will evaluate based on whether such a response is clearly unreasonable in light of the known circumstances. The Department will interpret these final regulations in a manner that complements an employer's obligations under Title VII, and nothing in these final regulations or in Part 106 of Title 34 of the Code of Federal Regulations may be read in derogation of any individual's rights, including any employee's rights, under Title VII, as explained in more detail in the "Section 106.6(f) Title VII and Directed Question 3 (Application to Employees)" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

Section 106.44(a) prohibits a recipient from imposing disciplinary sanctions against a respondent without following a grievance process that complies with § 106.45. Administrative leave without pay is generally considered disciplinary, and would likely be prohibited under §

106.44(a) in the absence of the § 106.44(d) administrative leave provision. The Department believes that while an investigation is pending, a recipient should have discretion to place an employee-respondent on any form of administrative leave the recipient deems appropriate, so that the recipient has flexibility to protect students from exposure to a potentially sexually abusive employee. Numerous commenters asserted that educator sexual misconduct is prevalent throughout elementary and secondary schools, and postsecondary institutions.[980] For these reasons, the final regulations permit, but do not require, what may amount to an interim suspension of an employee-respondent (i.e., administrative leave without pay) even though the final regulations prohibit interim suspensions of student-respondents. We reiterate that any respondent may be removed on an emergency basis under § 106.44(c).

We do not believe that employees placed on administrative leave are denied sufficient due process under these circumstances, because in order for § 106.44(d) to apply, a § 106.45 grievance process must be underway, and that grievance process provides the respondent (and complainant) with clear, strong procedural protections designed to reach accurate outcomes, including the right to conclusion of the grievance process within the recipient's designated, reasonably prompt time frame. As previously explained, the Department revised § 106.44(d) to clarify that a recipient may place a non-student respondent on administrative leave during the pendency of a grievance process that complies with § 106.45.

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[980] *E.g.,* Charol Shakeshaft, *Educator Sexual Misconduct: A Synthesis of Existing Literature* (2004) (prepared for the U.S. Dep't. of Education) (ten percent of children were targets of educator sexual misconduct by the time they graduated from high school); National Academies of Science, Engineering, and Medicine, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* 61 (Frasier F. Benya *et al.* eds., 2018) (describing the prevalence of faculty-on-student sexual harassment at the postsecondary level).

Commenters erroneously asserted that because § 106.44(d) applies only to "non-student employees," a recipient is always precluded from placing an employee-respondent on administrative leave if the employee is also a student. We decline to make § 106.44(d) apply to student-employees or to change this provision to specify that administrative leave is "from the person's employment." Consistent with § 106.6(f), where an employee is not a student, we do not preclude a recipient-employer from placing a non-student employee on administrative leave during the pendency of a grievance process that complies with § 106.45. These final regulations do not prohibit a recipient from placing a student-employee respondent on administrative leave if doing so does not violate other regulatory provisions. As discussed above, placing a student-employee respondent on administrative leave with pay may be permissible as a supportive measure, defined in § 106.30, and may be considered by the recipient as part of the recipient's obligation to respond in a non-deliberately indifferent manner under § 106.44(a). Where a student is also employed by their school, college, or university, it is likely that the student depends on that employment in order to pay tuition, or that the employment is important to the student's academic opportunities. Administrative leave may jeopardize a student-employee's access to educational benefits and opportunities in a way that a non-student employee's access to education is not jeopardized. Accordingly, administrative leave is not always appropriate for student-employees. There may be circumstances that justify administrative leave with pay for student-employees, and the specific facts of a particular matter will dictate whether a recipient's response in placing a student-employee on administrative leave is permissible. For example, if a student-employee respondent works at a school cafeteria where the complainant usually eats, a recipient may determine that placing the student-employee respondent on administrative leave with pay, during the pendency of a grievance process that complies with § 106.45, will not

unreasonably burden the student-employee respondent, or the recipient may determine that re-assigning the student-employee respondent to a different position during pendency of a § 106.45 grievance process, will not unreasonably burden the student-employee respondent. If a recipient places a party who is a student-employee on administrative leave with pay as a supportive measure, then such administrative leave must be non-disciplinary, non-punitive, not unreasonably burdensome, and otherwise satisfy the definition of supportive measures in § 106.30. With respect to a student-employee respondent, a recipient also may choose to take measures other than administrative leave that could constitute supportive measures for a complainant, designed to protect safety or deter sexual harassment without unreasonably burdening the respondent. For example, where an employee is also a recipient's student, it is likely that the recipient has the ability to supervise the student-employee to ensure that any continued contact between the student-employee respondent and other students occurs under monitored or supervised conditions (e.g., where the respondent is a teaching assistant), during the pendency of an investigation. If a recipient removes a respondent pursuant to § 106.44(c) after conducting an individualized safety and risk analysis and determining that an immediate threat to the physical health or safety of any students or other individuals justifies removal, then a recipient also may remove a student-employee respondent from any employment opportunity that is part of the recipient's education program or activity.

The Department is persuaded by commenters who asserted that analogous disability protections should expressly apply for employee-respondents under § 106.44(d) as for respondents under the § 106.44(c) emergency removal provision. We have revised § 106.44(d) of the final regulations to state that this provision may not be construed to modify any rights under Section 504 or the ADA.

Changes: We have revised § 106.44(d) to clarify that it will not be construed to modify Section 504 or the ADA.[981] We also revised § 106.44(d) to clarify that nothing in subpart D of Part 106, Title 34 of the Code of Regulations, precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45.

Section 106.45 Recipient's Response to Formal Complaints

General Requirements for § 106.45 Grievance Process

Section 106.45(a) Treatment of Complainants or Respondents Can Violate Title IX

Comments: Commenters including students, professors, campus administrators, and attorneys, expressed appreciation and support for § 106.45(a). Some commenters asserted that § 106.45(a) is a welcome addition because in recent years, Federal judges have expressed concerns about how university treatment of respondents (or complainants) might run afoul of Title IX and contradict Title IX's promise of gender equity. Some commenters noted that although Federal courts have not assumed that all unfair procedures depriving respondents of a fair process necessarily equate to sex discrimination,[982] numerous Federal courts have identified plausible claims of an institutions' sex discrimination against respondents, and commenters cited Federal

[981] As discussed in the "Section 106.6(f) Title VII and Directed Question 3 (Application to Employees)" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble, we revised the reference to "this section" to "this subpart" in § 106.44(d).

[982] Commenters cited: *Nokes v. Miami Univ.*, 1:17-CV-482, 2017 WL 3674910 (S.D. Ohio Aug. 25, 2017); *Sahm v. Miami Univ.*, 110 F. Supp. 3d 774 (S.D. Ohio 2015); *Bleiler v. Coll. of the Holy Cross*, No. 1:11-CV-11541, 2013 WL 4714340 (D. Mass. Aug. 26, 2013).

cases[983] where courts noted sex discrimination may exist where an institution failed to investigate evidence that the complainant might also have committed sexual misconduct in the same case, credited only female witnesses, ignored exonerating evidence because of preconceived notions about how males and females behave, used gender-biased training materials that portray only men as sexual predators or only women as victims, or denied the respondent necessary statistical information to test allegations of gender bias.

Other commenters gave examples of how they have observed sex-driven unfair treatment against respondents in campus Title IX proceedings. A few commenters pointed out that when a sexual harassment grievance process favors females over males in an attempt to be equitable to victims, the result is often that male victims of sexual harassment are not treated equitably; some commenters cited to statistics showing that similar percentages of men (5.3 percent) and women (5.6 percent) experience sexual violence other than rape each year,[984] that about 14 percent of reported rape cases involve men or boys, one in six reported sexual assaults is against a boy, one in 25 reported sexual assaults is against a man,[985] and that a survey of 27 colleges and universities revealed that 40.9 percent of undergraduate heterosexual males had experienced sexual harassment, intimate partner violence, or stalking, compared to 60.5 percent of

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[983] Commenters cited: *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018); *Doe v. Miami Univ.*, 882 F.3d 579 (6th Cir. 2018); *Rossley v. Drake Univ.*, 342 F. Supp. 3d 904 (S.D. Iowa 2018); *Doe v. Univ. of Miss.*, No. 3:16-CV-63, 2018 WL 3570229 (S.D. Miss. July 14, 2018); *Doe v. Univ. of Pa.*, 270 F. Supp. 3d 799 (E.D. Pa. 2017); *Doe v. Amherst Coll.*, 238 F. Supp. 3d 195 (D. Mass. 2017); *Doe v. Williams Coll.*, No. 3:16-CV-30184 (D. Mass. Apr. 28, 2017); *Saravanan v. Drexel Univ.*, No. 2:17-CV-03409, 2017 WL 5659821 (E.D. Pa. Nov. 24, 2017); *Marshall v. Ind. Univ.*, No. 1:15-CV-00726, 2016 WL 4541431 (S.D. Ind. Aug. 31, 2016).

[984] Commenters cited: Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report* Tables 2.1 and 2.2 (Nov. 2011).

[985] Commenters cited: National Alliance to End Sexual Violence, "Male Victims," ("About 14% of reported rapes involve men or boys, 1 in 6 reported sexual assaults is against a boy, and 1 in 25 reported sexual assaults is against a man."), https://www.endsexualviolence.org/where_we_stand/male-victims/.

undergraduate heterosexual females.[986] Some commenters opined that the Department's withdrawn 2011 Dear Colleague Letter contributed to more instances of universities applying grievance procedures in a sex-discriminatory manner (usually against respondents, who, commenters argued, are overwhelmingly male). At least one commenter supportive of § 106.45(a) cited a white paper by NCHERM cautioning colleges and universities to avoid applying grievance procedures in an unfair, biased manner (whether favoring complainants, or favoring the accused) and urging institutions to have balanced processes.[987] Several commenters, including attorneys and organizations with experience representing accused students, supported § 106.45(a) because although the provision only clarifies what is already the intent of the law, the provision is necessary to counter institutional bias in favor of female accusers and against male accused students, as both are entitled to equally fair procedures untainted by gender bias; one such commenter referred to § 106.45(a) as an "essential corrective" to gender bias that permeates campus sexual misconduct proceedings, and another believed that the provision will encourage schools to be more careful in how they treat both sides.

Discussion: The Department appreciates commenters' support for § 106.45(a) and acknowledges that many commenters have observed through personal experiences navigating campus sexual misconduct proceedings that some recipients have applied grievance procedures in a manner that

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[986] Commenters cited: The Association of American Universities, *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* (Westat 2015).

[987] Commenters cited: National Center for Higher Education Risk Management (NCHERM), *White Paper: Due Process and the Sex Police* 14-15 (2017) ("There are always unintended consequences to showing favoritism. If a college is known to be biased toward responding parties, this can chill the willingness of victims/survivors to report. If a college is known to be biased toward reporting parties, a victim/survivor's sense of safety or justice based on the campus outcome in the short run may be quickly compromised by a court order or lawsuit reinstating the responding party, giving her a Pyrrhic victory, at best. What is needed for all of our students is a balanced process that centers on their respective rights while showing favoritism to neither. Not only is that best, it is required by law.").

shows discrimination against respondents on the basis of sex. We note that other commenters have recounted personal experiences navigating campus sexual misconduct proceedings perceived to be biased against complainants on the basis of sex. To the extent that such discriminatory practices occur, § 106.45(a) advises recipients against sex discriminatory practices during the grievance process and to avoid different treatment favoring or disfavoring any party on the basis of sex. However, to clarify that § 106.45(a) applies as much to complainants as to respondents, the final regulations revise the language in this provision but retain the provision's statement that how a recipient treats a complainant, or a respondent, "may" constitute sex discrimination under Title IX. The Department emphasizes that any person regardless of sex may be a victim or perpetrator of sexual harassment and that different treatment due to sex-based stereotypes about how men or women behave with respect to sexual violence violates Title IX's non-discrimination mandate.

Changes: The final regulations revise § 106.45(a) to state more clearly that treatment of a complainant or respondent may constitute sex discrimination in violation of Title IX.

Comments: Some commenters opposed § 106.45(a), claiming that this provision would harbor perpetrators by permitting them to claim a Title IX violation even if the recipient merely opens an investigation into their conduct, and would revictimize and retraumatize survivors. Some commenters argued that this provision operates from a premise of false equivalency since the respondent is not involved in the process on the basis of their sex but rather on the basis of their alleged behavior whereas the complainant alleges to have suffered Title IX sexual harassment (discrimination on the basis of sex). Some commenters argued that a recipient's treatment of the respondent does not constitute discrimination on the basis of sex under Title IX unless sex bias was a factor and therefore the Department lacks authority to issue a regulation that equates unfair

treatment of a respondent with sex discrimination. Other commenters contended that Title IX[988] does not include the grievance process prescribed in these final regulations and does not address the conduct of school officials implementing a grievance process, and that the Department has no authority to create new individual rights under Title IX. At least one commenter argued that the purpose of § 106.45(a) appears to be justifying the entirety of the Department's prescribed grievance process (which the commenter argued is characterized by rape exceptionalism with many provisions designed to benefit only respondents) by wrongfully characterizing procedural protections for respondents as needed to avoid sex discrimination. Another commenter argued that § 106.45(a) turns Title IX on its head by making respondents accused of sexual harassment into a protected class, enabling respondents to make a sex discrimination claim for any deviation from the § 106.45 grievance process requirements while complainants would need to show deliberate indifference to claim sex discrimination.

Some commenters asserted that this provision hamstrings recipients excessively and that the provision is fundamentally unfair to survivors. Some commenters argued that the provision grants respondents the right to sue for sex discrimination under Title IX and contended that fear of respondent litigation causes recipients to deprive complainants of due process and fair procedures by, for example, giving respondents access to information or accommodations not given to the complainant or to deliberately mislead the complainant about the investigation. One commenter characterized § 106.45(a) as giving an "unsubstantiated right of action for respondents under Title IX" that will cause "risk-averse universities to fail to investigate properly, and that schools and university legal counsel will be incentivized to never find in a

[988] Commenters cited: 20 U.S.C. 1681(a).

survivor's favor, even when the facts clearly indicate that sexual violence occurred," leading to more complainants suing recipients privately under Title IX just to force institutions to treat complainants equally. This concern was echoed by a few commenters who argued that this provision would cause institutions to ignore reports and refuse to punish perpetrators for fear of respondent lawsuits.

Other commenters characterized § 106.45(a) as purporting to consider the treatment of the respondent as equally violating Title IX as the alleged behavior (sexual violence) prompting the Title IX case in the first place, while another commenter believed this provision meant that unfair treatment of a respondent constituted sexual harassment. A few commenters argued that § 106.45(a) unnecessarily risks incentivizing institutions to treat survivors unfairly, because respondents already have legal theories (such as violation of due process and breach of contract) with which to challenge unfair discipline, and Federal courts[989] have appropriately made it difficult for respondents to successfully challenge unfair discipline as sex discrimination, either on an erroneous outcome or selective enforcement theory – a result that would be undermined by § 106.45(a) giving respondents new rights to pursue unfair discipline claims under the auspices of Title IX.

One commenter, a Title IX Coordinator, stated that § 106.45(a) seems unnecessary because typically both parties are members of the recipient's community and the recipient should

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[989] Commenters cited, e.g.: *Doe v. Colgate Univ. Bd. of Trustees*, 760 F. App'x 22 (2d Cir. 2019); *Doe v. Cummins*, 662 F. App'x 437, 451-53 (6th Cir. 2016); *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994); *Preston v. Va. ex rel. New River Comm. Coll.*, 31 F.3d 203, 207 (4th Cir. 1994); *Doe v. Univ. of Cincinnati*, 173 F. Supp. 3d 586, 606-07 (S.D. Ohio 2016); *Winter v. Pa. State Univ*., 172 F. Supp. 3d 756, 775-76 (M.D. Pa. 2016); *Nungesser v. Columbia Univ.*, 169 F. Supp. 3d 353, 364 (S.D.N.Y. 2016); *Doe v. Columbia Univ*., 101 F. Supp. 3d 356, 372 (S.D.N.Y. 2015); *Doe v. Univ. of the So.*, 687 F. Supp. 2d 744, 756 (E.D. Tenn. 2011); *Patenaude v. Salmon River Cent. Sch. Dist.*, No. 3:03-CV-1016, 2005 WL 6152380 (N.D.N.Y. Feb. 16, 2005).

not discriminate against any member of its community. One commenter opposed § 106.45(a) because it tells male students they have been victimized and gives male students more incentive to gratify themselves at the expense of a woman's education. One commenter argued that if stating that a recipient's treatment of a party in sexual harassment proceedings "may" constitute sex discrimination is sufficient to justify the Department regulating extensive grievance procedures in sexual harassment cases, there is no end to the Department's authority, on the same reasoning, to regulate any other type of interaction between a school and its students or employees, since any action taken by a recipient "may" constitute sex discrimination.

Some commenters suggested modifications in language including to specify that a recipient's response to a complaint may constitute sex discrimination where: the recipient deprives a respondent of access to education based on sex stereotypes or by using procedures that discriminate on the basis of sex; the recipient acts with deliberate indifference; by a reasonable and objective standard, the "treatment" is sufficiently severe or pervasive so as to interfere with a student's educational opportunities and/or create a hostile work environment; there is evidence of discriminatory application of Title IX or acts of retaliation; the recipient uses investigatory or other acts to mistreat (or not adequately treat well) the respondent. Another commenter asserted that § 106.45(a) should specify that programs funded by the U.S. Department of Justice's Office on Violence Against Women (OVW) must comply with these final regulations. Another commenter argued that §106.45 should consider that when in doubt, the recipient may err on side of releasing information in order to avoid liability under these final regulations.

Discussion: The Department disagrees with commenters who believed that § 106.45(a) would harbor perpetrators and revictimize or retraumatize survivors by permitting respondents to claim

a Title IX violation based on a recipient's opening of an investigation into alleged sexual harassment. This provision does not declare that actions toward a respondent (or complainant) *do* constitute sex discrimination in violation of Title IX, but states only that treatment of a respondent (or treatment of a complainant) *may* constitute sex discrimination. Title IX prohibits sex discrimination against all individuals on the basis of the protected characteristic (sex), and § 106.45(a) advises recipients to be aware that taking action with respect to either party in a grievance process resolving allegations of sexual harassment may not be done in a sex discriminatory manner. This provision operates to protect complainants and respondents equally, irrespective of sex, by emphasizing to recipients that although a grievance process takes place in the context of resolving allegations of one type of sex discrimination (sexual harassment), a recipient must take care not to treat a party differently on the basis of the party's sex because to do so would inject further sex discrimination into the situation. For example, a recipient's decision to investigate sexual harassment complaints brought by women but not by men may constitute sex discrimination in the context of a sexual harassment grievance process; similarly, a recipient's practice of imposing a sanction of expulsion on female respondents found responsible for sexual harassment, but suspension on male respondents found responsible, may constitute sex discrimination.

The Department acknowledges that the text of the Title IX statute does not specify grievance procedures for resolving allegations of sexual harassment. However, at the time Title IX was enacted in 1972, Federal courts had not yet addressed sexual harassment as a form of sex discrimination, but the Supreme Court's *Gebser/Davis* framework explicitly interpreted Title IX's non-discrimination mandate to include sexual harassment as a form of sex discrimination. Since 1975 the Department's Title IX regulations have required recipients to adopt and publish

"grievance procedures" for the prompt and equitable resolution of complaints that recipients are committing sex discrimination against students or employees.[990] The Department's authority to enforce such regulations has been acknowledged by the Supreme Court.[991] The Department has determined that current regulatory reference to "grievance procedures" that are "prompt and equitable" does not adequately prescribe a consistent, fair, reliable grievance process for resolving allegations of Title IX sexual harassment; in accordance with the Department's regulatory authority under Title IX, the final regulations now set forth a grievance process for resolving formal complaints raising allegations of sexual harassment.

The Department disagrees that § 106.45(a) turns Title IX on its head or creates a new protected class (respondents); this provision focuses on the central purpose of Title IX, to provide protections from sex-discriminatory practices to all persons, acknowledging that the ways in which complainants and respondents are treated must not be affected by the sex of a person even though the underlying allegations involve allegations of a type of sex discrimination (sexual harassment) that make it tempting for recipients to intentionally or unintentionally allow sex-based biases, stereotypes, and generalizations to influence how procedures are applied. Partly in response to commenters' misapprehension that § 106.45(a) allows respondents – but not complainants – to claim sex discrimination whenever a requirement in § 106.45 is not met, the final regulations permit either party equally to appeal a determination regarding responsibility on the basis of procedural irregularity.[992] Similarly, either party believing a recipient failed to follow the § 106.45 grievance process could file a complaint with OCR that could result in the

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[990] 34 CFR 106.8(b).
[991] *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291-92 (1998).
[992] Section 106.45(b)(8).

Department requiring the recipient to come into compliance with § 106.45, regardless of whether the violation of § 106.45 also amounted to deliberate indifference (as to a complainant) or otherwise constituted sex discrimination (as to a respondent). A violation of § 106.45 need not, and might not necessarily, constitute sex discrimination, whether the violation disfavored a complainant or a respondent. Thus, § 106.45(a) does not create a special protection for respondents or special burden for complainants with respect to allegations that a recipient failed to comply with the § 106.45 grievance process.

For similar reasons, the Department disagrees that § 106.45(a) in any way "hamstrings" recipients into catering to respondents' interests or permits recipients to ignore complainants or treat complainants unfavorably out of fear of being sued by respondents. Rather, § 106.45(a) reminds recipients that Title IX requires recipients to avoid bias, prejudice, or stereotypes based on sex whether the recipient's intent is to favor or disfavor complainants or respondents. As to commenters' concerns that out of fear of respondent lawsuits recipients will, for example, give respondents access to information or accommodations not given to the complainant or deliberately mislead the complainant about the investigation, the Department notes that such actions likely will either violate specific provisions of § 106.45 (e.g., § 106.45(b)(5)(vi) requires the parties to have equal opportunity to inspect and review evidence) or constitute the very treatment against a complainant that § 106.45(a) cautions against. For reasons discussed in the "General Support and Opposition for the § 106.45 Grievance Process" section of this preamble, the Department disputes that the § 106.45 grievance process is premised on rape exceptionalism. The prescribed grievance process is tailored to resolve allegations of sexual harassment that constitute sex discrimination under a Federal civil rights law, not to adjudicate criminal charges; the fact that resolution of sexual harassment under Title IX requires, in the Department's

judgment, a consistent, predictable grievance process in no way implies that a "special" process is needed due to rape myths or sex-based generalizations (such as, "women lie about rape"). The § 106.45 grievance process does not prioritize respondent's rights over those of complainants. Rather, § 106.45 contains important procedural protections that apply equally to both parties with three exceptions: one provision that treats complainants and respondents equitably instead of equally (by recognizing a complainant's interest in a recipient providing remedies, and a respondent's interest in disciplinary sanctions imposed only after a recipient follows a fair process);[993] one provision that applies only to respondents (a presumption of non-responsibility until conclusion of a fair process);[994] and one provision that applies only to complainants (protection from questions and evidence regarding sexual history).[995]

The Department is aware that in private lawsuits brought under Title IX, Federal courts have been reluctant to equate unfair treatment of a respondent during a sexual misconduct disciplinary proceeding with sex discrimination unless the respondent can show that the unfair treatment was motivated by the party's sex. Contrary to commenters' assertions, § 106.45(a) does not assume that any unfair treatment constitutes sex discrimination, but does caution recipients that treatment of any party could constitute sex discrimination. In this way, § 106.45(a) shields parties (both complainants and respondents) from recipient actions during the grievance process that are impermissibly motivated by sex-based bias or stereotypes in violation of Title IX's non-discrimination mandate. However, as discussed above, this does not mean that every violation of § 106.45 necessarily equates to sex discrimination. The Department disagrees

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[993] Section 106.45(b)(1)(i).
[994] Section 106.45(b)(1)(iv).
[995] Section 106.45(b)(6)(i)-(ii).

that § 106.45(a) purports to consider treatment of a respondent during a grievance process as the same type of behavior that prompted the respondent to become a respondent in the first place (e.g., alleged sexual misconduct), or that this provision equates unfair discipline with sexual harassment. The Department appreciates the opportunity to clarify that when a respondent is treated differently based on sex during a grievance process designed to resolve allegations that the respondent perpetrated sexual harassment, the sex-based treatment of the respondent violates Title IX's non-discrimination mandate in a different way than sexual harassment does when sexual harassment constitutes sex discrimination under Title IX. Title IX prohibits different treatment on the basis of sex, which § 106.45(a) acknowledges may occur against respondents or complainants in violation of Title IX. Title IX also requires recipients to respond appropriately to allegations of sexual harassment, because sexual harassment constitutes a particular form of sex discrimination. The Department also appreciates the opportunity to clarify that the Department does not draw an equivalency among different types of sex discrimination prohibited under Title IX, and recognizes that when sex discrimination takes the form of sexual harassment victims often face trauma and negative impacts unique to that particular form of sex discrimination; indeed, it is this recognition that has prompted the Department to promulgate legally binding regulations governing recipients' response to sexual harassment rather than continuing to rely on guidance documents that lack the force and effect of law.

The Department disagrees with commenters who argued that § 106.45(a) is unnecessary because respondents already have non-Title IX legal theories on which to challenge unfair discipline and have erroneous outcome and selective enforcement theories with which to challenge unfair discipline under Title IX. While it is true that respondents have relied on such theories to pursue private lawsuits, similarly complainants already have a judicially implied

private right of action under Title IX to sue a recipient for being deliberately indifferent to a complainant victimized by sexual harassment. The existence of private rights of action under Title IX, or under other laws, does not obviate the importance of the Department using its statutory authorization to effectuate the purposes of Title IX through administrative enforcement by promulgating regulations designed to provide individuals with effective protections against discriminatory practices. Indeed, in the final regulations some requirements intended to protect against sex discrimination apply only to the benefit of complainants (e.g., § 106.44(a) has been revised to require as part of a non-deliberately indifferent response that recipients notify complainants of the availability of supportive measures with or without the filing of a formal complaint, offer supportive measures to the complainant, and explain to complainants the process for filing a formal complaint) while other provisions aim to ensure protections against sex discrimination for both complainants and respondents (e.g., § 106.45(a)). The Department has administrative authority to enforce such provisions, whether or not Federal courts would impose the same requirements under a complainant's or respondent's private Title IX lawsuit.

The Department agrees with the commenter who asserted that recipients should not discriminate against any member of the recipient's community but maintains that § 106.45(a) is not rendered unnecessary by that belief. The Department disagrees that § 106.45(a) conveys to male students that being treated unfairly in the grievance process gives license to perpetrate sexual misconduct against women; while a recipient must treat a respondent in a manner free from sex discrimination and impose discipline only after following a fair grievance process, those restrictions in no way encourage or incentivize perpetration of sexual misconduct and in fact help ensure that sexual misconduct, where reliably determined to have occurred, is addressed through remedies for victims and disciplinary sanctions for perpetrators.

The Department understands the commenter's concern that § 106.45(a) could be misunderstood to justify the Department regulating any facet of a recipient's interaction with students and employees because in any circumstance a recipient "may" act in a sex-biased manner. The Department appreciates the opportunity to clarify that § 106.45(a) is necessary in the context of sexual harassment because allegations of such conduct present an inherent risk of sex-based biases, stereotypes, and generalizations permeating the way parties are treated, such that a consistent, fair process applied without sex bias to any party is needed.

The Department's authority to promulgate regulations under Title IX encompasses regulations to effectuate the purpose of Title IX, and as commenters acknowledged, one of the two main purposes of Title IX is providing individuals with protections against discriminatory practices.[996] Implementation of a grievance process for resolution of sexual harassment lies within the Department's statutory authority to regulate under Title IX,[997] and § 106.45(a) is a provision designed to protect all individuals involved in a sexual harassment situation from sex discriminatory practices in the context of a grievance process to resolve formal complaints of sexual harassment. Thus, § 106.45, and paragraph (a) in particular, does not create new individual rights but rather prescribes procedures designed to protect the rights granted all persons under Title IX to be free from sex discrimination with respect to participation in education programs or activities.

The Department notes that nothing about § 106.45(a) creates or grants respondents (or complainants) rights to file private lawsuits, whether under Title IX or otherwise. Title IX does

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[996] *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979).
[997] 20 U.S.C. 1682.

not contain an express private right of action, but the Supreme Court has judicially implied such a right.[998] In *Gebser*, the Supreme Court declined to allow petitioner to seek damages in a private suit under Title IX for the school's alleged failure to have a grievance procedure as required under Department regulations because "failure to promulgate a grievance procedure does not itself constitute 'discrimination' under Title IX."[999] The Court continued, "Of course, the Department of Education could enforce the requirement administratively: Agencies generally have authority to promulgate and enforce requirements that effectuate the statute's non-discrimination mandate, 20 U.S.C. 1682, even if those requirements do not purport to represent a definition of discrimination under the statute."[1000] Thus, the Department's exercise of administrative enforcement authority does not grant new rights to respondents (or complainants) who pursue remedies against recipients in private lawsuits under Title IX.

The Department appreciates commenters' suggestions for modifications to this provision, but declines to add modifiers or qualifiers that would further describe how and when a recipient's treatment of a complainant or respondent might constitute sex discrimination. In the interest of retaining the broad intent of Title IX's non-discrimination mandate, § 106.45(a) in the final regulations begins the entirety of a Title IX sexual harassment grievance process under § 106.45 by advising recipients to avoid treatment of any party in a manner that discriminates on the basis of sex. The § 106.45 grievance process leaves recipients with significant discretion to adopt procedures that are not required or prohibited by § 106.45, including, for example, rules designed to conduct hearings in an orderly manner respectful to all parties. Section 106.45(a)

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[998] *Cannon*, 441 U.S. at 691.
[999] *Gebser*, 524 U.S. at 292.
[1000] *Id.*

emphasizes to recipients that such rules or practices that a recipient chooses to adopt must be applied without different treatment on the basis of sex. To reinforce the importance of treating complainants and respondents equally in a grievance process, the final regulations also revise the introductory sentence of § 106.45(b) to indicate that any grievance process rules a recipient chooses to adopt (that are not already required under § 106.45) must treat the parties equally. Together with § 106.45(a), this modification emphasizes, for the benefit of any person involved in a Title IX grievance process, that recipients must treat both parties equally and without regard to sex.

The Department declines to specify what programs (including those funded by OVW grants) must comply with this provision; questions about application of Title IX to individual recipients may be submitted to the recipient's Title IX Coordinator, the Assistant Secretary, or both, under § 106.8(b)(1). The Department disagrees with the commenter who suggested that § 106.45(a) will cause a recipient to err on the side of releasing information or increase a recipient's fear of retaliation; however, in response to many comments concerning confidentiality and retaliation, the final regulations include § 106.71 prohibiting retaliation and specifying that the recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by FERPA, required by law, or as necessary to conduct the grievance process, and providing that complaints alleging retaliation may be filed according to the prompt and equitable grievance procedures for sex discrimination that recipients must adopt under § 106.8(c).

Changes: We are adding § 106.71, prohibiting retaliation and specifying that the recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute or regulations, 20 U.S.C. 1232g and 34 CFR part 99, or required by law, or to carry out the purposes of 34 CFR part 106, and providing that complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination that recipients must adopt under § 106.8(c). We are revising § 106.45(b)(8) regarding appeals, to expressly permit both parties equally to appeal a determination regarding responsibility on the basis of procedural irregularity. We are revising the introductory sentence of § 106.45(b) to state that any rules a recipient chooses to adopt (that are not required under § 106.45) must apply equally to both parties.

Section 106.45(b)(1)(i) Equitable Treatment of Complainants and Respondents

Comments: Many commenters expressed support for § 106.45(b)(1)(i). Some commenters asserted that this provision rectifies sex discrimination against males that has occurred in recipients' Title IX campus proceedings.[1001] Other commenters stated that this provision advances Title IX's goal of due process-type fundamental fairness to both complainants and respondents alike by balancing the scales. One commenter supported this provision because, in the commenter's view, too many institutions view allegations as "self-proving." At least one

[1001] Commenters cited, for example: Jeannie Suk Gersen, *The Transformation of Sexual-Harassment Law Will Be Double-Faced*, THE NEW YORKER (Dec. 20, 2017); American Association of University Women Educational Foundation, *Drawing the Line: Sexual Harassment on Campus* (2005).

commenter approved of this provision as being consistent with existing § 106.8 requiring "prompt and equitable" resolution of sex discrimination complaints. Another commenter asserted that § 106.45(b)(1)(i) is consistent with our Nation's fundamental values that persons accused of serious misconduct should receive notice and a fair hearing before unbiased decision makers, and a presumption of innocence. Another commenter supported this provision because everyone on campus benefits from fundamentally fair proceedings. One commenter called this provision a "welcome change" because, in the commenter's view, accused students at institutions of higher education have had a difficult time restoring their reputations after the institution removes the accused student before a fair determination of the truth of the allegations.

Discussion: The Department appreciates commenters' support for this provision. The Department agrees that a fair process benefits both parties, and recipients, by leading to reliable outcomes and increasing the confidence that parties and the public have regarding Title IX proceedings in schools, colleges, and universities. The Department also agrees with the commenter who noted that this provision is consistent with the principle underlying existing § 106.8 wherein recipients have long been required to have "prompt and equitable" grievance procedures for handling sex discrimination complaints. The purpose of § 106.45(b)(1)(i) is to emphasize the importance of treating complainants and respondents equitably in the specific context of Title IX sexual harassment, by drawing a recipient's attention to the need to provide remedies to complainants and avoid punishing respondents prior to conclusion of a fair process. As discussed in the "Role of Due Process in the Grievance Process" section of this preamble, the § 106.45 grievance process generally treats both parties equally, and § 106.45(b)(1)(i) is one of the few exceptions to strict equality where equitable treatment of the parties requires recognizing that a complainant's interests differ from those of a respondent with respect to the purpose of the

grievance process. This is intended to provide both parties with a fair, truth-seeking process that reasonably takes into account differences between a party's status as a complainant, versus as a respondent. Thus, with respect to remedies and disciplinary sanctions, strictly equal treatment of the parties does not make sense, and to treat the parties equitably, a complainant must be provided with remedies where the outcome shows the complainant to have been victimized by sexual harassment; similarly, a respondent must be sanctioned only after a fair process has determined whether or not the respondent has perpetrated sexual harassment.

Changes: None.

Comments: Some commenters objected to § 106.45(b)(1)(i) on the ground that it reinforces the approach of the overall grievance process that commenters believed requires a complainant to undergo a protracted, often traumatic investigation necessitating continuous interrogation of the complainant, all while forcing the complainant to continue seeing the respondent on campus because the respondent is protected from removal until completion of the grievance process; some of these commenters asserted that this will chill reporting.

Some commenters opposed this provision on the ground that it aims to treat victims and perpetrators as equals, which is inappropriate because a victim has suffered harm inflicted by a perpetrator, placing them in inherently unequal positions of power; some of these commenters expressed particular concern that this dynamic perpetuates the status quo where teachers accused of harassing students are believed because of their position of authority.

