The Department declines to follow the commenter's recommendation 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. The recipient has discretion to be more responsive than the final regulations require, but the final regulations do not require the recipient to contact the parties at least once a week. The Department notes that the final regulations require the recipient to send notice to the parties regarding essential case developments such as where additional allegations become part of the investigation; where allegations or the entire formal complaint have been dismissed; where any short-term delay or time frame extension has been granted for good cause; and after the determination regarding responsibility has been made.

Changes: 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.

*General Clarification Requests*

Comments: Several commenters requested that the Department clarify what "sufficient time [for the respondent] to prepare a response" means. Likewise, several commenters asked that the Department clarify when a recipient must provide notice of any additional allegations to the parties, asserting that § 106.45(b)(2) does not define "upon receipt," but that if read literally, that phrase could suggest "immediately upon receipt," which is impossible in light of the detailed information that must be provided in the written notice. One commenter suggested a definitive guideline (e.g., at least five workdays after receipt) should be imposed. Commenters asserted that ascertaining what the allegations are or how they should be phrased is not always obvious "upon receipt" of a formal complaint; a degree of fact-finding and/or analysis must be conducted first.

One commenter argued that the provision should set forth a reasonable time frame for institutions to evaluate the information provided in a formal complaint before issuing the notice described in 106.45(b)(2)(i). Another commenter asked the Department to explain the consequences to universities of violating § 106.45(b)(2).

Discussion: The Department understands commenters' concerns that sometimes preparing a written notice of the allegations requires time for the recipient to intake a formal complaint and then compile the details required for a written notice. The Department will not interpret this provision to require notice to be provided "immediately" (and the provision does not use that word), but rather notice must be provided early enough to allow the respondent "sufficient time to prepare a response." The Department also notes that a recipient's discretion in this regard is constrained by a recipient's obligation to conduct a grievance process within the recipient's designated, reasonably prompt time frames, such that waiting to send the written notice of allegations (even without yet conducting initial interviews with parties) could result in the recipient failing to meet time frames applicable to its grievance process. Whether the recipient provided the respondent "sufficient time" under § 106.45(b)(2) is a fact-specific determination. Consequences for failing to comply with the final regulations include enforcement action by the Department requiring the recipient to come into compliance by taking remedial actions the Department deems necessary, consistent with 20 U.S.C. 1682, and potentially placing the recipient's Federal funding at risk.

Changes: None.

*Dismissal and Consolidation of Formal Complaints*

Section 106.45(b)(3)(i) Mandatory Dismissal of Formal Complaints

Comments: Many commenters supported proposed § 106.45(b)(3) because it obligates recipients to investigate only allegations in a formal complaint, and thus provides the victim with control over whether or not to trigger the formal grievance process by filing a formal complaint. Other commenters appreciated how clear this provision was for recipients to follow. Some commenters sought clarification with respect to the practical application of this provision, such as what standard would schools be held to if they initiate proceedings on their own, but were not required to do so under Title IX. Certain commenters asked whether a respondent could claim that the school failed to comply with the proposed regulations and thus violated respondent's rights if the school used separate proceedings because the respondent's alleged conduct did not satisfy the three requirements in § 106.44(a) and § 106.45(b)(3)(i). Other commenters asked whether a respondent can use the dismissal provision to demand that a school dismiss a complaint against the respondent.

In contrast, several comments recommended that the Department remove any provision requiring dismissal of certain complaints so that recipients retain institutional flexibility to investigate complaints at their own discretion. Many commenters expressed the belief that schools should investigate each and every claim and refrain from making an initial determination (some viewed this initial determination as requiring individuals to make a prima facie case) of whether the alleged conduct satisfied the § 106.30 definition of sexual harassment. At least one commenter believed that schools should not have to dismiss even when a victim is not actually harmed. Another commenter stated that the proposed rules provided no avenue for reviewing or appealing a recipient's determination as to whether the alleged conduct satisfies the definition of

sexual harassment. Commenters asserted that the Department has no authority to forbid or preclude schools from investigating non-Title IV matters that affect their institutions, but only the authority to require schools to respond to sexual harassment. Several commenters also urged the Department to transform the provision from a mandatory provision to a permissive provision by replacing "must" with "may." Many commenters opposed the dismissal provision believing that the provision required institutions to always dismiss or ignore allegations that occurred off-campus. Several commenters cited the concern that dismissing a large number of off-campus complaints will disincentivize reporting by students altogether, forcing students to go to police departments instead.

Combined with urging the Department to expand the definition of sexual harassment in § 106.30 or alter the "education program or activity" jurisdictional requirement in § 106.44(a) for fear that recipients will be required to dismiss too many complaints, many commenters argued that the mandatory dismissal language in § 106.45(b)(3) effectively foreclosed recipients from addressing sexual harassment that harms students at alarming rates (e.g., harassment that is severe but not pervasive, or sexual assaults of students, by other students, that occur outside the recipient's education program or activity) even voluntarily (or under State laws) under a recipient's non-Title IX codes of conduct.

Some commenters argued that the language in § 106.45(b)(3) was inconsistent with the language of § 106.44(a) because proposed § 106.45(b)(3) omitted reference to conduct that occurred "against a person in the United States."

Discussion: We appreciate commenters' support for this provision's requirement that recipients must investigate allegations in a formal complaint, and agree that this provides complainants with autonomy over choosing to file a formal complaint that triggers an investigation. We

acknowledge those comments expressing the concern that as proposed, § 106.45(b)(3) effectively required recipients to make an initial determination as to whether the alleged conduct satisfies the definition of sexual harassment in § 106.30 and whether it occurred within the recipient's education program or activity, and to dismiss complaints based on that initial determination, leaving recipients, complainants, and respondents unclear about whether dismissed allegations could be handled under a recipient's non-Title IX code of conduct. As discussed below, we have revised § 106.45(b)(3)(i) to mirror the conditions listed in § 106.44(a) (by adding "against a person in the United States"), and we have added language to clarify that the mandatory dismissal in this provision is only for Title IX purposes and does not preclude a recipient from responding to allegations under a recipient's non-Title IX codes of conduct.

We are also persuaded by commenters who expressed concern that the proposed rules did not provide an avenue for reviewing or appealing a recipient's initial determination to dismiss allegations under this provision, and we have revised § 106.45(b)(3)(iii) to require the recipient to notify the parties of a dismissal decision, and we have revised § 106.45(b)(8) to give both parties equal right to appeal a dismissal decision.

The § 106.45 grievance process obligates recipients to investigate and adjudicate allegations of sexual harassment for Title IX purposes; the Department does not have authority to require recipients to investigate and adjudicate misconduct that is not covered under Title IX, nor to preclude a recipient from handling misconduct that does not implicate Title IX in the manner the recipient deems fit. In response to commenters' concerns, the final regulations clarify that dismissal is mandatory where the allegations, if true, would not meet the Title IX jurisdictional conditions (i.e., § 106.30 definition of sexual harassment, against a person in the United States, in the recipient's education program or activity), reflecting the same conditions that trigger a

recipient's response under § 106.44(a). The criticism of many commenters was well-taken as to the lack of clarity in the proposed rules regarding a recipient's discretion to address allegations subject to the mandatory dismissal through non-Title IX code of conduct processes. The final regulations therefore revise § 106.45(b)(3)(i) to expressly state (emphasis added) that "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*." The Department notes that recipients retain the flexibility to employ supportive measures in response to allegations of conduct that does not fall under Title IX's purview, as well as to investigate such conduct under the recipient's own code of conduct at the recipient's discretion. This clarifies that the Department does not intend to dictate how a recipient responds with respect to conduct that does not meet the conditions specified in § 106.44(a). For similar reasons, the Department does not believe that it has the authority to make dismissal optional by changing "must dismiss" to "may dismiss" because that change would imply that if a recipient chose not to dismiss allegations about conduct that does not meet the conditions specified in § 106.44(a), the Department would nonetheless hold the recipient accountable for following the prescribed grievance process, but the § 106.45 grievance process is only required for conduct that falls under Title IX. The Department therefore retains the mandatory dismissal language in this provision and adds the clarifying language described above. Thus, these final regulations leave recipients discretion to address allegations of misconduct that do not trigger a recipient's Title IX response obligations due to not meeting the Section 106.30 definition of sexual harassment, not occurring in the recipient's education program or activity, or not occurring against a person in the U.S.

Changes: We are revising § 106.45(b)(3)(i) to add "against a person in the United States" to align this provision with the conditions stated in § 106.44(a). We are also revising § 106.45(b)(3)(i) to clarify that a mandatory dismissal under this provision is a dismissal for purposes of Title IX and does not preclude action under another provision of the recipient's code of conduct. We add § 106.45(b)(3)(iii) to require recipients to send the parties written notice of any dismissal decision, and we have revised § 106.45(b)(8) to give both parties equal rights to appeal a recipient's dismissal decisions.

Section 106.45(b)(3)(ii)-(iii) Discretionary Dismissals / Notice of Dismissal

Comments: Some commenters suggested that the Department provide greater flexibility to institutions to decide whether or not a full investigation is merited. For instance, some commenters suggested that in circumstances involving a frivolous accusation, a matter that has already been investigated, complaints by multiple complainants none of whom are willing to participate in the grievance process, or when there has been an unreasonable delay in filing that could prejudice the respondent, the Department should grant institutions greater flexibility to determine whether or not to start or continue a formal investigation. At least one commenter suggested that, if greater flexibility were provided, institutions should also be required to document why they did not choose to conduct a formal investigation. Other commenters requested that the Department expand victims' options for institutional responses to include non-adversarial choices.

Discussion: We are persuaded by the commenters urging the Department to grant recipients greater discretion and flexibility to dismiss formal complaints under certain circumstances. Accordingly, we are revising § 106.45(b)(3) to permit discretionary dismissals. Specifically, the Department is adding § 106.45(b)(3)(ii), which allows (but does not require) recipients to

dismiss formal complaints in three specified circumstances: where a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; where the respondent is no longer enrolled or employed by the recipient; or where specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the allegations contained in the formal complaint.

The Department believes that § 106.45(b)(3)(ii) reaffirms the autonomy of complainants and their ability to choose to remove themselves from the formal grievance process at any point, while granting recipients the discretion to proceed with an investigation against a respondent even where the complainant has requested that the formal complaint or allegations be withdrawn (for example, where the recipient has gathered evidence apart from the complainant's statements and desires to reach a determination regarding the respondent's responsibility). By granting recipients the discretion to dismiss in situations where the respondent is no longer a student or employee of the recipient, the Department believes this provision appropriately permits a recipient to make a dismissal decision based on reasons that may include whether a respondent poses an ongoing risk to the recipient's community, whether a determination regarding responsibility provides a benefit to the complainant even where the recipient lacks control over the respondent and would be unable to issue disciplinary sanctions, or other reasons.[1143] The final category of discretionary dismissals addresses situations where specific circumstances prevent a recipient from meeting the recipient's burden to collect evidence sufficient to reach a

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[1143] The Department notes 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 and that continuing a Title IX sexual harassment investigation even when the accused employee has left the recipient's employ may assist the recipient in knowing whether the recipient does, or does not, have probable cause to believe the employee engaged in sexual misconduct. *E.g.*, https://www2.ed.gov/policy/elsec/leg/essa/section8546dearcolleagueletter.pdf.

determination regarding responsibility; for example, where a complainant refuses to participate in the grievance process (but also has not decided to send written notice stating that the complainant wishes to withdraw the formal complaint), or where the respondent is not under the authority of the recipient (for instance because the respondent is a non-student, non-employee individual who came onto campus and allegedly sexually harassed a complaint), and the recipient has no way to gather evidence sufficient to make a determination, this provision permits dismissal. The Department wishes to emphasize that this provision is *not* the equivalent of a recipient deciding that the evidence gathered has not met a probable or reasonable cause threshold or other measure of the quality or weight of the evidence, but rather is intended to apply narrowly to situations where specific circumstances prevent the recipient from meeting its burden in § 106.45(b)(5)(i) to gather sufficient evidence to reach a determination. Accordingly, a recipient should not apply a discretionary dismissal in situations where the recipient does not know whether it can meet the *burden of proof* under § 106.45(b)(5)(i). Decisions about whether the recipient's burden of proof has been carried must be made in accordance with §§ 106.45(b)(6)-(7) – not prematurely made by persons other than the decision-maker, without following those adjudication and written determination requirements.

The Department declines to authorize a discretionary dismissal for "frivolous" or "meritless" allegations because many commenters have expressed to the Department well-founded concerns that complainants have faced disbelief or skepticism when reporting sexual harassment, and the Department believes that where a complainant has filed a formal complaint, the recipient must be required to investigate the allegations without dismissing based on a conclusion that the allegations are frivolous, meritless, or otherwise unfounded, because the point of the § 106.45 grievance process is to require the recipient to gather and objectively

evaluate relevant evidence before reaching conclusions about the merits of the allegations. In making the revisions to § 106.45(b)(3)(ii) authorizing three grounds for a discretionary dismissal of a formal complaint (or allegations therein), the Department believes it is reaching a fair balance between obligating the recipient to fully investigate all allegations that a complainant has presented in a formal complaint, with the recognition that certain circumstances render completion of an investigation futile. Because these three grounds for dismissal are discretionary rather than mandatory, the recipient retains discretion to take into account the unique facts and circumstances of each case before reaching a dismissal decision.

Finally, we are also persuaded by commenters' recommendations that the Department offer the parties an appeal from a recipient's dismissal decisions. The final regulations add § 106.45(b)(3)(iii) requiring that the recipient promptly send the parties written notice so that the parties know when a formal complaint (or allegations therein) has been dismissed (whether under mandatory dismissal, or discretionary dismissal), including the reason for the dismissal. This requirement promotes a fair process by informing both parties of recipient's actions during the grievance process particularly as to a matter as significant as a dismissal of a formal complaint (or allegations therein). Including an explicit notice requirement under this provision is also consistent with the Department's goal of providing greater clarity and transparency as to a recipient's obligations and what the parties to a formal grievance process can expect. The final regulations also revise the appeals provision at § 106.45(b)(8) to allow the parties equal opportunity to appeal any dismissal decision of the recipient.

Changes: The Department is adding § 106.45(b)(3)(ii) to specify three situations where a recipient is permitted but not required to dismiss a formal complaint: where a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the

formal complaint or any allegations therein; where the respondent is no longer enrolled or employed by the recipient; or where specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the allegations contained in the formal complaint. The Department is also adding § 106.45(b)(3)(iii) to require a recipient to notify the parties, in writing, as to any mandatory or discretionary dismissal and reasons for the dismissal. We also revise the appeals provision at § 106.45(b)(8) to allow the parties equal opportunity to appeal any dismissal decision of the recipient.

Section 106.45(b)(4) Consolidation of Formal Complaints

Comments: One commenter suggested revising references to "both parties" to "all parties" to account for incidents that involve more than two parties. One commenter criticized the proposed rules for seeming to contemplate that sexual harassment incidents only involve a single victim and a single perpetrator and failing to acknowledge that the process may involve multiple groups of people on either side. Another commenter asked the Department to explain how a single incident involving multiple parties would be handled. A few commenters asserted that some recipients have a practice of not allowing a respondent to pursue a counter-complaint against an original complainant, resulting in what one commenter characterized as an unfair rule that amounts to "first to file, wins."

Discussion: In response to commenters' concerns that the proposed rules did not sufficiently provide clarity about situations involving multiple parties, and in response to commenters who asserted that recipients have not always understood how to handle a complaint filed by one party against the other party, the Department adds § 106.45(b)(4), addressing consolidation of formal complaints. The Department believes that recipients and parties will benefit from knowing that recipients have discretion to consolidate formal complaints in situations that arise out of the same

facts or circumstances and involve more than one complainant, more than one respondent, or what amount to counter-complaints by one party against the other. Section 106.45(b)(4) further clarifies that where a grievance process involves more than one complainant or respondent, references to the singular "party," "complainant" or "respondent" include the plural.

Changes: The final regulations add § 106.45(b)(4) to give recipients discretion to consolidate formal complaints of sexual harassment where the allegations of sexual harassment arise out of the same facts or circumstances. Where a grievance process involves more than one complainant or more than one respondent, references in § 106.45 to the singular "party," "complainant," or "respondent" include the plural, as applicable.

*Investigation*

Section 106.45(b)(5)(i) Burdens of Proof and Gathering Evidence Rest on the Recipient

Comments: Some commenters supported this provision based on personal stories involving the recipient placing the burden of proof on a party when the party had no rights to interview witnesses or inspect locations involved in the incident. One commenter supported this provision because it is entirely appropriate that complainants not be assigned the burden of proof or burden of producing evidence since they are seeking equal access to education and it is the school that should provide equal access, and removing these burdens from the shoulders of the respondent is also an important part of the accused's presumption of innocence. One commenter supported placing the burden of proof on the recipient because it is always the school's responsibility to ensure compliance with Title IX.

Some commenters believe that placing the burden of proof on the recipient is tantamount to putting it on the survivor(s) to prove all the elements of the assault, which is an impossible burden and which will deter survivor(s) from reporting and recovering from the assault. One

commenter supported placing the burden of gathering evidence on the recipient but not the burden of proof because the recipient is not a party to the proceeding. Some commenters expressed concern that this provision of the final regulations will cause instability in the system because placing the burden of gathering evidence on the recipient suggests an adversarial rather than educational process and opens recipients up to charges that the recipient failed to do enough to gather evidence. Various commenters also contended that this provision of the final regulations is too strict and demanding. Some commenters suggested that Title IX requires only that an institution demonstrate that it did not act with deliberate indifference when it had actual knowledge of sexual harassment or sexual assault – not proving whether each factual allegation in a complaint has merit – and that requiring a recipient to prove each allegation is a burden that Title IX itself has not imposed on recipients.

Some commenters suggested explaining what the recipient can and cannot do in pursuit of gathering evidence, or limiting the recipient's burden to gathering evidence "reasonably available." Other commenters suggested requiring the recipient to investigate all reasonable leads and interview all witnesses identified by the parties.

Discussion: The Department appreciates commenters' support for § 106.45(b)(5)(i). The Department agrees with commenters who asserted that the recipient is responsible for ensuring equal access to education programs and activities and should not place the burden of gathering relevant evidence, or meeting a burden of proof, on either party; Title IX obligates recipients to operate education programs and activities free from sex discrimination, and does not place burdens on students or employees who are seeking to maintain the equal educational access that recipients are obligated to provide. The Department believes that § 106.45(b)(5)(i) is important to providing a fair process to both parties by taking the burden of factually determining which

situations require redress of sexual harassment off the shoulders of the parties. At the same time, the final regulations ensure that parties may participate fully and robustly in the investigation process, by gathering evidence, presenting fact and expert witnesses, reviewing the evidence gathered, responding to the investigative report that summarizes relevant evidence, and asking questions of other parties and witnesses before a decision-maker has reached a determination regarding responsibility.