Some commenters claimed that by being gender-neutral this provision makes campuses and Title IX proceedings an unsafe space for victims and is biased against women because it reflects obsolete and unfounded assumptions about sexual harassment and sexual violence and perpetuates harm against women and vulnerable populations. At least one such commenter urged

the Department to instead adopt a feminist model that supports the healing of survivors of gender-based violence, prevents revictimization following assault, and seeks to restore power and control the survivor has lost.[1002]

Discussion: The Department believes that § 106.45(b)(1)(i) reflects the critical way in which that a recipient must, throughout a grievance process, treat the parties equitably. The Department disagrees that the final regulations require complainants to undergo protracted, traumatic investigations or necessarily require complainants to interact with respondents on campus while a process is pending. The final regulations require a recipient to offer supportive measures to a complainant with or without the filing of a formal complaint triggering the grievance process.[1003] The final regulations have removed proposed § 106.44(b)(2) and revised the § 106.30 definition of "complainant" such that in combination, those revisions ensure that the final regulations do not require a Title IX Coordinator to initiate a grievance process over the wishes of a complainant, and never require a complainant to become a party or to participate in a grievance process.[1004] In these ways, the final regulations respect the autonomy of survivors to choose whether to participate in a grievance process, while ensuring that regardless of that choice, survivors are entitled to supportive measures. Although supportive measures must be non-punitive and non-disciplinary (to any party) and cannot unreasonably burden the other party,[1005]

[1002] Commenters cited: Tara N. Richards *et al.*, *A feminist analysis of campus sexual assault policies: Results from a national sample*, 66 FAMILY RELATIONS 1 (2017) (criticizing gender-neutral policy approaches because "In gender-neutral advocacy, policies and practices are uniformly applied and do not take gender dynamics into consideration, thus increasing the risk of victim-blaming attitudes and adherence to myths about rape and other forms of gendered violence").

[1003] Section 106.44(a) (further requiring the Title IX Coordinator to contact each complainant to discuss the availability of supportive measures with or without a formal complaint, consider the complainant's wishes regarding supportive measures, and explain to the complainant the process for filing a formal complaint).

[1004] Section 106.71 (prohibiting retaliation for the purpose of interfering with any right under Title IX, including the right to refuse to participate in a Title IX proceeding).

[1005] Section 106.30 (defining "supportive measures").

supportive measures do allow complainants options with respect to changes in class schedules or housing re-assignments even while a grievance process is still pending, or where no formal complaint has initiated a grievance process. Moreover, § 106.44(c) permits a recipient to remove a respondent from the recipient's education program or activity without undergoing a grievance process, where an individualized risk assessment shows the respondent poses a threat to any person's physical health or safety, so long as the respondent is afforded post-removal notice and opportunity to challenge the removal decision. The final regulations thus effectuate the purpose of Title IX to provide protection for complainants, while ensuring that a fair process is used to generate a factually reliable resolution of sexual harassment allegations before a respondent is sanctioned based on such allegations. To clarify that the § 106.30 definition of "supportive measures" gives recipients wide latitude to take actions to support a complainant, even while having to refrain from imposing disciplinary sanctions against the respondent, we have added to § 106.45(b)(1)(i) the phrase "or other actions that are not supportive measures as defined in § 106.30."[1006] Even where supportive measures, emergency removal where appropriate, the right of both parties to be accompanied by an advisor of choice,[1007] and other provisions intended to ease the stress of a formal process may result in a complainant finding the process traumatizing,[1008] the Department maintains that allegations of sexual harassment must be

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[1006] Section 106.45(b)(1)(i), stating that equitable treatment of the parties means following a § 106.45 grievance process before imposing disciplinary sanctions or other actions that are not "supportive measures" as defined in § 106.30, and remedies for a complainant whenever a respondent is determined to be responsible, is mirrored in § 106.44(a), which requires equitable treatment of respondents in the same manner and (because no grievance process is required for a recipient's response obligations under § 106.44 to be triggered) equitable treatment of complainants by offering supportive measures.

[1007] Section 106.45(b)(5)(iv).

[1008] *E.g.*, § 106.45(b)(6)(i) (either party has the right to undergo a live hearing and cross-examination in a separate room, and this provision deems irrelevant any questions or evidence regarding a complainant's sexual predisposition (without exception) and any questions or evidence about a complainant's sexual behavior with two exceptions).

resolved accurately in order to ensure that recipients remedy sex discrimination occurring in education programs or activities.

The Department disagrees that treating parties equally throughout the grievance process, and recognizing specific ways in which complainants and respondents must be treated equitably under § 106.45(b)(1)(i), inappropriately attempts to place victims and perpetrators on equal footing without recognizing that victims are suffering from a perpetrator's conduct. The Department recognizes that a variety of power dynamics can affect perpetration and victimization in the sexual violence context, including differences in the sex, age, or positions of authority of the parties. The Department believes that a fair process provides procedural tools to parties that can counteract situations where a power imbalance led to the alleged incident. By providing both parties with strong, clear procedural rights – including the right to an advisor of choice to assist a party in navigating the process – a party perceived as being in a weaker position has the same rights as the party perceived as having greater power (perhaps due to sex, age, or a position of authority over the other party), and the process is more likely to generate accurate determinations about what occurred between the parties.

The Department disagrees with commenters who criticized this provision (and the overall approach of the final regulations) for being gender-neutral. Title IX's non-discrimination mandate benefits "persons" without regard to sex.[1009] The Department believes that Title IX's non-discrimination mandate is served by an approach that is neutral with respect to sex. The Department notes that applying a sex-neutral framework does not imply that recipients cannot gain understanding about the dynamics of sexual violence including particular impacts of sexual

[1009] 20 U.S.C. 1681(a) ("No person in the United States shall, on the basis of sex . . .").

violence on women or other demographic groups – but such background knowledge and information cannot be applied in a way that injects bias or lack of impartiality into a process designed to resolve particular allegations of sexual harassment. Contrary to some commenters' concerns, sex-neutrality in the grievance process helps prevent the very kind of victim-blaming and rape myths that have improperly affected responses to females, and does so in a manner that also prevents improper injection of sex-bias against males. A sex-neutral approach is also the only approach that appropriately prohibits generalizations about "women as victims" and "men as perpetrators" from improperly affecting an objective evaluation of the facts surrounding each particular allegation and emphasizes for students and recipients the fact that with respect to sexual harassment, any person can be a victim and any person can be a perpetrator, regardless of sex.

Changes: We have revised § 106.45(b)(1)(i) to include the phrase "or other actions that are not supportive measures as defined in § 106.30" in addition to disciplinary sanctions, to describe equitable treatment of a respondent during a grievance process.

Comments: Some commenters characterized this provision as a "weak" attempt to restore or preserve a complainant's access to education without sufficiently acknowledging that often, sexual harassment causes a complete or total denial of access for the victim (for example, where a victim drops out of school entirely).[1010] Some commenters viewed this provision's description of remedies for a complainant as too narrow because such remedies must be "designed to restore or preserve access" to the recipient's education program or activity. At least one commenter

[1010] Many commenters cited: Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18 JOURNAL OF COLL. STUDENT RETENTION: RESEARCH, THEORY & PRACTICE 2, 234, 244 (2015), for the proposition that survivors drop out of school at higher rates than non-survivors.

understood the phrase "designed to restore or preserve access" to forbid a recipient from imposing a disciplinary sanction on a respondent unless the sanction itself is designed to restore or preserve access to education. At least one commenter suggested adding the word "equal" before "access" in this provision to align this provision with the "equal access" language used in § 106.30 defining sexual harassment. A few commenters urged the Department to add a list of possible remedies for complainants including counseling, supportive services, and training for staff. At least one commenter suggested that remedies for a complainant must actually restore or preserve the complainant's access to education and so proposed deleting "designed to" from this provision.

Discussion: The Department believes that § 106.45(b)(1)(i) provides a strong, clear requirement for the benefit of victims of sexual harassment: where a § 106.45 grievance process results in a determination that the respondent in fact committed sexual harassment against the complainant, the complainant must be given remedies. The Department understands that research shows that sexual harassment victims drop out of school more often than other students, and in an effort to prevent that loss of access to education, this provision mandates that recipients provide remedies. In response to commenters concerned that the description of remedies is too narrow or unclear, the final regulations revise this provision. This provision now uses the phrase "equal access" rather than simply "access," in response to commenters who pointed out that "equal access" is the phrase used in § 106.30 defining sexual harassment. Further, the final regulations substitute "determination of responsibility" for "finding of responsibility," out of caution that this provision's use of "finding" instead of "determination" (when the latter is used elsewhere throughout the proposed rules) caused a commenter's confusion between remedies for a complainant (which are designed to restore the complainant's equal access to education) versus

disciplinary sanctions against a respondent (which are not designed to restore a respondent's access to education). Moreover, the final regulations revise § 106.45(b)(1)(i) to state that remedies may consist of the same individualized services listed illustratively in § 106.30 as "supportive measures" but remedies need not meet the limitations of supportive measures (i.e., unlike supportive measures, remedies may in fact burden the respondent, or be punitive or disciplinary in nature). The Department believes that this additional language in the final regulations obviates the need to repeat a non-exhaustive list of possible remedies and gives recipients and complainants additional clarity about the kind of remedies available to help restore or preserve equal educational access for victims of sexual harassment.

The Department declines to remove "designed to" from this provision. Sexual harassment can cause severe trauma to victims, and while Title IX obligates a recipient to respond appropriately when students or employees are victimized with measures aimed at ensuring a victim's equal access, the Department does not believe it is reasonable to hold recipients accountable for situations where despite a recipient's reasonably designed and implemented remedies, a victim still suffers loss of access (for example, by dropping out) due to the underlying trauma. We have also added § 106.45(b)(7)(iv) requiring Title IX Coordinators to be responsible for the "effective implementation" of remedies to clarify that the burden of effectively implementing the remedies designed to restore or preserve the complainant's equal access to education rests on the recipient and must not fall on the complainant.

The Department acknowledges that the 2001 Guidance discussed corrective action in terms of both remedying effects of the harassment on the victim and measures that end the

harassment and prevent its recurrence.[1011] For reasons described in the "Deliberate Indifference" subsection of the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the Department believes that remedies designed to restore and preserve equal access to the recipient's education programs or activities is the appropriate focus of these final regulations, and a recipient's selection and implementation of remedies will be evaluated by what is not clearly unreasonable in light of the known circumstances.[1012] The Department is persuaded by the Supreme Court's rationale in *Davis* that courts (and administrative agencies) should not second guess a school's disciplinary decisions, and the Department desires to avoid creating regulatory rules that effectively dictate particular disciplinary sanctions that obligate recipients to attempt to guarantee that sexual harassment does not recur, instead focusing on whether a recipient is effectively implementing remedies to complainants where respondents are found responsible for sexual harassment.

Changes: The final regulations revise § 106.45(b)(1)(i) to use the phrase "equal access" instead of "access," substitute "determination of responsibility" for "finding of responsibility," and state that remedies may include the same individualized services described in § 106.30 defining "supportive measures" but unlike supportive measures, remedies need not avoid burdening the respondent and can be punitive or disciplinary. We have also added § 106.45(b)(7)(iv) requiring Title IX Coordinators to be responsible for the "effective implementation" of remedies.

[1011] 2001 Guidance at 10 (stating that where the school has determined that sexual harassed occurred, "The recipient is, therefore, also responsible for remedying any effects of the harassment on the victim, as well as for ending the harassment and preventing its recurrence.").

[1012] Recipients must also document their reasons for concluding that the recipient's response to sexual harassment was not deliberately indifferent, under § 106.45(b)(10).

Comments: Some commenters objected to § 106.45(b)(1)(i) for referencing "due process protections" owed to respondents, claiming that respondents have no right to due process in campus administrative proceedings, or that courts do not require the specific due process protections that the proposed rules require. Some commenters criticized this provision for referring to due process protections for respondents because the reference implies that due process protections are not important for complainants and thereby discounts and downplays the needs of victims. At least one commenter recommended modifying this provision to specify that equitable treatment of both parties requires due process protections for both parties. Other commenters urged the Department not to use "due process" or "due process protections" in the final regulations and to instead refer to a "fair process" for all parties; similarly, at least one commenter asked for clarification whether by using the phrase "due process protections" the Department intended to reference constitutional due process or only those protections set forth in the proposed regulations.

Some commenters contended that § 106.45(b)(1)(i) is contradicted by other provisions in the proposed rules; for example, commenters characterized the § 106.44(c) emergency removal provision as contrary to the requirement for equitable treatment of a respondent in § 106.45(b)(1)(i) because the emergency removal section permits schools to remove respondents without due process protections. Other commenters pointed to the requirement in proposed § 106.44(b)(2) that Title IX Coordinators must file a formal complaint upon receiving multiple reports against the same respondent as inequitable to respondents in contravention of § 106.45(b)(1)(i) because a respondent should not have to undergo a grievance process without a cooperating complainant. Other commenters pointed to the presumption of non-responsibility in § 106.45(b)(1)(iv) as "inequitable" to complainants in contradiction with § 106.45(b)(1)(i); other

commenters characterized the live hearing and cross-examination requirements of § 106.45(b)(6)(i) as inequitable treatment of complainants.

At least one commenter asked the Department to answer whether being sensitive to the trauma experienced by victims would violate this provision by being inequitable to respondents. At least one commenter requested that as part of treating the parties equitably, this provision should require a Title IX Coordinator to offer, and keep lists available that describe, various off-campus supportive resources available to both complainants and respondents, including resources oriented toward survivors and those oriented toward accused students. One commenter asserted that this provision should include a statement that equitable treatment of a respondent must include remedies for a respondent where a complainant is found to have brought a false allegation.

Discussion: The Department appreciates commenters' varied concerns about use of the phrase "due process protections" in § 106.45(b)(1)(i) and perceived tension between this provision and other provisions in the proposed rules. The Department agrees with commenters that "due process protections" caused unnecessary confusion about whether the proposed rules intended to reference due process of law under the U.S. Constitution, or only those protections embodied in the proposed rules. In response to such comments, the final regulations replace "due process protections" with "a grievance process that complies with § 106.45" throughout the final regulations, including in this provision, § 106.45(b)(1)(i). As explained in the "Role of Due Process in the Grievance Process" section of this preamble, while the Department believes that the § 106.45 grievance process is consistent with constitutional due process obligations, these final regulations apply to all recipients including private institutions that do not owe

constitutional protections to their students and employees, and making this terminology change throughout the final regulations helps clarify that position.

The Department disagrees that § 106.45(b)(1)(i) implies that the protections in the grievance process do not also benefit complainants, or should not be given to complainants. The grievance process is of equal benefit to complainants and respondents and each provision has been selected for the purpose of creating a fair process likely to result in reliable outcomes resolving sexual harassment allegations. The equitable distinction in § 106.45(b)(1)(i) recognizes the significance of remedies for complainants and disciplinary sanctions for respondents, but does not alter the benefit of the § 106.45 grievance process providing procedural rights and protections for both parties.

The Department understands commenters' views that certain other provisions in the final regulations are "inequitable" for either complainants or respondents. For reasons explained in this preamble with respect to each particular provision, the Department believes that each provision in the final regulations contributes to effectuating Title IX's non-discrimination mandate while providing a fair process for both parties. Section 106.45(b)(1)(i) was not intended to create a standard of "equitableness" under which other provisions of the proposed rules should be measured. In response to commenters' apparent perception that § 106.45(b)(1)(i) created a general equitability requirement that applied to the proposed rules or created conflict between this provision and other parts of the proposed rules, the final regulations revise § 106.45(b)(1)(i) to more clearly express its intent – that equitable treatment of a complainant means providing

remedies, and equitable treatment of a respondent means imposing disciplinary sanctions only after following the grievance process.[1013]

Being sensitive to the trauma a complainant may have experienced does not violate § 106.45(b)(1)(i) or any other provision of the grievance process, so long as what the commenter means by "being sensitive" does not lead a Title IX Coordinator, investigator, or decision-maker to lose impartiality, prejudge the facts at issue, or demonstrate bias for or against any party.[1014] The Department declines to require recipients to list off-campus supportive resources for complainants, respondents, or both, though the final regulations do not prohibit a recipient from choosing to do this. The Department believes that § 106.45(b)(1)(ix), requiring recipients to describe the range of supportive measures available to complainants and respondents, is sufficient to serve the Department's interest in ensuring that parties are aware of the availability of supportive measures. The Department declines to require remedies for respondents in situations where a complainant is found to have brought a false allegation. These final regulations are focused on sexual harassment allegations, including remedies for victims of sexual harassment, and not on remedies for other kinds of misconduct.[1015]

Changes: Section 106.45(b)(1)(i) is revised by replacing "due process protections" with "a grievance process that complies with § 106.45" and by stating that treating complainants

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[1013] The Department notes that similar language is included in the final regulations in § 106.44(a) such that a recipient's response in the absence of a formal complaint must treat complainants equitably by offering supportive measures and must treat respondents equitably by imposing sanctions only after following a grievance process that complies with § 106.45.

[1014] Section 106.45(b)(1)(iii).

[1015] The Department notes that the final regulations add § 106.71 prohibiting retaliation, and paragraph (b)(2) of that section cautions recipients that a determination regarding responsibility, alone, is not sufficient to conclude that a party has made a materially false statement in bad faith. The Department leaves recipients with discretion to address false statements (by any party) under the recipient's own code of conduct.

equitably means providing remedies where a respondent has been determined to be responsible, and treating respondents equitably means imposing disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30 only after following the § 106.45 grievance process.

Section 106.45(b)(1)(ii) Objective Evaluation of All Relevant Evidence

Comments: Numerous commenters supported § 106.45(b)(1)(ii) asserting that it ensures fairness, accuracy, due process, and impartiality to all parties. Several commenters shared personal experiences with Title IX investigations in which they witnessed the recipient ignoring, discounting, burying, or destroying exculpatory evidence. Similarly, other commenters stated that they have observed inculpatory evidence being ignored or discounted particularly when a respondent is a star athlete or otherwise prominent within the recipient's educational community.

Other commenters expressed concerns about requiring an objective evaluation of relevant evidence. Some commenters asserted that it would be challenging to get such evidence in sexual assault cases, because sexual assault often happens without witnesses who can corroborate stories. One commenter contended that getting objective evidence every time would be a "near-impossible task," while another felt it is "unrealistic" to expect tangible evidence in all cases. Some commenters argued that such a high standard would likely chill reporting. One commenter was concerned that an objective evaluation of *all* relevant evidence could lead to respondents extending investigations indefinitely since almost anything could be relevant and new evidence or witnesses might surface regularly.

Some commenters expressed support for this provision's preclusion of making credibility determinations based on party status because it is inappropriate to make presumptions about trustworthiness based on whether a person is a complainant or respondent. Other commenters

opposed this part of § 106.45(b)(1)(ii) and suggested modifying the provision to require that credibility determinations not be based "solely" on a person's status, but argued that fact-finders could base credibility determinations in part on a person's status as a complainant or respondent. These commenters opposed any categorical bar to the fact-finder's considerations when determining credibility, and questioned whether this provision is in significant tension with the presumption of non-responsibility in § 106.45(b)(1)(iv). Commenters asserted that § 106.45(b)(1)(ii)'s requirement is problematic for adjudicators because it directs them to ignore central factors in credibility determinations, such as what interests a party has at stake. Commenters argued that courts, law enforcement, and other investigators have always considered a party's status as a defendant or plaintiff when determining how to weigh evidence and testimony. Commenters argued that recipients should be permitted to consider a party's status when considering the totality of the circumstances to reach credibility determinations.

A number of commenters proposed modifications related to training that commenters believed would improve implementation of this provision and promote objectivity and competence, such as training about applying rules of evidence, how to collect and evaluate evidence, and how to determine if evidence is credible, relevant, or reliable.

Many commenters suggested types of evidence that should be considered, specific investigative processes, or other evidentiary requirements. Commenters proposed, for example, that the final regulations should require consideration of letters, videos, photos, e-mails, texts, phone calls, social media, mental health history, drug, alcohol, and medication use, and rape kits. Commenters also proposed requiring a variety of investigative techniques, including asking the Department to require recipients to take immediate action to collect and test all evidence, including permitting recipients to interview community members and other witnesses (e.g.,

roommates, dorm residents, classmates, fraternity members). Commenters also asked whether the recipient may consider evidence of the respondent's lack of credibility, other bad acts, and misrepresentation of key facts. Some commenters asked whether the proposed rules would allow respondents to introduce lie detector test results and impact statements. Some commenters wanted the final regulations to require investigators to identify any data gaps in investigative report noting unavailable information (e.g., unable to interview eyewitnesses or to visit the scene of an incident) and all attempts to fill those data gaps, as well as requiring hearing boards to explain the specific evidentiary basis for each finding. Other commenters asserted that the final regulations should require all evidence to be shared with the parties to ensure fairness, and that an investigator should not get to decide what is relevant.

Commenters requested that the Department clarify how to evaluate whether evidence is relevant. Commenters asked how recipients should make credibility determinations, and whether it would be permissible to admit character and reputation evidence, including past sexual history or testimony based on hearsay. One commenter asserted that requiring an "objective evaluation" leaves questions about what this term will mean in practice, noting that similar provisions in the VAWA negotiated rulemaking in 2012 raised concerns that the subjectivity (at least in defining bias) would be an overreach into campus administrative decisions.

Some commenters suggested specific modifications to the wording of the proposed provision. For example, individual commenters suggested that the Department: replace "objective" with "impartial' for consistency with VAWA; add language emphasizing that the recipient's determination must be unbiased since recipient bias has been a significant problem in Title IX investigations; add that objective evaluation be "based on rules of evidence under applicable State law;" add that schools shall resolve doubts "in favor of considering evidence to

be relevant and exculpatory" to address the danger that recipients will narrowly construe what constitutes exculpatory evidence; and add that unsubstantiated theories of trauma cannot be relied on to conclude that a particular complainant suffered from trauma or be used to explain away a complainant's inconsistencies. One commenter asserted that underweighting relevant testimony simply because someone is a friend to a party in a case will make it materially harder to prove an assault and will not promote equitable treatment for all parties; this commenter mistakenly believed that the proposed rules used the phrase "arbiters should underweight character feedback from biased witnesses" and wanted that language changed.

Discussion: The Department appreciates commenters' support of this provision and acknowledges other commenters' concerns about § 106.45(b)(1)(ii). While the gathering and evaluation of available evidence will take time and effort on the part of the recipient, the Department views any difficulties associated with the provision's evidence requirement to be outweighed by the due process benefits the provision will bring to both parties during the grievance process. The recipient's investigation and adjudication of the allegations must be based on an objective evaluation of the evidence available in a particular case; the type and extent of evidence available will differ based on the facts of each incident. The Department understands that in some situations, there may be little or no evidence other than the statements of the parties themselves, and this provision applies to those situations. As some commenters have observed, Title IX campus proceedings often involve allegations with competing plausible narratives and no eyewitnesses, and such situations still must be evaluated by objectively evaluating the relevant evidence, regardless of whether that available, relevant evidence consists of the parties' own statements, statements of witnesses, or other evidence. This provision does not require "objective" evidence (as in, corroborating evidence); this provision requires that the

recipient objectively evaluate the relevant evidence that is available in a particular case. The Department disagrees that this provision could permit endlessly delayed proceedings while parties or the recipient search for "all" relevant evidence; § 106.45(b)(1)(v) requires recipients to conclude the grievance process within designated reasonable time frames and thus "all" the evidence is tempered by what a thorough investigation effort can gather within a reasonably prompt time frame.

The Department agrees with commenters who noted the inappropriateness of investigators and decision-makers drawing conclusions about credibility based on a party's status as a complainant or respondent. While the Department appreciates the concerns by commenters advocating that the final regulations should permit status-based inferences as to a person's credibility, the Department believes that to do so would invite bias and partiality. To that end, we disagree with commenters who opposed categorical bars on the factors that investigators or decision-makers may consider, and who want to partially judge a person's credibility based on the person's status as a complainant, respondent, or witness. A process that permitted credibility inferences or conclusions to be based on party status would inevitably prejudge the facts at issue rather than determine facts based on the objective evaluation of evidence, and this would decrease the likelihood that the outcome reached would be accurate.

The Department disagrees that § 106.45(b)(1)(ii) conflicts with the presumption of non-responsibility; in fact, § 106.45(b)(1)(ii) helps to ensure that the presumption is not improperly applied by recipients. Section 106.45(b)(1)(iv) affords respondents a presumption of non-responsibility until the conclusion of the grievance process. Section 106.45(b)(1)(ii) applies throughout the grievance process, including with respect to application of the presumption, to ensure that the presumption of non-responsibility is not interpreted to mean that a respondent is

considered truthful, or that the respondent's statements are credible or not credible, based on the respondent's status as a respondent. Treating the respondent as not responsible until the conclusion of the grievance process does not mean considering the respondent truthful or credible; rather, that presumption buttresses the requirement that investigators and decision-makers serve impartially without prejudging the facts at issue.[1016] Determinations of credibility, including of the respondent, must be based on objective evaluation of relevant evidence – not on inferences based on party status. Both the presumption of non-responsibility and this provision are designed to promote a fair process by which an impartial fact-finder determines whether the respondent is responsible for perpetrating sexual harassment. Every determination regarding responsibility must be based on evidence, not assumptions about respondents or complainants. The Department disagrees that disregarding party status poses problems for investigators or adjudicators or directs them to ignore central factors in reaching credibility determinations. Title IX personnel are not prevented from understanding and taking into account each party's interests and the "stakes" at issue for each party, yet what is at stake does not, by itself, reflect on the party's truthfulness.

In response to commenters' concerns about how to determine "relevance" in the context of these final regulations, we have revised § 106.45(b)(1)(iii) specifically to require training on issues of relevance (including application of the "rape shield" protections in § 106.45(b)(6)). Thus, these final regulations require Title IX personnel to be well trained in how to conduct a

[1016] For further discussion on the purpose and function of the presumption of non-responsibility, see the "Section 106.45(b)(1)(iv) Presumption of Non-Responsibility" subsection of the "General Requirements for § 106.45 Grievance Process" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

grievance process; within the requirements stated in § 106.45(b)(1)(iii) recipients have flexibility to adopt additional training requirements concerning evidence collection or evaluation.

Similarly, the Department declines to adopt commenters' suggestions that the final regulations explicitly allow or disallow certain types of evidence or utilize specific investigative techniques. The Department believes that the final regulations reach the appropriate balance between prescribing sufficiently detailed procedures to foster a consistently applied grievance process, while deferring to recipients to tailor rules that best fit each recipient's unique needs. While the proposed rules do not speak to admissibility of hearsay,[1017] prior bad acts, character evidence, polygraph (lie detector) results, standards for authentication of evidence, or similar issues concerning evidence, the final regulations require recipients to gather and evaluate relevant evidence,[1018] with the understanding that this includes both inculpatory and exculpatory evidence, and the final regulations deem questions and evidence about a complainant's prior sexual behavior to be irrelevant with two exceptions[1019] and preclude use of any information protected by a legally recognized privilege (e.g., attorney-client).[1020] Within these evidentiary parameters recipients retain the flexibility to adopt rules that govern how the recipient's investigator and decision-maker evaluate evidence and conduct the grievance process (so long as

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[1017] While not addressed to hearsay evidence as such, § 106.45(b)(6)(i), which requires postsecondary institutions to hold live hearings to adjudicate formal complaints of sexual harassment, states that the decision-maker must not rely on the statement of a party or witness who does not submit to cross-examination, resulting in exclusion of statements that remain untested by cross-examination.

[1018] The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.

[1019] Section 106.45(b)(6) contains rape shield protections, providing that questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

[1020] Section 106.45(b)(1)(x) (precluding a recipient from using information or evidence protected by a legally recognized privilege unless the holder of the privilege has waived the privilege).

such rules apply equally to both parties).[1021] Relevance is the standard that these final regulations require, and any evidentiary rules that a recipient chooses must respect this standard of relevance. For example, a recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence. A recipient may adopt rules of order or decorum to forbid badgering a witness, and may fairly deem repetition of the same question to be irrelevant.

The Department disagrees that requiring an "objective evaluation" leaves questions about what this will mean in practice; the final regulations contain sufficient clarity concerning objectivity, while leaving recipients discretion to apply the grievance process in a manner that best fits the recipient's needs. Similarly, the Department is not persuaded that the final regulations permit inappropriate subjectivity as to defining bias or constitute overreach into campus administrative proceedings. A commenter raising that concern noted that the same issue was raised during negotiated rulemaking under VAWA; however, the Department believes that these final regulations prohibit bias with adequate specificity (i.e., bias against complainants or respondents generally, or against an individual complainant or respondent) yet reserve adequate flexibility for recipients to apply the prohibition against bias without unduly overreaching into a

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[1021] Of course, the manner in which a recipient adopted or applied such a rule or practice concerning evaluation of evidence could constitute sex discrimination, a situation that § 106.45(a) cautions recipients against, and the entirety of a recipient's grievance process must be conducted impartially, free from conflicts of interest or bias for or against complainants or respondents. Further, the introductory sentence of § 106.45(b) has been revised in the final regulations to ensure that a recipient's self-selected rules must apply equally to both parties. The Department notes that the universe of evidence given to the parties for inspection and review under § 106.45(b)(5)(vi) must consist of all evidence directly related to the allegations; determinations as to whether evidence is "relevant" are made when finalizing the investigative report, pursuant to § 106.45(b)(5)(vii) (requiring creation of an investigative report that "fairly summarizes all relevant evidence"). Only "relevant" evidence can be subject to the decision-maker's objective evaluation in reaching a determination, and relevant evidence must be considered, subject to the rape shield and legally recognized privilege exceptions contained in the final regulations. This does not preclude, for instance, a recipient adopting a rule or providing training to a decision-maker regarding how to assign weight to a given type of relevant evidence, so long as such a rule applies equally to both parties.

recipient's internal administrative affairs. To the extent that the commenter was arguing that prohibiting bias is itself an overreach into campus administrative decisions, the Department does not agree. The text of Title IX prohibits recipients from engaging in discrimination on the basis of sex. Biased decision making increases the risk of erroneous outcomes because bias, rather than evidence, dictates the conclusion. Sex-based bias is a specific risk in the context of sexual harassment allegations, where the underlying conduct at issue inherently raises issues related to sex, making these proceedings susceptible to improper sex-based bias that prevents reliable outcomes. Other forms of bias on the part of individuals in charge of investigating and adjudicating allegations also lessen the likelihood that outcomes are reliable and viewed as legitimate; because Title IX's non-discrimination mandate requires that recipients accurately identify (and remedy) sexual harassment occurring in education programs or activities, these final regulations prohibit bias on the part of Title IX personnel (in § 106.45(b)(1)(iii)) and require objective evaluation of evidence (in § 106.45(b)(1)(ii)).

Rather than require recipients to take "immediate action" to collect all evidence, the final regulations require the recipient to investigate the allegations in a formal complaint[1022] yet permit recipients flexibility to conduct the investigation, under the constraint that the investigation (and adjudication) must be completed within the recipient's designated, reasonably prompt time frames.[1023]

While the final regulations do not require hearing boards (as opposed to a single individual acting as the decision-maker), the final regulations do not preclude the recipient from

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[1022] Section 106.45(b)(5).
[1023] Section 106.45(b)(1)(v).

using a hearing board to function as a decision-maker, such that more than one individual serves as a decision-maker, each of whom must fulfill the obligations under § 106.45(b)(1)(iii). Whether or not the determination regarding responsibility is made by a single decision-maker or by multiple decision-makers serving as a hearing board, § 106.45(b)(7)(ii) requires that decision-makers lay out the evidentiary basis for conclusions reached in the case, in a written determination regarding responsibility. Prior to the time that a determination regarding responsibility will be reached, § 106.45(b)(5)(vi) requires the recipient to make all evidence directly related to the allegations available to the parties for their inspection and review, and § 106.45(b)(5)(vii) requires that recipients create an investigative report that fairly summarizes all relevant evidence. The final regulations add language in § 106.45(b)(5)(vi) stating that evidence subject to inspection and review must include inculpatory and exculpatory evidence whether obtained from a party or from another source. The Department does not believe it is necessary to require investigators to identify data gaps in the investigative report, because the parties' right to inspect and review evidence, and review and respond to the investigative report, adequately provide opportunity to identify any perceived data gaps and challenge such deficiencies.

The Department disagrees that an investigator should not get to decide what is relevant, and the final regulations give the parties ample opportunity to challenge relevancy determinations. The investigator is obligated to gather evidence directly related to the allegations whether or not the recipient intends to rely on such evidence (for instance, where evidence is directly related to the allegations but the recipient's investigator does not believe the evidence to be credible and thus does not intend to rely on it). The parties may then inspect and review the

evidence directly related to the allegations.[1024] The investigator must take into consideration the parties' responses and then determine what evidence is relevant and summarize the relevant evidence in the investigative report.[1025] The parties then have equal opportunity to review the investigative report; if a party disagrees with an investigator's determination about relevance, the party can make that argument in the party's written response to the investigative report under § 106.45(b)(5)(vii) and to the decision-maker at any hearing held; either way the decision-maker is obligated to objectively evaluate all relevant evidence and the parties have the opportunity to argue about what is relevant (and about the persuasiveness of relevant evidence). The final regulations also provide the parties equal appeal rights including on the ground of procedural irregularity,[1026] which could include a recipient's failure to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence. Furthermore, § 106.45(b)(1)(iii) requires the recipient's investigator and decision-maker to be well-trained to conduct a grievance process compliant with § 106.45 including determining "relevance" within the parameters of the final regulations.

While the Department appreciates commenters' desire for more oversight as to how a recipient defines or "counts" exculpatory evidence, based on commenters' observations that recipients have not consistently understood the need to consider exculpatory evidence as relevant, the Department believes that the final regulations adequately address this concern by specifying that relevant evidence must include both inculpatory and exculpatory evidence, ensuring the parties have opportunities to challenge relevance determinations, and requiring Title

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[1024] Section 106.45(b)(5)(vi).
[1025] Section 106.45(b)(5)(vii).
[1026] Section 106.45(b)(8).

IX personnel to be trained to serve impartially including specific training for investigators and decision-makers on issues of relevance.

While some commenters wished to alter the wording of the provision in numerous ways, for the reasons explained above the Department believes that § 106.45(b)(1)(ii) appropriately serves the Department's goal of providing clear parameters for evaluation of evidence while leaving flexibility for recipients within those parameters. The Department thus declines to remove the word "objective," require recipients to adopt any jurisdiction's rules of evidence, or add rules or presumptions that would require particular types of evidence to be relevant.

Changes: In the final regulations we add § 106.45(b)(1)(x), precluding the recipient from using evidence that would result in disclosure of information protected by a legally recognized privilege. The final regulations add language in § 106.45(b)(5)(vi) stating that evidence subject to inspection and review must include inculpatory and exculpatory evidence whether obtained from a party or from another source. We have also revised § 106.45(b)(1)(iii) to specifically require investigators and decision-makers to receive training on issues of relevance.