The Department disagrees that § 106.45(b)(5)(i) places a *de facto* burden of proof on the complainant to prove the elements of an alleged assault, and disagrees that this provision is likely to chill reporting. To the contrary, this provision clearly prevents a recipient from placing that burden on a complainant (or a respondent). The Department disagrees that the recipient should bear the burden of producing evidence yet not bear the burden of proof at the adjudication; the Department recognizes that the recipient is not a party to the proceeding, but this does not prevent the recipient from presenting evidence to the decision-maker, who must then objectively evaluate relevant evidence (both inculpatory and exculpatory) and reach a determination regarding responsibility. Nothing about having to carry the burden of proof suggests that the recipient must desire or advocate for meeting (or not meeting) the burden of proof; to the contrary, the final regulations contemplate that the recipient remains objective and impartial throughout the grievance process, as emphasized by requiring a recipient's Title IX personnel involved in a grievance process to serve free from bias and conflicts of interest and to be trained in how to serve impartially and how to conduct a grievance process.[1144] Whether the evidence gathered and presented by the recipient (i.e., gathered by the investigator and with respect to

[1144] Section 106.45(b)(1)(iii).

relevant evidence, summarized in an investigative report) does or does not meet the burden of proof, the recipient's obligation is the same: to respond to the determination regarding responsibility by complying with § 106.45 (including effectively implementing remedies for the complainant if the respondent is determined to be responsible).[1145]

The Department recognizes that bearing the burden of proof may seem uncomfortable for recipients who do not wish to place themselves "between" two members of their community or be viewed as prosecutors adversarial to the respondent. The Department does not believe that this provision makes Title IX proceedings more adversarial; rather, these proceedings are inherently adversarial, often involving competing plausible narratives and high stakes for both parties, and recipients are obligated to identify and address sexual harassment that occurs in the recipient's education program or activity. The final regulations do not require a recipient to take an adversarial posture with respect to either party, and in fact require impartiality. Ultimately, however, the recipient itself must take action in response to the determination regarding responsibility that directly affects both parties, and it is the recipient's burden to impartially gather evidence and present it so that the decision-maker can determine whether the recipient (not either party) has shown that the weight of the evidence reaches or falls short of the standard of evidence selected by the recipient for making determinations. The Department is aware that the final regulations contemplate a recipient fulfilling many obligations that, while performed by several different individuals, are legally attributable to the recipient itself. However, this does not mean that the recipient, having appropriately designated individuals to perform certain roles in fulfillment of the recipient's obligations, cannot meet a burden to gather and collect evidence,

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[1145] Section 106.45(b)(1)(i); § 106.45(b)(7)(iv).

present the evidence to a decision-maker, and reach a fair and accurate determination. Thus, the Department disagrees that this provision is too strict or demanding.

The Department agrees that the Supreme Court framework for private Title IX litigation applies a deliberate indifference standard to known sexual harassment (including reports or allegations of sexual harassment). As explained in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, the Department intentionally adopts that framework, and adapts it for administrative enforcement purposes so that these final regulations hold a recipient liable not only when the recipient may be deemed to have intentionally committed sex discrimination (i.e., by being deliberately indifferent to actual knowledge of actionable sexual harassment) but also when a recipient has violated regulatory obligations that, while they may not purport to represent definitions of sex discrimination are required in order to further Title IX's non-discrimination mandate. One of the ways in which the Department adapts that framework is concluding that where a complainant wants a recipient to investigate allegations, the recipient must conduct an investigation and adjudication, and provide remedies to that complainant if the respondent is found responsible. While this response may or may not be required in private Title IX lawsuits, the Department has determined that a consistent, fair grievance process to resolve sexual harassment allegations, under the conditions prescribed in the final regulations, effectuates the purpose of Title IX to provide individuals with effective protections against discriminatory practices.

The Department appreciates commenters' suggestions that this provision be narrowed (e.g., to state that the burden is to gather evidence "reasonably available") or broadened (e.g., to require investigation of "all" leads or interviews of all witnesses), or to further specify steps a recipient must take to gather evidence. The Department believes that the scope of §

106.45(b)(5)(i) appropriately obligates a recipient to undertake a thorough search for relevant facts and evidence pertaining to a particular case, while operating under the constraints of conducting and concluding the investigation under designated, reasonably prompt time frames and without powers of subpoena. Such conditions limit the extensiveness or comprehensiveness of a recipient's efforts to gather evidence while reasonably expecting the recipient to gather evidence that is available.

Changes: None.

Section 106.45(b)(5)(ii) Equal Opportunity to Present Witnesses and Other Inculpatory/Exculpatory Evidence

Comments: Many commenters supported § 106.45(b)(5)(ii), asserting that it will provide equal opportunity for the parties to present witnesses and other evidence. Commenters stated that this provision will make the grievance process clearer, provide more reliable outcomes, and afford participants important due process protections. One commenter asserted that this provision will create greater uniformity between Title IX regulations and other justice systems in the U.S. designed to deal with similar issues. This commenter also asserted that this provision will reduce the risk of a false positive guilty finding for an innocent student accused of sexual harassment.

At the same time, one commenter expressed concerns that allowing respondents to hear the complainant's evidence and learn the identity of the complainants' witnesses will enable the respondent to intimidate the complainant, intimidate the complainant's witnesses, or spread lies about the complainant. Another commenter argued that previous guidance and regulations already allowed for schools to give each party a chance to present evidence, so the proposed rules are superfluous.

Several commenters recounted personal stories about Title IX Coordinators failing to consider a respondent's exculpatory evidence, including refusing to ask questions the respondent wished to ask the complainant or the complainant's witnesses, and refusing to speak with the respondent's witnesses. One commenter submitted a personal story about the recipient never providing the respondent with the complainant's evidence, which the commenter contended severely hindered the respondent's ability to defend against the complainant's allegations.

One commenter stated approvingly that a provision similar to § 106.45(b)(5)(ii) also appears in the Harvard Law School Sexual and Gender-Based Harassment Policy, under which all parties are afforded due process protections, including the right to present evidence and witnesses at a live hearing before an impartial decision maker. Another commenter suggested that § 106.45(b)(5)(ii) should give the parties an equal opportunity to identify witnesses.

One commenter believed that the provision is consistent with the Sixth Amendment right to confront adverse witnesses, call favorable witnesses, as well as the right to effective assistance of counsel. The commenter argued that some universities have a practice refusing respondents the assistance of counsel, which meant that a young person must defend against trained, seasoned Title IX Coordinators who often serve as the investigator (and sometimes also the decision-maker) in a case. The commenter also cited numerous situations of students being prevented from introducing exculpatory evidence ostensibly on the basis of the complex rules of evidence applied in courtrooms that universities purport to apply to Title IX proceedings, yet universities selectively apply court-based evidentiary rules in ways designed to disadvantage respondents. Commenters asserted that universities allow hearsay and other evidence into Title IX proceedings under the argument that the hearings are an "informal" or an "educational" process where more relaxed rules are applied, yet do not carefully apply all the court evidentiary rules

that ensure hearsay evidence is reliable before being admissible, and at the same time refuse to allow respondents to cross-examine witnesses who are making non-hearsay statements at a hearing.

One commenter asked the Department to require recipients to provide training materials to parties upon request. The commenter requested that the training materials must explain what evidence may or may not be considered in light of what the commenter believed is bias that most Title IX Coordinators hold in favor of victims.

Discussion: The Department agrees with commenters who asserted that § 106.45(b)(5)(ii) will improve the grievance process for all parties, and appreciates references to the beneficial impact of other laws and policies (including Department guidance) that include similar provisions.[1146] The Department acknowledges the personal experiences shared by commenters describing instances in which recipients have ignored, discounted, or denied opportunities to introduce exculpatory evidence, and the Department also acknowledges that other commenters recounted personal experiences involving recipients ignoring, discounting, or denying opportunity to introduce inculpatory evidence (by, for example, showing evidence to a respondent or respondent's attorney without showing it to the complainant). The Department appreciates that many recipients already require Title IX personnel to allow both parties equal opportunity to present evidence and witnesses, but in light of commenters' anecdotal evidence and for reasons

[1146] As discussed throughout this preamble, including in the "Support and Opposition for the Grievance Process in the § 106.45 Grievance Process" and the "Role of Due Process in the Grievance Process" sections of this preamble, the Department has considered grievance procedures in use by particular recipients, prescribed under various State and other Federal laws, recommended by advocacy organizations, and from other sources, and has intentionally crafted the § 106.45 grievance process to contain those procedural rights and protections that best serve Title IX's non-discrimination mandate, comport with constitutional due process and fundamental fairness, and may reasonably be implemented in the context of an educational institution as opposed to courts of law.

discussed in the "Role of Due Process in the Grievance Process" section of this preamble, the reality and perception is that too many recipients fail to consider inculpatory or exculpatory evidence resulting in real and perceived injustices for complainants and respondents. Equal opportunity to present inculpatory evidence and exculpatory evidence, including fact witnesses and expert witnesses, is an important procedural right and protection for both parties, and will improve the reliability and legitimacy of the outcomes recipients reach in Title IX sexual harassment grievance processes.

The Department received numerous comments expressing concern about the potential for retaliation and recounting experiences of retaliation suffered by complainants and respondents. The Department has added § 106.71 in these final regulations, explicitly prohibiting any person from intimidating, threatening, coercing, or discriminating against another individual for the purpose of interfering with any right or privilege secured by Title IX. The retaliation provision also requires that the identities of complainants, respondents, and witnesses must be kept confidential, except as permitted by FERPA, required by law, or to the extent necessary to carry out a Title IX grievance process. Section 106.71 also authorizes parties to file complaints alleging retaliation under § 106.8(c) which requires recipients to adopt and publish grievance procedures that provide for the prompt and equitable resolution of complaints of sex discrimination. The Department believes that this provision will deter retaliation, as well as afford parties and the recipient the opportunity promptly to redress retaliation that does occur.

In response to commenters who asserted that recipients should specify in their materials used to train Title IX personnel what evidence is relevant or admissible, we have revised § 106.45(b)(1)(iii) to require a recipient's investigators and decision-makers to receive training on

issues of relevance,[1147] including for a decision-maker training on when questions about a complainant's prior sexual history are deemed "not relevant" under § 106.45(b)(6). Section 106.45(b)(1)(iii) continues to require training on how to conduct an investigation and grievance process, such that each aspect of a recipient's procedural rules (including evidentiary rules) that a recipient must adopt in order to comply with these regulations, and any additional rules that are consistent with these final regulations,[1148] must be included in the training for a recipient's Title IX personnel. Further, if a recipient trains Title IX personnel to evaluate, credit, or assign weight to types of relevant, admissible evidence, that topic will be reflected in the recipient's training materials. The Department agrees with commenters who urged the Department to require that the recipients publicize their training materials, because such a requirement will improve the transparency of a recipient's grievance process. Accordingly, the Department requires recipients to make materials used to train a recipient's Title IX personnel publicly available on recipients' websites, under § 106.45(b)(10).

Changes: We are revising § 106.45(b)(5)(ii) to require recipients to provide an equal opportunity for all parties to present both fact and expert witnesses. We are also revising § 106.45(b)(10) to require recipients to make the materials used to train Title IX personnel publicly available on recipients' websites or, if a recipient does not have a website, available upon request for

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[1147] For discussion of these final regulations' requirement that relevant evidence, and only relevant evidence, must be objectively evaluated to reach a determination regarding responsibility, and the specific types of evidence that these final regulations deem irrelevant or excluded from consideration in a grievance process (e.g., a complainant's prior sexual history, any party's medical, psychological, and similar records, any information protected by a legally recognized privilege, and (as to adjudications by postsecondary institutions), party or witness statements that have not been subjected to cross-examination at a live hearing, see the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

[1148] The revised introductory sentence of § 106.45(b) expressly allows recipients to adopt rules that apply to the recipient's grievance process, other than those required under § 106.45, so long as such additional rules apply equally to both parties. For example, a postsecondary institution recipient may adopt reasonable rules of order and decorum to govern the conduct of live hearings.

inspection by members of the public. We have also added § 106.71 to the final regulations to expressly prohibit retaliating against any individual for exercising rights under Title IX.

Comments: One commenter requested the Department to modify § 106.45(b)(5)(ii) to expressly allow a party's mental health history to be introduced as evidence. One commenter argued that the respondent should be permitted to admit as evidence instances where the complainant had accused other students of sexual misconduct in the past. One commenter argued that complainants often receive the benefit of certain types of evidence, such as hearsay and victim impact statements, while respondents are denied the use of the same evidence and arguments. The commenter asked the Department to level the playing field by allowing respondents to write their own impact statement and present evidence such as the results of lie detector tests if the hearing allows complainants the use of similar evidence. Another commenter asked the Department to direct recipients to exclude irrelevant evidence.

One commenter suggested that, at the initial complaint stage, complainants should be able to present additional evidence to prevent the recipient from quickly dismissing the complainant's complaint and if the complainant can provide sufficient evidence, then the commenter asked the Department to require the recipient to open a case and investigate the allegations. A few commenters asked the Department to afford both parties the right to present evidence, not just at the investigation stage, but also during the hearings themselves and during the appeal process. One commenter suggested that the Department should require recipients to consider new evidence at the hearing, including evidence of retaliation or additional harassment by the respondent.

Discussion: A recipient's grievance process must objectively evaluate all *relevant* evidence (§ 106.45(b)(1)(ii)). Section 106.45(b)(5)(iii) of these final regulations requires the recipients to

refrain from restricting the ability of either party to gather and present *relevant* evidence. Section 106.45(b)(5)(vi) permits both parties equal opportunity to inspect and review all evidence directly related to the allegations. Section 106.45(b)(6)(i)-(ii) directs the decision-maker to allow parties to ask witnesses all *relevant* questions and follow-up questions, and § 106.45(b)(6)(i) expressly states that only *relevant* cross-examination questions may be asked at a live hearing. The requirement for recipients to summarize and evaluate relevant evidence, and specification of certain types of evidence that must be deemed not relevant or are otherwise inadmissible in a grievance process pursuant to § 106.45, appropriately directs recipients to focus investigations and adjudications on evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true (i.e., on what is relevant). At the same time, § 106.45 deems certain evidence and information not relevant or otherwise not subject to use in a grievance process: information protected by a legally recognized privilege;[1149] evidence about a complainant's prior sexual history;[1150] any party's medical, psychological, and similar records unless the party has given voluntary, written consent;[1151] and (as to adjudications by postsecondary institutions), party or witness statements that have not been subjected to cross-examination at a live hearing.[1152]

These final regulations require objective evaluation of relevant evidence, and contain several provisions specifying types of evidence deemed irrelevant or excluded from consideration in a grievance process; a recipient may not adopt evidentiary rules of admissibility

[1149] Section 106.45(b)(1)(x).
[1150] Section 106.45(b)(6)(i)-(ii).
[1151] Section 106.45(b)(5)(i).
[1152] Section 106.45(b)(6)(i).

that contravene those evidentiary requirements prescribed under § 106.45. For example, a recipient may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice; although such a rule is part of the Federal Rules of Evidence, the Federal Rules of Evidence constitute a complex, comprehensive set of evidentiary rules and exceptions designed to be applied by judges and lawyers, while Title IX grievance processes are not court trials and are expected to be overseen by layperson officials of a school, college, or university rather than by a judge or lawyer. Similarly, a recipient may not adopt rules excluding certain types of relevant evidence (e.g., lie detector test results, or rape kits) where the type of evidence is not either deemed "not relevant" (as is, for instance, evidence concerning a complainant's prior sexual history[1153]) or otherwise barred from use under § 106.45 (as is, for instance, information protected by a legally recognized privilege[1154]). However, the § 106.45 grievance process does not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by a recipient's decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with § 106.45 and apply equally to both parties.[1155] In response to commenters' concerns that the final regulations do not specify rules about evaluation of evidence, and recognizing that recipients therefore have discretion to adopt rules not otherwise prohibited under § 106.45, the final regulations acknowledge this reality by adding language to the introductory sentence of § 106.45(b): "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

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[1153] Section 106.45(b)(6)(i)-(ii).
[1154] Section 106.45(b)(1)(x).
[1155] Section 106.45(b) (introductory sentence).

harassment, as defined in § 106.30, must apply equally to both parties." A recipient may, for example, adopt a rule regarding the weight or credibility (but not the admissibility) that a decision-maker should assign to evidence of a party's prior bad acts, so long as such a rule applied equally to the prior bad acts of complainants and the prior bad acts of respondents. Because a recipient's investigators and decision-makers must be trained specifically with respect to "issues of relevance,"[1156] any rules adopted by a recipient in this regard should be reflected in the recipient's training materials, which must be publicly available.[1157]

As to a commenter's request that the Department require the recipient to investigate a complaint of sexual harassment or assault if the complainant can supply enough evidence to overcome the recipient's dismissal, the final regulations address mandatory and discretionary dismissals, including expressly giving both parties the right to appeal a recipient's dismissal decision, and one basis of appeal expressly includes where newly discovered evidence may affect the outcome.[1158] Thus, if a recipient dismisses a formal complaint under § 106.45(b)(3)(i) because, for instance, the recipient concludes that the misconduct alleged does not meet the definition of sexual harassment in § 106.30, the complainant can appeal that dismissal, for example by asserting that newly discovered evidence demonstrates that the misconduct in fact does meet the § 106.30 definition of sexual harassment, or alternatively by asserting procedural irregularity on the basis that the alleged conduct in fact does meet the definition of § 106.30 sexual harassment and thus mandatory dismissal was inappropriate under § 106.45(b)(3)(i).

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[1156] Section 106.45(b)(1)(iii).
[1157] Section 106.45(b)(10)(i)(D).
[1158] Section 106.45(b)(8).

As to commenters' request to allow both parties to introduce new evidence at every stage, including the hearing and on appeal, the final regulations require recipients to allow both parties equally to appeal on certain bases including newly discovered evidence that may affect the outcome of the matter (as well as on the basis of procedural irregularity, or conflict of interest of bias, that may have affected the outcome).[1159] For reasons discussed above, the Department declines to be more prescriptive than the Department believes is necessary to ensure a consistent, fair grievance process, and thus leaves decisions about other circumstances under which a party may offer or present evidence in the recipient's discretion, so long as a recipient's rules in this regard comply with § 106.45(b)(5)(ii) by giving "equal opportunity" to both parties to present witnesses (including fact witnesses and expert witnesses) and other evidence (including inculpatory and exculpatory evidence).

Changes: The Department is revising § 106.45(b)(5)(ii) to add the phrase "including fact and expert witnesses" to clarify that the equal opportunity to present witnesses must apply to experts. The final regulations also add language to the introductory sentence of § 106.45(b) stating that rules adopted by a recipient for use in the grievance process must apply equally to both parties. We have also added § 106.45(b)(1)(x) prohibiting use of information protected by a legally recognized privilege. We have also revised § 106.45(b)(5)(i) prohibiting use of a party's medical, psychological, and other treatment records without the party's voluntary, written consent.

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[1159] *Id.*

Section 106.45(b)(5)(iii) Recipients Must Not Restrict Ability of Either Party to Discuss Allegations or Gather and Present Relevant Evidence

Comments: Some commenters expressed support for § 106.45(b)(5)(iii), noting that First Amendment free speech issues are implicated when schools impose "gag orders" on parties' ability to speak about a Title IX situation. A few commenters noted that recipients' application of gag orders ends up preventing parties from collecting evidence by preventing them from talking to possible witnesses, and even from calling parents or friends for support.

Many commenters argued that this provision will harm survivors and chill reporting because survivors often feel severe distress when other students know of the survivor's report, or experience stigma and backlash when other students find out the survivor made a formal complaint, which deters reporting.[1160] Other commenters argued that a provision that permits sensitive information to be disseminated and even published on social media or campus newspapers results in loss of privacy and anonymity that betrays already-traumatized survivors. Other commenters opposed this provision fearing it will negatively affect both parties by leading to gossip, shaming, retaliation, and defamation. Other commenters believed this provision opens the door to witness or evidence tampering and intimidation and/or interference with the investigation. Other commenters asserted that the final regulations should permit each party to identify witnesses but then permit only the recipient to discuss the allegations with the witnesses, because witnesses might be more forthcoming with an investigator than with a party.

[1160] Commenters cited: Alan M. Gross *et al.*, *An examination of sexual violence against college women*, 12 VIOLENCE AGAINST WOMEN 3 (2006).

Some commenters believed that with regard to elementary and secondary schools, the final regulations should clarify the extent to which this provision applies because common sense suggests that a school administrator, such as a principal, should be able to restrict a student from randomly or maliciously discussing allegations of sexual harassment without impeding the student's ability to participate in the formal complaint process.