Section 106.45(b)(1)(iii) Impartiality and Mandatory Training of Title IX Personnel; Directed Question 4 (training)

Comments: Many commenters expressed support for § 106.45(b)(1)(iii) and, in response to the NPRM's directed question about training, stated that the training provided for in this provision is adequate. Several commenters believed this provision provides recipients with appropriate flexibility to decide the amount and type of training recipients must provide to individuals involved with Title IX proceedings. At least one commenter, on behalf of a college, noted that the college already provides for investigators free from bias or conflict of interest. Several commenters supported this provision because its prohibition on bias, conflicts of interest, and

training materials that rely on sex stereotypes will lead to impartial investigations and adjudications. One commenter asserted that the proposed regulations help reduce bias by ensuring that training programs are fair and neutral and noted that social scientists and legal academics have argued that training programs can help adjudicatory bodies make better decisions.[1027]

Many commenters supported § 106.45(b)(1)(iii) because of personal experiences with Title IX campus proceedings involving perceived bias or conflicts of interest that commenters believed rendered the investigation or adjudication unfair. One commenter supported this provision because the commenter believed it will counteract the ideological propaganda having to do with sex and gender that has been disseminated throughout institutions of higher education. Another commenter believed this provision will help remedy widespread sex bias against male students at colleges and universities. One commenter favored this provision because the topics considered in a Title IX process are sensitive and personal, improper handling of cases can potentially retraumatize survivors or lead to unfair outcomes for both survivors and the accused, and mandatory training should lead to better results for all involved. One commenter analyzed how and why unconscious biases and sex-based stereotypes are pernicious especially in university disciplinary hearings, can constitute Title IX violations, and lead to biased outcomes. This commenter argued that bias can subvert procedural protections, which are necessary to

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[1027] Commenters cited: Stephen E. Fienberg & Mark J. Schervish, *The Relevance of Bayesian Inference for the Presentation of Statistical Evidence and Legal Decisionmaking*, 66 BOSTON UNIV. L. REV. 771 (1986) (advocating that jurors be instructed in Bayesian probabilities); James J. Gobert, *In Search of the Impartial Jury*, 79 J. CRIM. L. & CRIMINOLOGY 269, 326 (1988) (suggesting that juries receive "impartiality training"); Jennifer A. Richeson & Richard J. Nussbaum, *The Impact of Multiculturalism Versus Color-Blindness on Racial Bias*, 40 J. OF EXPERIMENTAL SOCIAL PSYCHOL. 417 (2004) (explaining how diversity training can lead to less implicit bias); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, DUKE L. J. 345 (2007) (arguing for diversity training).

render fair outcomes, and biased adjudicators cannot properly carry out their duties. One commenter supported this provision's restriction against sex stereotyping in training materials for Title IX personnel, arguing that while appropriate training can reduce bias, improper trainings can leave biases unchecked or exacerbate underlying biases. The commenter argued that numerous examples exist showing that recipients' training documents given to adjudicators in university sexual misconduct processes have demonstrated bias especially against respondents, making it impossible for decision-makers to be impartial and unbiased.[1028]

Another commenter supported § 106.45(b)(1)(iii) combined with the other provisions in § 106.45 because while nothing can completely eliminate gender or racial bias from the system, bias can be reduced by expanding the evidence considered by decision-makers, a function served by a full investigation and hearings with cross-examination. The commenter argued that decisions are most biased when they rely on less evidence and more hunches because hunches are easily tainted by subconscious racial or gender bias.[1029] The commenter asserted that the obligation of the law under Title IX is to treat each person as an individual, not as a member of a class subject to prejudgment and prejudice on the basis of sex, and nowhere is the problem of sex

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[1028] Commenters asserted that as of 2014, Harvard Law School's disciplinary board training contained slides to this effect and that one Harvard Law School professor stated that these slides were "100% aimed to convince [adjudicators] to believe complainants, precisely *when* they seem unreliable and incoherent" *citing to* Emily Yoffe, *The Bad Science Behind Campus Response to Sexual Assault*, THE ATLANTIC (Sept. 8, 2017). Commenters further stated that at Ohio State University, for instance, decision-makers were told that a "victim centered approach can lead to safer campus communities." *Doe v. Ohio State Univ.*, No. 2:15-CV-2830, 2016 WL 692547, at *3 (S.D. Ohio, Feb. 22, 2016). Commenters further stated that same Ohio State University training guide, for example, told decision-makers that "[s]ex offenders are overwhelmingly white males." *Id.*; *see also Doe v. Univ. of Pa.*, 270 F. Supp. 3d 799, 823 (E.D. Pa. 2017).

[1029] In support of the proposition that most decisions after a full trial are not based on using race as a proxy but rather on the evidence at trial, resulting in racially fair decisions, while racial bias is rampant in low-stakes, low-evidence decision making where people make decisions on little evidence, the commenter cited Stephen P. Klein, *et al.*, *Race and Imprisonment Decisions in California*, 247 SCIENCE 812 (1990). More than one commenter cited to *Driving While Black in Maryland*, AMERICAN CIVIL LIBERTIES UNION (ACLU) (Feb. 2, 2010) https://www.aclu.org/cases/driving-while-black-maryland, for similar propositions.

bias more pronounced than in the area of perception, prejudgment, and prejudice in the matter of incidences of violence between members of the opposite sex. The commenter supported the Department's proposed rules, including this provision, based on the Department's authority and obligation to issue regulations that end the discrimination based on sex that exists in Title IX programs themselves.[1030]

One commenter supported this provision but noted that the Supreme Court has recognized that as a practical matter it is difficult if not impossible for an adjudicator "to free himself from the influence" of circumstances that would give rise to bias, and the private nature of motives "underscore the need for objective rules" for determining when an adjudicator is biased.[1031] This commenter asserted recipients thus need to have objective rules for determining bias. A few commenters supporting this provision recommended that the Department, or recipients on their own, establish a clear process or mechanism for reporting conflicts of interest or demanding recusal for bias during the investigative process.

Several commenters supported this provision but urged the Department to make the training materials referred to in § 106.45(b)(1)(iii) publicly available because transparency is the most effective means to eradicate the problems with biased Title IX proceedings, which problems are often rooted in biased training materials. These commenters argued that when recipients know that their training materials are subject to scrutiny, recipients will be more

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[1030] Commenters asserted that services for male victims of opposite sex violence are nearly non-existent at educational institutions and in society at large because of an ingrained "man as perpetrator/woman as victim" stereotype, which stereotype has always been false, shown by CDC data revealing the prevalence of male victims of sexual violence: Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *The National Intimate Partner and Sexual Violence Survey (NISVS): 2015 Data Brief* Tables 9, 11 (2018).

[1031] Commenters cited: *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 883 (2009) (holding that a judge cannot hear a case centered on the financial interests of someone who substantially supported the judge's election campaign).

careful to ensure that Title IX personnel are being trained to be impartial. One commenter asserted that a lot of training is conducted via webinars and that public disclosure of training materials must include audio and video of the training as well as documents or slideshow presentations used during the training.

Discussion: The Department appreciates commenters' support for § 106.45(b)(1)(iii), and the commenters who provided feedback in response to the Department's directed question as to whether this provision adequately addresses training implicated under the proposed rules. The Department agrees with commenters who noted that prohibiting conflicts of interest and bias, including racial bias, on the part of people administering a grievance process is an essential part of providing both parties a fair process and increasing the accuracy and reliability of determinations reached in grievance processes. Recognizing that commenters recounted instances of experience with perceived conflicts of interest and bias that resulted in unfair treatment and biased outcomes, the Department believes that this provision provides a necessary safeguard to improve the impartiality, reliability, and legitimacy of Title IX proceedings.[1032] The Department agrees with a commenter who asserted that recipients should have objective rules for determining when an adjudicator (or Title IX Coordinator, investigator, or person who facilitates an informal resolution process) is biased, and the Department leaves recipients discretion to decide how best to implement the prohibition on conflicts of interest and bias, including whether a recipient wishes to provide a process for parties to assert claims of conflict of interest of bias during the investigation. The Department notes that § 106.45(b)(8) in the final regulations

[1032] The 2001 Guidance at 21 contained a similar training recommendation: "Finally, the school must make sure that all designated employees [referring to designated Title IX Coordinators] have adequate training as to what conduct constitutes sexual harassment and are able to explain how the grievance procedure operates."

requires recipients to allow both parties equal right to appeal including on the basis that the Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that affected the outcome. The Department is persuaded by the numerous commenters who urged the Department to require training materials to be available for public inspection, to create transparency and better effectuate the requirements of § 106.45(b)(1)(iii). The final regulations impose that requirement in § 106.45(b)(10).

Additionally, the Department will not tolerate discrimination on the basis of race, color, or national origin, which is prohibited under Title VI. If any recipient discriminates against any person involved in a Title IX proceeding on the basis of that person's race, color, or national origin, then the Department will address such discrimination under Title VI and its implementing regulations, in addition to such discrimination potentially constituting bias prohibited under § 106.45(b)(1)(iii) of these final regulations.

Changes: The final regulations revise § 106.45(b)(10)(i)(D) to require that training materials referred to in § 106.45(b)(1)(iii) must be made publicly available on a recipient's website, or if the recipient does not have a website such materials must be made available upon request for inspection by members of the public.

Comments: Several commenters expressed skepticism that any recipient employees can be objective, fair, unbiased, or free from conflicts of interest because a recipient's employees share the recipient's interest in protecting the recipient's reputation or furthering a recipient's financial interests. Some commenters asserted this leads to recipient employees being unwilling to treat complainants fairly while others asserted this leads to recipient employees being unwilling to treat respondents fairly. A few commenters asserted that this problem of inherent conflicts of interest between recipient employees and complainants means that the only way to avoid

conflicts of interest is to require recipients to use an external, impartial arbiter or require investigations to be done by people unaffiliated with any students in the school, and one commenter argued that because all paid staff members are biased (in favor of the recipient), the solution is to allow complainants and respondents to pick the persons who run the grievance proceedings similar to jury selection. One commenter suggested that to counter institutional bias, which the commenter argued was on display in notorious cover-up situations at prestigious universities where employees committed sexual abuse, the proposed rules should specifically require training on conflicts of interest caused by employees' misplaced loyalty to the recipient. Another commenter stated that schools must be required to purchase liability insurance covering exposure arising from the handling of sexual harassment claims, to ensure that they do not have a secret conflict of interest that might cause them to put a finger on the scale one way or the other in the course of investigating or adjudicating a Title IX complaint.

Several commenters indicated that this provision seems reasonable but requested clarity as to what might in practice constitute a conflict of interest under § 106.45(b)(1)(iii), with one commenter noting that this issue often arises when a school district hires their legal counsel, insurance carrier, or risk pool to complete an investigation or respond to a formal complaint. Another commenter requested more information on what would constitute "general bias" for or against complainants or respondents under this provision, expressing concern that without any framework for evaluating whether a particular administrator is tainted by such bias this provision is amorphous and will add confusion and grounds for attack at smaller institutions where many student affairs administrators fill several different roles. Another commenter asked for clarification that school employees serving in the Title IX process should be presumed to be unbiased notwithstanding having previously investigated a matter involving one or more of

particular parties, or else this provision could be quite costly by requiring a school district to hire outside investigators every time an investigator deals with a party more than once.

Several commenters recommended countering inherent institutional conflicts of interest on the part of recipient employees by revising the final regulations to avoid any commingling of administrative and adjudicative roles. Several commenters offered the specific recommendation that the Title IX Coordinator must not be an employment supervisor of the decision-maker in the school's administrative hierarchy and if investigators are independent contractors, the Title IX Coordinator should not have a role in hiring or firing such investigators. The same commenters recommended bolstering neutrality and independence by removing the role of counseling complainants from the office that coordinates the grievance process and requiring that investigators have some degree of institutional independence. One commenter asserted that if the Department intends to prohibit any overlap in responsibilities among the Title IX Coordinator, investigator, or decision-maker, the Department must make that intention clear.

Many commenters requested clarification as to whether this provision's prohibition against conflicts of interest and bias would be interpreted to bar anyone from being a Title IX Coordinator, investigator, or decision-maker if the person currently or in their past has ever advocated for victims' rights or otherwise worked in sexual violence prevention fields. Several commenters argued against such an interpretation because individuals with that kind of experience are often highly knowledgeable about sexual violence and able to serve impartially, while several other commenters argued that Title IX-related personnel are a self-selected group likely to include victim advocates, self-identified victims, and those associated with women's studies and thus come to a Title IX role with biases against men, respondents, or both. One commenter asserted that while the choice of a professor's field of study may or may not indicate

bias, the fact that a university relies on volunteers to staff Title IX hearing panels is highly questionable because self-selection creates the likelihood that those who "want" to serve on a Title IX hearing board have preconceived ideas and views about whether male students are guilty, regardless of the actual facts and circumstances, and thus the final regulations should require the recipient to select decision-makers based on random selection from its entire faculty and administrators. One commenter shared an example of bias on the part of the single administrator tasked with ruling on the commenter's client's appeal of a responsibility finding, where the appeal decision-maker had recently retweeted a survivor advocacy organization's tweet "To survivors everywhere, we believe you," yet the recipient overruled a bias objection stating that nothing suggested that such a tweet meant the appeal decision-maker was biased against that particular respondent. This commenter proposed adding language explaining that a "reasonable person" standard will be applied to determine bias, along with cautionary language that a history of working or advocating on one side or another of this issue might constitute bias. One commenter asserted that Federal courts of appeal, including the Sixth Circuit, agree that "being a feminist, being affiliated with a gender-studies program, or researching sexual assault does not support a reasonable inference than an individual is biased against men."[1033] This commenter believed that the proposed rules offered no clarity on whether the Department would consider bias claims based on being a feminist or working in the sexual assault field to be "frivolous" or would be taken seriously.

Several commenters urged the Department to expand this provision to prohibit "perceived" conflicts of interest or "the appearance" of bias in line with standards that require

[1033] Commenter cited: *Doe v. Miami Univ.*, 882 F.3d 579, 593 fn. 6 (6th Cir. 2018).

judges not to have even the appearance of bias or impropriety; other commenters urged the Department to apply a presumption that campus decision-makers are free of bias, noting that courts require proof that a conduct official had an "actual" bias against the party because of the party's sex, and the proposed rules seem to reverse this judicial presumption, opening the door to numerous claims that undermine the presumption of honesty in campus proceedings. One commenter suggested a more clearly defined standard by specifying that Title IX personnel not have a personal bias or prejudice for or against complainants or respondents generally, and not have an interest, relationship, or other consideration that may compromise or have the appearance of compromising the individual's judgment with respect to any individual complainant or respondent. One commenter suggested that this provision should require "nondiscriminatory" investigations and adjudications instead of being "not biased." One commenter believed that student leaders should take more responsibility for addressing sexual misconduct and might do a better job than bureaucrats can; the commenter asserted that the final regulations should not prohibit recipients from relying on students to investigate and adjudicate sexual misconduct cases.

Discussion: The Department understands commenters' concerns that the final regulations work within a framework where a recipient's own employees are permitted to serve as Title IX personnel,[1034] and the potential conflicts of interest this creates. The final regulations leave recipients flexibility to use their own employees, or to outsource Title IX investigation and adjudication functions, and the Department encourages recipients to pursue alternatives to the

[1034] References in this preamble to "Title IX personnel" mean Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolution processes.

inherent difficulties that arise when a recipient's own employees are expected to perform these functions free from conflicts of interest and bias. The Department notes that several commenters favorably described regional center models that could involve recipients coordinating with each other to outsource Title IX grievance proceedings to experts free from potential conflicts of interest stemming from affiliation with the recipient. The Department declines to require recipients to use outside, unaffiliated Title IX personnel because the Department does not conclude that such prescription is necessary to effectuate the purposes of the final regulations; although recipients may face challenges with respect to ensuring that personnel serve free from conflicts of interest and bias, recipients can comply with the final regulations by using the recipient's own employees. Unless prescription is necessary to achieve compliance with the final regulations, the Department does not wish to interfere with recipients' discretion to conduct a recipient's own internal, administrative affairs. The Department is also sensitive to the reality that prescriptions regarding employment relationships likely will result in many recipients being compelled to hire additional personnel in order to comply with these final regulations, and the Department wishes to prescribe only those measures necessary for compliance, without unnecessarily diverting recipients' resources into hiring personnel and away from other priorities important to recipients and the students they serve. For these reasons, the Department declines to define certain employment relationships or administrative hierarchy arrangements as *per se* prohibited conflicts of interest under § 106.45(b)(1)(iii).[1035] The Department is cognizant that the

[1035] Although the decision-maker must be different from any individual serving as a Title IX Coordinator or investigator, pursuant to § 106.45(b)(7)(i), the final regulations do not preclude a Title IX Coordinator from also serving as the investigator, and the final regulations do not prescribe any particular administrative "chain of reporting" restrictions or declare any such administrative arrangements to be *per se* conflicts of interest prohibited under § 106.45(b)(1)(iii).

Department's authority under Title IX extends to regulation of recipients themselves, and not to the individual personnel serving as Title IX Coordinators, investigators, decision-makers, or persons who facilitate an informal resolution process. Thus, the Department will hold a recipient accountable for the end result of using Title IX personnel free from conflicts of interest and bias, regardless of the employment or supervisory relationships among various Title IX personnel. To the extent that recipients wish to adopt best practices to better ensure that conflicts of interest do not cause violations of the final regulations, recipients have discretion to adopt practices suggested by commenters, such as ensuring that investigators have institutional independence or deciding that Title IX Coordinators should have no role in the hiring or firing of investigators.

For similar reasons, the Department declines to state whether particular professional experiences or affiliations do or do not constitute *per se* violations of § 106.45(b)(1)(iii). The Department acknowledges the concerns expressed both by commenters concerned that certain professional qualifications (e.g., a history of working in the field of sexual violence) may indicate bias, and by commenters concerned that excluding certain professionals out of fear of bias would improperly exclude experienced, knowledgeable individuals who are capable of serving impartially. Whether bias exists requires examination of the particular facts of a situation and the Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists (for example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents), bearing in mind that the very training

required by § 106.45(b)(1)(iii) is intended to provide Title IX personnel with the tools needed to serve impartially and without bias such that the prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role.

In response to commenters' concerns that the prohibition against conflicts of interest and bias is unclear, the Department revises this provision to mandate training in "how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias" in place of the proposed language for training to "protect the safety of students, ensure due process protections for all parties, and promote accountability." This shift in language is intended to reinforce that recipients have significant control, and flexibility, to prevent conflicts of interest and bias by carefully selecting training content focused on impartiality and avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

The Department disagrees with the commenter who suggested replacing "bias" in this provision with "non-discrimination." Based on anecdotal evidence from commenters asserting specific instances that ostensibly reveal a recipient's Title IX personnel exhibiting bias for or against men, women, complainants, or respondents, the Department believes that bias, especially sex-based bias, is a particular risk in Title IX proceedings and aims specifically to reduce and prevent bias from influencing how a recipient responds to sexual harassment including through required training for Title IX personnel.[1036]

[1036] *E.g.*, Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L. J. 345 (2007) (arguing for diversity training); Jennifer A. Richeson & Richard J. Nussbaum, *The Impact of Multiculturalism Versus Color-Blindness on Racial Bias*, 40 J. OF EXPERIMENTAL SOCIAL PSYCHOL. 417 (2004) (explaining how diversity training can lead to less implicit bias).

The Department declines to narrow or widen this provision by specifying whether conflicts of interest or bias must be "actual" or "perceived," and declines to adopt an "appearance of bias" standard. As noted above, the topic of sexual harassment inherently involves issues revolving around sex and sexual dynamics such that a standard of "appearance of" or "perceived" bias might lead to conclusions that most people are biased in one direction or another by virtue of being male, being female, supporting women's rights or supporting men's rights, or having had personal, negative experiences with men or with women. The Department believes that keeping this provision focused on "bias" paired with an expectation of impartiality helps appropriately focus on bias that impedes impartiality. The Department cautions parties and recipients from concluding bias, or possible bias, based solely on the outcomes of grievance processes decided under the final regulations; for example, the mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate or imply bias on the part of Title IX personnel. The entire purpose of the § 106.45 grievance process is to increase the reliability and accuracy of outcomes in Title IX proceedings, and the number of particular outcomes, alone, thus does not raise an inference of bias because the final regulations help ensure that each individual case is decided on its merits.

The Department notes that the final regulations do not preclude a recipient from allowing student leaders to serve in Title IX roles so long as the recipient can meet all requirements in § 106.45 and these final regulations,[1037] and leaves it to a recipient's judgment to decide under what circumstances, if any, a recipient wants to involve student leaders in Title IX roles.

[1037] For example, § 106.8(a) specifies that the Title IX Coordinator must be an "employee" designated and authorized by the recipient to coordinate the recipient's efforts to comply with Title IX obligations. No such requirement of employee status applies to, for instance, serving as a decision-maker on a hearing panel.

Changes: Section 106.45(b)(1)(iii) is revised to specify that the required training include "how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias" in place of the proposed language "that protect the safety of students, ensure due process protections for all parties, and promote accountability." [1038]

Comments: One commenter asked whether the training on the definition of sexual harassment referenced in § 106.45(b)(1)(iii) means the definition in § 106.30, a definition used by the recipient (that might be broader than in § 106.30), or both. One commenter wondered why this provision removes vital sexual harassment training of school personnel but gave no explanation for drawing this conclusion. Several commenters noted that § 106.45(b)(1)(iii) does not state the frequency for the required training and wondered if it must be annual, while several others requested more clarity about what would be considered adequate training especially for a decision-maker expected to conduct a live hearing with cross-examination, and further explanation of what kinds of training materials foster impartial determinations. One commenter stated that § 106.45(b)(1)(iii) does not provide for a standardized level of training or offer financial assistance for training personnel. One commenter agreed with the proposed rules' effort to diagnose severe training gaps in the Title IX system but because this provision mandates training "conceptually" without specifying what the training must include, the commenter asserted that the inevitable result will be more Dear Colleague Letters and guidance from the Department, which the Department should avoid by taking time to include more specific training requirements in these final regulations.

[1038] Because revised § 106.45(b)(8) now requires recipients to offer appeals, § 106.45(b)(1)(iii) has also been revised to include training on conducting appeals.

Many commenters expressed views about this provision's prohibition against the use of "sex stereotypes" in training materials. Some commenters urged the Department to include a definition of "sex stereotypes," asserting that without clarity this provision is a legal morass exposing recipients to liability. One commenter asserted that "bias" lacks a definitive legal meaning and should be replaced by "non-discriminatory." Some commenters argued that without a definition, this provision could be interpreted to forbid recipients from relying on research and evidence-based practices that instruct personnel to reject notions of "regret sex" and women lying about sexual assault. Other commenters requested clarity that stereotypes of men as sexually aggressive or likely to perpetrate sexual assault and references to "toxic masculinity" are prohibited under this provision. One commenter argued that the First Amendment likely prohibits the Department from dictating that training materials be free from sex stereotypes or that if the Department no longer perceives the First Amendment as a barrier to the Federal government prohibiting sex stereotyping materials then the Department should repeal 34 CFR 106.42 and replace it with a prohibition against reliance on sex stereotyping that extends to all training or educational materials used by a recipient for any purpose. This commenter also requested clarification as to whether § 106.45(b)(1)(iii) would prohibit reliance on peer-reviewed journal articles that state, for example,[1039] that trauma victims often recall only some vivid details from their ordeal and that memories may be impaired with amnesia or gaps or contain false details following extreme cases of negative emotions, such as rape trauma. Another commenter expressed concern that this provision might result in information provided by sexual violence

[1039] Commenters cited: Katrin Hohl & Martin Conway, *Memory as Evidence: How Normal Features of Victim Memory Lead to the Attrition of Rape Complaints*, 17 CRIMINOLOGY & CRIMINAL JUSTICE 3 (2017).

experts being forbidden, resulting in respondents' lawyers' opinions replacing peer-reviewed, scientific data. One commenter urged the Department to interpret this provision to require training around bias that exists against complainants and to clarify that the "Start by Believing" approach promoted by End Violence Against Women International should be part of these training requirements because that approach trains investigators to start by believing the survivor to avoid incorporating personal bias and victim-blaming myths that might bias the investigation against the survivor. The commenter asserted that understanding the dynamics of sexual trauma is necessary in order to treat both complainants and respondents fairly without bias. Another commenter asserted that "start by believing" is not appropriate for investigations but is appropriate for counseling and thus, the final regulations should require that for counseling purposes personnel must "start by believing" a complainant or a respondent seeking counseling.

One commenter suggested this provision be modified to require training to have a working understanding of impartiality. One commenter contended that training materials should never be allowed to refer to the AAU/Westat Report[1040] for the statistic that one-in-four women are raped on college campuses because there are so many methodological problems with that report that using it constitutes sex discrimination under Title IX. One commenter argued that § 106.45(b)(1)(iii) must not be applied to exclude the application of proven profiles and indicators of certain predictive behaviors because that is a tried and tested practice in professional law enforcement and should be utilized according to best practices of trained investigators in any quest for the truth.

[1040] Commenters cited: The Association of American Universities, *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* (Westat 2015).

Discussion: The Department appreciates a commenter asking whether the training on the definition of sexual harassment in this provision was intended to refer to the definition of sexual harassment in § 106.30; to clarify that was the intent of this provision, § 106.45(b)(1)(iii) has been revised to so state. The Department disagrees that this provision removes vital training regarding a recipient's responses to sexual harassment; rather, this provision prescribes mandatory training for Title IX personnel that promotes the purpose of a Title IX process and compliance with these final regulations, and leaves recipients free to adopt additional education and training content that a recipient believes serves the needs of the recipient's community. Commenters correctly noted that the final regulations do not impose an annual or other frequency condition on the mandatory training required in § 106.45(b)(1)(iii). The Department interprets this provision as requiring that any Title IX Coordinator, investigator, decision-maker, or person who facilitates an informal resolution process will, when serving in such a role, be trained to serve in that role. The Department wishes to leave recipients flexibility to decide to what extent additional training is needed to ensure that Title IX personnel are trained when they serve[1041] so that recipients efficiently allocate their resources among Title IX compliance obligations and other important needs of their educational communities. The Department disagrees with a commenter concerned that failing to be more prescriptive about the content of training in these final regulations necessarily will result in the Department issuing Dear

[1041] Some commenters questioned whether advisors provided to a party by a postsecondary institution recipient pursuant to § 106.45(b)(6)(i) must be free from conflicts of interest and bias and must be trained. The final regulations impose no prohibition of conflict of interest or bias for such advisors, nor any training requirement for such advisors, in order to leave recipients as much flexibility as possible to comply with the requirement to provide those advisors. The Department believes that advisors in such a role do not need to be unbiased or lack conflicts of interest precisely because the role of such advisor is to conduct cross-examination on behalf of one party, and recipients can determine to what extent a recipient wishes to provide training for advisors whom a recipient may need to provide to a party to conduct cross-examination.

Colleague Letters imposing training content requirements in the future. The Department is committed to imposing legally binding requirements by following applicable rulemaking processes.

The Department is persuaded by commenters' concerns that it is beneficial for § 106.45(b)(1)(iii) to emphasize the need for decision-makers to receive training in how to conduct hearings, and we have revised this provision to specify that decision-makers receive training in how to conduct a grievance process including how to use technology that will be used by a recipient to conduct a live hearing, and on issues of the relevance of questions and evidence (including how to determine the relevance or irrelevance of a complainant's prior sexual history), and that investigators receive training on issues of relevance in order to prepare an investigative report that fairly summarizes relevant evidence.

The Department appreciates the many commenters who requested a definition of "sex stereotypes" and asked that such a definition include, or exclude, particular generalizations and notions about women or about men. For reasons similar to those discussed above with respect to defining "bias" on the part of Title IX personnel, the Department declines to list or define what notions do or do not constitute sex stereotypes on which training materials must not rely. The Department disagrees that a broad prohibition against sex stereotypes is a legal morass exposing recipients to liability, any more than Title IX's broad prohibition against "sex discrimination" does so. It is not feasible to catalog the variety of notions expressing generalizations and stereotypes about the sexes that might constitute sex stereotypes, and the Department's interest in ensuring impartial Title IX proceedings that avoid prejudgment of the facts at issue necessitates a broad prohibition on sex stereotypes so that decisions are made on the basis of individualized facts and not on stereotypical notions of what "men" or "women" do or do not do. To reinforce

this necessity, the final regulations use "must" instead of "may" to state that training materials "must" not rely on sex stereotypes.

Contrary to the concerns of some commenters, a prohibition against reliance on sex stereotypes does not forbid training content that references evidence-based information or peer-reviewed scientific research into sexual violence dynamics, including the impact of trauma on sexual assault victims. Rather, § 106.45(b)(1)(iii) cautions recipients not to use training materials that "rely" on sex stereotypes in training Title IX personnel on how to serve in those roles impartially and without prejudgment of the facts at issue, meaning that research and data concerning sexual violence dynamics may be valuable and useful, but cannot be relied on to apply generalizations to particular allegations of sexual harassment. Commenters provided numerous examples of training materials containing phrases that may, or may not, violate the final regulations, but a fact-specific evaluation of the training materials and their use by the recipient would be needed to reach a conclusion regarding whether such materials comply with § 106.45(b)(1)(iii). We have revised § 106.45(b)(10) to require recipients to post on a recipient's website the training materials referred to in § 106.45(b)(1)(iii) so that a recipient's approach to training Title IX personnel may be transparently viewed by the recipient's educational community and the public, including for the purpose of holding a recipient accountable for using training materials that comply with these final regulations.

The Department does not believe that placing parameters around the training materials specifically needed to comply with Title IX regulations violates the First Amendment rights of recipients because the final regulations do not interfere with the right of recipients to control the recipient's own curricula and academic instruction materials. The Department is not proactively scouring recipients' curricula to spot instances of sex stereotyping; rather, the Department is

placing reasonable conditions on materials specifically used by recipients to carry out recipients' obligations under these final regulations.

For reasons explained above, the Department does not wish to be more prescriptive than necessary to achieve the purposes of these final regulations, and respects the discretion of recipients to choose how best to serve the needs of each recipient's community with respect to the content of training provided to Title IX personnel so long as the training meets the requirements in these final regulations. Thus, the Department declines to require recipients to adopt the "Start by Believing" approach promoted by End Violence Against Women, and cautions that a training approach that encourages Title IX personnel to "believe" one party or the other would fail to comply with the requirement that Title IX personnel be trained to serve impartially, and violate § 106.45(b)(1)(ii) precluding credibility determinations based on a party's status as a complainant or respondent. The Department takes no position on whether "start by believing" should be an approach adopted by non-Title IX personnel affiliated with a recipient, such as counselors who provide services to complainants or respondents. The Department wishes to emphasize that parties should be treated with equal dignity and respect by Title IX personnel, but doing so does not mean that either party is automatically "believed." The credibility of any party, as well as ultimate conclusions about responsibility for sexual harassment, must not be prejudged and must be based on objective evaluation of the relevant evidence in a particular case; for this reason, the Department cautions against training materials that promote the application of "profiles" or "predictive behaviors" to particular cases. The Department declines to predetermine whether particular studies or reports do or do not violate § 106.45(b)(1)(iii) or opine on the validity of particular reports, but encourages recipients to

examine the information utilized in training of Title IX personnel to ensure compliance with this provision.

Changes: Section 106.45(b)(1)(iii) clarifies that the training on the definition of sexual harassment means the definition in § 106.30,[1042] requires Title IX personnel to be trained on how to conduct a grievance process, requires investigators and decision-makers to be trained on issues of relevance (including when questions and evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant), requires decision-makers to be trained on technology to be used at any live hearing, and changes "may" to "must" in the directive that training materials not rely on sex stereotypes.

Comments: Several commenters suggested that § 106.45(b)(1)(iii) be expanded to include training for Title IX personnel on a variety of subjects. At least one commenter urged the Department to adopt the training language from the withdrawn 2014 Q&A.[1043] Without referencing the 2014 Q&A a few commenters suggested that training address similar topics such as: the neurobiology of trauma, counterintuitive responses to sexual violence, false reporting, barriers to reporting, incapacitation versus intoxication and blackout behaviors, assessing credibility in the context of trauma, Title IX compliance as it intersects with the Clery Act,

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[1042] As discussed in the "Section 106.44(a) 'education program or activity'" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble, the training requirements for Title IX personnel in § 106.45(b)(1)(iii) now also include training on the scope of the recipient's education program or activity.

[1043] Commenters cited: 2014 Q&A at 40 ("Training should include information on working with and interviewing persons subjected to sexual violence; information on particular types of conduct that would constitute sexual violence, including same-sex sexual violence; the proper standard of review for sexual violence complaints (preponderance of the evidence standard); information on consent and the role drugs or alcohol can play in the ability to consent; the importance of accountability for individuals found to have committed sexual violence; the need for remedial actions for the perpetrator, complainant, and school community; how to determine credibility; how to evaluate evidence and weigh it in an impartial manner; how to conduct investigations; confidentiality; the effects of trauma, including neurobiological change; and cultural awareness training regarding how sexual violence may impact students differently depending on their cultural backgrounds.").

FERPA, child protective services legislation, disability laws, and other laws that may intersect with Title IX, healthy sexuality and consent including affirmative consent, risk factors for sexual violence victimization, bystander intervention, rates of prevalence, addressing bias using an anti-oppression framework, effective interviewing of survivors such as forensic experiential models, cultural competency to address specific issues that affect marginalized survivors (e.g., LGBTQ individuals, persons with disabilities, persons of color, or persons who are undocumented or economically disadvantaged).

One commenter stated that training should ensure that Title IX personnel are first "mentored" by someone with experience before working directly with survivors. One commenter suggested the Department create an aspirational list of training components. One commenter asked the Department to define "training materials" as limited to material the recipient itself designates as essential for performing the applicable Title IX role, so as not to sweep up a range of professional continuing education presentations into the ambit of § 106.45(b)(1)(iii) just because such professional training seminars might mention something relevant to Title IX.

Discussion: For the reasons explained above, the Department has determined that § 106.45(b)(1)(iii) in the final regulations strikes the appropriate balance between mandating training topics the Department believe are necessary to promote a recipient's compliance with these final regulations while leaving as much flexibility as possible to recipients to choose the content and substance of training topics in addition to the topics mandated by this provision. Thus, the Department declines to expand this provision to mandate that training address the topics suggested by commenters. As discussed in this preamble under the § 106.44(a) "education program or activity" condition, the final regulations revise the training requirements in § 106.45(b)(1)(iii) to require training of Title IX personnel on the "scope of the recipient's

education program or activity." The Department makes this change in response to commenters concerned that the "education program or activity" condition was misunderstood too narrowly, for example as excluding all sexual harassment incidents that occur off campus. This revision to the training requirements in § 106.45(b)(1)(iii) helps to ensure that recipients do not inadvertently fail to treat as Title IX matters sexual harassment incidents that occur in the recipient's education program or activity. As explained above in this section of the preamble, we have also revised this provision to: add training on appeals and informal resolution processes in addition to hearings (as applicable); specify that Title IX personnel must be trained on the definition of sexual harassment in § 106.30 and on how to serve impartially without prejudgment of the facts at issue and how to avoid bias and conflicts of interest; specify that investigators and decision-makers must be trained on issues of relevance; and specify that decision-makers receive training on how to use technology at live hearings. As explained below in this section of the preamble, we also revise § 106.45(b)(1)(iii) to include "person who facilitates an informal resolution process" to the list of Title IX personnel who must receive training.

The Department declines to require that Title IX personnel be "mentored" before working with parties, or to create an aspirational list of training components. The Department's intent with respect to this provision is to provide flexibility for each recipient to design or select training components that best serve the recipient's unique needs and educational environment, while prescribing those training topics necessary for a recipient to comply with these final regulations. The Department appreciates the commenter's request for clarification that the training materials subject to these final regulations should be only those training materials specifically designated by the recipient as essential to performing Title IX personnel functions. In order to reasonably gauge compliance with the final regulations, the Department instead

reserves the right to examine training materials whether or not a recipient has not specifically designated the material as essential to performing a Title IX role.

Changes: The final regulations revise this provision to include training on the scope of a recipient's education program or activity; add training on appeals and informal resolution processes in addition to hearings (as applicable); specify that Title IX personnel must be trained on the definition of sexual harassment in § 106.30 and on how to serve impartially without prejudgment of the facts at issue and how to avoid bias and conflicts of interest; specify that investigators and decision-makers must be trained on issues of relevance; specify that decision-makers receive training on how to use technology at live hearings; and add "person who facilitates an informal resolution process" to the list of Title IX personnel who must receive training.

Comments: Many commenters expressed views about whether § 106.45(b)(1)(iii) should be applied to include or exclude training materials promoting "trauma-informed" practices, techniques, and approaches. One commenter believed that using "impartial" instead of "trauma-informed" is offensive to rape victims, for whom trauma necessitates a cognitive interview that takes the effects of trauma into account, while another commenter believed training must require trauma-informed best practices. A few commenters believed that the provision should address the use of trauma-informed theories by cautioning against misuse of victim-centered approaches for any purpose other than interviewing or counseling; these commenters distinguished between remaining "impartial," one the one hand, while still using trauma-informed methods when questioning a complainant so that the investigator does not expect a trauma victim to provide details in chronological order, on the other hand. Several commenters asserted that trauma-informed and believe-the-victim approaches must be prohibited in the interview process because

those approaches compromise objectivity, create presumptions of guilt, and result in exclusion of relevant (often exculpatory) evidence. At least one commenter suggested that FETI (forensic experimental trauma interview) techniques should be required. One commenter stated that several states including New York, California, and Illinois mandate trauma-informed training[1044] for campus officials who respond to sexual assault and asserted that the proposed rules are unclear about whether the Department's position is that trauma-informed practices constitute a form of sex discrimination,[1045] thus inviting further litigation on this issue.