Several commenters urged the Department to modify this provision in one or more of the following ways: the parties must be permitted to discuss allegations only with those who have a need to know those allegations; the recipient may limit any communication to solely neutral communication specifically intended to gather witnesses and evidence or participate in the grievance process; the recipient may limit the parties' communication or contact with each other during the investigation and prohibit disparaging communications, if those limits apply equally to both parties; recipients must be permitted to restrict the discussion or dissemination of materials marked as confidential; while parties should be allowed to discuss the general nature of the allegations under investigation, recipients should have the authority to limit parties from discussing specific evidence provided under §106.45(b)(5)(vi) with anyone other than their advisor; the evidence discussed should be limited to that which is made accessible to the decision-maker(s), which mirrors the requirements in VAWA; the final regulations should provide an initial warning that neither party is to aggravate the problem in any manner; the final regulations should include language permitting the issuance of "no contact" orders as a supportive measure; the final regulations should prohibit parties from engaging in retaliatory conduct in violation of institutional policies.

Discussion: The Department appreciates commenters' support for § 106.45(b)(5)(iii). The Department acknowledges the concerns expressed by other commenters concerned about

confidentiality and retaliation problems that may arise from application of this provision. This provision contains two related requirements: that a recipient not restrict a party's ability to (i) discuss the allegations under investigation or (ii) gather and present evidence. The two requirements overlap somewhat but serve distinct purposes.

As to this provision's requirement that a recipient not restrict a party's ability to discuss the allegations under investigation, the Department believes that a recipient should not, under the guise of confidentiality concerns, impose prior restraints on students' and employees' ability to discuss (i.e., speak or write about) the allegations under investigation, for example with a parent, friend, or other source of emotional support, or with an advocacy organization. Many commenters have observed that the grievance process is stressful, difficult to navigate, and distressing for both parties, many of whom in the postsecondary institution context are young adults "on their own" for the first time, and many of whom in the elementary and secondary school context are minors. The Department does not believe recipients should render parties feeling isolated or alone through the grievance process by restricting parties' ability to seek advice and support outside the recipient's provision of supportive measures. Nor should a party face prior restraint on the party's ability to discuss the allegations under investigation where the party intends to, for example, criticize the recipient's handling of the investigation or approach to Title IX generally. The Department notes that student activism, and employee publication of articles and essays, has spurred many recipients to change or improve Title IX procedures, and often such activism and publications have included discussion by parties to a Title IX grievance process of perceived flaws in the recipient's Title IX policies and procedures. The Department further notes that § 106.45(b)(5)(iii) is not unlimited in scope; by its terms, this provision stops a recipient from restricting parties' ability to discuss "the allegations under investigation." This

provision does not, therefore, apply to discussion of information that does not consist of "the allegations under investigation" (for example, evidence related to the allegations that has been collected and exchanged between the parties and their advisors during the investigation under § 106.45(b)(5)(vi), or the investigative report summarizing relevant evidence sent to the parties and their advisors under § 106.45(b)(5)(vii)).

As to the requirement in § 106.45(b)(5)(iii) that recipients must not restrict parties' ability "to gather and present evidence," the purpose of this provision is to ensure that parties have equal opportunity to participate in serving their own respective interests in affecting the outcome of the case. This provision helps ensure that other procedural rights under § 106.45 are meaningful to the parties; for example, while the parties have equal opportunity to inspect and review evidence gathered by the recipient under § 106.45(b)(5)(vi), this provision helps make that right meaningful by ensuring that no party's ability to gather evidence (e.g., by contacting a potential witness, or taking photographs of the location where the incident occurred) is hampered by the recipient.

Finally, the two requirements of this provision sometimes overlap, such as where a party's ability to "discuss the allegations under investigation" is necessary precisely so that the party can "gather and present evidence," for example to seek advice from an advocacy organization or explain to campus security the need to access a building to inspect the location of an alleged incident.

The Department appreciates the opportunity to clarify that this provision in no way immunizes a party from abusing the right to "discuss the allegations under investigation" by, for example, discussing those allegations in a manner that exposes the party to liability for defamation or related privacy torts, or in a manner that constitutes unlawful retaliation. In

response to many commenters concerned that the proposed rules did not address retaliation, the final regulations add § 106.71 prohibiting retaliation and stating in relevant part (emphasis added): "No recipient *or other person* may *intimidate, threaten, coerce,* or discriminate against *any individual for the purpose of interfering with any right or privilege* secured by title IX or this part[.]"[1161] The Department thus believes that § 106.45(b)(5)(iii) – permitting the parties to discuss the allegations under investigation, and to gather and present evidence – furthers the Department's interest in promoting a fair investigation that gives both parties meaningful opportunity to participate in advancing the party's own interests in case, while abuses of a party's ability to discuss the allegations can be addressed through tort law and retaliation prohibitions.

The Department recognizes commenters' concerns that some discussion about the allegations under investigation may fall short of retaliation or tortious conduct, yet still cause harmful effects. For example, discussion and gossip about the allegations may negatively impact a party's social relationships. For the above reasons, the Department believes that the benefits of § 106.45(b)(5)(iii), for both parties, outweigh the harm that could result from this provision. This provision, by its terms, applies only to discussion of "the allegations under investigation," which means that where a complainant reports sexual harassment but no formal complaint is filed, § 106.45(b)(5)(iii) does not apply, leaving recipients discretion to impose non-disclosure or confidentiality requirements on complainants and respondents. Thus, reporting should not be

[1161] As discussed in the "Retaliation" section of this preamble, § 106.71 takes care to protect the constitutional free speech rights of students and employees at public institutions that must protect constitutional rights. Nonetheless, abuse of speech unprotected by the First Amendment, when such speech amounts to intimidation, threats, or coercion for the purpose of chilling exercise of a person's Title IX rights, is prohibited retaliation.

chilled by this provision because it does not apply to a report of sexual harassment but only where a formal complaint is filed. One reason why the final regulations take great care to preserve a complainant's autonomy to file or not file a formal complaint (yet still receive supportive measures either way) is because participating in a grievance process is a weighty and serious matter, and each complainant should have control over whether or not to undertake that process.[1162] Once allegations are made in a formal complaint, a fair grievance process requires that both parties have every opportunity to fully, meaningfully participate by locating evidence that furthers the party's interests and by confiding in others to receive emotional support and for other personally expressive purposes. The Department believes that this provision, by its plain language, limits the scope of what can be discussed, and laws prohibiting tortious speech and invasion of privacy, and retaliation prohibitions, protect all parties against abusive "discussion" otherwise permitted by this provision.

The Department has considered carefully the concerns of several commenters who believe this provision will lead to witness tampering or intimidation, or otherwise interfere with a proper investigation. As to witness intimidation, such conduct is prohibited under § 106.71(a). As to whether a party approaching or speaking to a witness could constitute "tampering," the Department believes that generally, a party's communication with a witness or potential witness must be considered part of a party's right to meaningfully participate in furthering the party's interests in the case, and not an "interference" with the investigation. However, where a party's

[1162] As discussed elsewhere in the preamble, including in the "Formal Complaint" subsection of the "Section 106.30 Definitions" section, the decision to initiate a grievance process against the wishes of a complainant is one that must be undertaken only when the Title IX Coordinator determines that signing a formal complaint initiating a grievance process against a respondent is not clearly unreasonable in light of the known circumstances.

conduct toward a witness might constitute "tampering" (for instance, by attempting to alter or prevent a witness's testimony), such conduct also is prohibited under § 106.71(a). Some commenters were particularly concerned that a party's communication with a witness could result in the witness telling a different story to the party than the witness is willing to tell an investigator; any such inconsistencies or discrepancies would be taken into account by the parties, investigator, and decision-maker but do not necessarily constitute "interference" with the investigation by the party who spoke with the witness. Furthermore, in some situations, a party may not know the identity of witnesses until discussing the situation with others (for example, asking a roommate who was at the party at which the alleged incident occurred so as to discover whether any party attendees witnessed relevant events); thus, the Department declines to require that only recipients (or their investigators) may communicate with witnesses or potential witnesses.

With respect to commenters concerned about applying this provision in elementary and secondary schools, the Department disagrees that this provision forbids a school principal from warning students not to speak "maliciously" since malicious discussion intended to interfere with the other party's Title IX rights would constitute prohibited retaliation.

For the reasons discussed above, the Department declines to narrow or modify this provision per commenters' various suggestions. The Department believes that parties, not recipients, should determine who has a "need to know" about the allegations in order to provide advice, support, or assistance to a party during a grievance process; for similar reasons, recipients should not determine what information to label "confidential." Limiting a party's discussions to "neutral" communications, or to communications solely for the purpose of gathering evidence, would deprive the parties of the benefits discussed above, such as seeking

emotional support and using the party's experience to express viewpoints on the larger issues of sexual violence or Title IX policies and procedures; for the same reasons the Department declines to narrow this provision to allow discussion only with advisors or to require a warning to parties that neither party should "aggravate the problem." This provision does not affect a recipient's discretion to restrict parties from contact or communication with each other through, e.g., mutual no-contact orders that meet the definition of supportive measures in § 106.30. Where "disparaging communications" are unprotected under the Constitution and violate tort laws or constitute retaliation, such communications may be prohibited without violating this provision. This provision applies to discussion of "the allegations under investigation" and not to the evidence subject to the parties' inspection and review under § 106.45(b)(5)(vi).

Changes: The final regulations add § 106.71 prohibiting retaliation.

Section 106.45(b)(5)(iv) Advisors of Choice

*Supporting Presence and Participation of Advisors*

Comments: Some commenters supported allowing parties to have an advisor present because of the severe nature of Title IX charges and the potentially life-altering consequences. Commenters argued the proposed regulations would promote due process and give students more control over the proceedings. Other commenters supported allowing students to have an advisor because it will reduce the risk of false findings by allowing students to avail themselves of an advisor's expertise. Some commenters supported this provision believing the proposed regulations will reconcile Title IX proceedings with protections that are offered in analogous proceedings, such as criminal trials.