Discussion: The Department understands from personal anecdotes and research studies that sexual violence is a traumatic experience for survivors. The Department is aware that the neurobiology of trauma and the impact of trauma on a survivor's neurobiological functioning is a developing field of study with application to the way in which investigators of sexual violence offenses interact with victims in criminal justice systems and campus sexual misconduct proceedings. The Department appreciates the views of commenters urging that trauma-informed practices be mandatory, and those urging that such practices be forbidden, and the commenters noting that trauma-informed practices are required in some States, and noting there is a difference between applying such practices in different contexts (i.e., interview and questioning techniques, providing counseling services, or when making investigatory decisions about relevant evidence and credibility or adjudicatory decisions about responsibility). For reasons explained above, the Department believes that § 106.45(b)(1)(iii) appropriately forbids conflicts

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[1044] Commenters cited a white paper by Jeffrey J. Nolan, *Promoting Fairness in Trauma-Informed Investigation Training*, NACUA Notes, vol. 16, no. 5, p. 3 (Feb. 8, 2018), now updated as: Jeffrey J. Nolan, *Fair, Equitable Trauma-Informed Investigation Training* (Holland & Knight updated July 19, 2019).

[1045] The commenter asserted that Federal courts tend to reject this proposition, citing for example *Doe v. Univ. of Or.*, No. 6:17-CV-01103, 2018 WL 1474531 (D. Or. Mar. 26, 2018).

of interest and bias, mandates training on topics necessary to promote recipients' compliance with these final regulations (including how to serve impartially), and precludes training materials that rely on sex stereotypes. Recipients have flexibility to choose how to meet those requirements in a way that best serves the needs, and reflects the values, of a recipient's community including selecting best practices that exceed (though must be consistent with) the legal requirements imposed by these final regulations. The Department notes that although there is no fixed definition of "trauma-informed" practices with respect to all the contexts to which such practices may apply in an educational setting, practitioners and experts believe that application of such practices is possible – albeit challenging – to apply in a truly impartial, non-biased manner.[1046]

Changes: None.

Comments: One commenter suggested expanding the persons who must be trained to include counselors, diversity and inclusion departments, deans of students, ombudspersons, and restorative justice committees. A few commenters suggested that training about Title IX rights and Title IX procedures should be mandatory for all students and all staff, including teachers and

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[1046] *E.g.*, Jeffrey J. Nolan, *Fair, Equitable Trauma-Informed Investigation Training* 14-15 (Holland & Knight updated July 19, 2019) (concluding that "All parties can benefit if trauma-informed training is provided in a manner that is fair, equitable, nuanced, and adapted appropriately to the context of college and university investigations and disciplinary proceedings, and that does 'not rely on sex stereotypes.' Given the complexity of these issues and the importance of training as a matter of substance and potential litigation risk, institutions should strive to ensure that their training programs are truly fair and trauma-informed."); "Recommendations of the Post-SB 169 Working Group," 3 (Nov. 14, 2018) (report by a task force convened by former Governor of California Jerry Brown to make recommendations about how California institutions of higher education should address allegations of sexual misconduct) (trauma-informed "approaches have different meanings in different contexts. Trauma-informed training should be provided to investigators so they can avoid re-traumatizing complainants during the investigation. This is distinct from a trauma-informed approach to evaluating the testimony of parties or witnesses. The use of trauma-informed approaches to evaluating evidence can lead adjudicators to overlook significant inconsistencies on the part of complainants in a manner that is incompatible with due process protections for the respondent. Investigators and adjudicators should consider and balance noteworthy inconsistencies (rather than ignoring them altogether) and must use approaches to trauma and memory that are well grounded in current scientific findings.").

faculty so that everyone affiliated with a recipient knows the definition of sexual harassment and the complaint procedures. A few commenters noted that the proposed rules lacked any training requirements for staff that work on informal resolution processes and urged the Department to set minimum standards for training of those individuals so that all students are served by individuals with high levels of training whether they go through a formal or informal process.

Discussion: The intent of § 106.45(b)(1)(iii) is to ensure that Title IX personnel directly involved in carrying out the recipient's Title IX response duties are trained in a manner that promotes a recipient's compliance with these final regulations. The Department appreciates commenters suggesting that additional school personnel, or students, need training about Title IX, but the Department leaves such decisions to recipients' discretion. The Department appreciates commenters who noted that the proposed rules contemplated the recipient facilitating informal resolution processes yet omitted such a role from the listed personnel who must receive training under § 106.45(b)(1)(iii), resulting in parties interacting with well-trained personnel during a formal process but perhaps with untrained personnel during an informal process. The commenters' concerns are well-founded, and the final regulations include "any person who facilitates an informal resolution process" wherever reference had been made to "Title IX Coordinators, investigators, and decision-makers."

Changes: Section 106.45(b)(1)(iii) is revised to include "any person who facilitates an informal resolution process" in addition to Title IX Coordinators, investigators, and decision-makers, as a person whom the recipient must ensure is free from conflicts of interest and bias, and receives the training specified in this provision.

Comments: At least one commenter requested more information about who is expected to provide the training required under § 106.45(b)(1)(iii), for example whether training presenters

must have experience with administrative proceedings in order to provide qualified training to others. One commenter with extensive experience as a sexual assault investigator proposed that the Federal Law Enforcement Training Center (FLETC) should be mandated to create a Title IX focused training program to which recipients would send Title IX investigators within a certain time frame after being hired; the commenter stated that FLETC already has instructors, resources, and qualified, experienced professionals that provide accredited training to sexual assault investigators, so expanding FLETC training to be specific to Title IX proceedings would create consistent knowledge and best practices across all institutions.

Discussion: For reasons explained above, the Department believes that the mandated training requirements in § 106.45(b)(1)(iii) are sufficient to effectuate the purposes of these final regulations, without unduly restricting recipients' flexibility to design and select training that best serves each recipient's unique needs. For similar reasons, the Department declines to prescribe whether training presenters must possess certain qualifications and will enforce § 106.45(b)(1)(iii) based on whether a recipient trains Title IX personnel in conformity with this provision rather than on the qualifications or expertise of the trainers. The Department appreciates the commenter's suggestion regarding FLETC creating a Title IX-specific training program. While adoption of that suggestion is outside the scope of these final regulations because it is not within the Department's regulatory authority under Title IX to direct FLETC to expand its programming,[1047] the Department encourages recipients to pursue training from sources that rely on qualified, experienced professionals likely to result in best practices for

[1047] FLETC is part of the Department of Homeland Security. U.S. Dep't. of Homeland Security, *Federal Law Enforcement Training Centers*, https://www fletc.gov/.

effective, impartial investigations. The Department does not certify, endorse, or otherwise approve or disapprove of particular organizations (whether for-profit or non-profit) or individuals that provide Title IX-related training and consulting services to recipients. Whether or not a recipient has complied with § 106.45(b)(1)(iii) is not determined by the source of the training materials or training presentations utilized by a recipient.

Changes: None.

Section 106.45(b)(1)(iv) Presumption of Non-Responsibility

Purpose of the Presumption

Comments: Many commenters supported § 106.45(b)(1)(iv), requiring a recipient's grievance process to apply a presumption that a respondent is not responsible until conclusion of a grievance process (referred to in this section as the "presumption"), because such a presumption means that recipients will adjudicate based on evidence rather than beliefs or assumptions. Commenters referred to the presumption as the equivalent of a "presumption of innocence" which, commenters asserted, is crucial for determining the truth of what happened when one party levies an accusation against another party. Commenters shared personal experiences with campus Title IX proceedings in which the commenters believed that the process unfairly placed the respondent in a position of having to try to prove non-responsibility rather than being treated as not responsible unless evidence proved otherwise. Commenters who agreed with the presumption asserted that, especially under a preponderance of the evidence standard, it is important that an accused student be presumed innocent, to stress for decision-makers that if they believe the complainant and respondent are equally truthful, the required finding must be not-responsible. Commenters asserted that lawsuits filed against universities by respondents accused of sexual misconduct have revealed that universities often do not presume the respondent

innocent[1048] and that this may lead schools to place the burden of proof on respondents.[1049] Commenters asserted that § 106.45(b)(1)(iv) will clarify that respondents do not have the burden of proving their innocence.

Several commenters who supported the presumption cited an article arguing that believing complainants is the beginning and the end of a search for the truth.[1050] Several commenters asserted that the mantra of "Believe Survivors" encourages a presumption of guilt against respondents. Other commenters opined that a person can both believe complainants and presume the respondent is innocent during an investigation.

Commenters argued that the presumption of non-responsibility is essential to affording respondents an opportunity to defend themselves. Commenters supportive of the presumption shared personal stories in which they or their family members were respondents in Title IX grievance hearings and as respondents and felt as though the recipient placed the burden of proving innocence on the respondent's shoulders and made it seem that the accusations had been prejudged as truthful; others shared experiences of interim suspensions imposed prior to any facts or evidence leading to a conclusion of "guilt." Commenters argued that it is imperative that accusations are not equated with "guilt." One commenter described living in countries that were behind the Iron Curtain, where to be accused was the same as to be proven guilty without evidence.

[1048] Commenters cited: *Doe v. Univ. of Cincinnati*, *aff'd sub nom. Doe v. Cummins*, 662 F. App'x 437, 447 (6th Cir. 2016).
[1049] Commenters cited: *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746 (S.D. Ohio 2014).
[1050] Commenters cited: Emily Yoffe, *The problem with #BelieveSurvivors*, THE ATLANTIC (Oct. 3, 2018).

Commenters who opposed the presumption argued that the purpose of the presumption is to favor respondents over complainants. Commenters asserted that the presumption is evidence of the Department's animus towards complainants. Commenters asserted that the presumption codifies a unique status for sexual harassment and assault complainants, explicitly requiring that schools treat them with heightened skepticism. Additionally, several commenters argued that the Department proposed the presumption because the Department seeks to perpetuate the myth of false reporting in Federal policy and desires to protect the reputation and interests of the accused. Commenters argued that the presumption gives special, greater rights to the respondent, creating a procedural bias against complainants that violates complainants' rights to an impartial grievance procedure under Title IX and the Clery Act.

Many commenters argued that the presumption of non-responsibility is a presumption that the alleged harassment did not occur. Commenters questioned how the recipient can adequately listen to the complainant if the recipient is required to presume that no harassment occurred. Commenters argued that the presumption creates a hostile environment for complainants by implying that the complainant is dishonest. Commenters argued that the presumption will increase negative social reactions to complainants, such as minimization and victim-blaming, and predicted that these negative reactions will create adverse health effects for complainants including post-traumatic stress disorder symptoms.

Commenters opposed the requirement in the proposed rules for the recipient to expressly state the presumption of non-responsibility in its first communication with the complainant, arguing that this provision seems "deliberately cruel" towards complainants.

Commenters argued that the presumption would encourage schools to ignore or punish historically marginalized groups that report sexual harassment by implying such complainants

are "lying" about sexual harassment, and that complainants will feel chilled from reporting out of belief that they will be retaliated against (i.e., by being punished for "lying") when they do report.[1051]

Commenters asserted that in a criminal proceeding, there is an imbalance of power between the accused person and the government prosecuting the accused, and therefore the U.S. Constitution gives the criminal defendant a presumption of innocence; commenters argued that this dynamic is absent in a Title IX proceeding where the complainant does not represent the power of the government prosecuting a criminal defendant, and thus a Title IX respondent should not enjoy the presumption given to a criminal defendant.

Discussion: The Department appreciates commenters' support for § 106.45(b)(1)(iv) and acknowledges the many commenters who shared personal experiences as respondents in Title IX proceedings where the investigation process made the commenter feel like the burden was on the respondent to prove non-responsibility rather than being presumed not responsible unless evidence showed otherwise.

The Department disagrees with commenters who believed that the purpose of the presumption of non-responsibility is to favor respondents at the expense of complainants or that a presumption of non-responsibility demonstrates animus or hostility toward complainants. The Department does not seek to "perpetuate the myth of false reporting in Federal policy," nor does it desire "to protect the reputation and interests of the accused" at the expense of victims as some commenters claimed. To the contrary, we seek to establish a fair grievance process for all parties,

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[1051] Commenters cited, *e.g.*, Tyler Kingkade, *When Colleges Threaten To Punish Students Who Report Sexual Violence*, THE HUFFINGTON POST (Sept. 9, 2015).

and the presumption does not affect or diminish the strong procedural rights granted to complainants throughout the grievance process.

The Department acknowledges that these final regulations apply only to allegations of Title IX sexual harassment, and as such these final regulations do not impose a presumption of non-responsibility in other types of student misconduct proceedings. This does not indicate that the allegations in formal complaints of sexual harassment are more suspect or warrant more skepticism than allegations of other types of misconduct. The Department believes that the notion of presuming a student not responsible until facts show otherwise represents a basic concept of fairness, but these regulations address only recipients' responses to Title IX sexual harassment and do not dictate whether a similar presumption should be applied to other forms of student misconduct.

While the Department acknowledges that Title IX proceedings are not criminal in nature and do not require application of constitutional protections granted to criminal defendants, the Department believes that a presumption of non-responsibility is critical to ensuring a fair proceeding in the Title IX sexual harassment context, rooted in the same principle that underlies the constitutional presumption of innocence afforded to criminal defendants.[1052] In the noncriminal context of a Title IX grievance process, the presumption reinforces the final regulations' prohibition against a recipient treating a respondent as responsible until conclusion

[1052] *See* François Quintard-Morénas, *The Presumption of Innocence in the French and Anglo-American Legal Traditions*, 58 AM. J. OF COMPARATIVE L. 107, 110 (2010) ("Because one can be accused of a crime without being a criminal, an elementary principle of justice requires that plaintiffs prove their allegations and that the accused be considered innocent in the interval between accusation and judgment.").

of a grievance process[1053] and reinforces correct application of the standard of evidence selected by the recipient for use in the recipient's Title IX sexual harassment grievance process. These aspects of the presumption improve the fairness of the process and increase party and public confidence in such outcomes,[1054] thereby leading to greater compliance with rules against sexual

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[1053] Sections 106.44(a), 106.45(b)(1)(i) (recipients may not impose disciplinary sanctions on a respondent, or otherwise take actions against the respondent that do not constitute supportive measures as defined in § 106.30, without following a grievance process that complies with § 106.45). The final regulations expressly allow exceptions to this principle, where in certain circumstances a respondent may be treated adversely even though responsibility has not been determined at the conclusion of a grievance process. *See* § 106.30 (defining "supportive measures" under which a supportive measure must not "unreasonably burden" the other party, so reasonably burdening a respondent to accomplish the aim of a supportive measure is permissible); § 106.44(c) (a respondent may be removed from education programs or activities where the respondent poses an immediate threat to the physical health or safety of one or more individuals, and while a post-removal opportunity to challenge the removal must be given to the respondent, such an emergency removal may occur prior to conclusion of a grievance process or where no grievance process is pending at all); § 106.44(d) (allowing a recipient to place a (non-student) employee on administrative leaving while an investigation under § 106.45 is pending). The Department notes that in an essay cited by commenters, the author criticizes the presumption of non-responsibility in the NPRM, arguing that if the presumption is intended only to mean that the burden of proof remains on the recipient (and not on the respondent) then the presumption is "unobjectionable as a matter of substance, although a seeming invitation to confusion" because recipients may wrongly believe that a presumption of non-responsibility implies that the recipient must apply the criminal burden of proof (beyond a reasonable doubt). Michael C. Dorf, *What Does a Presumption of Non-Responsibility Mean in a Civil Context*, DORF ON LAW (Nov. 28, 2018), http://www.dorfonlaw.org/2018/11/what-does-presumption-of-non html. The author recognized that the second purpose of the presumption seemed to be treating the respondent as not responsible throughout a grievance process and believed that to be "quite a bad idea" because in daily life we make decisions based on someone being accused of a crime even before a conviction. The author correctly noted that one purpose of the presumption is to reinforce that the burden of proof remains on the recipient and not on the respondent (or complainant). The Department clarifies that contrary to the author's concerns, and for reasons discussed in the "Section 106.45(b)(7)(i) Standard of Evidence and Directed Question 6" subsection of the "Determinations Regarding Responsibility" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, recipients may *not* apply the criminal standard of beyond a reasonable doubt. Further, while the author of that essay correctly identified a second purpose of the presumption as ensuring that recipients do not treat the respondent as responsible until the respondent is proved responsible, as explained above in this footnote that principle is subject to exceptions.

[1054] Rinat Kitai, *Presuming Innocence*, 55 OKLAHOMA L. REV. 257, 272 (2002) (the "presumption of innocence is based mainly on grounds of public policy relating to political morality and human dignity. The presumption of innocence is a normative principle, directing state authorities as to the proper way of treating a person who has not yet been convicted. This principle is not tied to empirical data about the incidence of criminal offenses or the probability of innocence in certain circumstances."); Dale A. Nance, *Civility and the Burden of Proof*, 17 HARV. J. OF L. & PUB. POL'Y 647, 689 (1994) ("we should not forget that the moral order that the law endorses carries with it certain obligations concerning its application, one of which is *the obligation to presume compliance with legal duties, at least to the extent they represent a consensus about serious moral duties*. . . . Even if that principle has lost its constitutional luster, the very fact that it has attained such status, off and on over the years, is evidence of the weight the law accords it. A presumption of innocence applies quite generally, though not of course with perfect uniformity, in both civil and criminal cases.") (emphasis added).

misconduct.[1055] Without expressly stating a presumption of non-responsibility, a perception that recipients may prejudge respondents as responsible will continue to negatively affect party and public confidence in Title IX proceedings.[1056]

On the other hand, nothing about this presumption deprives complainants of the robust procedural protections granted to both parties under § 106.45, or the protections granted only to complainants in § 106.44(a) (including the right to be offered supportive measures with or without filing a formal complaint). The presumption does not imply that the alleged harassment did not occur; the presumption ensures that recipients do not take action against a respondent *as though* the harassment occurred prior to the allegations being proved,[1057] and the final regulations require a recipient's Title IX personnel to interact with both the complainant and respondent in an impartial manner throughout the grievance process without prejudgment of the facts at issue,[1058] and without drawing inferences about credibility based on a party's status as a complainant or respondent.[1059] The presumption therefore serves rather than frustrates the goal of

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[1055] *E.g.*, Rebecca Holland-Blumoff, *Fairness Beyond the Adversary System: Procedural Justice Norms for Legal Negotiation*, 85 FORDHAM L. REV. 2081, 2084 (2017) ("A fair process provided by a third party leads to higher perceptions of legitimacy; in turn, legitimacy leads to increased compliance with the law") (internal citation omitted).

[1056] For example, the Foundation for Individual Rights in Education (FIRE) published a 2017 report, *Spotlight on Due Process*, https://www.thefire.org/resources/spotlight/due-process-reports/due-process-report-2017/, finding that "Nearly three-quarters (73.6%) of America's top 53 universities do not even guarantee students that they will be presumed innocent until proven guilty." The Department recognizes that a presumption of non-liability does not formally apply in Federal civil lawsuits the way that a presumption of innocence applies to criminal defendants; however, civil court procedures do generally place the burden of proof on the plaintiff to prove the defendant's civil liability, which echoes the principle that civil defendants generally are not liable until proved otherwise.

[1057] Under § 106.45(b)(9), a recipient may choose to facilitate an informal resolution process (except as to allegations that an employee sexually harassed a student) and an informal resolution may result in the parties, and the recipient, agreeing on a resolution of the allegations of a formal complaint that involves punishing or disciplining a respondent. This result comports with the prescription in § 106.44(a) and § 106.45(b)(1)(i) that a recipient may not discipline a respondent without following a grievance process that complies with § 106.45, because § 106.45 expressly authorizes a recipient to pursue an informal resolution process (with the informed, written, voluntary consent of both parties).

[1058] Section 106.45(b)(1)(iii).

[1059] Section 106.45(b)(1)(ii).

an impartial process. The Department expects that a fair grievance process will lend greater legitimacy to the resolution of complainants' allegations, which will improve the environment for complainants rather than perpetuate a hostile environment or increase negative social reactions to complainants, such as disbelief and blame. The presumption of non-responsibility does not interfere with a complainant's right under § 106.44(a) to receive supportive measures offered by the recipient; this obligation imposed on recipients does not depend at all on waiting for evidence to show a respondent's responsibility. Section 106.44(a) is intended to assure complainants of a prompt, supportive response from their school, college, or university notwithstanding the recipient's obligation not to treat the respondent as responsible for sexual harassment until the conclusion of a grievance process.

While the recipient must include a statement of the presumption in the initial written notice sent to both parties after a formal complaint has been filed,[1060] the Department does not believe that this communication from the recipient is "deliberately cruel" to complainants; rather, both parties benefit from understanding that the purpose of a grievance process is to reach reliable decisions based on evidence instead of equating allegations with the outcome, especially where the recipient's own code of conduct penalizes a party for making false statements during a grievance proceeding. The final regulations place the burden of proof solely on a recipient[1061] – not on a complainant or respondent – and therefore the presumption does not operate to burden or disfavor a complainant. Under § 106.44(a) and the § 106.30 definition of "supportive measures," recipients must offer complainants supportive measures designed to restore or

[1060] Section 106.45(b)(2)(i)(B).
[1061] Section 106.45(b)(5)(i).

preserve complainants' equal educational access (with or without a grievance process pending), and the final regulations' prohibition against a recipient punishing a respondent without following a fair grievance process, including application of a presumption of non-responsibility until conclusion of the grievance process, does not diminish the supportive, meaningful response that a recipient is obligated to offer complainants.[1062]

The Department disagrees that the presumption would encourage schools to ignore or punish historically marginalized groups that report sexual harassment, for "lying" about it. The Department requires a recipient to respond promptly to actual knowledge of sexual harassment in its education program or activity against a person in the United States, including by offering supportive measures to the complainant. Thus, ignoring sexual harassment violates these final regulations and places the recipient's Federal funding in jeopardy. The presumption does not imply that a respondent is truthful or that a complainant is lying, and a recipient cannot use the presumption as an excuse not to respond to a complainant as required under § 106.44(a), or not to objectively evaluate all relevant evidence in reaching a determination regarding responsibility. Finally, § 106.71(b)(2) cautions recipients that it may constitute retaliation to punish a complainant (or any party) for making false statements unless the recipient determines that the party made materially false statements in bad faith and that determination is not based solely on the outcome of the case.

The Department acknowledges that Title IX grievance processes are very different from criminal proceedings and that the presumption of innocence afforded to criminal defendants is

[1062] Nothing in the final regulations precludes a recipient from continuing to provide supportive measures to assist any party regardless of the outcome of a case.

not a constitutional requirement in Title IX proceedings, but believes that a presumption of non-responsibility is needed in Title IX proceedings. While commenters correctly noted that a complainant does not wield the power of the government prosecuting a criminal charge, the purposes served by the presumption of non-responsibility still apply: ensuring that the burden of proof remains on the recipient (not on the respondent or complainant) and that the standard of evidence is correctly applied, and ensuring the recipient does not treat the respondent as responsible until conclusion of the grievance process. The procedural requirements of § 106.45 equalize the rights of complainants and respondents to participate in the investigation and adjudication by presenting each party's own view of the evidence and desire for the case outcome, while leaving the burden of gathering evidence and the burden of proof on the recipient.

Changes: We have added § 106.71(a) to the final regulations, prohibiting retaliation against any person exercising rights under Title IX. In addition, § 106.71(b)(2) clarifies that charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance process does not constitute retaliation, but a determination regarding responsibility, alone, is not sufficient to conclude that an individual made a materially false statement in bad faith.

Students of Color, LGBTQ Students, and Individuals with Disabilities

Comments: Multiple commenters asserted that, because of the presumption of non-responsibility, schools may be more likely to ignore or punish survivors who are women and girls of color, pregnant and parenting students, and LGBTQ students because of harmful stereotypes. Commenters argued that the presumption would especially harm Asian Pacific Islander women who, because of social taboos about sexual activity prevalent in Asian cultures, are significantly

less likely to report instances of sexual assault and will feel further deterred by a presumption favoring the respondent. Commenters argued that Black women and girls are more likely to be punished by schools who stereotype them as the aggressor when they defend themselves against their harassers or when they respond to trauma.

Several commenters argued that the presumption would harm students with disabilities because they are more likely to be victims of sexual assault and may be particularly vulnerable to unfair treatment due to the presumption of non-responsibility, and because students with disabilities are less likely to be believed when they report these experiences and often have greater difficulty describing the harassment they experience.[1063] One commenter opposed § 106.45(b)(1)(iv) because the provision does not address sexual harassment and assault cases involving students with disabilities.

Other commenters who agreed with the proposed rules, including the presumption, recounted personal stories in which family members and friends who are Black males were falsely accused of sexual assault yet the recipient seemed to treat the respondent as guilty unless proven innocent. One commenter asserted that the sexual assault grievance process has become a tool for white administrators to punish Black males as young as five years old. The commenter wished to see what they called an outdated Jim Crow-era system replaced with a system that is fair to all.

[1063] Commenters cited: U.S. Dep't. of Justice, National Institute of Justice, *The Many Challenges Facing Sexual Assault Survivors With Disabilities* (July 19, 2017), https://www nij.gov/topics/crime/rape-sexual-violence/Pages/challenges-facing-sexual-assault-survivors-with-disabilities.aspx.

Other commenters supported this provision based on personal stories about students with disabilities whom commenters believed had been falsely accused of sexual misconduct, including students with autism who found the Title IX grievance process traumatic.

Discussion: The Department understands commenters' concerns that students of color, LGBTQ students, students with disabilities, and other students will be adversely affected by the presumption of non-responsibility. The Department does not believe that the presumption will adversely affect the rights of any complainant, including complainants of demographic groups who may suffer sexual harassment at greater rates than members of other demographic groups. The Department believes that a presumption that protects respondents from being treated as responsible until conclusion of a grievance process furthers the recipient's obligation to fairly resolve allegations of sexual harassment and increases the likelihood that every outcome will carry greater legitimacy.

Further, students of color, LGBTQ students, and students with disabilities may be respondents in Title IX grievance processes, in which situation the presumption of non-responsibility reinforces the recipient's obligation not to prejudge responsibility, countering negative stereotypes that may affect such respondents.

The presumption of non-responsibility in § 106.45(b)(1)(iv) does not contribute to negative stereotypes that commenters characterize as causing people to disbelieve students of color, pregnant or parenting students, LGBTQ students, or students with disabilities (or conversely, to rush to assume the responsibility of such students based on similar negative stereotypes). The presumption protects respondents against being treated as responsible until conclusion of the grievance process but this does not entail disbelieving complainants. Any person may be a complainant or a respondent, and the final regulations require all Title IX

personnel to serve impartially, without prejudging the facts at issue, and without bias toward complainants or respondents generally or toward an individual complainant or respondent.

Changes: None.

The Complainant's Right to Due Process Protections

Comments: Commenters argued that the presumption of non-responsibility is a deprivation of the complainant's own due process rights, and argued that the complainant will be forced to proceed blindly, at a severe information deficit, while being forced to overcome the presumption. Other commenters argued that merely stating that the recipient will bear the burden of proof does not in practical terms make it so, and a presumption that the respondent is not responsible in reality shifts the burden of proof onto the complainant. Many commenters asserted that the respondent should bear the burden to prove the respondent is innocent.

One commenter, citing *John Doe v. University of Cincinnati*,[1064] noted that a court in the Southern District of Ohio found no violation of due process where the respondent argued that the recipient failed to grant the respondent a presumption of non-responsibility. Another commenter asserted that the U.S. Supreme Court has already balanced the competing interests and determined what process is due and it does not require a presumption of non-responsibility, because in *Mathews v. Eldridge*[1065] the U.S. Supreme Court considered (1) the private interest that will be affected; (2) the risk of an erroneous deprivation of such interest through procedures used, and the probable value, if any, of additional procedural safeguards; and (3) the government's interest, yet did not specify that a presumption favoring any party was required.

[1064] Commenters cited: *Doe v. Univ. of Cincinnati*, 173 F. Supp. 3d 586, 604 (S.D. Ohio 2016), *aff'd sub nom. Doe v. Cummins*, 662 F. App'x 437, 447 (6th Cir. 2016).
[1065] Commenters cited: *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Many commenters argued that the presumption will make many women feel it is not worth it to report their assaulters to authorities because survivors already often do not report their sexual assaults due to fear of being disbelieved and the presumption will only heighten the perception that the recipient believes respondents and disbelieves complainants.[1066] One commenter asserted that, out of every 1,000 rapes, only 230 are reported to police, and just five result in conviction,[1067] and argued that a presumption in favor of respondents will lead to even fewer perpetrators of rape being held accountable.

Discussion: The presumption of non-responsibility does not hold complainants to a higher standard of evidence, shift the burden of proof onto complainants, require complainants to "overcome" the presumption or proceed "blindly" through an investigation, or deny complainants due process. Rather, the presumption simply requires that the recipient not treat the respondent as responsible until the recipient has objectively evaluated the evidence, and reinforces application of the standard of evidence the recipient has already selected (which may be the preponderance of the evidence standard, or the clear and convincing evidence standard).[1068] The final regulations require the burden of proof to remain on the recipient,[1069] and the recipient must reach a determination of responsibility against the respondent if the evidence meets the applicable standard of evidence. The complainant therefore does not bear any burden of proof and does not have to "overcome" the presumption. The presumption does not negate the strong procedural protections given to complainants throughout the grievance process, and these

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[1066] Commenters cited: Kathryn J. Holland & Lilia M. Cortina, *The evolving landscape of Title IX: Predicting mandatory reporters' responses to sexual assault disclosures*, 41 LAW & HUM. BEHAVIOR 5 (2017).
[1067] Commenters cited: U.S. Dep't. of Justice, Federal Bureau of Investigation, *National Incident-Based Reporting System, 2012-2016* (2017).
[1068] Section 106.45(b)(1)(vii).
[1069] Section 106.45(b)(5)(i).

due process protections ensure that complainants have a meaningful opportunity (equal to that of respondents) to put forward the complainant's own evidence and arguments about the evidence, even though the burden of proof remains on the recipient.

The Department declines to place the burden of proof on respondents to prove non-responsibility because the purpose of Title IX is to ensure that the recipient, not the parties, bears responsibility to draw accurate conclusions about whether sexual harassment has occurred in the recipient's education program or activity. Title IX obligates *recipients*, not individual students or employees, to operate education programs or activities free from sex discrimination, so it is the recipient's burden to gather relevant evidence and carry the burden of proof.

While the Department acknowledges the Federal district court decision cited by a commenter for the proposition that courts do not require a presumption of non-responsibility in Title IX proceedings, neither the Federal district court, nor the Sixth Circuit on appeal of that case, disapproved of a recipient applying a presumption of non-responsibility in a Title IX case or suggested that such a presumption would be constitutionally problematic; rather, the district court's opinion held that the recipient's alleged failure to provide such a presumption (even if true) would not amount to a due process deprivation under the U.S. Constitution.[1070] On appeal, the Sixth Circuit did not address the presumption of non-responsibility issue at all, and noted that it appeared the recipient placed the burden of proof on the itself (not on either party), a practice

[1070] *Doe v. Univ. of Cincinnati*, 173 F. Supp. 3d 586, 604 (S.D. Ohio 2016), *aff'd sub nom. Doe v. Cummins*, 662 F. App'x 437, 447 (6th Cir. 2016) ("Nevertheless, even assuming that the [recipient] placed the burden of proof on Plaintiffs as they claim, they have not stated a due process violation. As Defendants correctly argue in their brief, "[o]utside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of Federal constitutional moment."). This does not imply that a presumption of non-responsibility would be problematic under a constitutional analysis.

that was constitutionally sound[1071] and a requirement the final regulations impose on recipients in § 106.45(b)(5)(i).

Additionally, the Department is not persuaded by the commenter's citation to *Mathews v. Eldridge*, a U.S. Supreme Court case which set forth a three-part balancing test for determining the amount of process due to meet the basic requirements of providing notice and meaningful opportunity to be heard in particular situations and held that an evidentiary hearing is not required prior to the Social Security Administration's termination of social security benefits (in part because the basic due process requirements of notice and meaningful opportunity to be heard were met when an evidentiary hearing *was* available before a termination decision became final).[1072] The *Mathews* Court did not address the issue of whether a presumption is appropriate in an administrative proceeding and is inapposite on that particular point. As noted in the "Role of Due Process in the Grievance Process" section of this preamble, the Department believes that the § 106.45 grievance process is consistent with constitutional due process requirements and serves important policy purposes with respect to the fairness, accuracy, and perception of legitimacy of Title IX grievance processes.

Changes: None.

[1071] *Cummins*, 662 F. App'x at 449 (noting that the recipient appeared to place the burden of proof on the recipient rather than on either the complainant or respondent and stating "Allocating the burden of proof in this manner – in addition to having other procedural mechanisms in place that counterbalance the lower standard used . . . is constitutionally sound and does not give rise to a due-process violation."). The final regulations similarly allocate the burden of proof on the recipient (and not on either party). § 106.45(b)(5)(i).

[1072] *See Mathews v. Eldridge,* 424 U.S. 319, 335, 349 (1976) (holding that determining the adequacy of due process procedures involves a balancing test that considers the private interest affected, the risk of erroneous deprivation and benefit of additional procedures, and the government's interest including the burden and cost of providing additional procedures).

False Allegations

Comments: Many commenters cited statistics that most people who report sexual assault are telling the truth, so a presumption of non-responsibility does not reflect reality. Several commenters urged the Department not to require recipients to presume that the respondent is not responsible, since they say that statistics show that most respondents are guilty. Numerous commenters asserted that the rate of false reporting of sexual assault is between two to ten percent.[1073] Other commenters asserted that 95 percent of sexual assault reports to the police are true.[1074] Commenters asserted that since data collection began in 1989, there are only 52 cases where men have been exonerated after being falsely convicted of sexual assault while in the same period, 790 men were exonerated for murder.[1075]

Commenters argued that all false accusations, wrongful expulsions, suspensions, punishments, and undue burdens levied against respondents still do not add up to the overwhelming numbers of victims, so any provision that makes it harder for victims to prevail only serves to harm a greater number (of victims) in an attempt to protect a very small number (of falsely accused respondents), leading to greater unequal access to education for victims. Commenters argued that very few respondents who are found guilty are expelled, and therefore respondents are usually not in danger of losing their access to educational opportunities, so a

[1073] Commenters cited, *e.g.*, David Lisak *et al.*, *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 12, 1318 (2010); *see also* the "False Allegations" subsection of the "General Support and Opposition" section of this preamble.
[1074] Commenters cited: Claire E. Ferguson & John M. Malouff, *Assessing Police Classifications of Sexual Assault Reports: A Meta-Analysis of False Reporting Rates*, 45 ARCHIVES OF SEXUAL BEHAVIOR 5, 1185 (2016).
[1075] Commenters cited: National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/browse.aspx.

wrongful result adverse to a respondent is not as consequential as a wrongful result adverse to a complainant.

Other commenters argued that a presumption against responsibility is not needed because it is easy to identify patterns of individuals who file false accusations, because almost all false accusers have "a history of bizarre fabrications or criminal fraud."[1076] Commenters stated that false accusations are unusually dramatic, involving gang rape, a gun or a knife, or violent attacks from strangers resulting in severe injuries.

Other commenters supported the presumption by asserting that false allegations do occur, and with more regularity than other commenters claim. Commenters cited the incidence of numerous lawsuits filed by students claiming they had been falsely accused,[1077] arguing that the prevalence of these lawsuits shows that many respondents, mostly young men, have been falsely accused and suspended or expelled from school under procedures that lacked fairness and reliability, often resulting in a respondent *de facto* being required to try to prove innocence. Commenters referred to high-profile campus sexual assault situations that commenters argued demonstrate the fact that false rape accusations do occur and damage respondents caught in systems that prejudge them without any benefit of being presumed innocent. Commenters argued that the frequency of false accusations is not as low as other commenters have claimed because studies examining the rate of false accusations only count accusations proven to be false, and do not count accusations dismissed for lack of evidence. One commenter shared details of the

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[1076] Commenters cited: Sandra Newman, *What Kind of Person Makes False Rape Accusations*, QUARTZ (May 11, 2017).
[1077] Commenters cited: T. Rees Shapiro, *Expelled for sex assault, young men are filing more lawsuits to clear their names*, THE WASHINGTON POST (Apr. 28, 2017).

commenter's own research finding that 53 percent of sexual assault allegations were false, which the commenter argued is much higher than the "2-10%" statistic relied on by many victim advocates;[1078] the commenter argued that the 53 percent number is more accurate because it counted "not responsible" determinations as "false accusations."

One commenter asserted that high-conflict divorce proceedings take into account the reality that spite plays a role in some parties' negotiations and litigation strategies, but many people seem to believe sexual harassment allegations are almost entirely free of such distorting motives.

Discussion: The Department is not persuaded by commenters who argued that we should remove the presumption of non-responsibility from the final regulations because of studies showing that many, or even the vast majority, of allegations of sexual assault are true. Statistical findings can be instructive but not dispositive, and statistics cannot by themselves justify or rationalize procedural protections in a process designed to determine the truth of particular allegations involving specific individuals.[1079] Even if only two to ten percent of rape allegations are false or unfounded, the Department believes that statistical generalizations must not compel conclusions about the truth of particular allegations because without careful assessment of the facts of each particular situation it is not be possible to know whether the respondent is one of the 90 to 98

[1078] Commenters cited: National Sexual Violence Resource Center, *False Reporting: Overview* (2012); *see also* the "False allegations" subsection of the "General Support and Opposition" section of this preamble.
[1079] V.C. Ball, *The Moment of Truth: Probability Theory and Standards of Proof*, 14 VAND. L. REV. 807, 811 (1961) ("[F]or individuals there are no statistics, and for statistics no individuals.").

percent who statistically are "guilty" or among the two to ten percent who are statistically "innocent."[1080]

Similarly, whether respondents are expelled at low rates or high rates, the final regulations are concerned with ensuring that the determination regarding responsibility is reliable and perceived as legitimate. For reasons described elsewhere in this preamble, the Department does not require any particular disciplinary sanctions against respondents, because these Title IX regulations are focused on requiring remedies for victims, leaving disciplinary decisions to recipients' discretion. For similar reasons, the Department declines to adopt a premise that most false allegations are "easy to identify" because even if research has identified certain patterns, common features, or motives for false allegations, it is not possible to assess the veracity of a complainant's specific allegations, or an individual complainant's motive, based on generalizations. Therefore, procedural rules designed for fairness and accuracy cannot be based on statistics or studies about what kind of allegations tend to be false. The Department disagrees that all determinations of non-responsibility are fairly characterized as involving a false or unfounded allegation; as numerous commenters have pointed out, an allegation may be true and lack sufficient evidence to meet a standard of evidence proving responsibility, or an allegation may be inaccurate but not intentionally falsified. The final regulations add § 106.71(b) cautioning recipients that punishing a party ostensibly for making false statements during a grievance process may constitute unlawful retaliation unless the recipient has concluded that a

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[1080] *See* Alex Stein, *An Essay on Uncertainty and Fact-Finding in Civil Litigation, with Special Reference to Contract Cases*, 48 UNIV. OF TORONTO L. J. 299, 301 (1998) ("Allowing verdicts to be based upon bare statistical evidence, rather than on case-specific proof, is generally regarded as problematic. Adjudication involves individuals and their individual affairs, which need to be translated into individual rights and duties. This is not the case with bare statistical evidence. As the famous saying goes, for statistics there are no individuals and for individuals, no statistics.").

party made a bad faith materially false statement and that conclusion is not based solely on the determination regarding responsibility. This provision acknowledges the reality that a complainant's allegations may not have been false even where the ultimate determination is that the respondent is not responsible and/or that the complainant may not have acted subjectively in bad faith (and conversely, that a respondent may not have made false, or subjectively bad faith, denials even where the respondent is found responsible).

The presumption of non-responsibility is not designed to protect "a few" falsely accused respondents at the expense of "the many" sexual harassment victims; the presumption is designed to improve the accuracy and legitimacy of the outcome in *each individual* formal complaint of sexual harassment to prevent injustice to any complainant or any respondent.

Changes: Section 106.71(b) states that charging an individual with a code of conduct violation for making a bad faith materially false statement during a grievance process is not retaliation so long as that conclusion is not based solely on the determination regarding responsibility.

Inaccurate Findings of Non-Responsibility

Comments: Commenters argued that, in a misguided attempt to shield falsely accused people, the presumption of non-responsibility will allow assailants to go unpunished, which will further traumatize and disempower victims. Commenters argued that the presumption would allow more sexual harassment perpetrators to escape responsibility because it can be difficult to prove sexual assault, and evidence is frequently scant or based heavily on testimony alone so overcoming a presumption is yet another unfair obstacle for survivors to receive justice.

Commenters argued that, for those schools that employ a clear and convincing evidence standard, complainants will be more likely to lose the case, a result compounded by the presumption of non-responsibility. Commenters argued that abusive people will be found not

responsible more often, making campuses less safe and increasing the number of sexual assaults on campuses. Another commenter argued that the presumption ensures that only the most egregious cases of sexual assault will be punished, which is unjust for many women.

Some commenters disagreed with the presumption, asserting that it requires fact-finding doctrines used in criminal law proceedings. Commenters expressed concern that, if schools handle complaints of sexual assault the same way law enforcement handles them, most complaints will not be pursued. One commenter asserted that 69 percent of survivors have experienced police officers discouraging them from filing a report and one-third of survivors have experienced police refusing to take their reports.[1081]

Commenters argued that the presumption is in tension with § 106.45(b)(1)(ii), which states that "credibility determinations may not be based on a person's status as a complainant" or "respondent."

One commenter asserted that the presumption would not work for medical schools, because medical students frequently experience sexual harassment or assault from patients or visitors, and medical schools do not have the authority to compel them to participate in investigatory interviews or live hearings.[1082]

Discussion: As applied under these final regulations, in the context of a Title IX grievance process, the presumption does not operate to let "guilty" respondents go free. While the presumption is based on a similar principle animating the presumption of innocence in criminal

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[1081] Commenters cited: Rebecca Campbell, *Survivors' Help-Seeking Experiences with the Legal and Medical Systems*, 20 VIOLENCE & VICTIMS 1 (2005).
[1082] Commenters cited: Charlotte Grinberg, *'These Things Sometimes Happen': Speaking Up About Harassment*, 37 HEALTH AFFAIRS 6 (2018).

law, the § 106.45 grievance process generally, including the presumption under § 106.45(b)(1)(iv), does not mirror criminal law protections or mimic criminal courts. As discussed below, the presumption of non-responsibility reinforces that the burden of proof remains on the recipient, not on either party, and reinforces application of the standard of evidence, which under the final regulations must be lower than the criminal standard of beyond a reasonable doubt.

The Department disagrees that the final regulations require schools to handle reports or formal complaints of sexual assault the same way law enforcement handles them. Recipients are prohibited from showing deliberate indifference towards sexual harassment complainants, including by offering supporting measures to complainants irrespective of whether a formal complaint is ever filed, and under these final regulations recipients are obligated to investigate formal complaints, unlike law enforcement where officers and prosecutors generally have discretion to decline to investigate and prosecute. Further, law enforcement and criminal prosecutors gather evidence under a burden to prove guilt beyond a reasonable doubt, but the final regulations place a burden on recipients to meet a burden of proof that shows a respondent responsible measured against a lower standard of evidence.[1083]

The Department is unpersuaded by commenters who asserted that the presumption will make campuses more dangerous because it will chill reporting or prevent recipients from punishing and expelling offenders from campuses because § 106.45 is too similar to criminal procedures. A presumption of non-responsibility need not chill or deter reporting of sexual

[1083] Section 106.45(b)(1)(vii) (requiring recipients to select and apply to all Title IX sexual harassment cases a standard of evidence that is either the preponderance of the evidence standard, or the clear and convincing evidence standard).

harassment, because reporting under the final regulations leaves complainants autonomy over whether to seek supportive measures or also participate in a grievance process, and because a fair process with procedures rooted in principles of due process provides assurance that the outcome of a grievance process (when a complainant or Title IX Coordinator decides to initiate a grievance process) is reliable and viewed as legitimate.

Refraining from treating a respondent as responsible until conclusion of the grievance process does not make it more difficult to hold a respondent responsible or prevent implementation of supportive measures for a complainant. To the extent that commenters are advocating for latitude for recipients to impose *interim* suspensions or expulsions, the Department believes that without a fair, reliable process the recipient cannot know whether it has interim-expelled a respondent who is actually responsible for the allegations, or a respondent who is not responsible. However, the Department reiterates that § 106.44(c) allows emergency removals of respondents prior to conclusion of a grievance process (or even where no grievance process is pending), thus protecting the safety of a recipient's community where an immediate threat exists.

Because the standard of evidence is lower in the Title IX grievance process (recipients must select and apply either the preponderance of the evidence standard or the clear and convincing evidence standard) than in a criminal proceeding (beyond a reasonable doubt), the presumption in § 106.45(b)(1)(iv) does not convert the standard of evidence to the criminal standard (beyond a reasonable doubt). Under the § 106.45 grievance process, the § 106.45(b)(1)(iv) presumption ensures that recipients correctly apply the standard of evidence selected by each recipient, but no recipient is permitted to select the criminal "beyond a

reasonable doubt" standard.[1084] Thus, the presumption helps to ensure that the recipient does not treat a respondent as responsible until conclusion of the grievance process, and to reinforce a recipient's proper application of the standard of evidence the recipient has selected[1085] without converting the Title IX grievance process to a criminal court proceeding. The presumption does not make it more difficult to hold a respondent responsible, because the presumption reinforces, but does not change, the burden of proof that rests on the recipient and the obligation to appropriately apply the recipient's selected standard of evidence in reaching a determination regarding responsibility to decide if the recipient's burden of proof has been met. The presumption will not result in assailants going unpunished; a perpetrator of sexual harassment proved responsible for the alleged conduct may be punished at the recipient's discretion, and these final regulations require the recipient to effectively implement remedies for the complainant where a respondent is found to be responsible.[1086]

The structure of the fact-finding process, including the presumption, prevents recipients from acting on an assumption that a particular complainant is (or is not) truthful; similarly,

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[1084] Section 106.45(b)(1)(vii); § 106.45(b)(7)(i); *see also* discussion in the "Section 106.45(b)(7)(i) Standard of Evidence and Directed Question 6" subsection of the "Determinations Regarding Responsibility" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

[1085] Because the Department has determined that the preponderance of the evidence standard is the lowest possible standard of evidence that a recipient may select for a § 106.45 grievance process, the presumption of non-responsibility's function of ensuring proper application of the standard of evidence is particularly important where a recipient has selected the preponderance of the evidence standard, to ensure that in cases where the evidence is in equipoise (i.e., "50/50") the result is a determination of non-responsibility. *E.g.*, Vern R. Walker, *Preponderance, Probability, and Warranted Factfinding*, 62 BROOKLYN L. REV. 1075, 1076 (1996) (noting that the traditional formulation of the preponderance of the evidence standard by courts and legal scholars is that the party with the burden of persuasion must prove that a proposition is more probably true than false meaning a probability of truth greater than 50 percent); Neil B. Cohen, *The Gatekeeping Role in Civil Litigation and the Abdication of Legal Values in Favor of Scientific Values*, 33 SETON HALL L. REV. 943, 954-56 (2003) (noting that the preponderance of the evidence standard applied in civil litigation results in the plaintiff losing the case where the plaintiff's and defendant's positions are "in equipoise" i.e., where the evidence presented makes the case "too close to call").

[1086] Section 106.45(b)(1)(i); § 106.45(b)(7)(iv).

recipients may not look to the presumption as an excuse to "believe" or find credible, the respondent and to do so would violate § 106.45(b)(1)(ii). Thus, the Department disagrees with commenters who argue that the presumption contradicts § 106.45(b)(1)(ii) which requires that recipients may not make credibility determinations based on a party's status as a complainant or respondent. The presumption in § 106.45(b)(1)(iv) reinforces the obligation in § 106.45(b)(1)(ii) to refrain from drawing inferences about credibility based on a party's status as a complainant or respondent.

Nothing in the final regulations, including the presumption of non-responsibility, prevents recipients who are medical schools from offering supportive measures to medical students who allege that hospital patients or visitors are sexually harassing them. Section 106.30 defining "supportive measures" provides that the recipient may offer such measures either before or after the filing of a formal complaint or where no formal complaint has been filed, for the purpose of restoring the complainant's access to the education program without unreasonably burdening the respondent. The Department cannot comment more specifically as to what supportive measures might be reasonably available to preserve a medical student's equal access and avoid unreasonably burdening a respondent who is a patient or visitor, because each case requires the recipient's independent review and judgment. Where the respondent is a patient or visitor to the recipient's campus or facility and the recipient thus lacks an employment or enrollment relationship with the respondent, a recipient has discretion under § 106.45(b)(3)(ii) to dismiss a formal complaint where the respondent is not enrolled or employed by the recipient; or, also in the recipient's discretion, the recipient may investigate and adjudicate a formal complaint against such a respondent and, for example, issue a no-trespass order following a determination regarding responsibility. Regardless of how a recipient exercises its discretion with respect to

formal complaints against respondents over whom a recipient lacks disciplinary authority, medical schools may still comply with the requirements in these final regulations to respond to sexual harassment that occurs in the recipient's education program or activity.

Changes: None.

Recipients Should Apply Dual Presumptions or No Presumption

Comments: Commenters stated that § 106.45(b)(1)(iv) equates to a presumption that the complainant is lying, or a presumption that the alleged harassment never occurred. Commenters asserted if presumptions exist, the provision should direct the recipient to presume, in addition to the respondent's presumption of non-responsibility, that the complainant is credible and making a good faith complaint. One commenter asserted that the Department should provide training to address bias against complainants.

Commenters argued that, because the grievance process is not a criminal proceeding, there should be no presumption in favor of either party. Commenters argued that investigators should have no presumption – either in favor or against either party – when performing their fact-finding duties. Commenters argued that it is unfair to complainants to start an investigation with a presumption of the respondent's innocence, just as it would be unfair to the respondent to start with a presumption of guilt. Commenters argued that in civil and administrative proceedings, both parties start on equal footing in the process with a blank slate in front of the decision-maker, and there is no reason why Title IX proceedings should not treat the parties equally in this manner. Commenters argued that while criminal proceedings give defendants a presumption of innocence, State and Federal victims' rights laws balance even that presumption of innocence to ensure victims are treated fairly. Commenters argued that a civil case requires

that the victim and perpetrator appear as equals[1087] and argued that a Title IX investigation should treat both parties equally regarding credibility, with no presumption of innocence or presumption of guilt. One commenter argued that the presumption makes no sense in an educational environment because the complainant and respondent are tied together because of their relationship to the institution, which is different from the relationship between defendants and the government in criminal matters, and the § 106.45(b)(1)(iv) presumption will negatively impact every complainant's education because the complainant will be assumed to be lying just by filing a complaint.

Commenters asserted that currently there is no presumption of non-responsibility for respondents in other student misconduct proceedings, such as theft, cheating, plagiarism, and even physical assault. Commenters argued that if the Department believes such a presumption is important in sexual misconduct cases, then it should require the presumption in all student misconduct cases for the sake of uniformity.

Discussion: The Department declines to adopt commenters' recommendations that recipients should presume that complainants are credible. If the presumption of non-responsibility meant assuming that the respondent is credible, then the Department would agree that such a presumption would be unfair to complainants and should be balanced by an equal presumption of credibility for complainants (or, more reasonably, no presumptions at all). However, the presumption of non-responsibility is *not* a presumption about the respondent's credibility, believability, or truthfulness, and § 106.45(b)(1)(ii) requires recipients not to make credibility

[1087] Commenters cited: The National Center for Victims of Crime, "Criminal and Civil Justice," http://victimsofcrime.org/media/reporting-on-child-sexual-abuse/criminal-and-civil-justice, for this proposition.

determinations based on a party's status as complainant or respondent. A critical feature of a fair grievance process is that Title IX personnel refrain from drawing conclusions or making assumptions about either party's credibility or truthfulness until conclusion of the grievance process; therefore, the Department declines to impose a presumption that either party (or both parties) are credible or truthful. Because the presumption of non-responsibility is not a presumption that a respondent is credible, there is no need for a presumption specific to complainants to balance or counteract the presumption of non-responsibility.[1088] The presumption of non-responsibility does not assume, or allow recipients to act as though, complainants are lying; under the final regulations, recipients must not prejudge the facts at issue, must not draw inferences about credibility based on a party's status as a complainant or

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[1088] A presumption specific to a complainant that corresponds to the presumption of a respondent's non-responsibility might, hypothetically, be a presumption that the complainant is not responsible – but such a presumption simply does not apply to a complainant, because a complainant by definition is not alleged to be responsible for misconduct. Alternatively, a presumption specific to a complainant analogous to the presumption of non-responsibility might be that the complainant must be treated as a victim of the respondent's conduct until conclusion of the grievance process (because, as explained above, the presumption of non-responsibility operates to treat a respondent as "not a perpetrator" until conclusion of the grievance process, subject to the § 106.44(c) and § 106.44(d) exceptions for emergency removals and administrative leave for employee-respondents). However, the Department does not believe such a presumption would operate to protect complainants in any manner not already provided for in the final regulations. Section 106.44(a) already requires the recipient essentially to treat a complainant as a victim in need of services in the aftermath of suffering sexual harassment (by offering supportive measures and engaging in an interactive discussion with the complainant to arrive at helpful supportive measures to preserve the complainant's equal educational access) even before, or without, a fact-finding process that has determined that the respondent victimized the complainant. Moreover, the grievance process effectively requires a complainant to be treated as a victim in two specific provisions that apply for complainants' benefit: § 106.45(b)(6)(i)-(ii) provides rape shield protection for complainants – but not respondents – against questions and evidence inquiring into the complainant's prior sexual behavior; and § 106.45(b)(6)(i) allows either party to request that a live hearing (including cross-examination) occurs in separate rooms. While the latter provision applies on its face to both parties, the provision is responsive to public comment informing the Department that complainants already traumatized by sexual violence likely will be traumatized by coming face-to-face with the respondent; no such concerns about the traumatic effect of personal confrontation were raised on behalf of respondents. Thus, where appropriate, the grievance process takes into account the unique needs of complainants, in ways that the Department believes serve Title IX's non-discrimination mandate by protecting complainants *as though* every complainant has been victimized, without unfairness to the respondent. A presumption of non-responsibility does not deprive a complainant of the protections given solely to complainants under § 106.44(a) and § 106.45, nor deprive a complainant of the benefits of the robust procedural rights given equally to both parties during the grievance process.

respondent, and must objectively evaluate all relevant evidence to reach a determination regarding responsibility.

The procedural rights granted to both parties under § 106.45 ensure that complainants and respondents have equal opportunities to meaningfully participate in putting forth their views about the allegations and their desired case outcome, an essential requirement for due process even in a civil (noncriminal) setting.[1089] The Department disagrees that in civil (as opposed to criminal) trials the plaintiff and defendant "appear as equals" in every regard, because even in civil trials the burden of proof generally rests on the plaintiff to prove allegations, not on the defendant to prove non-liability.[1090] Thus, while parties in civil litigation (and under § 106.45) have equal rights to participate in the process (for example, by gathering and presenting evidence), a burden of proof must still be met. The final regulations ensure that *neither* party bears the burden of proof (which remains on the recipient) yet give both parties equal procedural rights throughout the grievance process. The presumption does not create inequality between the complainant and respondent; the presumption reinforces the recipient's burden of proof and correct application of the standard of evidence, neither of which burdens or disadvantages the complainant.

[1089] *E.g.*, Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE LAW & POL. REV. 1, 10-11 (2006) (due process in civil settings "places central importance on the participation of the affected party in decision-making. Ex parte procedures are the exception, while participatory procedures are the rule. Notice and an opportunity to be heard is, obviously, the principle without which a participatory model of justice cannot work effectively. Unless a party is notified that there is a controversy, it cannot participate in decision-making; unless a party has the opportunity for a hearing, it cannot present its side of the controversy; and unless the decision-maker hears from both parties, there cannot be a meaningful ruling. This is the adversary system's vision of justice.").

[1090] *E.g.*, Dale A. Nance, *Civility and the Burden of Proof*, 17 HARV. J. OF L. & PUB. POL'Y 647, 659 (1994) (in civil litigation "it remains true that the burden is placed, in the vast majority of contexts, on the person or institution claiming that someone has breached a duty serious enough to warrant legal recognition."). We reiterate that the final regulations, § 106.45(b)(1)(i), place the burden squarely on the recipient – not on the complainant – to prove that a respondent has committed sexual harassment.

The Department notes that § 106.45(b)(1)(iii) not only requires Title IX personnel to serve without bias for or against complainants or respondents, but also requires training for Title IX personnel, expressly to avoid bias for or against complainants or respondents generally or for or against an individual complainant or respondent. Recipients have discretion as to the content and approaches of such training so long as the requirements of § 106.45(b)(1)(iii) are met.

A presumption of non-responsibility reinforces placement of the burden of proof, proper application of the standard of evidence, and fair treatment of an accused person prior to adjudication of responsibility. These features of a fair grievance process may be beneficial to the legitimacy and reliability of outcomes of non-sexual harassment student misconduct proceedings. However, these final regulations focus only on effectuating Title IX's non-discrimination mandate by improving the perception and reality that recipients' Title IX proceedings reach fair, accurate outcomes; these regulations do not impose requirements on recipients for grievance proceedings other than for Title IX sexual harassment.

Changes: None.

The Adversarial Nature of the Grievance Process

Comments: Commenters asserted that universities already treat both parties equitably and the presumption in § 106.45(b)(1)(iv) escalates the adversarial nature of Title IX proceedings; commenters argued this will raise the financial and emotional toll the grievance process will have on both complainants and respondents. Commenters argued that the proposed regulations ask a university to act as a judicial system, placing an undue burden on the educational system and imposing an unprecedented amount of control over a school's – especially a private school's – ability to develop and implement disciplinary processes in a way that best serves its community and upholds its values, which often include using codes of conduct to educate

students rather than be punitive. One commenter opposed the presumption because recipients already train staff and faculty to serve neutrally, bearing in mind the educational context in student misconduct cases, because the student is paying to be in an educational environment, not a prison system. One commenter warned that the presumption of non-responsibility would create an "inaccessibility to justice."

Other commenters supported the presumption of non-responsibility, arguing that Title IX proceedings are often highly contested, yet school proceedings are biased against the accused; commenters cited articles showing that over 150 lawsuits have been filed arising from fundamental unfairness in schools' Title IX proceedings.[1091] Commenters argued that a presumption of non-responsibility is essential because recipients have denied respondents the right to know the allegations against them or the identity of the person accusing them, and that respondents have been repeatedly denied the ability to question the complainant, submit exculpatory evidence, or have their witnesses interviewed by the recipient. Commenters argued that respondents have sued recipients for expelling them or finding them responsible without first giving them procedural protections, and that some courts have agreed that some recipients committed due process or fairness violations. One commenter shared information from a university's website promoting adherence to the public awareness campaign "Start by Believing,"[1092] which the commenter argued shows the university's bias against accused students. Commenters argued that college environments are highly politicized and college

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[1091] Commenters cited: Foundation for Individual Rights in Education (FIRE), *Report: As changes to Title IX enforcement loom, America's top universities overwhelmingly fail to guarantee fair hearings for students* (Dec. 18, 2018); *see also* T. Rees Shapiro, *Expelled for sex assault, young men are filing more lawsuits to clear their names*, THE WASHINGTON POST (Apr. 28, 2017).

[1092] Commenters cited: University of Iowa Rape Victim Advocacy program, *Start By Believing*, https://rvap.uiowa.edu/take-action/prevent-and-educate/start-by-believing/.

administrators and faculty are not objective fact-finders, and a presumption of non-responsibility helps counteract that lack of objectivity.

Discussion: The Department disagrees that the presumption of non-responsibility increases the adversarial nature of Title IX proceedings; Title IX proceedings are often inherently adversarial, due to the need to resolve contested factual allegations. The Department understands commenters' concerns that an adversarial process may take an emotional toll on participants, and the final regulations encourage provision of supportive measures to both parties and give both parties an equal right to select an advisor of choice to assist the parties during a grievance process. The presumption of non-responsibility does not magnify the adversarial nature of the grievance process; rather, the presumption reinforces the recipient's burden of proof, proper application of the standard of evidence, and how a respondent is treated pending the outcome of the grievance process. The Department disagrees that the presumption will lead to "inaccessibility" of justice; rather, complainants will benefit from increased legitimacy of recipient determinations when respondents are found responsible, while respondents will benefit from assurance that a recipient cannot treat the respondent as though responsibility has been determined until the conclusion of a fair grievance process. The § 106.45 grievance process, and the final regulations as a whole, impose an obligation on recipients to remain impartial toward parties whose views about the allegations are adverse to each other. To the extent that commenters' concerns about an adversarial process reflect concern that financial inequities can affect the process (for example, where one party can afford to hire an attorney to further the party's interests and the other party cannot afford an attorney), the final regulations permit, but do not require, advisors to be attorneys, allow recipients to limit the active participation of advisors significantly, with the exception of conducting cross-examination at a live hearing in

postsecondary institutions,[1093] and do not preclude recipients from offering both parties legal representation.[1094] This approach reflects the reality that recipients are not courts, yet do need to apply a fair, truth-seeking process to resolve factual allegations of Title IX sexual harassment.

The Department recognizes that some recipients expressed concerns that the presumption of non-responsibility, in conjunction with other provisions in § 106.45, requires educational institutions to mimic courts of law. The Department acknowledges, and the final regulations reflect, that recipients' purpose is to educate, not to act as courts. The § 106.45 grievance process is designed for implementation by non-lawyer recipient officials, and the final regulations do not intrude on a recipient's discretion to use disciplinary sanctions as educational tools of behavior modification rather than, or in addition to, punitive measures. However, to effectuate Title IX's non-discrimination mandate, recipients must accurately resolve allegations of sexual harassment in order to identify and address sex discrimination in the recipient's education program or activity. The Department believes the presumption of non-responsibility is important to ensure that recipients do not treat respondents as responsible until conclusion of the grievance process and to reinforce the recipient's burden of proof and proper application of the standard of evidence, and these features will improve the legitimacy and reliability of the outcomes of recipients' Title IX grievance processes.

[1093] Section 106.45(b)(5)(iv); § 106.45(b)(6)(i).

[1094] The Department realizes that only a fraction of postsecondary institutions currently offer to provide both parties in a grievance proceeding with legal representation, but such an option remains available to recipients who choose to address disparity with respect to the financial ability of parties to hire legal representation in the recipient's educational community. *E.g.*, Kristen N. Jozkowski & Jacquelyn D. Wiersma-Mosley, *The Greek System: How Gender Inequality and Class Privilege Perpetuate Rape Culture*, 66 FAM. RELATIONS 1 (2017) (noting that only about three percent of colleges and universities provide victims with legal representation and arguing that colleges and universities should provide free legal representation to both complainants and respondents in campus sexual assault proceedings).

Changes: None.

Supportive Measures

Comments: Several commenters sought clarification as to whether the presumption in § 106.45(b)(1)(iv) would preclude a recipient from taking interim or emergency actions as dictated by individual circumstances when needed to ensure safety. For example, if a respondent is presumed not to be responsible for stalking a complainant until the end of the grievance process, commenters asked how a recipient could take effective measures to ensure that the respondent will not stalk the complainant prior to the conclusion of the grievance proceeding. Commenters asserted that the presumption appeared to require the recipient to remove the complainant from dorms and classes rather than the respondent, and that the presumption would curtail the ability of recipients to remove harassers and abusers from dorms and classes, which will lead to more sexual assaults because research indicates that most perpetrators are repeat offenders.[1095] Commenters argued that the presumption may discourage schools from providing crucial supportive measures to complainants to avoid being perceived as punishing respondents.[1096]

Commenters argued that the proposed rules not only give respondents a presumption of innocence but also require recipients to provide supportive measures to respondents, constituting unprecedented concern with the well-being of accused harassers above the interests of victims.

Discussion: The § 106.30 definition of "supportive measures" permits recipients to provide either party, or both parties, individualized services, without fee or charge, before or after filing a

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[1095] Commenters cited: David Lisak & Paul Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 1 (2002), for the proposition that a majority of "undetected rapists" were repeat rapists and undetected repeat rapists committed an average of 5.8 rapes each.

[1096] Commenters cited: Michael C. Dorf, *What Does a Presumption of Non-Responsibility Mean in a Civil Context*, DORF ON LAW (Nov. 28, 2018), http://www.dorfonlaw.org/2018/11/what-does-presumption-of-non.html.

formal complainant, or where no formal complaint has been filed. Section 106.44(a) *obligates* a recipient to offer supportive measures to every complainant, by engaging in an interactive process by which the Title IX Coordinator contacts the complainant, discusses available supportive measures, considers the complainant's wishes with respect to supportive measures, and explains to the complainant the option for filing a formal complaint. Title IX Coordinators are responsible for the effective implementation of supportive measures, and under revised § 106.45(b)(10) if a recipient's response to sexual harassment does *not* include providing supportive measures to a complainant the recipient must specifically document why that response was not clearly unreasonable in light of the known circumstances (for example, because the complainant did not wish to receive supportive measures or refused to discuss supportive measures with the Title IX Coordinator when the Title IX Coordinator contacted the complainant to have such a discussion). Thus, unless a complainant does not desire supportive measures (i.e., refuses the offer of supportive measures), complainants must receive supportive measures designed to restore or preserve the complainant's equal educational access, regardless of whether a grievance process is ever initiated. There is no corresponding obligation to offer supportive measures to respondents; rather, recipients may provide supportive measures to respondents and under § 106.45(b)(1)(ix) the recipient's grievance process must describe the range of supportive measures available to complainants and respondents.

The presumption of non-responsibility, which operates throughout a grievance process, does not prohibit the recipient from providing a complainant with supportive measures, but does reinforce the provision in the § 106.30 definition of "supportive measures" that supportive measures are designed to restore or preserve equal access to education "without unreasonably burdening the other party" including measures designed to protect a complainant's safety or

deter sexual harassment (which includes stalking), but supportive measures cannot be punitive or disciplinary. This does not bar all measures that place *any* burden on a respondent, but only those that "unreasonably burden" a respondent (or a complainant). Thus, changing a respondent's class schedule, or forbidding the respondent from communicating with the complainant, may be an appropriate supportive measure for a complainant if such measures do not "unreasonably burden" the respondent, and such measures do not violate the presumption of non-responsibility.

To the extent that commenters' concern is that current Department guidance affords recipients more discretion to impose interim measures that in fact do constitute disciplinary actions against the respondent (for example, interim suspensions), the Department has reconsidered that approach and, based on public comments on the NPRM, concluded that the non-discrimination mandate of Title IX is better served by the framework in the final regulations than the approach taken in guidance documents. With respect to disciplinary or punitive actions taken prior to an adjudication factually establishing a respondent's responsibility for sexual harassment, the final regulations circumscribe a recipient's discretion to treat a respondent as though accusations are true before the accusations have been proved.[1097] When applied in the

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[1097] The final regulations prohibit a recipient from taking disciplinary action, or other action that does not meet the definition of a supportive measure, against a respondent without following a grievance process that complies with § 106.45. § 106.44(a); § 106.45(b)(1). Through an informal resolution process (which is authorized under § 106.45) a recipient may impose disciplinary sanctions against a respondent without concluding an investigation or adjudication. § 106.45(b)(9). An exception to the requirement not to impose punitive or disciplinary action until conclusion of a grievance process is § 106.44(c), permitting a recipient to remove a respondent from an education program or activity in an emergency situation whether or not a grievance process has been concluded or is even pending. Supportive measures designed to restore or preserve a complainant's equal access to education, protect parties' safety, and/or deter sexual harassment, may be imposed even where such measures burden a respondent, so long as the burden is not unreasonable. § 106.30 (defining "supportive measures"). Thus, the final regulations are premised on the principle that a recipient must not treat a respondent as responsible prior to an adjudication finding the respondent responsible, yet that principle is not absolute and leave recipients with the ability (and, judged under the deliberate indifference standard, the obligation) to protect and support complainants and respond to emergency threat situations, without unduly, prematurely punishing a respondent based on accusations that have not been factually proved.

context of these final regulations, the presumption of non-responsibility's reinforcement of the notion that a person accused should not be treated as though accusations are true until the accusations have been proved increases the legitimacy of a recipient's response to sexual harassment, while preserving every complainant's right to supportive measures designed to maintain a complainant's equal educational access and protect a complainant's safety. This approach directly effectuates Title IX's non-discrimination mandate by improving the fairness and accuracy of a recipient's response to sexual harassment occurring in the recipient's education programs or activities.

The Department understands commenters' concerns that restricting a recipient's ability to impose interim discipline poses a risk that perpetrators may repeat an offense because they remain on campus while a grievance process is pending; however, even in situations that do not constitute the kind of immediate threat justifying an emergency removal under § 106.44(c), there are supportive measures short of disciplinary actions that a recipient may take to protect the safety of parties and deter sexual harassment, such as a no-contact order prohibiting communication with the complainant, supervising the respondent, and informing the respondent of the recipient's policy against sexual harassment.[1098]

Changes: None.

[1098] *E.g.*, *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1296 (11th Cir. 2007) (pointing to the recipient's failure to supervise the respondent or inform the respondent of the recipient's expectations of behavior under the recipient's sexual harassment policy as evidence of the recipient's deliberate indifference that subjected the complainant to sexual harassment).

Miscellaneous Concerns

Comments: At least one commenter asked the Department to add at the end of the presumption provision the language ". . . respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process *or any subsequent litigation.*" Commenters asked the Department to provide the respondent with a right to remain silent, since the respondent's statements during any investigation or hearing could be used against the respondent at a criminal trial. One commenter recommended inserting the following language: "The recipient bears the burden of demonstrating that the respondent is responsible for the alleged conduct and may not infer responsibility based solely on the respondent declining to present testimony, evidence, or witnesses in response to a formal complaint."

Another commenter urged the Department to add to § 106.45(b)(1)(iv) a sentence declaring that it is the obligation of the recipient to prove every element of every alleged offense before the accused student may be found responsible and punished for committing an alleged offense.

Discussion: The Department does not attempt to regulate procedures that apply in private lawsuits and so declines commenters' request that the Department require a recipient to abide by a presumption of non-responsibility until conclusion of "any subsequent litigation." The recipient's obligation is to conclude a grievance process by reaching a determination regarding responsibility when presented with a formal complaint of sexual harassment under Title IX, whether or not litigation arises from the same allegations.

Section 106.6(d) provides that these regulations do not require a recipient to restrict any rights that would otherwise be protected from government action under the U.S. Constitution,

which includes the Fifth Amendment right against self-incrimination. To ensure that the determination regarding responsibility is reached in a manner that does not require violation of that constitutional right, we revised § 106.45(b)(6)(i) in the final regulations to provide that a decision-maker cannot draw any inferences about the determination regarding responsibility based on a party's failure to appear at the hearing or answer cross-examination or other questions. While this applies equally to respondents and complainants, this modification addresses commenters' concerns that a respondent should not be found responsible solely because the respondent refused to provide self-incriminating statements. The Department declines to change § 106.45(b)(1)(iv) to add language about the recipient's burden to prove each element of an offense, because § 106.45(b)(5)(i) places the burden of proof on the recipient.