Discussion: The Department appreciates the general support from commenters regarding § 106.45(b)(5)(iv), which requires recipients to provide all parties with the same opportunities to

have advisors present in Title IX proceedings and to also have advisors participate in Title IX proceedings, subject to equal restrictions on advisors' participation, in recipients' discretion. We share commenters' beliefs that this provision will make the grievance process substantially more thorough and fairer and that the resulting outcomes will be more reliable. The Department recognizes the high stakes for all parties involved in sexual misconduct proceedings under Title IX, and that the outcomes of these cases can carry potentially life-altering consequences, and thus believes every party should have the right to seek advice and assistance from an advisor of the party's choice. However, providing parties the right to select an advisor of choice does not align with the constitutional right of criminal defendants to be provided with effective representation. The more rigorous constitutional protection provided to criminal defendants is not necessary or appropriate in the context of administrative proceedings held by an educational institution rather than by a criminal court. To better clarify that parties' right to an advisor of choice differs from the right to legal representation in a criminal proceeding, the final regulations revise § 106.45(b)(5)(iv) to specify that the advisor of choice may be, but is not required to be, an attorney.

Changes: To clarify that a recipient may not limit the choice or presence of an advisor we have added "or presence" to § 106.45(b)(5)(iv), and we have added language in this section to clarify that a party's advisor may be, but is not required to be, an attorney.

*Fairness Considerations*

Comments: Some commenters argued that § 106.45(b)(5)(iv) is not survivor-centered and will tip the scales in favor of wealthy students who can afford counsel.

Discussion: The Department believes that by permitting both parties to receive guidance from an advisor of their choice throughout the Title IX proceedings, the process will be substantially

more thorough and fairer and the resulting outcomes will be more reliable. In response to commenters' concerns, the final regulations revise § 106.45(b)(5)(iv) to specify that a party's chosen advisor may be, but is not required to be, an attorney. The Department acknowledges that a party's choice of advisor may be limited by whether the party can afford to hire an advisor or must rely on an advisor to assist the party without fee or charge. The Department wishes to emphasize that the status of any party's advisor (i.e., whether a party's advisor is an attorney or not), the financial resources of any party, and the potential of any party to yield financial benefits to a recipient, must not affect the recipient's compliance with § 106.45. The Department believes that the clear procedural rights provided to both parties during the grievance process give both parties opportunity to advance each party's respective interests in the case, regardless of financial ability. Further, while the final regulations do not require the recipient to pay for parties' advisors, nothing the in the final regulations precludes a recipient from choosing to do so.

Changes: We have added language in § 106.45(b)(5)(iv) to clarify that a party's advisor may be, but is not required to be, an attorney.

*Conflicts of Interest, Confidentiality, and Union Issues*

Comments: Commenters argued that student-picked advisors will have a conflict of interest and will raise confidentiality issues. Other commenters expressed concern that § 106.45(b)(5)(iv) may conflict with a union's duty of providing fair representation in the grievance process. One commenter stated that Federal labor law and many State labor laws already provide that an employee subject to investigatory interviews may have a union representative present for a meeting that might lead to discipline.

Discussion: The Department acknowledges the concerns raised by commenters regarding potential conflicts of interest and confidentiality issues arising from permitting the presence or

participation of advisors of a party's choice in Title IX proceedings, and potential conflict with labor union duties in grievance processes. With respect to potential conflicts of interest, we believe that parties are in the best position to decide which individuals should serve as their advisors. Advisors, for example, may be friends, family members, attorneys, or other individuals with whom the party has a trusted relationship. The Department believes it would be inappropriate for it to second guess this important decision.

With respect to confidentiality, the Department notes that commenters who raised this issue did not explain exactly how parties' confidentiality interests would be compromised by permitting them to have an advisor of choice to attend or participate in Title IX proceedings. As explained more fully in the "Section 106.6(e) FERPA" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble, we note that § 106.6(e) of the final regulations makes it clear that the final regulations should be interpreted to be consistent with a recipient's obligations under FERPA. Recipients may require advisors to use the evidence received for inspection and review under § 106.45(b)(5)(vi) as well as the investigative report under § 106.45(b)(5)(vii) only for purposes of the grievance process under § 106.45 and require them not to further disseminate or disclose these materials. Additionally, these final regulations do not prohibit a recipient from using a non-disclosure agreement that complies with these final regulations and other applicable laws.

Lastly, it is not the intent of the Department to undermine the important role that union advisors may play in grievance proceedings. However, we wish to clarify that in the event of an actual conflict between a union contract or practice and the final regulations, then the final

regulations would have preemptive effect.[1163] We note that the final regulations do not preclude a union lawyer from serving as an advisor to a party in a proceeding.

Changes: None.

*Modification Requests*

Comments: Some commenters argued that § 106.45(b)(5)(iv) conflicts with past guidance from the Department. Other commenters argued that advisors should not be allowed so students can learn to speak for themselves. Some commenters opposed this provision because they believe there should be no limits on attorney participation in grievance procedures. Some commenters argued that recipients should provide each party with an advisor to assist them throughout the grievance process. Some commenters expressed concern that the presence of advisors could complicate the proceedings, for instance, if the advisor was needed to also serve as a witness, if the advisor did not wish to take part in cross-examinations, if taking part in cross-examinations would adversely affect a teacher-student relationship, or if the advisor had limited availability to attend hearings and meetings. Other commenters suggested there should be no limits placed on who can serve as an advisor and that advisors should be allowed to be fully active participants, especially on behalf of students with disabilities or international students who may need active representation by counsel. Other commenters suggested that advisors should be required to be attorneys in order to avoid unauthorized practice of law.

Discussion: With respect to allowing advisors of choice, who may be attorneys, and the participation of such advisors in grievance procedures, these final regulations take a similar

[1163] For further discussion see the "Section 106.6(h) Preemptive Effect" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

approach to Department guidance, with two significant differences. The withdrawn 2011 Dear Colleague Letter stated that recipients could "choose" to allow students to be represented by lawyers during grievance procedures and directed that any rules about a lawyer's appearance or participation must apply equally to both parties.[1164] These final regulations better align the Department's approach to advisors of choice for Title IX purposes with the Clery Act as amended by VAWA,[1165] clarifying that in a Title IX grievance process recipients *must* allow parties to select advisors of the parties' choice, who may be, but need not be, attorneys, while continuing to insist that any restrictions on the active participation of advisors during the grievance process must apply equally to both parties. Unlike Department guidance or Clery Act regulations, these final regulations implementing Title IX specify that when live hearings are held by postsecondary institutions, the recipient must permit a party's advisor to conduct cross-examination on behalf of a party.[1166] The Department believes that requiring recipients to allow both parties to have an advisor of their own choosing accompany them throughout the Title IX grievance process, and also to participate within limits set by recipients, is important to ensure fairness for all parties. For discussion of the reasons why cross-examination at a live hearing must be conducted by a party's advisor rather than by parties personally, see the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble. As discussed above, the Department believes that § 106.45(b)(5)(iv) will help to make

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[1164] *E.g.*, 2011 Dear Colleague Letter at 11 ("While OCR does not require schools to permit parties to have lawyers at any stage of the proceedings, if a school chooses to allow the parties to have their lawyers participate in the proceedings, it must do so equally for both parties. Additionally, any school-imposed restrictions on the ability of lawyers to speak or otherwise participate in the proceedings should apply equally.").
[1165] For discussion of the Clery Act and these final regulations, see the "Clery Act" subsection of the "Miscellaneous" section of this preamble.
[1166] Section 106.45(b)(6)(i).

the grievance process substantially more thorough and fairer, and the resulting outcomes more reliable. While nothing in the final regulations discourages parties from speaking for themselves during the proceedings, the Department believes it is important that each party have the right to receive advice and assistance navigating the grievance process. As such, we decline to forbid parties from obtaining advisors of choice. Section 106.45(b)(5)(iv) (allowing recipients to place restrictions on active participation by party advisors) and the revised introductory sentence to § 106.45(b) (requiring any rules a recipient adopts for its grievance process other than rules required under § 106.45 to apply equally to both parties) would, for example, permit a recipient to require parties personally to answer questions posed by an investigator during an interview, or personally to make any opening or closing statements the recipient allows at a live hearing, so long as such rules apply equally to both parties. We do not believe that specifying what restrictions on advisor participation may be appropriate is necessary, and we decline to remove the discretion of a recipient to restrict an advisor's participation so as not to unnecessarily limit a recipient's flexibility to conduct a grievance process that both complies with § 106.45 and, in the recipient's judgment, best serves the needs and interests of the recipient and its educational community. The Department therefore disagrees that the final regulations should prohibit recipients from imposing any restrictions on the participation of advisors, including attorneys, in the Title IX grievance process.[1167] These final regulations ensure that a party's advisor of choice must be included in the party's receipt of, for instance, evidence subject to party inspection and

[1167] As discussed in the "Section 106.45(b)(6)(i) Postsecondary Institution Recipients Must Provide Live Hearing with Cross-Examination" subsection of the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, the final regulations make one exception to the provision in § 106.45(b)(5)(iv) that recipients have discretion to restrict the extent to which party advisors may actively participate in the grievance process: where a postsecondary institution must hold a live hearing with cross-examination, such cross-examination must be conducted by party advisors.

review,[1168] and the investigative report,[1169] so that a party's advisor of choice is fully informed throughout the investigation in order to advise and assist the party.

The Department understands the concerns of commenters who raised the question of whether acting as a party's advisor of choice could constitute the practice of law such that parties will feel obligated to hire licensed attorneys as advisors of choice, to avoid placing non-attorney advisors (such as a professor, friend, or advocacy organization volunteer) in the untenable position of potentially violating State laws that prohibit the unauthorized practice of law.[1170] While the issues raised by allegations of sexual misconduct may make it preferable or advisable for one or both parties to receive legal advice or obtain legal representation, the Department recognizes school disciplinary proceedings, including the grievance process required under these final regulations, as an administrative setting that does not require either party to be represented by an attorney. The Department believes that the § 106.45 grievance process sets forth clear, transparent procedural rules that enable parties and non-lawyer party advisors effectively to navigate the grievance process. Because the grievance process occurs in an educational setting and does not require court appearances or detailed legal knowledge, the Department believes that assisting a party to a grievance process is best viewed not as practicing law, but rather as

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[1168] Section 106.45(b)(5)(vi) (evidence subject to inspection and review must be sent electronically or in hard copy to each party and the party's advisor of choice).

[1169] Section 106.45(b)(5)(vii) (a copy of the investigative report must be sent electronically or in hard copy to each party and the party's advisor of choice).

[1170] *E.g.*, Michelle Cotton, *Experiment, Interrupted: Unauthorized Practice of Law Versus Access to Justice*, 5 DEPAUL J. FOR SOCIAL JUSTICE 179, 188-89 (2012) ("Most States continue to have broad definitions of the practice of law and broad concepts of [unauthorized practice of law] UPL that prevent or inhibit the involvement of nonlawyers in providing assistance to unrepresented persons."); Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2585-88 (1999) (noting that in every state, nonlawyers are generally prohibited from practicing law, that the definition of unauthorized practice of law (UPL) varies widely from jurisdiction to jurisdiction, and that exceptions to what constitutes UPL often include appearing in administrative proceedings).

providing advocacy services to a complainant or respondent. The Department concludes that with respect to Title IX proceedings the line between assisting a party, and providing legal representation to the party, is a line that has been and will continue to be, an issue taken into consideration by students, recipients, and advocates pursuant to the variety of State unauthorized practice of law statutes.

The Department notes that some commenters argued that the grievance process is complex and frequently intersects with legal proceedings (for example, when a complainant sues the respondent for civil assault or battery, or files a police report that results in a criminal proceeding against the respondent), and that legal representation would benefit both parties to a Title IX proceeding.[1171] The Department leaves recipients flexibility and discretion to determine whether a recipient wishes to provide legal representation to parties in a grievance process, but the final regulations do not restrict the right of each party to select an advisor with whom the party feels most comfortable and believes will best assist the party, and thus clarifies in this provision that the party's advisor of choice may be, but is not required to be, an attorney.

The Department acknowledges commenters' concerns that advisors may also serve as witnesses in Title IX proceedings, or may not wish to conduct cross-examination for a party whom the advisor would otherwise be willing to advise, or may be unavailable to attend all hearings and meetings. Notwithstanding these potential complications that could arise in particular cases, the Department believes it would be inappropriate to restrict the parties'

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[1171] *E.g.*, Merle H. Weiner, *Legal Counsel for Survivors of Campus Sexual Violence*, 29 YALE J. OF L. & FEMINISM 123 (2017) (arguing that campuses should provide student survivors with legal representation, and noting that providing accused students with legal representation is also beneficial).

selection of advisors by requiring advisors to be chosen by the recipient, or by precluding a party from selecting an advisor who may also be a witness. The Department notes that the § 106.45(b)(1)(iii) prohibition of Title IX personnel having conflicts of interest or bias does *not* apply to party advisors (including advisors provided to a party by a postsecondary institution as required under § 106.45(b)(6)(i)), and thus, the existence of a possible conflict of interest where an advisor is assisting one party and also expected to give a statement as a witness does not violate the final regulations. Rather, the perceived "conflict of interest" created under that situation would be taken into account by the decision-maker in weighing the credibility and persuasiveness of the advisor-witness's testimony. We further note that live hearings with cross-examination conducted by party advisors is required only for postsecondary institutions, and the requirement for a party's advisor to conduct cross-examination on a party's behalf need not be more extensive than simply relaying the party's desired questions to be asked of other parties and witnesses.[1172]

Changes: We have added language in § 106.45(b)(5)(iv) to clarify that a party's advisor may be, but is not required to be, an attorney.

Section 106.45(b)(5)(v) Written Notice of Hearings, Meetings, and Interviews

Comments: Several commenters supported § 106.45(b)(5)(v) because it will promote fairness, due process, and increase the likelihood of reaching an accurate result. One commenter shared a personal story of a family member with a disability who was not allowed to prepare a defense after being accused of sexual harassment. Other commenters supported this provision believing it

[1172] For further discussion see the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

offers the same protections that would be offered in a criminal trial. Other commenters supported this provision believing it will limit the abuse of power that can be wielded under Title IX investigations.

Discussion: The Department agrees with commenters who supported this provision on the grounds that it will promote fairness, provides both parties with due process protections, and increase the likelihood of reaching an accurate result. The Department believes that written notice of investigative interviews, meetings, and hearings, with time to prepare, permits both parties meaningfully to advance their respective interests during the grievance process, which helps ensure that relevant evidence is gathered and considered in investigating and adjudicating allegations of sexual harassment.

Changes: None.

Comments: Several commenters argued that the proposed regulations, including § 106.45(b)(5)(v), would be burdensome by requiring recipients to provide written notice, placing them under time constraints, adding administrative layers, and that these burdens would be particularly difficult for elementary and secondary schools.

Discussion: The Department acknowledges the concern of commenters that § 106.45(b)(5)(v) will place a burden on recipients, including elementary and secondary schools, but believes the burden associated with providing this notice is outweighed by the due process protections such notice provides. Because the stakes are high for both parties in a grievance process, both parties should receive notice with sufficient time to prepare before participating in interviews, meetings, or hearings associated with the grievance process, and written notice is better calculated to effectively ensure that parties are apprised of the date, time, and nature of interviews, meetings, and hearings than relying solely on notice in the form of oral communications. For example, if a

party receives written notice of the date of an interview, and needs to request rescheduling of the date or time of the interview due to a conflict with the party's class schedule, the recipient and parties benefit from having had the originally-scheduled notice confirmed in writing so that any rescheduled date or time is measured accurately against the original schedule. We note that nothing in these final regulations precludes a recipient from also conveying notice via in-person, telephonic, or other means of conveying the notice, in addition to complying with § 106.45(b)(5)(v) by sending written notice.

Changes: We have made non-substantive revisions to § 106.45(b)(5)(v), such as changing "the" to "a" in the opening clause "Provide to a party" and adding a comma after "invited or expected," for clarity.

Comments: Some commenters argued that the procedures required by the proposed regulations are not suited to the campus environment where proceedings should not be adversarial, where notice of hearings might allow accused students time to destroy evidence and prepare alibis, and where it will contribute to underreporting as complainants will feel a loss of control or bullied because the proposed regulations are not informed by a victim-centered perspective.

Discussion: The Department disagrees that § 106.45(b)(5)(v), or the final regulations overall, increase the adversarial nature of sexual misconduct proceedings or incentivize any party to fabricate or destroy evidence. Allegations of sexual harassment often present an inherently adversarial situation, where parties have different recollections and perspectives about the incident at issue. The final regulations do not increase the adversarial nature of such a situation, but the § 106.45 grievance process (including this provision requiring written notice to both parties with time to prepare to participate in interviews and hearings) helps ensure that the adversarial nature of sexual harassment allegations are investigated and adjudicated impartially

by the recipient with meaningful participation by the parties whose interests are adverse to each other.[1173] Accordingly, the final regulations require schools to investigate and adjudicate formal complaints of sexual harassment, and to give complainants and respondents a meaningful opportunity to participate in the investigation that increases the likelihood that the recipient will reach an accurate, reliable determination regarding the respondent's responsibility.

The Department does not agree that providing the parties with advance notice of investigative interviews, meetings, and hearings increases the likelihood that any party will concoct alibis or destroy evidence. The final regulations contain provisions that help ensure that false statements (e.g., making up an alibi) or destruction of evidence will be revealed during the investigation and taken into account in reaching a determination. For example, § 106.45(b)(2) requires the initial written notice to the parties to include a statement about whether the recipient's code of conduct prohibits false statements, and § 106.45(b)(5)(vi) gives both parties equal opportunity to inspect and review all evidence gathered by the recipient that is directly related to the allegations, such that if relevant evidence seems to be missing, a party can point that out to the investigator, and if it turns out that relevant evidence was destroyed by a party, the decision-maker can take that into account in assessing the credibility of parties, and the weight of evidence in the case.

The Department disagrees that § 106.45(b)(5)(v) will contribute to underreporting because complainants will feel a loss of control or bullied, or feel chilled from reporting, or that

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[1173] *E.g.*, *Pennsylvania v. Finley*, 481 U.S. 551, 568 (1987) ("The very premise of our adversarial system . . . is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.") (internal quotation marks and citation omitted); *see also Tolan v. Cotton*, 572 U.S. 650, 660 (2014) ("The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system.").

this provision is not informed by a victim-centered perspective. The Department believes this provision provides a fundamental and essential due process protection that equally benefits complainants and respondents by giving both parties advance notice of interviews, meetings, and hearings so that each party can meaningfully participate and assert their respective positions and viewpoints through the grievance process.[1174] This is an important part of ensuring that the grievance process reaches accurate determinations, which in turn ensures that schools, colleges, and universities know when and how to provide remedies to victims of sex discrimination in the form of sexual harassment.

Changes: None.

Comments: Some commenters suggested that recipients should only be required to give respondents notice of charges, not necessarily of interviews, in order to reflect the standards set by VAWA. Some commenters suggested that the final regulations should require an advisor be copied on all correspondence between the institutions and the parties.

Discussion: The Department disagrees with the commenters who suggested that recipients should only be required to give respondents notice of charges, not necessarily of interviews, in order to reflect the standards set by Section 304 of VAWA. The commenter offered no rationale for why the approach under VAWA is superior to the § 106.45(b)(5)(v) requirements in this regard, and the Department believes that parties are entitled to notice of interviews, meetings, and hearings where the party's participation is expected or invited; otherwise, a party may miss critical opportunities to advance the party's interests during the grievance process. To clarify that

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[1174] *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'") (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

this provision intends for notice to be given only to the party whose participation is invited or expected, we have made non-substantive revisions to the language of this provision to better convey that intent. Because this provision is consistent with the VAWA provision cited by commenters, even though this provision requires more notice than the VAWA provision, the Department sees no conflict raised for recipients who must comply with both VAWA and Title IX.