Changes: We revised § 106.45(b)(6)(i) of the final regulations to provide that a decision-maker cannot draw any inferences about the determination regarding responsibility based on a party's failure to appear at the hearing or answer cross-examination or other questions.

Section 106.45(b)(1)(v) Reasonably Prompt Time Frames

Support

Comments: A number of commenters expressed support for this section. Some did not expand upon the reasons for their support. Others, primarily some college and university commenters, expressed particular support for eliminating the 60-day time frame contained in withdrawn Department guidance. Some commenters identified concerns with a 60-day time frame, such as asserting that: it does not reflect the complex nature of these cases, such as multiple parties, various witnesses, time to obtain evidence, and school breaks; it is arbitrary and hard to adhere to while providing due process for all; it interferes with the time parties need to provide evidence and to make their case; it has not been required by courts; and it increases the risks of decisions

based on conjecture or gender or racial stereotypes. Other commenters contended that eliminating such a constrained timeline would be beneficial, by for instance allowing for more thorough investigations, collection of more evidence, and added accommodation of disabilities.

A number of the supportive commenters also noted support more generally for the NPRM's flexibility regarding the time to conclude Title IX investigations and extensions for good cause. Some emphasized that prompt resolution is important, but contended that various factors may delay proceedings (such as police investigations, witness availability, school breaks, faculty sabbaticals) and asserted that fairness demands thoroughness. According to these commenters, § 106.45(b)(1)(v) appropriately accounts for schools' unique attributes (for example, their size, population, location, or mission), recognizes that complex matters may not lend themselves to set deadlines, and acknowledges that delays may sometimes be necessary, especially with a concurrent criminal investigation. Likewise, some commenters expressed support for good cause extensions for a related criminal proceeding in the belief that students should not be forced to choose between participating in campus proceedings and giving up their right to silence in criminal proceedings.

Discussion: The Department appreciates the commenters' support for § 106.45(b)(1)(v) under which a recipient's grievance process must include reasonably prompt time frames for concluding the grievance process, including appeals and any informal resolution processes, with temporary delays and limited extensions of time frames permitted only for good cause. The Department agrees with commenters that this provision appropriately requires prompt resolution of a grievance process while leaving recipients flexibility to designate reasonable time frames and address situations that justify short-term delays or extensions. This is the same recommendation made in the 2001 Guidance, which advised recipients that grievance procedures

should include "Designated and reasonably prompt time frames for the major stages of the complaint process."[1099]

Changes: None.

Opposition – Lack of Specified Time Limit

Comments: Many commenters expressed opposition to § 106.45(b)(1)(v) because of concerns about the absence of specific time frames for completing investigations and adjudications, including appeals. Commenters asserted that schools could delay investigations indefinitely or for unspecified periods of time and that students might wait months or years for resolution of their complaint. Commenters identified a number of other drawbacks they felt would result from uncertain, indefinite time frames with possible delays. Commenters asserted that this provision would: make it less likely that survivors will report, less likely parties will receive justice, and more likely that students will lose faith in the reporting process; eliminate the mechanism for discovering and correcting harassment as early and effectively as possible; result in inconsistent resolution time frames at different schools; and only further delay the already lengthy process to reach resolution of sexual misconduct cases (for example, long unexplained delays even under the prior guidance with a 60-day time frame). Some commenters noted other concerns about the proposed time frames and potential delays or extensions.

Commenters asserted that indefinite time frames and probable delays would create uncertainty and a longer process that would harm survivors' well-being, safety, and education, and subject them to unreasonable physical, mental, time, and cost demands. Some felt that the proposal would: deny due process; exacerbate survivors' emotional distress; heighten the

[1099] 2001 Guidance at 20.

chances survivors would drop their cases or drop out of school as investigations drag on; increase risks of self-harm or suicide as delays might take too long for schools to provide prompt supports; prolong the period of survivors' exposure to their attackers; and add costs for counseling services or medical assistance, which would especially burden low-income students. Other commenters emphasized their belief that the indefinite time frames and delays would harm the mental health and education of both complainants and respondents, by adding uncertainty and stress for lengthy periods without resolution, exoneration, or closure. Other commenters expressed concerns about increasing safety risks to all students by allowing a hostile environment to continue unchecked, and assailants to harass, assault, or retaliate against their victims or others during the long waiting period. One commenter expressed concern that the NPRM would permit delays even when a respondent poses a clear threat to the campus community.

Some commenters contended that delays or extensions may result in: information, memory, and witnesses being lost; less, lost, or corrupted evidence, including fewer witnesses who may no longer be available or on campus (for example, students or short-term staff); and parties who have left school or graduated impairing schools from investigating or resolving concerns. Other commenters believed that a lengthier process and delays would: signal that schools do not care about the safety or education of victims; make it more likely that a victim will be identified or lose confidentiality; force survivors to rely on supportive measures for longer than they may be adequate or effective; allow a respondent's refusal to cooperate to delay a case indefinitely; permit recipients to place respondents on administrative leave to further delay an investigation; and particularly harm schools' short-term staff or contractors. A few commenters asserted that delays have increased in resolving Title IX cases since the Department

withdrew the 2011 Dear Colleague Letter, and at least one commenter expressed concern that the Department failed to offer data that a 60-day time frame had compromised accuracy and fairness.

Discussion: The Department disagrees that this provision allows recipients to conduct grievance processes without specified time frames, or allows indefinite delays. This provision specifically requires a recipient's grievance process to include reasonably prompt time frames; thus, a recipient must resolve each formal complaint of sexual harassment according to the time frames the recipient has committed to in its grievance process. Any delays or extensions of the recipient's designated time frames must be "temporary" and "limited" and "for good cause" and the recipient must notify the parties of the reason for any such short-term delay or extension. This provision thus does not allow for open-ended or indefinite grievance processes.

Under existing regulations at 34 CFR 106.8(b), in effect since 1975, recipients have been required to "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging" sex discrimination. The final regulations require more of recipients than do existing regulations, because § 106.45(b)(1)(v) requires recipients to include "reasonably prompt time frames" in the recipient's grievance process, rather than simply "providing for prompt" resolution. Further, the final regulations specify that the time frames designated by the recipient must account for conclusion of the entire grievance process, including appeals and any informal resolutions processes. Thus, no avenue for handling a formal complaint of sexual harassment is subject to an open-ended time frame.

Any time frame included by the recipient must be "reasonably prompt," where the reasonableness of the time frame is evaluated in the context of the recipient's operation of an education program or activity. The Department believes that conclusion of the grievance process must be reasonably prompt, because students (or employees) should not have to wait longer than

necessary to know the resolution of a formal complaint of sexual harassment; any grievance process is difficult for both parties, and participating in such a process likely detracts from students' ability to focus on participating in the recipient's education program or activity. Furthermore, victims of sexual harassment are entitled to remedies to restore or preserve equal access to education, and while supportive measures should be implemented as appropriate designed to achieve the same ends while a grievance process is pending, remedies *after* a respondent is found responsible may consist of measures not permissible as supportive measures. Thus, prompt resolution of a formal complaint of sexual harassment is necessary to further Title IX's non-discrimination mandate. At the same time, grievance processes must be fair and lead to reliable outcomes, so that sexual harassment in a recipient's education program or activity is accurately identified and remedied. The final regulations prescribe procedures and protections throughout the § 106.45 grievance process that the Department has concluded are necessary to ensure fairness and accuracy. The Department believes that each recipient is in the best position to balance promptness with fairness and accuracy based on the recipient's unique attributes and the recipient's experience with its own student disciplinary proceedings, and thus requires recipients to include "reasonably prompt time frames" for conclusion of a grievance process that complies with these final regulations.

The Department acknowledges that withdrawn Department guidance referred to a 60-day time frame for sexual harassment complaints. For recipients who determine that 60 days represents a reasonable time frame under which that recipient can conclude a grievance process that complies with § 106.45, a recipient has discretion to include that time frame under the final regulations. For recipients who determine that a shorter or longer period of time represents the time frame under which the recipient can conclude a grievance process, the recipient has

discretion to include that time frame. The Department emphasizes that what a recipient selects as a "reasonable" time frame is judged in the context of the recipient's obligation to provide students and employees with education programs and activities free from sex discrimination, so that the recipient's selection of time frames must reflect the goal of resolving a grievance process as quickly as possible while complying with the procedures set forth in § 106.45 that aim to ensure fairness and accuracy. Because the final regulations allow short-term delays and extensions for good cause, recipients need not base designated time frames on, for example, the most complex, time-consuming investigation that a formal complaint of sexual harassment *might* present. Rather, the recipient may select time frames under which the recipient is confident it can conclude the grievance process in most situations, knowing that case-specific complexities may be accounted for with factually justified short-term delays and extensions.

Commenters correctly noted that this provision allows different recipients to select different designated time frames and thus a grievance process may take longer at one school than at another. The Department believes that each recipient's commitment to a designated, reasonable time frame known to its students and employees,[1100] where each recipient has determined what time frame to designate by considering its own unique educational community and operations, is more effective than imposing a fixed time frame across all recipients because it results in each recipient being held accountable for complying with time frames the recipient has selected (and made known to its educational community), while ensuring that *all* recipients select time frames that are reasonably prompt.

[1100] Section 106.45(b)(1)(v) (requiring a recipient's grievance process to designate reasonably prompt time frames); § 106.8 (requiring recipients to notify students and employees (and others) of its non-discrimination policy and its grievance process for resolution of formal complaints of sexual harassment).

The non-exhaustive list in § 106.45(b)(1)(v) of factors that may constitute good cause for short-term delays or extensions of the recipient's designated time frames relate to the fundamental fairness of the proceedings. Delays caused solely by administrative needs, for example, would be insufficient to satisfy this standard.[1101] Furthermore, even where good cause exists, the final regulations make clear that recipients may only delay the grievance process on a temporary basis for a limited time. A respondent (or other party, advisor, or witness) would not be able to indefinitely delay a Title IX proceeding by refusing to cooperate. While recipients must attempt to accommodate the schedules of parties and witnesses throughout the grievance process in order to provide parties with a meaningful opportunity to exercise the rights granted to parties under these final regulations, it is the recipient's obligation to meet its own designated time frames, and the final regulations provide that a grievance process can proceed to conclusion even in the absence of a party or witness.

The Department understands commenters' concerns that the longer a grievance process is pending, the more risk there is of loss of information, evidence, and availability of witnesses. These concerns are addressed through requiring that a grievance process is concluded within a "reasonably prompt" time frame, yet in a manner that applies procedures designed to ensure fairness and accuracy. Administrative leave under § 106.44(d) of the final regulations would not preclude an investigation from proceeding; regardless of whether a party has been voluntarily or involuntarily separated from the recipient's campus, the recipient can provide for the party to

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[1101] The Department notes that temporary delay of a hearing caused by a recipient's need to provide an advisor to conduct cross-examination on behalf of a party at a hearing as required under § 106.45(b)(6)(i) *may* constitute good cause rather than mere administrative convenience, although a recipient aware of that potential obligation ought to take affirmative steps to ascertain whether a party will require an advisor provided by the recipient or not, in advance of the hearing, so as not to delay the proceedings.

return to participate in the grievance process, including with safety measures in place for the other parties and witnesses. Under § 106.45(b)(6)(i) a postsecondary institution has discretion to hold a live hearing virtually, or to allow any participant to participate remotely, using technology. Where a party refuses to participate, the recipient may still proceed with the grievance process (though the recipient must still send to a party who has chosen not to participate notices required under § 106.45; for instance, a written notice of the date, time, and location of a live hearing).

The Department disagrees that § 106.45(b)(1)(v) will jeopardize the safety of complainants or the educational environment, or that complainants will feel deterred from filing formal complainants because the grievance process might drag on indefinitely. As noted above, supportive measures designed to protect safety and deter sexual harassment are available during the pendency of the grievance process.[1102] Furthermore, under § 106.44(c) recipients may remove a respondent on an emergency basis without awaiting conclusion of a grievance process. As also noted above, the final regulations do not permit any recipient's grievance process to go on indefinitely.

With respect to a commenter's assertion that the Department did not provide data to show that the 60-day time frame has compromised accuracy and fairness, commenters on behalf of complainants and respondents have noted that the grievance process often takes too long, which may indicate that a 60-day time frame was not a reasonable expectation for recipients to conclude a fair process, and some comments on behalf of recipients expressed that many of the

[1102] Section 106.30 (defining "supportive measures"); § 106.44(a) (requiring recipients to offer supportive measures to complainants, with or without the filing of a formal complaint).

cases that go through a Title IX proceeding present complex facts that require more than 60 days for a recipient to conclude a fair process. For recipients who determine that 60 days (or less) is a reasonable time frame under which to conclude a fair process, recipients may designate such a time frame as part of their § 106.45 grievance process.

Changes: To ensure that reasonably prompt time frames are included for every stage of a grievance process, we have revised § 106.45(b)(1)(v) of the final regulations to apply the reasonably prompt time frame requirement to informal resolution processes, if recipients choose to offer them, and we have removed the phrase "if the recipient offers an appeal" because under the final regulations, § 106.45(b)(8), appeals are mandatory, not optional.

Effects on Recipients

Comments: Other commenters expressed opposition to § 106.45(b)(1)(v) because they believed it would weaken schools' accountability and incentives for prioritizing sexual harassment complaints and would increase the chances that reports are brushed under the rug or not promptly and appropriately handled. Some commenters noted concerns that the provision is too vague to be clear, effective, and enforceable, and would give schools too much leeway to decide what is reasonably prompt. Other commenters expressed concern that schools already have incentives to delay, such as to protect their reputations or resources, and so might drag out investigations until one or both parties graduate, a survivor drops the case, or until after a season ends or a major game is played, in cases involving athletes. A number of commenters called for set time frames for clearer expectations and accountability. One commenter felt that a set time frame would also leave schools less vulnerable to lawsuits or complaints.

Discussion: The Department does not believe that this provision perversely incentivizes recipients to sweep allegations of sexual harassment under the rug, gives recipients the freedom

to simply indefinitely delay proceedings against the interests of fairness and justice, or increases the risk of litigation against recipients. The Department believes that § 106.45(b)(1)(v) strikes an appropriate balance between imposing clear constraints on recipients in the interests of achieving Title IX's purpose, and ensuring they have adequate flexibility and discretion to select reasonably prompt time frames in a manner that each recipient can apply within its own unique educational environment. We also believe that moving away from a strict timeline that does not permit short-term extensions will help to address pitfalls and implementation problems that commenters have recounted in recipients' Title IX proceedings under the previous guidance, where some recipients felt pressure to resolve their grievance processes within 60 days regardless of the circumstances of the situation. The Department believes that recipients are in the best position to balance the interests of promptness, and fairness and accuracy, within the confines of such a decision resulting in "reasonably prompt" conclusion of grievance processes. This provision does not permit a recipient to conduct a grievance process without a "set" time frame; to the contrary, this provision requires a recipient to designate and include in its grievance process what its set time frame will be, for each phase of the grievance process (including appeals and any informal resolution process). Permitting recipients to set their own reasonably prompt time frames increases the likelihood that recipients will meet the time frames they have designated and thereby more often meet the expectations of students and employees as to how long a recipient's grievance process will take. Requiring recipients to notify the parties whenever the recipient applies a short-term delay or extension will further promote predictability and transparency of recipients' grievance process. Prescribing that any delay or extension must be for good cause, and must be temporary and limited in duration, ensures that no grievance process is open-ended and that parties receive a reasonably prompt resolution of each formal complaint.

Changes: None.

Concerns Regarding Concurrent Law Enforcement Activity

Comments: Some commenters opposed to this provision emphasized concerns about permitting delay for concurrent ongoing criminal investigations. Commenters asserted that criminal investigations can and often do take months or years because of rape kit backlogs or lengthy DNA analyses, and expressed concern about allowing schools to delay action for unspecified and lengthy periods. These commenters felt this would force students to wait months or longer for resolution as they suffer serious emotional and academic harm when they need timely responses and support to continue in school and to heal from their trauma. Some commenters felt that it would deny due process in school Title IX proceedings, ignore schools' independent Title IX obligations to remedy sex-based harassment, and allow perpetrators to evade responsibility or consequences or to perpetrate again. A number of commenters were concerned that schools delaying or suspending investigations at the request of law enforcement or prosecutors creates a safety risk to the survivor and to other students, by allowing assailants to harass or assault survivors or others during the waiting period. Commenters also asserted that Title IX and criminal justice proceedings have different purposes, considerations, rules of evidence, burdens of proof, and outcomes, and felt as a result that their determinations are separate and independent from each other. Some of these commenters also argued that schools should prioritize and not delay a complainant's educational access and can provide supportive measures that are not available from the police.

A number of commenters emphasized concerns about problematic incentives and consequences that they believed would result from permitting delays for concurrent ongoing criminal investigations. For example, some commenters felt that such a provision would

incentivize survivors not to report to law enforcement, since it would delay resolution of their Title IX case, thereby increasing safety risks to both survivors and school communities. Other commenters believed this provision would force survivors who pursue a police investigation to wait a long time for it to end before receiving accommodations from their school or to drop their criminal case to get measures only schools can provide. At least one commenter expressed concern that students would be forced to bring civil cases to protect themselves during a criminal investigation. Many others asserted that it would force elementary and secondary school students to wait months or even longer for any resolution to their complaints as most school employees are legally required to report child sexual abuse to the police as mandatory reporters. A number of these commenters expressed concern that this might impede elementary and secondary schools from implementing critical safety measures for child victims until a criminal investigation is completed.

Discussion: We acknowledge the concerns raised by some commenters specifically relating to recipients' flexibility under § 106.45(b)(1)(v) to temporarily delay the grievance process due to concurrent law enforcement activity. The Department acknowledges that the criminal justice system and the Title IX grievance process serve distinct purposes. However, the two systems sometimes overlap with respect to allegations of conduct that constitutes sex discrimination under Title IX and criminal offenses under State or other laws. By acknowledging that concurrent law enforcement activity *may* constitute good cause for short-term delays or extensions of a recipient's designated time frames, this provision helps recipients navigate situations where a recipient is expected to meet its Title IX obligations while intersecting with criminal investigations that involve the same facts and parties. For example, if a concurrent law enforcement investigation uncovers evidence that the police plan to release on a specific time

frame and that evidence would likely be material to the recipient's determination regarding responsibility, then the recipient may have good cause for a temporary delay or limited extension of its grievance process in order to allow that evidence to be included as part of the Title IX investigation. Because the final regulations only permit "temporary" delays or "limited" extensions of time frames even for good cause such as concurrent law enforcement activity, this provision does not result in protracted or open-ended investigations in situations where law enforcement's evidence collection (e.g., processing rape kits) occurs over a time period that extends more than briefly beyond the recipient's designated time frames.[1103]

In response to commenters concerned that concurrent law enforcement activity is prevalent especially in sexual misconduct situations in elementary and secondary schools (where mandatory child abuse reporting laws often require reporting sexual misconduct to law enforcement), § 106.45(b)(1)(v) benefits recipients and young victims in such situations by allowing circumstance-driven flexibility for schools and law enforcement to coordinate efforts so that sexual abuse against children is effectively addressed both in terms of the purposes of the criminal justice system and Title IX's non-discrimination mandate. While a grievance process is pending, recipients may (and must, if refusing to do so is clearly unreasonable under the circumstances) implement supportive measures designed to ensure a complainant's equal access to education, protect the safety of parties, and deter sexual harassment.

Changes: None.

[1103] *E.g.*, *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1297 (11th Cir. 2007) ("[T]he pending criminal charges did not affect [the university's] ability to institute its own procedures" and did not justify university waiting 11 months for outcome of the criminal matter before finishing its own investigation and conducting its own disciplinary proceeding against sexual misconduct respondents).

Consistency with Other Federal Law

Comments: Some commenters raised concerns that allowing temporary delays or limited extensions conflicts with Title IX and Clery Act requirements that schools provide "prompt" resolution of complaints. Similarly, some commenters felt that permitting extensions for language assistance or disability accommodations is inconsistent with statutory obligations to provide these in a timely manner under Title VI, the Equal Educational Opportunities Act of 1974 ("EEOA"), ADA, and Section 504. Commenters also expressed concerns that the final regulations would permit delays for far longer than is permitted of employers under Title VII.

Discussion: Section 106.45(b)(1)(v) requires recipients to have good cause for any short-term delays or extensions, with written notice to the parties and an explanation for the delay or extension. Because the overall time frame must be reasonably prompt, and any delay or extension must be temporary or limited, § 106.45(b)(1)(v) poses no conflict with the Clery Act or other laws that require "prompt" resolution of processes designed to redress sexual harassment or sex offenses.[1104] Neither does application of short-term delays or extensions violate the "promptness" requirement that Title IX regulations have required since 1975; under the final regulations the grievance process still must be concluded in a "reasonably prompt" time frame and any delay or extension, even for good cause, may only be brief in length.

Recipients must still satisfy their legal obligation to provide timely auxiliary aids and services and reasonable accommodations under the ADA, Section 504, and Title VI, and should reasonably consider other services such as meaningful access to language assistance. With respect to the EEOA, Title VII, or other laws that may impose time frames on the same

[1104] For further discussion see the "Clery Act" subsection of the "Miscellaneous" section of this preamble.

grievance process that recipients must apply under § 106.45, these final regulations *permit* a recipient to apply short-term delays or extensions for good cause. These final regulations do not *require* a recipient to apply short-term delays or extensions, and thus if a recipient is precluded by another law from extending a time frame the recipient is not required to do so under these final regulations.

Changes: None.

Alternative Proposals

Comments: A number of commenters suggested alternative approaches to address their concerns about the proposed time frames. Commenters also suggested other approaches such as: eliminating any time frame requirement for recipients; barring delays due to an ongoing criminal investigation; prohibiting extensions for refusal to cooperate, lack of witnesses, or the need for language assistance or accommodation of disabilities; setting a time limit for law enforcement delays that is brief, such as three to ten days; setting a time limit for temporary delays and allowing delays for concurrent law enforcement activity only if requested by external municipal entities to gather evidence and for not more than ten days except when specifically requested and justified; and narrowing delay for law enforcement activity to only when absolutely necessary like when a school cannot proceed without evidence in law enforcement's exclusive domain (for example, a DNA sample to identify an unknown assailant). Other suggestions raised by commenters included: requiring supportive measures while criminal and school investigations are ongoing; and ensuring schools and criminal justice agencies set protocols for concurrent investigations that are responsive to the complexity of these situations and to each entity's duties and timelines.

Discussion: The Department believes that recipients are in the best position to designate "reasonably prompt time frames" that balance the need to conclude Title IX grievance processes promptly with providing the fairness and accuracy that these final regulations require. For reasons discussed above, prompt resolution is important to serve the purpose of Title IX's non-discrimination mandate, and the Department thus declines to remove the requirement that recipients conclude grievance processes promptly. For reasons discussed above, the Department believes that categorically prohibiting delays based on concurrent law enforcement investigations would deprive recipients of flexibility to work effectively and appropriately with law enforcement where the purpose of both the criminal justice system and the Title IX grievance process is to protect victims of sexual misconduct, and this discretion is appropriately balanced by not permitting a recipient to apply a delay or extension (even for good cause) that is not "temporary" or "limited." For similar reasons, the Department declines to specify a particular number of days that constitute "temporary" delays or "limited" extensions of time frames. State laws that do specify such maximum delays may be complied with by recipients without violating these final regulations, because § 106.45(b)(1)(v) allows but does not require a recipient to implement short-term delays even for good cause. The Department also reiterates that nothing in the final regulations precludes recipients from offering supportive measures to one or both parties while the grievance process is temporarily delayed, and revised § 106.44(a) obligates a recipient to offer supportive measures to complainants, with or without a grievance process pending.

The Department declines to allow short-term delays on the basis of working with a concurrent law enforcement effort only where the law enforcement agency specifically requests that the recipient delay, or only where the school and law enforcement agency have a

memorandum of understanding or similar cooperative agreement in place. Recipients' obligations under Title IX are independent of recipients' obligations to cooperate or coordinate with law enforcement with respect to investigations or proceedings affecting the recipient's students or employees. These final regulations do not attempt to govern the circumstances where such cooperation or coordination may be required under other laws, or advisable as a best practice, but § 106.45(b)(1)(v) gives recipients flexibility to address situations that overlap with law enforcement activities so that potential victims of sex offenses are better served by both systems while ensuring that a recipient's grievance process is not made dependent on a concurrent law enforcement investigation, and thus a Title IX grievance process will still be concluded promptly even if the law enforcement matter is still ongoing.

Changes: None.

Clarification Requests

Comments: Commenters requested clarifications of certain terms used in this provision, including the terms reasonably prompt, absence of the parties or witnesses, administrative delay, limited extensions, and temporary delay. Commenters also requested clarification as to what does or does not constitute good cause for delay, such as with respect to administrative needs or accommodation of disabilities, as well as when and for how long schools should delay for law enforcement activity. Some commenters asked for more clarity about the limits on extensions, the mechanisms to end delays when the advantages are outweighed by the benefits of resolution, the steps schools must take to protect students regardless of law enforcement activity, and what OCR will assess in determining if a grievance process is prompt. Other commenters asked for a clarification that the list of examples of good cause for delay are not exhaustive, and several commenters requested clarifying that schools can excuse complainants from participating in the

process for study abroad or other academic programming involving a significant time away from campus.

Discussion: As clarified above, the Department believes that recipients should retain flexibility to designate time frames that are reasonably prompt, and what is "reasonable" is a decision made in the context of a recipient's purpose of providing education programs or activities free from sex discrimination, thus requiring recipients to designate time frames taking into account the importance to students of resolving grievance processes so that students may focus their attention on participating in education programs or activities, and the reality that every academic term (e.g., an academic quarter, semester, trimester, etc.) is important to a student's progress toward advancing a grade level or completing a degree. A recipient must balance the foregoing realities with the need for recipients to conduct grievance processes fairly in a manner that reaches reliable outcomes, meeting the requirements of § 106.45, in deciding what time frames to include as "reasonably prompt" in a recipient's grievance process for formal complaints of sexual harassment under Title IX.

This provision's reference to the absence of parties or witnesses has its ordinary meaning, suggesting that the reasons for a party or witness's absence is a factor in a recipient deciding whether circumstances constitute "good cause" for a short-term delay or extension. With respect to administrative delay, we intend that concept to include delays caused by recipient inefficiencies or mismanagement of their own resources, but not necessarily circumstances outside the recipient's control (e.g., if technology relied on to conduct a live hearing is interrupted due to a power outage). We intend delay to have its ordinary meaning; a delay is a postponement of a deadline that would otherwise have applied. We appreciate the opportunity to clarify here that the examples of good cause listed in § 106.45(b)(1)(v) of the final regulations

are illustrative, not exhaustive. We defer to recipients' experience and familiarity with the cases recipients investigate to determine whether other factual circumstances present good cause that could justify extending the time frame. Further, we wish to emphasize that any delay or extension contemplated by § 106.45(b)(1)(v) must be on a limited and temporary basis, regardless of the good cause that exists. The Department trusts recipients to make sound determinations regarding the length of a brief delay; we believe recipients are in the best position to make these decisions as they may be closer to the parties and have a deeper understanding of how to balance the interests of promptness, fairness to the parties, and accuracy of adjudications in each case. As noted above, a recipient's response to sexual harassment must include offering supportive measures to a complainant (with or without a grievance process pending). While a recipient is not obligated in every situation to offer supportive measures to a respondent, if refusing to offer supportive measures to a respondent (for instance, where a live hearing date that falls on a respondent's final examination date results in a respondent needing to reschedule the examination) would be clearly unreasonable in light of the known circumstances such a refusal could also violate these final regulations.

Changes: None.

Section 106.45(b)(1)(vi) Describe Range or List of Possible Sanctions and Remedies

Comments: Several commenters support this provision because it furthers due process. One commenter supported § 106.45(b)(1)(vi) because it will increase parties' understanding of the proceedings and decrease the possibility of arbitrary, disproportionate, or inconsistent sanctions. A group of concerned attorneys and educators commented that consistent standards, such as this provision, are necessary to ensure a fair process will benefit everyone. Another commenter expressed support for § 106.45(b)(1)(vi) because it promotes parity between parties; requiring

recipients' grievance procedures to contain significant specificity is key because individuals must have a clear understanding of the procedures and possible penalties for wrongdoing. One commenter agreed that full and proper notice to all students, faculty, and other personnel is critical to the effective implementation of Title IX and therefore consistent with due process, so a recipient's grievance procedures must describe the range of possible sanctions and remedies that the recipient may implement following any determination of responsibility.

Discussion: The Department agrees with commenters that it is important to provide to all students, faculty, and other personnel a clear understanding of the possible remedies and sanctions under a recipient's Title IX grievance process. The Department agrees with commenters who asserted that § 106.45(b)(1)(vi) furthers due process protections for both parties and lessens the likelihood of ineffective remedies and arbitrary, disproportionate, or inconsistent disciplinary sanctions. For consistency of terminology, the final regulations use "disciplinary sanctions" rather than "sanctions" including in this provision, to avoid ambiguity as to whether a "sanction" differed from a "disciplinary sanction." Throughout the NPRM and these final regulations, where reference is made to disciplinary sanctions, the provisions are calling attention to the disciplinary nature of the action taken by the recipient, and the phrase "disciplinary sanctions" is thus more specific and accurate than the word "sanctions." Because the intent of this provision is to provide clarity for recipients and their educational communities, we have also revised this provision to state that the recipient's grievance process must describe "or list" the range of disciplinary sanctions, to clarify that complying with this provision also complies with the Clery Act.[1105]

[1105] For further discussion see the "Clery Act" subsection of the "Miscellaneous" section of this preamble.

Changes: We have revised the final regulations to use the phrase "disciplinary sanctions" consistently, replacing "sanctions" with "disciplinary sanctions" in provisions such as § 106.45(b)(1)(vi). We have also revised § 106.45(b)(1)(vi) to state that a recipient may describe the range of possible sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility.

Comments: A number of commenters opposed § 106.45(b)(1)(vi). One commenter expressed concern that this provision is too restrictive because disciplinary actions are often implemented in a number of creative ways that are specific to each individual case. One commenter expressed concern that the proposed regulations, including this provision, are unconstitutional, since the decisions to be made by the "decision-maker" determining responsibility and sanctions against a student are those that must be made by the judicial branch of government acting under Article III of the U.S. Constitution, and not by the executive branch, or by the recipient.

Several commenters expressed concern that recipients should not be required to describe a range of sanctions. One commenter expressed concern that each type of employee at their university has their own grievance procedures and penalties and appeals process, and the university does not have the expertise to know in certain circumstances how a faculty member's tenure would be implicated. One university commented that notice of investigation letters may exacerbate tense situations because the practice will be to describe every possible sanction, including termination, even when the possibility of some sanctions is remote or would contravene good practice.

Several commenters proposed modifications to § 106.45(b)(1)(vi). One commenter urged the Department to offer examples of the types of remedies it would find equitable, and the types of sanctions it would find acceptable, asserting that at a minimum, the Department should make

clear that it defers to the educational judgment of schools to take into consideration the myriad factors impacting the elementary and secondary school environment, from age to developmental level and beyond, in implementing the "equitability" requirement. One commenter suggested the language be altered due to the importance of ensuring that any sanction imposed be proportional to the offense committed, and noted that this principle reflects our societal understanding of punishment, as reflected in the U.S. Constitution's prohibition on "cruel and unusual punishment." The commenter argued that the proposed language would allow minor violations of university policy to be punished in extreme, disproportionate ways and would also allow for different violations to be punished in the same manner as long as the punishment had been described in the grievance process. One commenter suggested that this provision should be altered to clarify that collective punishment is unacceptable to the extent that it punishes individuals or organizations that did not perpetrate, or were not found responsible for perpetrating, the offense in question.

One commenter suggested that recipients should be required to list any factors that will or will not be considered in issuing a sanction. One commenter suggested the Department should make clear how specific the range of sanctions must be and that recipients be permitted to state, for example, "suspension of varying lengths" rather than having to itemize every possible length of a suspension.

Discussion: The Department proposed § 106.45(b)(1)(vi) to provide consistency, predictability, and transparency as to the range of consequences (both in terms of remedies for complainants, and disciplinary sanctions for respondents) students can expect from the outcome of a grievance process. A transparent grievance process benefits all parties because they are more likely to trust in, engage with, and rely upon the process as legitimate. After a respondent has been found

responsible for sexual harassment, any disciplinary sanction decision rests within the discretion of the recipient, and the recipient must provide remedies to the complainant designed to restore or preserve the complainant's educational access, as provided for in § 106.45(b)(1)(i). Both parties should be advised of the potential range of remedies and disciplinary sanctions.

The Department disagrees that the decision-maker imposing disciplinary sanctions must be a judge appointed under Article III of the Constitution. As discussed in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, Title IX is a Federal civil rights law, and the Supreme Court has judicially implied a private right of action under Title IX, and in private litigation in Federal courts a Federal judge may impose remedies to effectuate the purposes of Title IX. However, the Title IX statute expressly authorizes Federal agencies, such as the Department, to administratively enforce Title IX and require recipients to take remedial action following violations of Title IX or regulations implementing Title IX. Such administrative enforcement of Title IX does not require the participation or direction of an Article III Federal judge. In these final regulations, the Department has determined that the Department's interest in effectuating Title IX's non-discrimination mandate necessitates setting forth a predictable, fair grievance process for resolving allegations of Title IX sexual harassment and requiring recipients to provide remedies to complainants if a respondent is found responsible. The Department has determined that administrative enforcement of Title IX does not require overriding recipients' discretion to make decisions regarding disciplinary sanctions, and thus these final regulations focus on ensuring that respondents are not punished or disciplined unless a fair process has determined responsibility, but respects the discretion of State and local educators to make disciplinary decisions pursuant to a recipient's own code of conduct.

The Department acknowledges commenters' concerns that each type of employee at their university has their own grievance procedures, penalties, and appeals process as well as concerns about whether tenure may be implicated, but disagrees that this presents a problem under § 106.45(b)(1)(vi). The Department believes that simply providing a *range* of sanctions to respondents is feasible despite the reality of the different grievance procedures and penalties and appeals that may apply depending on whether a recipient's employee is tenured, and the final regulations permit the recipient to either list the possible disciplinary sanctions or describe the range of possible disciplinary sanctions. Describing a range of disciplinary sanctions should not be difficult for recipients, particularly regarding a maximum sanction.

Nothing in the final regulations prevents the recipient from communicating that the described range is required by Federal law under Title IX and that the published range is purely for purposes of notice as to the possibility of a range of remedies and disciplinary sanctions and does not reflect the probability that any particular outcome will occur.

The Department does not believe offering examples of types of appropriate disciplinary sanctions is necessary because as discussed above, whether and what type of sanctions are imposed is a decision left to the sound discretion of recipients. Similarly, these final regulations do not impose a standard of proportionality on disciplinary sanctions. Some commenters raised concerns that disciplinary sanctions against respondents found responsible are too severe, not severe enough, or that student discipline should be an educational process rather than a punitive process. These final regulations permit recipients to evaluate such considerations and make disciplinary decisions that each recipient believes are in the best interest of the recipient's educational environment. Because the recipient's grievance process must describe the range, or list the possible, disciplinary sanctions and remedies, a recipient's students and employees will

understand whether the recipient has, for example, decided that certain disciplinary sanctions or certain remedies are not available following a grievance process. This clarity gives potential complainants a sense of what a recipient intends provide in terms of remedies and potential respondents a sense of what a recipient is prepared to impose in terms of disciplinary sanctions, with respect to victimization and perpetration of Title IX sexual harassment.

Because remedies are required under the final regulations, the Department agrees with commenters who suggested more clarity as to what constitute possible remedies. The final regulations revise another provision, § 106.45(b)(1)(i), to specify that remedies designed to restore or preserve equal access to the recipient's education program or activity may include the same individualized services described in § 106.30 "supportive measures," but that remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent. The Department believes this level of specificity is sufficient to emphasize that remedies aim to ensure a complainant's equal educational access. As discussed in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, a recipient's choice of remedies will be evaluated under the deliberate indifference standard.

With respect to a recipient punishing an organization or group of individuals following a member of the organization or group being found responsible for sexual harassment, these final regulations require a recipient to respond to sexual harassment incidents in specific ways, including by investigating and adjudicating allegations of sexual harassment made in a formal complaint. The final regulations only contemplate adjudication of allegations against a respondent (defined in § 106.30 as an "individual," not a group or organization). In order for a respondent to face disciplinary sanctions under the final regulations, the respondent must be brought into the grievance process through a formal complaint alleging conduct that could

constitute sexual harassment defined in § 106.30.[1106] The final regulations do not address sanctions by a recipient imposed against groups for non-sexual harassment offenses.

By describing the range, or listing the possible disciplinary sanctions, a recipient is notifying its community of the possible consequences of a determination that a respondent is responsible for Title IX sexual harassment; this provision is thus intended to increase the transparency and predictability of the grievance process, but it is not intended to unnecessarily restrict a recipient's ability to tailor disciplinary sanctions to address specific situations. We therefore decline to state that the range or list provided by the recipient under this provision is exclusive. For similar reasons, we decline to require a recipient to state what factors might be considered with respect to decisions regarding disciplinary sanctions or to impose more detailed requirements in this provision than the requirement to describe a range, or list the possible disciplinary sanctions. As described above, in response to commenters' desire for more specificity in this provision, the final regulations revise this provision to permit a recipient to either "describe the range" or "list the possible" disciplinary sanctions and remedies; this change gives recipients the option to comply with this provision in a more specific manner (i.e., by listing possible disciplinary sanctions and remedies rather than by describing a range).

Changes: The final regulations revise § 106.45(b)(1)(vi) to give recipients the option to either "describe the range of" or "list the possible" disciplinary sanctions and remedies.

[1106] Emergency removal under § 106.44(c) is an exception that allows punitive action (i.e., removal from education programs or activities) against a respondent without going through a grievance process.

Section 106.45(b)(1)(vii) Describe Standard of Evidence

Comments: A number of commenters expressed support for § 106.45(b)(1)(vii). One commenter stated that fully informing the parties of the standard of evidence as part of the recipients' policies is very important in Title IX procedures, since the respondent and the complainant must understand how such proceedings will unfold. Other commenters expressed support because a consistent standard of evidence is necessary to ensure a fair process. One commenter expressed support because this is a common-sense provision. One commenter supported §106.45(b)(1)(vii) because it will increase parties' understanding of the proceedings and decrease the possibility of arbitrary, disproportionate, or inconsistent decisions.

Discussion: The Department agrees that fully informing the parties of the standard of evidence that a recipient has determined most appropriate for reaching conclusions about Title IX sexual harassment, by describing that standard of evidence in the recipient's grievance process, is an important element of a fair process. The Department agrees that a standard of evidence selected by each recipient and applied consistently to formal complaints of sexual harassment is necessary to ensure a fair process.[1107]

In response to commenters who noted, under comments directed to § 106.45(b)(7), that the NPRM lacked clarity as to whether a recipient's choice between the preponderance of the evidence standard and the clear and convincing evidence standard was a choice that a recipient

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[1107] *E.g.*, Lavinia M. Weizel, *The Process That Is Due: Preponderance of The Evidence as The Standard of Proof For University Adjudications of Student-On-Student Sexual Assault Complaints*, 53 BOSTON COLLEGE L. REV. 1613, 1631 (2012) (explaining that selecting a standard of evidence (also called a standard of proof) "is important for theoretical and practical reasons" including that the "standard of proof imposed in a particular class of cases reflects the value society places on the rights that are in jeopardy" because "standards of proof signal to the fact-finder the level of certainty society requires before the state may act to impair an individual's rights" and whichever standard is selected, "articulating a specific standard of proof for a particular type of hearing . . . helps to ensure the meaningfulness of the hearing's other procedural safeguards") (internal citations omitted).

could make in each individual case, the Department revised language in § 106.45(b)(7) and correspondingly revised language in § 106.45(b)(1)(vii) to read: "State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment[.]" These revisions clarify that the standard of evidence must be selected, stated, and applied consistently by each recipient to all formal complaints of sexual harassment.

Changes: The final regulations revise § 106.45(b)(1)(vii) to clearly require a recipient's grievance process to state up front which of the two permissible standards of evidence the recipient has selected and then to apply that selected standard to all formal complaints of sexual harassment, including those against employees.

Section 106.45(b)(1)(viii) Procedures and Bases for Appeal

Comments: Some commenters expressed general support for § 106.45(b)(1)(viii), arguing that requiring recipients to specify appeal procedures will promote a fair process that will benefit everyone and ensure parity between the parties. Two commenters recommended that the Department add specific language regarding when a decision may be appealed. One commenter suggested that the Department clarify that the parties are allowed to raise a procedural problem at the hearing without waiting to file an appeal over the procedural breach. Another commenter suggested that the Department add language describing the specific instances in which a complainant or respondent is permitted to appeal. The commenter stated that in instances where the recipient determines the respondent to be responsible for the alleged conduct and implements a remedy designed to restore a complainant's equal access to the recipient's education program

or activity, the complainant may appeal the remedy as inadequate to restore the complainant's equal access to the recipient's education program or activity to prevent its reoccurrence, and address its adverse effects on the complainant and others who may have been adversely affected by the sexual harassment. The commenter further stated that in instances where the recipient determines the respondent to be responsible for the alleged conduct, the respondent can appeal the recipient's determination of responsibility. The commenter explained that these should be the only two situations in which an appeal is permitted because allowing a complainant to appeal a recipient's determination of non-responsibility subjects the respondent to administrative double jeopardy and contravenes the principles of basic fairness. The commenter asserted that this is especially troublesome for students from low-income families with little or no access to free legal counsel.

Discussion: The Department appreciates the general support received from commenters for §106.45(b)(1)(viii), which requires recipients' Title IX grievance process to include the permissible bases and procedures for complainants and respondents to appeal. The Department is persuaded by commenters that we should clarify the circumstances in which the parties may appeal, and that both parties should have equal appeal rights, and §106.45(b)(8) of the final regulations require recipients to offer appeals, equally to both parties, on at least the three following bases: (1) procedural irregularity that affected the outcome; (2) new evidence that was not reasonably available when the determination of responsibility was made that could affect the outcome; or (3) the Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that affected the outcome. Nothing in the final regulations precludes a party from raising the existence of procedural defects that occurred during the grievance process during a live hearing, and the final regulations ensure that whether or not a party has observed or objected

to a procedural defect during the hearing, the party may still appeal on the basis of procedural irregularity after the determination regarding responsibility has been made. The Department believes that a complainant entitled to remedies should not need to file an appeal to challenge the recipient's selection of remedies; instead, we have revised § 106.45(b)(7)(iv) to require that Title IX Coordinator is responsible for effective implementation of remedies. This permits a complainant to work with the Title IX Coordinator to select and effectively implement remedies designed to restore or preserve the complainant's equal access to education.

Complainants and respondents have different interests in the outcome of a sexual harassment complaint. Complainants "have a right, and are entitled to expect, that they may attend [school] without fear of sexual assault or harassment" and to expect recipients to respond promptly to complaints.[1108] For respondents, a "finding of responsibility for a sexual offense can have a 'lasting impact' on a student's personal life, in addition to [the student's] 'educational and employment opportunities'[.]"[1109] Although these interests may differ, each represents high-stakes, potentially life-altering consequences deserving of an accurate outcome.[1110]

We disagree with the commenters who argued that the final regulations should prohibit appeals of not responsible determinations because of double jeopardy concerns. The Department emphasizes that the constitutional prohibition on double jeopardy does not apply to Title IX proceedings and the Department does not believe that such a prohibition is needed to ensure fair and accurate resolution of sexual harassment allegations under Title IX. Where a procedural error, newly discovered evidence, or conflict of interest or bias has affected the outcome

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[1108] *Doe v. Univ. Of Cincinnati*, 872 F.3d 393, 403 (6th Cir. 2017).
[1109] *Id.* at 400 (internal citations omitted).
[1110] *Id*. at 404 (recognizing that the complainant "deserves a reliable, accurate outcome as much as" the respondent).

resulting in an *inaccurate* determination of non-responsibility, the recipient's obligation to redress sexual harassment in its education program or activity may be hindered, but the recipient may correct that inaccurate outcome on appeal and thus accurately identify the nature of sexual harassment in its education program or activity and provide remedies to the victim. Further, and as discussed above, we believe that both respondents and complainants face potentially life-altering consequences from the outcomes of Title IX proceedings. Both parties have a strong interest in accurate determinations regarding responsibility and it is important to protect complainants' right to appeal as well as respondents' right to appeal. We note that the final regulations do not require a party to hire an attorney for any phase of the grievance process, including on appeal.

Changes: We have revised § 106.45(b)(1)(viii) to remove the "if the recipient offers an appeal" language because § 106.45(b)(8) of the final regulations make appeals for both parties mandatory, on three bases: procedural irregularity, newly discovered evidence, and bias or conflict of interest on the part of the Title IX Coordinator, investigator, or decision-maker.

Section 106.45(b)(1)(ix) Describe Range of Supportive Measures

Comments: Several commenters supported § 106.45(b)(1)(ix) requiring recipients to describe the range of supportive measures available to complainants and respondents. Some commenters asserted that this requirement would promote parity between the parties and ensure a fair process that will benefit everyone. One commenter recommended that the Department encourage recipients to retain and maintain the names and contact information for individual groups, and other entities that provide support in these circumstances, including counselors, psychiatrists, law firms, and educational advocates, and make the information available to all parties. Two commenters suggested that the Department add language to the final regulations clarifying that

complainants and respondents must be afforded the same level of advocacy and supportive care so that both parties are treated equally. Another commenter was concerned that the requirement would be difficult to meet because supportive measures are often determined on an ad hoc basis and vary from investigation to investigation. To address this concern, the commenter recommended that the Department instead require grievance procedures to address the availability of supportive measures and describe some common examples.

Discussion: The Department agrees that requiring recipients to describe the range of supportive measures available to complainants and respondents is an important part of ensuring that the grievance process is transparent to all members of a recipient's educational community. Section 106.45(b)(1)(ix), particularly, notifies both parties of the kind of individualized services that may be available while a party navigates a grievance process, which many commenters asserted is a stressful and difficult process for complainants and respondents.

The Department clarifies that this provision does not require equality or parity in terms of the supportive measures actually available to, or offered to, complainants and respondents generally, or to a complainant or respondent in a particular case. This provision must be understood in conjunction with the obligation of a recipient to offer supportive measures to complainants (including having the Title IX Coordinator engage in an interactive discussion with the complainant to determine appropriate supportive measures), while no such obligation exists with respect to respondents. By defining supportive measures to mean individualized services that cannot unreasonably burden either party, these final regulations incentivize recipients to make supportive measures available to respondents, but these final regulations require recipients to offer supportive measures to complainants. In revised § 106.44(a), and in § 106.45(b)(1)(i) these final regulations reinforce that equitable treatment of complainants and respondents means

providing supportive measures and remedies for complainants, and avoiding disciplinary action against respondents unless the recipient follows the § 106.45 grievance process. The Department does not intend, and the final regulations do not require, to impose a requirement of equality or parity with respect to supportive measures provided to complainants and respondents.

The Department declines to require recipients to disseminate to students the names and contact information for organizations that provide support in these circumstances, including counselors, psychiatrists, law firms, educational advocates, and so forth, or make such a list available to all parties, although nothing in these final regulations precludes a recipient from doing so. The specific resources available in the general community surrounding the recipient's campus may change frequently making it difficult for recipients to accurately list currently available resources. The Department believes that by requiring recipients to describe the range of supportive measures made available by a recipient as part of the recipient's grievance process, and defining "supportive measures" in § 106.30 (which also includes an illustrative list of possible supportive measures), parties will be adequately advised of the types of individualized services available as they navigate a grievance process. A recipient may choose to create and distribute lists of specific resources in addition to complying with § 106.45(b)(1)(ix).

The Department appreciates the commenter's concern that the requirement would be difficult to meet because supportive measures are often determined on an ad hoc basis and vary from investigation to investigation. However, it is for this reason that the Department is only requiring a recipient's grievance process to describe the *range* of supportive measures available rather than a list of supportive measures available. One commenter requested that the Department provide examples of supportive measures. A non-exhaustive list of types of supportive measures is stated in the definition of "supportive measures" in § 106.30. Recipients

retain the flexibility to employ age-appropriate methods, exercise common sense and good judgment, and take into account the needs of the parties involved when determining the type of supportive measures appropriate for a particular party in a particular situation, and this flexibility is not inhibited by the requirement to describe the range of available supportive measures in § 106.45(b)(1)(ix).

Changes: None.

Section 106.45(b)(1)(x) Privileged Information

Comments: As discussed in more detail in the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, commenters inquired whether the § 106.45 grievance process required cross-examination questions that call for disclosure of attorney-client privileged information to be allowed to be asked during a live hearing held by a postsecondary institution.

Discussion: To ensure that a recipient's grievance process respects information protected by a legally recognized privilege (for example, attorney-client privilege, doctor-patient privilege, spousal privilege, and so forth), the Department has added a provision addressing protection of all privileged information during a grievance process.

Changes: We have added new § 106.45(b)(1)(x) to ensure that information protected by a legally recognized privilege is not used during a grievance process.

Written Notice of Allegations

Section 106.45(b)(2) Written Notice of Allegations

Retaliation

Comments: Many commenters opposed § 106.45(b)(2), arguing that respondents may retaliate against complainants if respondents are given notice of a formal complaint that contains the

complainant's identity. Some commenters cited a study which found that the fear of retaliation by the accused or by peers is a barrier for people to report sexual assault.[1111] These commenters also expressed concern that § 106.45(b)(2) does not require the recipient to assure the complainant that, if retaliation occurs, the recipient would take steps to correct the retaliatory actions. Commenters argued that such a requirement would affirm to complainants that they will be safeguarded by recipients in their complaints, and would help encourage complainants to come forward with reports of sexual harassment or assault. Several commenters argued that, because the Department provides for a warning to complainants against false allegations, the provision should also require recipients to warn respondents against retaliation. One commenter suggested that the provision should identify the types of retaliation prohibited, such as threats of civil litigation against the complainant for defamation, or spreading rumors intended to intimidate the complainant from filing a complaint. Another commenter asserted that the provision should notify the parties of the retaliation prohibition that is included in the Title IX regulation, at 34 CFR 106.71 that currently states that the Title VI regulation at 34 CFR 100.7(e) is incorporated by reference into the Title IX regulations. One commenter asked the Department to create an independent Title IX prohibition against retaliation to protect the complainant. Another commenter stated that the Clery Act requires that recipients' sexual misconduct policies include prohibitions of retaliation. A commenter cited *Jackson v. Birmingham Board of*

[1111] Commenters cited: Shelley Hymel & Susan M. Swearer: *Four Decades of Research on School Bullying: An Introduction*, 70 AM. PSYCHOL. 293, 295 (May-June 2015) (youth "are reluctant to report bullying, given legitimate fears of negative repercussions"); Ganga Vijayasiri, *Reporting Sexual Harassment: The Importance of Organizational Culture and Trust*, 25 GENDER ISSUES 43, 53-54, 56 (2008) ("fear of adverse career consequences, or being blamed for the incident are a major deterrent to reporting" and this includes peer mistreatment or disapproval).

Education, 544 U.S. 167 (2005) for the proposition that civil rights cannot be adequately protected if people can be punished for asserting such rights.

Commenters argued that some allegations of sexual assault involve circumstances so serious that providing respondents notice of a complaint would place the complainant at significant risk of further – and potentially escalating levels of – violence. Other commenters argued that respondents may destroy evidence or create false alibis if recipients give respondents detailed notice of the allegations in a formal complaint.

Other commenters expressed strong support for § 106.45(b)(2), arguing that society cannot purport to deliver justice for victims when extra-governmental institutions are permitted to ignore due process and the rule of law. Some commenters opined that only in the most totalitarian systems are people investigated and adjudicated without knowledge of the specific details of the charges before they are expected to present a defense. A number of commenters shared personal stories about respondents being interviewed multiple times by school officials before they were told what allegations had been made against them. Other commenters shared personal stories about recipients interviewing respondents without informing the respondent what precisely the complainant had alleged or when or where the alleged misconduct had occurred, and then when the respondent expressed uncertainty in recalling certain details in the interview, the recipient later cited the respondent's uncertain memory as evidence of the respondent's guilt. Commenters stated that, in these instances, respondents lost credibility when they were unable to clearly quote facts and events involving unclear allegations on a moment's notice at a surprise interview.

Discussion: The Department is persuaded by commenters' unease over a perceived lack of protection against retaliation and therefore the final regulations add § 106.71, which prohibits

any person from intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by Title IX including, among other things, making a report or formal complaint of sexual harassment. Recipients may communicate this protection against retaliation to the parties in any manner the recipient chooses. The Department disagrees that the warning about consequences for making false statements (if such a prohibition exists in the recipient's code of conduct) is directed only to complainants; such a warning is for the benefit of both parties so that if the recipient has chosen to make a prohibition against false statements part of the recipient's code of conduct, both parties are on notice that the § 106.45 grievance process potentially implicates that provision of the recipient's code of conduct. Similarly, § 106.71 protects all parties (and witnesses, and other individuals) from retaliation for exercising rights under Title IX, and is not directed solely toward complainants.

The Department understands that some complainants may fear to report sexual harassment or file a formal complaint alleging sexual harassment, because of the possibility of retaliation, and intends that adding § 106.71 prohibiting retaliation will empower complainants to report and file a formal complaint, if and when the complainant desires to do so. Recipients are obligated to offer supportive measures to a complainant (with or without the filing of a formal complaint) and to engage the complainant in an interactive discussion regarding the complainant's wishes with respect to supportive measures.[1112] Recipients must keep confidential the provision of supportive measures to the extent possible to allow implementation of the supportive measures.[1113] Thus, a complainant may discuss with the Title IX Coordinator the type

[1112] Section 106.44(a).
[1113] Section 106.30 (defining "supportive measures").

of supportive measures that may be appropriate due to a complainant's concerns about retaliation by the respondent (or others), or fears of continuing or escalating violence by the respondent. A recipient's decision about which supportive measures are offered and implemented for a complainant is judged under the deliberate indifference standard, which by definition takes into account the unique, particular circumstances faced by a complainant. For reasons described below in this section of the preamble, the Department has determined that a grievance process cannot proceed, consistent with due process and fundamental fairness, without the respondent being apprised of the identity of the complainant (as well as other sufficient details of the alleged sexual harassment incident). Thus, a complainant's identity cannot be withheld from the respondent once a formal complaint initiates a grievance process, yet this does not obviate a recipient's ability and responsibility to implement supportive measures designed to protect a complainant's safety, deter sexual harassment, and restore or preserve a complainant's equal educational access.[1114]

The Department believes that providing written notice of the allegations to both parties equally benefits complainants; after a recipient receives a formal complaint, a complainant benefits from seeing and understanding how the recipient has framed the allegations so that the complainant can prepare to participate in the grievance process in ways that best advance the complainant's interests in the case. The Department disagrees that providing written notice of allegations increases the risk that a respondent will destroy evidence or concoct alibis, and even

[1114] *Id.* (supportive measures must not be punitive or disciplinary). However, a recipient may warn a respondent that retaliation is prohibited and inform the respondent of the consequences of retaliating against the complainant, as part of a supportive measure provided for a complainant, because such a warning is not a punitive or disciplinary action against the respondent.

if such a risk existed the Department believes that benefit of providing detailed notice of the allegations outweighs such a risk because a party cannot be fairly expected to respond to allegations without the allegations being described prior to the expected response. Further, if a respondent does respond to a notice of allegations by destroying evidence or inventing an alibi, nothing in the final regulations prevents the recipient from taking such inappropriate conduct into account when reaching a determination regarding responsibility, numerous provisions in § 106.45 provide sufficient ways for the recipient (and complainant) to identify ways in which a respondent has fabricated (or invented, or concocted) untrue information, and such actions may also violate non-Title IX provisions of a recipient's code of conduct.

Changes: The final regulations add § 106.71 prohibiting retaliation by any person, against any person exercising rights under Title IX, and specify that complaints of retaliation may be filed with the recipient for handling under the "prompt and equitable" grievance procedures that recipients must adopt and publish for non-sexual harassment sex discrimination complaints by students and employees under § 106.8(c).

Warning Against False Statements

Comments: Several commenters asserted that the requirement in § 106.45(b)(2) that the written notice of allegations sent to both parties must contain information about any prohibition against knowingly submitting false information will chill reports of sexual assault because the provision implies that the Department does not believe allegations of sexual assault. One commenter shared the Department's interest in preserving the truth-seeking nature of the grievance process, but expressed concern that the threat implicit in the proposed admonition will outweigh its value. The commenter asserted that parties' and witnesses' statements rarely neatly align and inconsistencies can stem from passage of time, effects of drugs or alcohol, general unreliability

of human perception and memory, and other factors. The commenter asserted that school officials are rarely so certain a party is lying that they should pursue discipline, yet the admonition in § 106.45(b)(2) suggests otherwise. The commenter warned that the resulting fear is likely to discourage participation in the process and inhibit the candor the Department stated it is seeking, and the commenter believed that parties may interpret the statement as their school's endorsement of harmful stereotypes about the prevalence of false sexual misconduct reports.

Many commenters asserted that most women who choose not to come forward do so because of the fear that people will not believe them. Commenters cited research showing that victims rarely make false allegations, and that only somewhere between two to ten percent of sexual assault allegations are false.[1115] Commenters asserted that men are more likely to be sexually assaulted themselves than to be falsely accused of committing sexual assault.[1116] Commenters argued that because false allegations are so rare, there is no benefit to including a warning against making false statements and the only purpose of such a warning is to deter complainants from reporting or filing formal complaints.

One commenter suggested that § 106.45(b)(2) should state that, if the recipient finds the respondent not responsible at the conclusion of the proceedings, a determination of not responsible will not, based on the finding alone, result in the complainant being deemed to have made false allegations. The commenter further requested that the written notice include a statement that the recipient presumes that the complainant is bringing a truthful complaint.

[1115] Commenters cited: David Lisak *et al.*, *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 12 (2010).
[1116] Commenters cited: Tyler Kingkade, *Males are More Likely to Suffer Sexual Assault Than to be Falsely Accused of it*, THE HUFFINGTON POST (Dec. 8, 2014).

One commenter wanted clarification as to how false accusations would be determined. One commenter wished to know whether false accusations are a Title IX offense, and if so, who is authorized to bring a complaint alleging a false accusation. The commenter also wondered if a complainant can be held accountable for making a false report of sexual harassment if the recipient's code of conduct does not have a provision about submitting false statements during a disciplinary proceeding.

Several commenters who favored § 106.45(b)(2) suggested that the provision should subject students who knowingly made false allegations to disciplinary proceedings. Other commenters asked the Department to explain what minimum consequences will apply to students who make false allegations of sexual assault.

Discussion: The Department first notes that § 106.45(b)(2)(i)(B) will only apply to those situations in which the recipient's code of conduct prohibits students from knowingly making false statements or submitting false information during a disciplinary proceeding. If the recipient's code of conduct is silent on the issue of false statements in the grievance process, then the final regulations do not require recipients to include reference to false statements in the § 106.45(b)(2) written notice. If, on the other hand, a recipient's own code of conduct does reference making false statements during a school disciplinary proceeding then the Department believes that both parties deserve to know that their school, college, or university has such a provision that could subject either party to potential school discipline as a result of participation in the Title IX grievance process. Further, this "warning" about making false statements applies equally to respondents, as to complainants. Respondents should understand how a recipient intends to handle false statements (e.g., in the form of a respondent's denials of allegations) made during the grievance process.

Because the warning about making false statements occurs at a time when the complainants have already filed a formal complaint, the Department does not foresee that a complainant's decision to report sexual harassment (which need not also involve filing a formal complaint) will be affected by the recipient's notice about whether the recipient's code of conduct prohibits making false statements during a grievance process. The warning about false statements is not a requirement that the complainants' statements "neatly align" with the statements of other parties' or witnesses' statements, as one commenter suggested. Nor does the Department agree that the warning enforces harmful stereotypes about the prevalence of false sexual misconduct reports. The warning informs both parties about code of conduct provisions that govern either party's conduct at the grievance process, and only applies if such provisions exist in the recipients' own code of conduct. In response to commenters' concerns and to clarify for recipients, complainants, and respondents that merely making an allegation that a respondent or witness disagrees with (or is otherwise unintentionally inaccurate) constitutes a punishable "false statement," the final regulations include § 106.71 prohibiting retaliation for exercising Title IX rights generally, and specifically stating that while it is not retaliatory when a recipient charges a party with a code of conduct violation for making a bad faith, materially false statement in a Title IX proceeding, such a conclusion cannot be based solely on the determination regarding responsibility. This emphasizes that the mere fact that the outcome was not favorable (which could turn on a decision-maker deciding that the party or a witness was not credible, or did not provide accurate information, or that there was insufficient evidence to meet the recipient's burden of proof) is not sufficient to conclude that the party who "lost" the case made a bad faith, materially false statement warranting punishment.

The Department is sympathetic to the difficulties complainants face in bringing a formal complaint. But recognition of the difficulties faced by complainants navigating the grievance process should not overshadow the fact that the respondent also faces significant consequences in the grievance process, nor lessen the need for both parties to be advised by the recipient of the allegations under investigation. The Department appreciates commenters' assertions regarding the relative infrequency of false allegations; however, § 106.45(b)(2) is intended to emphasize the importance of both parties being truthful during the grievance process by giving both parties information about how a particular recipient addresses false statements in the recipient's own code of conduct. Because the statement about false statements referred to in § 106.45(b)(2) is not a statement about the truthfulness of respondents, the Department declines to require any statement in this provision regarding the truthfulness of complainants. Similarly, the statement in the written notice provision regarding the presumption that a respondent is not responsible is not a statement about the credibility or truthfulness of respondents, [1117] and the Department declines to require any statement in the written notice regarding truthfulness of complainants. Regardless of the frequency or infrequency of false or unfounded allegations, every party involved in a formal complaint of sexual harassment deserves a fair process designed to resolve the truth of the particular allegations at issue, without reference to whether similar allegations are "usually" (based on statistics or generalizations) true or untrue.

[1117] As discussed previously in the "Section 106.45(b)(1)(iv) Presumption of Non-Responsibility" subsection of the "General Requirements for § 106.45 Grievance Process" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, the presumption of non-responsibility is *not* a presumption of credibility or truthfulness for respondents, and § 106.45(b)(1)(ii) expressly prohibits the recipient from drawing any inferences about credibility based on status as a complainant or respondent.

Any determination that a complainant (or respondent) has violated the recipient's code of conduct with respect to making false statements during a grievance process is a fact-specific determination for the recipient to decide; however, as noted above, the final regulations add § 106.71 advising recipients that it could constitute retaliation to punish a party for false statements if that conclusion is reached solely based on the determination regarding responsibility, thus cautioning recipients to carefully assess whether a particular complainant (or respondent) should face code of conduct charges involving false statements.

The Department declines to follow the recommendations of commenters who argued that § 106.45(b)(2) should include a provision that subjects students who knowingly make false statements to disciplinary proceedings, nor does the Department wish to prescribe what the minimum consequences of making a false statement would be. If the recipient believes that a party violated the recipient's code of conduct during the grievance process, the recipient may investigate the matter under its own code of conduct, but the Department does not require such action.

Changes: The final regulations add § 106.71 prohibiting retaliation for exercising Title IX rights generally, and specifically stating that while it is not retaliatory when a recipient punishes a party for making a bad faith, materially false statement in a Title IX proceeding, such a conclusion cannot be based solely on the determination regarding responsibility.

Investigative Process

Comments: Several commenters with experience conducting criminal investigations asserted that, to get reliable and truthful information, it is important not to warn subjects of a criminal investigation that they are under investigation. The commenters argued that giving parties notice of the details of an alleged incident before the initial interview may give them the ability to affect

the outcome of their case by manipulating their own testimony, tampering with evidence, or intimidating witnesses. Several commenters asked the Department to change the notice requirement to align with standard investigation practices that call for unplanned interviews. These commenters suggested that recipients not be required to give parties notice of allegations until the university has decided to proceed with formal charges. Another commenter stated that, although there is general agreement that providing sufficient notice prior to interviews effectuates the rights to an advisor guaranteed by VAWA Section 304, the industry standard is to provide this notice prior to charging, not prior to interviewing.

One commenter who designs policies to address sexual assault on a university campus pointed out that universities lack the power to subpoena witnesses in its investigations. Since the notice provision in § 106.45(b)(2) gives witnesses ample time to craft their testimony before an initial interview, and as the university already lacks the ability to compel witnesses to hand over evidence, the commenter argued that the notice provision will hamper a recipient's ability to gather accurate testimony. To repair this problem, the commenter suggested that the Department instead require recipients to give notice of allegations to interested parties after the university has completed all initial interviews and has decided to proceed with a formal grievance procedure.

One commenter wanted to know how the provision would affect university police investigative techniques. Specifically, the commenter wondered whether university police would be prohibited from interviewing an accused party in a criminal investigation unless the university provided written notice of the interview. Another commenter requested further guidance from the Department on how schools should handle overlapping enforcement entities, especially regarding the notice requirement and whether an interview with law enforcement would violate

Title IX if the police officer conducted the interview before the Title IX Coordinator was able to provide notice of allegations to the respondent.

Several commenters expressed concern about the notice provision interfering with the ability of campus officials to perform investigations concurrently with police. Commenters warned that an institution may inadvertently interfere with an ongoing law enforcement investigation if the institution contacts a respondent or witnesses before law enforcement has had a chance to do so. One commenter asked the Department to clarify that institutions may allow for a temporary delay of notice to the respondent at the request of law enforcement after receipt of a complaint, but before initiation of grievance proceedings.

Discussion: While the Department appreciates commenters' concerns about best practices in conducting criminal investigations, the Department reiterates that a § 106.45 grievance process occurs independently of any criminal investigation that may occur concurrently, and the recipient's obligation to inform the parties of the allegations under investigation is a necessary procedural benefit for both parties. Precisely because schools, colleges, and universities are not law enforcement entities but rather educational institutions, the Department does not intend to require recipients to adopt best practices from law enforcement. For purposes of a fair, impartial investigation into allegations in a formal complaint, the Department believes that providing written notice of the allegations to both parties at the beginning of the investigation best serves the important goal of fostering reliable outcomes in Title IX grievance processes.

The Department understands commenters' concerns that investigators (whether law enforcement or not) may believe that catching a respondent by surprise gets at the truth better than giving a respondent notice of the allegations with sufficient time for the respondent to prepare a response, including by making it less likely that a respondent has time or opportunity

to destroy evidence or manipulate testimony. However, the Department agrees with commenters supporting § 106.45(b)(2) who asserted that notice of the allegations is an essential feature of a fair process; without knowing the scope and purpose of an interview a respondent will not have a fair opportunity to seek assistance from an advisor of choice and think through the respondent's view of the alleged facts. The Department declines to require written notice only if a recipient decides to proceed with a formal investigation, because the final regulations *require* a recipient to investigate the allegations in a formal complaint.[1118] The § 106.45 grievance process does not recognize, or permit a recipient to recognize, a difference between commencing an investigation upon receipt of a formal complaint, and a separate step of "charging" the respondent that, by commenters' descriptions, sometimes involves a recipient interviewing parties or witnesses before deciding whether to "charge" a respondent and thereby conduct a full investigation. If an investigation reveals facts requiring or permitting dismissal of the formal complaint pursuant to § 106.45(b)(3), the parties have been informed of the formal complaint, the allegations therein, and then the reasons for the dismissal, such that both parties can exercise their right to appeal the dismissal decision.[1119] While a recipient may take steps that the recipient considers part of an "investigation" without having received a formal complaint, the recipient may not impose discipline on a respondent without first complying with a grievance process that complies with § 106.45,[1120] which includes providing a party with written notice of the date, time, location, participants, and purpose of all investigative interviews with a party with sufficient time for the

[1118] Section 106.44(a); § 106.45(b)(3)(i).
[1119] The final regulations revise § 106.45(b)(8) to expressly grant both parties equal right to appeal a recipient's mandatory or discretionary dismissal decisions.
[1120] Section 106.44(a); § 106.45(b)(1)(i).

party to prepare to participate.[1121] Thus, even if a recipient is not in "receipt of a formal complaint" which triggers the recipient's obligation to send the written notice of allegations in § 106.45(b)(2), the recipient cannot impose disciplinary sanctions on a respondent, or take other actions against a respondent that do not fit the definition of "supportive measures" in § 106.30, without following the § 106.45 grievance process.

If a respondent reacts to a notice of allegations by manipulating the respondent's own testimony, or by tampering with evidence, the § 106.45 grievance process provides adequate avenues through which the investigation and adjudication can account for such conduct, so that a respondent's attempt to fabricate or falsify information would be part of the objective evaluation of evidence a decision-maker performs in reaching a determination. For example, if a respondent manufactures a counter-narrative to the allegations, the complainant and the recipient have the opportunity to question the respondent about the respondent's statements and reveal inaccuracies, inconsistencies, or false statements.[1122] Similarly, if a witness crafts or manipulates the witness's own testimony, inaccuracy and untruthfulness can be revealed through questioning of the witness by parties and the recipient. If a respondent reacts to a written notice of allegations by intimidating witnesses, such conduct is prohibited as retaliation under § 106.71.

The Department notes that the § 106.45 grievance process applies only to investigation and adjudication of formal complaints under Title IX, and has no applicability to criminal investigations. Regardless of whether a criminal investigation is conducted by "campus police"

[1121] Section 106.45(b)(5)(v).

[1122] Section 106.45(b)(6)(ii) (providing that whether or not a hearing is held in elementary and secondary schools, the parties have opportunity to submit written questions to the other party, including questions designed to test credibility); § 106.45(b)(6)(i) (providing that during a live hearing held by a postsecondary institution, each party has an opportunity to cross-examine the other party, but only with cross-examination conducted by party advisors).

or other law enforcement officers, the recipient's obligations to comply with § 106.45 apply when a party is interviewed for the purpose of a Title IX grievance process, as opposed to furtherance of a criminal investigation.

The Department recognizes that a recipient's obligation to investigate a formal complaint of sexual harassment may overlap with concurrent law enforcement investigation into the same allegations. Where appropriate, the final regulations acknowledge that potential overlap; for example, by acknowledging concurrent law enforcement activity as "good cause" to temporarily delay the § 106.45 grievance process under § 106.45(b)(1)(v). However, the Department emphasizes that a recipient's obligation to investigate and adjudicate promptly and fairly under § 106.45 exists separate and apart from any concurrent law enforcement proceeding, and the recipient therefore must comply with all provisions in § 106.45, including the written notice provision, regardless of whether law enforcement is conducting a concurrent investigation. The Department notes that § 106.45(b)(1)(v) addressing the recipient's designated, reasonably prompt time frames contemplates good cause temporary delays and limited extensions of time frames only *after* the parties have received the initial written notice of allegations under § 106.45(b)(2), such that concurrent law enforcement activity is not good cause to delay sending the written notice itself.[1123]

Changes: None.

[1123] Section 106.45(b)(1)(v) (specifying that where a recipient delays or extends a time frame for good cause, the recipient must send written notice to the complainant and the respondent of the delay or extension and the reasons for the action).

Administrative Burden on Schools

Comments: Many commenters urged the Department to give recipients more flexibility in determining the appropriate timing for sending the written notice of allegations under § 106.45(b)(2). Commenters argued that many complaints require an initial investigation to confirm the identity of the involved parties, to clarify any missing information, and to determine whether Title IX or the campus policy applies, and requiring written notice to the parties right away does not make sense when many complaints turn out to lack merit or not allege Title IX or policy violations. Several commenters asked the Department to provide that recipients must give respondents "prompt written notice" instead of "upon receipt of a formal complaint," to give recipients a reasonable amount of time before providing the written notice of allegations.

One commenter asked the Department to make the written notice provision more flexible for smaller universities, because college officials often have a close personal connection with students. One commenter argued that the written notice provision would amount to a disturbing constraint on a campus administrator's authority to respond quickly to allegations. The commenter quoted the Department's commentary in the NPRM that "when determining how to respond to sexual harassment, recipients have flexibility to employ age-appropriate methods, exercise common sense and good judgment, and take into account the needs of the parties involved," but the commenter opined that § 106.45(b)(2) runs contrary to this stated intent.

Other commenters noted that many institutions receive more disclosures of inappropriate conduct than formal complaints, and asserted that in many of those cases, the disclosing student is seeking supportive measures and feels satisfied when those personalized supports are put in place (extensions of time, opportunities to change housing, escorts, etc.). Commenters argued

that the written notice provision, by alerting the respondent of a report alleging sexual assault before an investigation has taken place, escalates the matter too early.

Another commenter asserted that, at the onset of an investigation, recipients should have the authority to identify allegations under their policy broadly, and then provide an additional, more specific, notice when the investigation process concludes because the proposed regulations appear to require as many written notices to parties as there are changes to the allegations over the course of an investigation, placing an undue burden on recipients with no clear added value to the transparency of the investigation.

Another commenter argued that § 106.45(b)(2) is burdensome to schools because Title IX already requires schools to file annual proactive notice to parties of the school's grievance procedures. Numerous commenters asserted that the administrative burdens placed on schools by the written notice of allegations provision will incentivize schools to try to avoid legal jeopardy rather than try to achieve school safety.

Discussion: The Department disagrees that § 106.45(b)(2) leaves recipients with insufficient flexibility to respond quickly to allegations or contradicts the intent expressed in the NPRM that recipients should employ age-appropriate methods, exercise common sense and good judgment, and take into account the needs of the parties involved. The Department reiterates that the written notice of allegations provision applies only after a recipient receives a formal complaint; thus, a recipient need not wait until written notice of allegations has been sent in order to, for example,

provide supportive measures to the complainant (or the respondent).[1124] For similar reasons, nothing about § 106.45(b)(2) restricts a recipient's flexibility to implement supportive measures designed to restore or preserve the complainant's equal access to education by taking into account the unique needs of the parties and using common sense and good judgment, and the definition of supportive measures emphasizes that supportive measures are "individualized services" reasonably available "before or after the filing of a formal complaint or where no formal complaint has been filed."[1125] With respect to the written notice itself, nothing in § 106.45(b)(2) prescribes how the information in the written notice is phrased, such that recipients are free to employ age-appropriate methods, common sense, and good judgment in choosing how to convey the information required to be included in the written notice.

The Department agrees with commenters who noted that many complainants report sexual harassment seeking supportive measures rather than a formal grievance process, and the Department reiterates that § 106.45 only applies after a recipient has received a formal complaint; a recipient need not send written notice of allegations based on reports, disclosures, or other forms of "notice" that charges a recipient with actual knowledge that do not consist of receipt of a formal complaint (and a formal complaint may only be filed by a complainant, or signed by the Title IX Coordinator).[1126]

[1124] In fact, revised § 106.44(a) obligates recipients to promptly respond to any notice of Title IX sexual harassment (regardless of whether a complainant or Title IX Coordinator also files a formal complaint) by, among other things, promptly offering the complainant supportive measures. We reiterate that no written or signed document, much less a "formal complaint" as defined in § 106.30, is required in order to trigger the recipient's response obligations. To emphasize this, we have revised § 106.30 defining "actual knowledge" to expressly state that "notice" conveying actual knowledge to the recipient (triggering the recipient's response obligations) includes a report to the Title IX Coordinator as described in § 106.8(a), which in turn states that any person may report sexual harassment to the Title IX Coordinator in person, by mail, phone, or e-mail. Section 106.8(b)(2) also requires the recipient to prominently display that contact information for the Title IX Coordinator on the recipient's website.

[1125] Section 106.30 (defining "supportive measures").

[1126] Section 106.30 (defining "formal complaint").

The Department disagrees that a recipient should have discretion to decide to dismiss formal complaints that are unsubstantiated or otherwise fail to meet some threshold of merit. The Department believes that where a complainant has chosen to file a formal complaint, or the Title IX Coordinator has decided to sign a formal complaint, the recipient *must* investigate those allegations; determinations about the merits of the allegations must be reached only by following the fair, impartial grievance process designed to reach accurate outcomes. As noted above, the final regulations revise § 106.45(b)(3) to provide for discretionary dismissals on specified grounds, but those grounds do not include a recipient's premature determination that allegations lack merit.

Whether or not many recipients currently provide written notice prior to conducting an interview as part of a Title IX grievance process, the Department believes written notice of allegations with adequate time to prepare for an interview constitutes a core procedural protection important to a fair process. A fundamental element of constitutional due process of law is effective notice that enables the person charged to participate in the proceeding.[1127] The final regulations promote clarity as to recipient's legal obligations, and promote respect for each complainant's autonomy, by distinguishing between a complainant's report of sexual harassment, on the one hand, and the filing of a formal complaint that has initiated a grievance process against a respondent, on the other hand. While the complainant and recipient may discuss the complainant's report of sexual harassment without notifying the respondent

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[1127] *Goss v. Lopez*, 419 U.S. 565, 579 (1975) ("At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given *some kind of notice* and afforded some kind of hearing. 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right *they must first be notified*.'") (internal citation omitted) (emphasis added); *id.* at 583 ("On the other hand, requiring *effective notice* and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action.") (emphasis added).

(including discussion to decide on appropriate supportive measures), when the complainant files a formal complaint, the respondent must be notified that the respondent is under investigation for the serious conduct defined as "sexual harassment" under § 106.30.

The Department understands commenters' assertions that waiting to provide notice of the allegations until after conducting an initial interview prevents a respondent from manipulating the respondent's own statements, and that some recipients' current practices permit the recipient an opportunity to decide after the initial respondent interview whether or not the recipient intends to proceed with the investigation. However, the Department believes that complainants deserve the clarity of knowing that the filing of a formal complaint *obligates* the recipient to investigate the allegations, and once the respondent is under investigation the respondent must be made aware of the allegations with sufficient time to prepare for an initial interview because "effective notice" in time to give the respondent opportunity to tell the respondent's "version of the events" helps prevent erroneous outcomes.[1128]

In response to commenters' concerns that the proposed rules did not provide a recipient sufficient leeway to halt investigations that seemed futile, the final regulations revise § 106.45(b)(3)(ii) to provide that a recipient may (in the recipient's discretion) dismiss a formal complaint, or allegations therein, in certain circumstances including where a complainant requests the dismissal (in writing to the Title IX Coordinator), where the respondent is no longer enrolled or employed by the recipient, or where specific circumstances prevent the recipient from meeting the recipient's burden to collect sufficient evidence (for example, where a postsecondary institution complainant has ceased participating in the investigation and the only inculpatory

[1128] *Goss*, 419 U.S. at 579.

evidence available is the complainant's statement in the formal complaint or as recorded in an interview by the investigator). Similarly, where it turns out that the allegations in a formal complaint do not meet the definition of sexual harassment under § 106.30, or did not occur against a person in the United States, or did not occur in the recipient's education program or activity, § 106.45(b)(3)(i) requires the recipient to dismiss the allegations (though the final regulations clarify that the recipient has discretion to address the allegations through a non-Title IX code of conduct) and notify the parties of the dismissal (which implies that the "parties" have already been informed that they are parties via receiving the § 106.45(b)(2) written notice of allegations). However, the fact that allegations of sexual harassment were raised in a formal complaint warrant notifying the respondent that those allegations had triggered an investigation, even if the allegations are subsequently dismissed, whether the dismissal is mandatory under § 106.45(b)(3)(i) or discretionary under § 106.45(b)(3)(ii). This gives both parties equal opportunity to appeal the recipient's dismissal decision, or to request that dismissed allegations be addressed under non-Title IX codes of conduct.[1129]

The Department believes that requiring subsequent written notice of allegations when the allegations under investigation change appropriately notifies the parties of a change in the scope of the investigation, and does not believe that this benefit would be achieved by only requiring a follow-up written notice after the investigation has concluded. The Department is requiring

[1129] The final regulations revise § 106.45(b)(8) so that parties have the right to appeal any dismissal decision. While some respondents may not desire to appeal a dismissal, other respondents may desire to challenge the recipient's conclusion that, for instance, the conduct alleged did not constitute sexual harassment as defined in § 106.30, because if the conduct constitutes Title IX sexual harassment the recipient is not permitted to discipline the respondent without first following the § 106.45 grievance process, which may provide stronger procedural rights and protections than other disciplinary proceedings a recipient might use if the recipient charges the respondent with a non-Title IX code of conduct violation over the allegations.

recipients to inform the parties of the alleged conduct that potentially constitutes sexual harassment under § 106.30, including certain details about the allegations (to the extent such details are known at the time). Although § 106.45(b)(2) requires subsequent written notice to the parties as the recipient discovers additional potential violations, the Department does not agree with the commenter that this requirement adds "no clear value" to the transparency of the investigation or that the benefits of such subsequent notice to the parties is outweighed by the administrative burden to the recipient of generating and sending such notices.[1130] If the respondent is facing an additional allegation, the respondent has a right to know what allegations have become part of the investigation for the same reasons the initial written notice of allegations is part of a fair process, and the complainant deserves to know whether additional allegations have (or have not) become part of the scope of the investigation. This information allows both parties to meaningfully participate during the investigation, for example by gathering and presenting inculpatory or exculpatory evidence (including fact and expert witnesses) relevant to each allegation under investigation.

The Department does not believe that requiring recipients to send written notice of the allegations under investigation will incentivize recipients to care less about school safety than about legal liability. While the written notice provision constitutes a legal obligation, the purpose

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[1130] Deciding whether additional procedural safeguards are required under constitutional due process of law involves balancing the "private" interests at stake (here, the interests of the parties in a recipient reaching an accurate outcome), the administrative burden and cost to the government (here, the recipient) to provide the additional procedure, and the likelihood that the additional procedure may reduce the risk of erroneous outcome. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). The Department believes that consideration of these factors weighs in favor of requiring subsequent written notices to the parties when the allegations change during an investigation: the outcome of a case poses serious consequences for both parties; recipients are not unaccustomed to sending written notices to students (and parents of minor students) for a wide range of activities; and ensuring that the parties' participation throughout the grievance process focuses on the actual allegations being investigated by the recipient significantly reduces the risk of erroneous outcomes.

of the provision is to ensure that parties have critical information about the recipient's investigation; in that way, the obligation to send written notice of the allegations forms part of the recipient's response demonstrating concern about the safety of the recipient's educational environment, not simply a legalistic obligation. Measures that a recipient should take specifically to protect the safety of a complainant, respondent, or members of the recipient's community are unaffected by the recipient's obligation to send written notice of the allegations to the parties. For example, a recipient's non-deliberately indifferent response under § 106.44(a) includes offering supportive measures to complainants, and supportive measures as defined in § 106.30 may be designed to protect a complainant's safety or deter sexual harassment. Under § 106.44(c), a respondent who poses an immediate threat to the physical health or safety of any student or other individual may be removed from the recipient's education program or activity on an emergency basis, with or without a grievance process pending.

Although the Department understands recipients' desire for as much flexibility as possible to design disciplinary proceedings that best meet the needs of a recipient's unique educational community, for the reasons discussed previously the Department believes that providing written notice of the allegations under investigation is not a procedural right that should be left to a recipient's discretion. The final regulations leave recipients flexibility to select the method of delivery of the written notices required under § 106.45(b)(2) (including the initial notice and any subsequent notices), and while the initial notice must be sent "upon receipt" of a formal complaint, with "sufficient time" for a party to prepare for an initial interview, such provisions do not dictate a specific time frame for sending the notice, leaving recipients flexibility to, for instance, inquire of the complainant details about the allegations that should be included in the written notice that may have been omitted in the formal complaint, and draft the

written notice, while bearing in the mind that the entire grievance process must conclude under the recipient's own designated time frames.

Changes: We have revised § 106.45(b)(3) to provide recipients with the discretion to dismiss a formal complaint, or allegations therein, where the complainant notifies the Title IX Coordinator in writing that the complainant wishes to withdraw the formal complaint or allegations, where the respondent is no longer enrolled or employed by the recipient, or where specific circumstances prevent a recipient from gathering evidence sufficient to reach a determination regarding responsibility.

Elementary and secondary schools

Comments: Several commenters argued that § 106.45(b)(2) would be harmful to students and administrators at elementary and secondary schools because accusations of sexual assault or abuse are often described without specific details or in a way that makes it difficult to determine whether the alleged misconduct falls under Title IX, under the recipient's code of conduct, or neither. Commenters argued that § 106.45(b)(2) would require school administrators to provide multiple written notices, because an initial description of the misconduct might make it seem like the allegations fall under several different codes of conduct. Another commenter stated that requiring that the respondent be given "sufficient time for a response before any initial interview" does not consider the possible threat to the learning environment or the developing nature of a minor's memory. Another commenter asserted that courts do not give elementary and secondary school students due process rights, so the written notice of allegations provision should not apply to elementary and secondary school recipients.

A few commenters advised changing the written notice provision to account for young complainants and respondents, especially students in preschool and elementary and secondary

schools by giving the Title IX Coordinator discretion to communicate to parents or parties over the phone rather than strictly in writing.

Commenters argued that, in elementary and secondary schools addressing peer harassment incidents, the written notice of allegations provision fails to take into account the high volume of low-level incidents schools address and how burdensome and expensive this provision would become for students, parents, and administrators. Commenters argued that this provision would escalate situations from relatively informal to extremely formal, which would be alarming for students and parents. One commenter agreed that the accused student must be afforded due process, including notice of the allegations and an opportunity to respond, but disagreed that the written notice provision should apply to elementary and secondary schools, because it is neither necessary nor reasonable for an elementary and secondary school administrator to send the level of detail required by § 106.45(b)(2) in a written notice for all sexual harassment cases. At least one commenter argued that public elementary and secondary schools in the commenter's State do not have "codes of conduct" and instead have policies approved by a board of education pursuant to the commenter's State education code. The commenter stated that the language of § 106.45(b)(2) does not fit the elementary and secondary school setting.

Discussion: The Department reiterates that the recipient need not provide the written notice of allegations under § 106.45(b)(2) unless a formal complaint has been filed; this should reduce commenters' concerns that elementary and secondary schools will be inundated with the need to generate written notices whenever any conduct termed "sexual harassment" is reported or that elementary and secondary school administrators will need to send out written notices concerning "vague" or "unspecific" reports of conduct that may or may not constitute sexual harassment.

Further, the Department clarifies that when a formal complaint contains allegations of conduct that could constitute not only sexual harassment defined by § 106.30 but also violations of other codes of conduct, the final regulations have revised the language used in § 106.45(b)(2) to remove confusing references to the recipient's code of conduct and focus this provision on the need to send notice of allegations that could constitute sexual harassment as defined in § 106.30. The Department appreciates the opportunity to clarify here that references in the final regulations to a recipient's "code of conduct" refer to any set of policies, rules, or similar codes that purport to govern the conduct or behavior of students or employees, whether such policies, rules, or codes have been crafted by the individual school itself, under mandates from a State or local law, pursuant to school board resolutions, or by other means. Furthermore, § 106.45(b)(2) requires the recipient to include in the written notice "sufficient details *known at the time*" (emphasis added), such that even if a young student describes a sexual harassment incident in a manner that omits precise, specific details, a recipient may still comply with § 106.45(b)(2)(i), and then send subsequent notices as described in § 106.45(b)(2)(ii) as details about allegations may be discovered during the investigation.

The Department notes that § 106.44(c) and § 106.44(d) allow a recipient to remove a respondent from the recipient's education program on an emergency basis, and place a non-student employee on administrative leave during the pendency of an investigation, alleviating commenters' concerns that giving the respondent sufficient time to respond by sending written notice that a grievance process is underway will allow a threat to remain in the educational environment. The recipient is also obligated to offer the complainant supportive measures, including during the pendency of a grievance process, and thus the Department does not believe

that requiring written notice to the parties after a formal complaint has been filed restricts a recipient's ability to provide for the safety of parties and deter sexual harassment.[1131]

The Department agrees with commenters that elementary and secondary school recipients, as well as postsecondary recipients, must appropriately address incidents of sexual harassment in order to avoid subjecting students and employees to sex discrimination in violation of Title IX. The Department notes that the Supreme Court has confirmed that public elementary and secondary school students are entitled to due process under the U.S. Constitution in school disciplinary proceedings.[1132] Although commenters are correct that no Supreme Court decision specifically requires written notice when a formal complaint of sexual misconduct has been filed, the Supreme Court has held that "effective notice" constitutes an essential element of due process because it allows the person accused to make sure that their "version of the events" is heard,[1133] and the Department reasonably has determined that providing written notice of allegations, containing details of the allegations that are known at the time, after a formal complaint has triggered a recipient's obligation to investigate and adjudicate sexual harassment constitutes an important procedural protection for the benefit of all participants in the grievance process, and increases the likelihood that the recipient will reach an accurate determination regarding responsibility, which is necessary to hold recipients accountable for providing remedies to victims of Title IX sexual harassment.

[1131] Section 106.30 (defining "supportive measures" as individualized services designed to, among other things, protect the safety of all parties and/or deter sexual harassment).
[1132] *Goss*, 419 U.S. at 578-79 (holding that in the educational context "the interpretation and application of the Due Process Clause are intensely practical matters" that require at a minimum notice and "opportunity for hearing appropriate to the nature of the case") (internal quotation marks and citations omitted).
[1133] *Goss*, 419 U.S. at 583.

The Department does not believe that the requirement for parties to receive written notice of the allegations needs to be modified when the parties are young. The final regulations revise § 106.8(b) to include parents on the list of persons to whom recipients send notice and information about the recipient's non-discrimination policy and procedures; the final regulations add § 106.6(g) to expressly state that these regulations do not alter the legal right of parents and guardians to exercise rights on behalf of parties; and nothing in the final regulations precludes a Title IX Coordinator from communicating with a young student's parent about the process (including conveying the same information as contained in a written notice) via telephone or in person so long as the written notice meets the requirements of § 106.45(b)(2).

The Department reiterates that the grievance process is initiated (and thus the written notice requirement applies) only when the complainant has filed, or the Title IX Coordinator has signed, a formal complaint. Thus, the written notice requirement does not "escalate" an incident; rather, a complainant's choice (or a Title IX Coordinator's decision) has resulted in a formal complaint triggering a grievance process. Only then is the recipient required to send the written notice of allegations under § 106.45(b)(2). Where no formal complaint has been filed by a complainant or signed by a Title IX Coordinator, the recipient is not obligated to "escalate" the reported incident by, for example, informing the respondent that the respondent has been reported to be a perpetrator of sexual harassment; a recipient is obligated to keep confidential provision of supportive measures to a complainant (which the recipient must offer to complainants), except as necessary to actually implement the supportive measures (for example, the respondent may need to know the identity of a complainant who has reported the respondent to have perpetrated sexual harassment if the appropriate supportive measure is a no-contact order

and the respondent needs to know with whom to avoid communicating under the terms of the order).

Because of the seriousness of the allegations in a formal complaint of sexual harassment, and the access to education that is at stake for both parties in a grievance process addressing those allegations, the Department requires the recipient to allow the parties to meaningfully participate in the grievance process. This participation requires written notice of allegations to both parties where there is a formal complaint, including the details specified in this provision. The Department disagrees that pertinent information such as the identity of the parties involved, location and date of the incident, and the nature of the misconduct that could constitute sexual harassment as defined in § 106.30, with "sufficient details known at the time" (as § 106.45(b)(2) provides) amounts to an unnecessary or unreasonable amount of detail for recipients to include in a written notice of allegations, including in elementary and secondary schools. The provision's use of the phrases "known at the time" and "if known" in this provision indicates that the Department understands that not every significant detail will be known in every situation, yet expects the written notice to provide both parties with key information about the alleged incident so that both parties understand the scope of the investigation and can prepare to meaningfully participate by advancing the party's own interests in the outcome of the case. The final regulations also revise § 106.45(b)(2) so that the written notice of allegations also notifies the parties of each party's right to an advisor of choice, further ensuring that parties are prepared to meaningfully participate in a grievance process.

Changes: We have revised § 106.45(b)(2)(ii) to remove references to a recipient's "code of conduct" and adds reference to sexual harassment "as defined in § 106.30" to reduce confusion among commenters as to whether the written notice requirement applies to allegations that

constitute sexual harassment as defined in § 106.30 or to other violations of a recipient's code of conduct. For the same reason, we have revised § 106.45(b)(2)(i) to reference the grievance process "that complies with § 106.45" to clarify that the written notice pertains to the grievance process a recipient must follow to comply with Title IX. We have revised § 106.8(a) to include parents and legal guardians of elementary and secondary school students on the list of persons to whom recipients send notice and information about the recipient's non-discrimination policy and procedures. We have added § 106.6(g) to state that nothing in the final regulations alters the legal right of parents or guardians to exercise rights on behalf of a party.

Confidentiality and Anonymity for Complainants

Comments: One commenter suggested that written notice of allegations sent to the parties naming the complainant and listing the details of the allegations could be leaked or forwarded to unrelated third parties, which could damage the respondent's reputation, threaten both parties' access to education, and possibly violate State and Federal health care privacy laws regarding the respondent's or complainant's medical history. Some commenters requested that § 106.45(b)(2) be revised to bar both respondents and complainants from disclosing personally identifiable information except as necessary to prepare a response.

Other commenters believed that § 106.45(b)(2), by sending notice of the formal complaint, exposes complainants to increased scrutiny not applied to students reporting other kinds of student misconduct.

Several commenters wanted the Department to give recipients flexibility to allow complainants to stay anonymous in certain circumstances, and to retain the approach under the 2001 Guidance, which advised that an institution may "evaluate the confidentiality request" of a complainant or respondent "in the context of its responsibility to provide a safe and non-

discriminatory environment for all schools,"[1134] considering factors like the severity of the alleged conduct.

One commenter asserted that there is precedent for including only the initials of parties in the pre-investigation stage of the complaint.[1135] Other commenters argued that respondents do not need to know the complainant's identity to meaningfully participate in the recipient's grievance procedure.

Several commenters argued that it is unfair to complainants to expose the complainant's identity, especially because proposed § 106.44(b)(2) required a Title IX Coordinator to file a formal complaint over the wishes of a complainant where multiple reports had been made against the same respondent. Commenters argued that this could significantly chill a complainant's willingness to report sexual misconduct because the complainant's identity could be revealed to the respondent even when the complainant never even wanted to initiate a grievance process. Commenters wondered whether a Title IX Coordinator must deny requests by complainants to remain anonymous if the Title IX Coordinator elects to file a formal complaint.

Commenters argued that, due to a fear of retaliation, many students are unwilling to report an employee or professor if the student cannot remain anonymous. One commenter stated that, for other types of misconduct allegations, such as theft of property, employees are often questioned without being told who reported them.

[1134] Commenters cited: 2001 Guidance at 17.
[1135] Commenter cited: Maricella Miranda, *Victims' names can be withheld in criminal complaints, court rules in Ramsey County case*, PIONEER PRESS (Aug. 18, 2009).

Some commenters suggested modifying § 106.45(b)(2) to expressly bar complainants from maintaining anonymity, or to forbid schools from investigating allegations unless complainant agree to identify themselves.

Commenters suggested that § 106.45(b)(2) should be modified to require schools to give the respondent a copy of the complainant's written formal complaint when sending the written notice of allegations, or if the formal complaint was not written then the recipient should send the respondent a verbatim summary of the oral complaint.

Other commenters supported § 106.45(b)(2) and shared personal stories where, as respondents, the commenters could not understand the allegations without knowing the identity of the complainant. For example, one commenter stated that the recipient attempted to inform the respondent of sexual misconduct allegations while also withholding the identity of the complainant and as a result, the respondent spent much of the investigation believing that the allegations centered around a kiss at a party with one person, only to find out after the identity of the complainant was finally revealed that the allegations were actually made by a different person. Other commenters supported § 106.45(b)(2) because while campus sexual misconduct hearings are not criminal cases, they are proceedings with significant and far-reaching consequences, including possible expulsion making it difficult for a respondent to transfer to any other university, and respondents deserve the basic due process right to know details about the allegations. At least one commenter cited a survey of public perceptions of higher education, including topics such as campus sexual assault and due process; in the survey, 81 percent of people agreed that students accused of sexual assault on college campuses should have the right

to know the charges against them before being called to defend themselves, which the commenters argued should include the identity of the complainant.[1136]

Discussion: The Department clarifies that recipients (and, as applicable, parties) must follow relevant State and Federal health care privacy laws throughout the grievance process. Nothing in the notice should divulge the complainant's (or respondent's) medical information or other sensitive information, nor does § 106.45(b)(2) require disclosure of such information. To further respond to commenters' concerns about disclosure of medical information, the final regulations add to § 106.45(b)(5)(i) a prohibition against a recipient accessing or using for a grievance process the medical, psychological, and similar records of any party without the party's voluntary, written consent.[1137] If the party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3.[1138] The Department agrees with commenters that it is unacceptable for any person to leak or disseminate information to retaliate against another person, and the final regulations add § 106.71, which prohibits the recipient or any other person from intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by Title IX. As discussed in this preamble at § 106.45(b)(5)(iii), the parties have a right to discuss the allegations under investigations, but this right does not preclude a recipient from warning the parties not to discuss or disseminate the allegations in a manner that constitutes retaliation or unlawful tortious conduct.

[1136] Commenters cited: Bucknell Institute for Public Policy, *Perceptions of Higher Education Survey – Topline Results* (2017).
[1137] Section 106.45(b)(5)(i).
[1138] *Id*.

The Department understands commenters' concerns that complaints of other forms of student misconduct may not lead to the same grievance process (for example, the recipient sending a written notice of allegations to both parties) as the process required under these final regulations for Title IX sexual harassment. However, for reasons described above, the Department believes that both parties should have the benefit of understanding how the recipient has framed the scope of a sexual harassment investigation upon receipt of a formal complaint, including sufficient details known at the time, to permit the respondent opportunity to respond to the allegations. The Department disagrees that this results in unwarranted "scrutiny" of a complainant, and reiterates that written notice of allegations is required only after a formal complaint has been filed; thus, complainants need not be identified by name to a respondent upon a report of sexual harassment, including for the purpose of obtaining supportive measures.[1139] However, a formal complaint alleging sexual harassment triggers a grievance process, and in the interest of fairness that process must commence with both parties receiving written notice of the pertinent details of the incident under investigation. We have removed proposed § 106.44(b)(2) from these final regulations, which provision would have required a Title IX Coordinator to file a formal complaint upon receiving multiple reports against the same respondent. Removal of that proposed provision reduces the likelihood that a complainant's desire *not* to file a formal complaint will be overridden by a Title IX Coordinator's decision to sign a formal complaint.

[1139] Under § 106.30 defining "supportive measures" recipients must keep confidential the provision of supportive measures to a complainant or respondent to the extent that maintaining confidentiality does not impair the ability of the recipient to provide the supportive measures. Thus, unless a particular supportive measure affects the respondent in a way that requires the respondent to know the identity of the complainant (for example, a mutual no-contact order), the Title IX Coordinator need not, and should not, disclose the complainant's identity to the respondent during the process of selecting and implementing supportive measures for the complainant.

The Department disagrees that using only the initials of the parties (instead of the full names), or withholding the complainant's identity entirely, or requiring both parties to refrain from disclosing each other's personally identifiable information, sufficiently permits the parties to meaningfully participate in the grievance process. The Department reiterates that the written notice of allegations serves both parties' interests. While complainants may often know the identity of a respondent, in some situations a complainant does not know the respondent's identity, but the written notice of allegations provision ensures that if the recipient knows or discovers the respondent's identity, the complainant is informed of that important fact. Further, the complainant's receipt of written notice under this provision ensures that the complainant understands the way in which the recipient has framed the scope of the investigation so that the complainant can meaningfully participate and advance the complainant's own interests throughout the grievance process.[1140]

The Department notes that the written notice of allegations provision does not require listing personally identifiable information of either party beyond the "identity" of the parties; thus, the written notice need not, and should not, for example, contain other personally identifiable information such as dates of birth, social security numbers, or home addresses, and

[1140] As discussed throughout this preamble, the final regulations: acknowledge the right of parents or guardians to exercise legal rights to act on behalf of a complainant (or respondent) in § 106.6(g); give both parties the right to select an advisor of choice and revise § 106.45(b)(2) to require the initial notice of allegations to advise parties of that right, and to notify the parties of the recipient's grievance process which includes a description of the range of supportive measures available to complainants and respondents; and forbid recipients from restricting the ability of the parties to discuss the allegations under investigation, in § 106.45(b)(5)(iii), including for the purpose of emotional or personal support, advice, or advocacy. Thus, these final regulations acknowledge that participation in a grievance process is often a difficult circumstance for any party and aim to provide numerous avenues by which a party may receive support, assistance, and advice tailored to the party's individual needs and wishes throughout the grievance process.

nothing in the final regulations precludes a recipient from directing parties not to disclose such personally identifiable information.

The Department acknowledges that the final regulations require identification of the parties after a formal complaint has triggered a grievance process, in a way that the 2001 Guidance did not.[1141] The Department does not believe that anonymity during a grievance process can lead to fair, reliable outcomes, and thus requires party identities (to the extent they are known) to be included in the written notice of allegations. As noted above, where a formal complaint has not been filed by a complainant or signed by a Title IX Coordinator, the final regulations do not require a recipient to disclose a complainant's identity to a respondent (unless needed in order to provide a particular supportive measure, such as a mutual no-contact order where a respondent would need to know the identity of the person with whom the respondent's communication is restricted). In situations where a complainant's life is in danger from the respondent, such a situation may present the kind of immediate threat to physical health or safety that justifies an emergency removal of a respondent under § 106.44(c). Further, nothing in the final regulations affects a complainant's ability to seek emergency protective orders from a court of law. The final regulations also expressly prohibit retaliation, in § 106.71, and recipients must

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[1141] 2001 Guidance at 17 ("The school should inform the student that a confidentiality request may limit the school's ability to respond. The school also should tell the student that Title IX prohibits retaliation and that, if he or she is afraid of reprisals from the alleged harasser, the school will take steps to prevent retaliation and will take strong responsive actions if retaliation occurs. If the student continues to ask that his or her name not be revealed, the school should take all reasonable steps to investigate and respond to the complainant consistent with the student's request as long as doing so does not prevent the school from responding effectively to the harassment and preventing harassment of other students."); *cf. id.* (stating that constitutional due process of law requires recipients that are public institutions to disclose the complainant's identity to the respondent and in such a situation the recipient should honor the complainant's desire for confidentiality and not proceed to discipline the alleged harasser.). The final regulations require identification of the name of the complainant where a formal complaint has been filed by a complainant or signed by a Title IX Coordinator, not only with respect public institutions but also as to private institutions, because constitutional due process and fundamental fairness require the respondent to know the identity of the alleged victim in order to meaningfully respond to the allegations.

respond to complaints of retaliation in order to protect complainants whose identity has been disclosed as a result of a formal complaint (or, as also discussed herein, where providing supportive measures to the complainant necessitates the respondent knowing the complainant's identity). Thus, in situations where a complainant fears that disclosure to the respondent of the complainant's identity (or the fact that the complainant has filed a formal complaint) poses a risk of retaliation against the complainant, the Title IX Coordinator must discuss available supportive measures and consider the complainant's wishes regarding supportive measures designed to protect the complainant's safety and deter sexual harassment.

The Department understands commenters' concerns that complainants may not want to report misconduct by an employee if the complainant cannot remain anonymous. The Department reiterates that the written notice of allegations identifying the parties to a sexual harassment incident is required only after a formal complaint has been filed by a complainant or signed by a Title IX Coordinator. Complainants, therefore, need not feel dissuaded from reporting sexual harassment by an employee due to a desire for the complainant's identity to be withheld from the respondent, because unless and until a formal complaint is filed, the final regulations do not require a recipient to disclose the complainant's identity to a respondent, including an employee-respondent (unless the respondent must be informed of the complainant's identity in order for the Title IX Coordinator to effectively implement a particular supportive measure that would necessitate the respondent knowing the complainant's identity, such as a no-contact order). The Department understands that some recipients may choose to question an employee-respondent about misconduct, such as stealing or theft, without disclosing to the employee the identity of the person who reported the theft. The Department notes that the final regulations do not prevent a recipient from questioning an employee-respondent about sexual

harassment allegations without disclosing the complainant's identity,[1142] provided that the recipient does not take disciplinary action against the respondent without first applying the § 106.45 grievance process (or unless emergency removal is warranted under § 106.44(c), or administrative leave is permitted under § 106.44(d)).

For the reasons already mentioned, the Department declines to require recipients to maintain the anonymity of complainants once a formal complaint has been filed. The Department also will not require recipients to give respondents a copy of the formal complaint. The written notice of allegations provision already requires the recipient to provide the date, time, alleged conduct, and identity of the complainant, so the information required by § 106.45(b)(2) provides sufficient opportunity for the respondent to participate in the grievance process while protecting the complainant's privacy rights to the extent that, for example, the complainant alleged facts in the formal complaint that are unrelated to Title IX sexual harassment and thus do not relate to the allegations that a recipient investigates in the grievance process.

While the Department does not decide policy matters based on public opinion polls, the Department agrees with commenters that informing the respondent of the "charges against them" represents a staple of a fair process that increases party and public confidence in the fairness and accuracy of Title IX proceedings, and believes that § 106.45(b)(2) is an important feature of the § 106.45 grievance process.

[1142] The Department notes that a recipient's questioning of a respondent (whether a student or employee) about a reported sexual harassment incident, in the absence of a formal complaint, may not be used as part of an investigation or adjudication if a formal complaint is later filed by the complainant or signed by the Title IX Coordinator, because § 106.45(b)(5)(v) requires that a party be given written notice of any interview or meeting relating to the allegations under investigation, and a recipient is precluded from imposing disciplinary sanctions on a respondent without following the § 106.45 grievance process.

Changes: The final regulations add § 106.71 prohibiting retaliation against any person for exercising rights under Title IX or for participating (or refusing to participate) in a Title IX grievance process, and revise § 106.45(b)(5)(i) to prevent recipients from using a party's treatment records without the party's (or party's parent, if applicable) voluntary, written consent.

General Modification Suggestions

Comments: Because anything a respondent says may be used against the respondent in subsequent proceedings at an interview regarding sexual assault, including criminal proceedings, one commenter recommended that § 106.45(b)(2) include a statement that, when the allegation against the respondent would constitute a felony in the State in which the accusation is made, the respondent's silence may not be construed as evidence of guilt or responsibility for the allegation.

Another commenter asked the Department to require the Title IX Coordinator to e-mail both the complainant and the respondent at least once a week to let them know of progress, changes, and updates on their case.

Discussion: To make clear that respondents may remain silent in circumstances in which answering a question might implicate a respondent's constitutional right to avoid self-incrimination, and to protect other rights of the parties, § 106.6(d)(2) states that nothing in Title IX requires a recipient to deprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution. The final regulations also add to § 106.45(b)(6)(i) a provision that the decision-maker must not draw inferences about the determination regarding responsibility based on a party's failure or refusal to appear at the hearing or answer cross-examination questions.