We note that the final regulations do require that copies of the evidence subject to the parties' inspection and review, and a copy of the investigative report, must be sent (electronically or in hard copy) to the parties and to the parties' advisors, if any. The Department appreciates commenters' request that advisors be copied on all correspondence between recipients and the parties, but declines to impose such a rule in order to preserve a recipient's discretion under § 106.45(b)(5)(iv) to limit the participation of party advisors, and to preserve a party's right to decide whether or not, for what purposes, and at what times, the party wishes for an advisor of choice to participate with the party. Nothing in the final regulations precludes a recipient from adopting a practice of copying party advisors on all notices sent under § 106.45(b)(5)(v), so long as the recipient complies with the revised introductory sentence of § 106.45(b) by ensuring that such a practice applies equally with respect to both parties.

Changes: We have revised the language in § 106.45(b)(5)(v) to more clearly convey that notice must be sent to a party when that party's participation is invited or expected with respect to any meeting, interview, or hearing during the grievance process, by changing "the" to "a" in the clause "Provide to a party" in this provision.

Section 106.45(b)(5)(vi) Inspection and Review of Evidence Directly Related to the Allegations, and Directed Question 7

Comments: Many commenters expressed support for § 106.45(b)(5)(vi) and asserted that the proposed regulations seek the equal treatment of complainants and respondents. One commenter asserted that the proposed regulations would remedy sex-biased investigations and included citations to circuit court cases involving male students challenging the Title IX processes at institutions that suspended or expelled the male students for sexual misconduct. A different commenter stated that the proposed regulations would restore fairness and provide full disclosure to both parties so that they can adequately prepare defenses and present additional facts and witnesses. Another commenter concluded that the proposed regulations would ensure justice for complainants and protection for those falsely accused.

A number of commenters shared stories of their personal experiences with recipients withholding information from parties in a Title IX proceeding.

One commenter concluded that both parties having access to all of the evidence will ensure a fair process for both parties. Many commenters remarked that a Title IX investigator should not have unilateral authority to deem certain evidence "irrelevant." Another commenter stated that schools should not hinder evidence reviews with short or limited time windows. One commenter stated that all evidence collected, including evidence collected by law enforcement, should be made available to the respondent.

Some commenters concluded that the electronic view-only format is unreasonable. Other commenters stated that all of the evidence should be provided to the parties to download and review on their own. The commenters remarked that this was necessary, especially in complex cases where review of the evidence would take a significant period of time. Some of these

commenters also argued that any effort on the part of a recipient to limit a party's access to the evidence should be viewed as a bad faith effort to negatively impact the proceeding.

While generally supportive of the provision, one commenter argued that the final regulations should require that the investigator incorporate the parties' responses into the final investigative report. Another generally supportive commenter proposed the inclusion of a party's right to call an external investigator. A different commenter supported the adoption of a special master to oversee the adjudicative process.

Some commenters agreed with the ten-day review and comment requirement, determining that it is an appropriate period for allowing the parties to read and provide written responses. Another commenter stated that the exchange of information between the parties will result in expedited hearings.

One supporter of the provision requested that the Department include a provision that would inform the parties of the consequences of submitting false information to the investigator.

A number of commenters opposed § 106.45(b)(5)(vi). One commenter concluded that the proposed regulations, including this provision, were antithetical to the purpose of Title IX. Another commenter called this provision a blunt solution to a nuanced problem that attempts to solve the "canard" of false allegations. The commenter added that the Department fails to see the issue through a victim-centered lens, pointing out that the term "trauma" is used only once in the NPRM. The same commenter stated that this provision is not informed by best practices for working with trauma survivors.

One commenter argued that the proposed regulations would lead to retaliation and witness tampering. Another commenter stated that § 106.45(b)(5)(vi) would "revictimize" complainants. Many commenters stated that this provision will hamstring and compromise

investigations, would likely chill the reporting process, is part of the administration's indifference to sexual violence, and will have negative effects on safety and fairness. One commenter concluded that the proposed rules would allow institutions to turn a "blind eye" to sexual violence on campus.

One commenter wrote that this provision "fails to adequately acknowledge the seriousness and complexity of sexual misconduct on college campuses" and called for a simpler, fairer, and more responsive approach. A different commenter argued that § 106.45(b)(5)(vi) would deter reporting, create difficulties in maintaining student privacy, and make Title IX cases more time-consuming and expensive. According to this commenter, this provision did not account for the potential for reputational damage and that it eliminates key aspects of the discretion that enables institutions to act in the "best interests of all parties." Another commenter concluded that this provision is "unhelpful and hurtful" to victims, which, the commenter opined, may be the purpose of the provision.

One commenter stated that the provision allows evidence of past sexual conduct to be presented in an investigation and that such history would be raised to shame complainants.

Another commenter concluded that this provision would result in the respondent being able to coerce new witnesses because the "regulations allow that." The same commenter also stated that the Department's focus on due process is misplaced because there is no due process problem until corrective action is proposed. A different commenter concluded that the provision is a barrier to effective investigation and resolution of Title IX grievances, calling it an "unacceptable" and "untimely" step. The same commenter proposed eliminating the ten-day period for review of the collected evidence or, conversely, the inclusion of a requirement that

each party must have a reasonable opportunity to review the evidence and provide feedback while the investigation is ongoing, but without a set timeline.

One commenter stated that fair notice and an opportunity to respond does not require discovery of all evidence "directly related" to the allegations, where the evidence will not be relied upon in making a responsibility determination. Similarly, the commenter argued that requiring recipients to turn over all evidence directly related to the allegations was overbroad and may result, ultimately, in less information being shared by parties during the investigation. Another commenter argued that no rational basis exists for requiring the disclosure of evidence not relied upon in reaching a determination. The commenter added that the provision is extremely confusing and benefits no one.

Many commenters questioned why the Department would allow parties to review evidence upon which the decision-maker does not intend to rely upon in adjudicating the claim. These commenters agreed that only relevant information should be shared with the parties. One of these commenters concluded that the provision "further legalizes" the process.

Another commenter argued that, under current judicial precedent, no formal right to discovery exists in a student disciplinary hearing.

One commenter argued in favor of the recipient only sharing information with the parties, allowing them to determine whether the information should be shared with their advisor.

Many commenters supported limitations on the information being shared, including the exclusion or redaction of medical, psychological, financial, sexual history, or other personal and private information that has "no bearing" on the investigative report. One commenter argued in favor of permitting schools to release information to the parties based upon the individual circumstances of the case. The commenter stated that this information would unnecessarily

violate the privacy of the disclosing parties and would prevent investigators from gathering evidence out of fear that personal information would need to be revealed. The commenter concluded that the result would be "truly harmful and possibly destructive to anyone who would engage in the formal Title IX process." A different commenter concluded that there is no purpose to sharing this information except to intrude into the privacy of the parties. Commenters stated that the final regulations would allow the improper, and potentially widespread, sharing of confidential information and incentivize respondents to "slip in" prejudicial information to undermine the process.

A number of commenters concluded that students would be less likely to report sexual harassment and sexual violence if investigations are not conducted properly because there is no incentive for schools to actually investigate. The commenter stated that, if enacted, the proposed rules would harm many students who "face these problems every day."

A number of commenters concluded that schools should not be required to disclose irrelevant information and that institutions should be allowed to place "reasonable restrictions" on records. Some stated that an exception could be provided for a "showing of particularized relevance." One commenter proposed that schools should not allow access to information they themselves cannot use. Calling the provision "utterly illogical," one commenter stated that sharing irrelevant information would lead to extreme disparity of potential outcomes.

Many commenters opposed the electronic sharing of evidence with the parties. They argued that no system currently exists that limits the user's ability to take pictures of the information on the screen. One commenter was concerned that the proposed regulations do not include a requirement that the viewing of the relevant evidence be supervised and suggested the inclusion of such a provision. Some commenters argued that sharing records electronically could

exacerbate gender and socioeconomic inequality and put some students at a disadvantage if they do not have access to a private computer.

A number of commenters proposed sharing the evidence file in hard copy format. Some of these commenters argued in favor of the supervised viewing of evidence files, to protect the party's confidentiality and to prevent parties from taking photographs of the evidence, while others argued for investigators to use their discretion in redacting certain information from the files before sharing with the parties. Some commenters supported redactions for information deemed more prejudicial than probative and for "inflammatory" evidence. Many of these commenters expressed concern that the parties should not be allowed to take physical possession of the evidence files. Commenters who favored redactions, also argued that the final regulations unreasonably limit the discretion of investigators. These commenters argued that recipients should have the right to reasonably redact confidential and private information, including the identity of the complainant, if the recipient deems it necessary to do so. One commenter, who favored the hard copy format, argued that students with disabilities may have a difficult time reviewing the files if not submitted in hard copy.

Some commenters remarked that electronic file sharing programs are cost prohibitive, leading some to conclude that such cost would prohibit institutions from paying for advisors for the parties.

Many commenters asserted that the provision could run afoul of State laws, including laws regarding student privacy and the sharing of confidential information, as well as potentially violate State rape shield laws. Some commenters were also concerned about the effect of open-records statutes as a means to publicize investigative files to embarrass the opposing party.

A commenter stated that the proposed regulations fail to state that the report should include all exculpatory and inculpatory evidence, which could prevent an adequate record, jeopardize the parties' ability to make a defense, might diminish the thoroughness with which facts are considered, and unduly raise the risk of bias. Another commenter agreed that crafting a full report before sharing it with the parties is premature and could lead to errors, dissatisfaction, and the appearance of bias.

A number of commenters pointed out that the proposed provision would require recipients to change their current processes, causing a disruption in how they handle Title IX cases on their campuses.

One commenter pointed out that student conduct processes at institutions of higher education are not criminal processes and should not be expected to mirror them. The commenter stated that colleges and universities are not making criminal law decisions, but rather a policy violation determination. In addition, the commenter believed that the best policy would allow students to provide information, respond to information, and ask questions, but in a manner that is appropriate to limit creating an adversarial environment. Similarly, one commenter concluded that the final regulations place a greater burden on recipients than on a criminal prosecutor.

Some commenters opposed enacting a ten-day requirement for review and responses. One commenter suggested that the ten-day timeline was an "overregulation" of institutions, suggesting instead that institutions should set their own time frames, so long as they are equitable. A number of commenters argued that institutions should be able to determine appropriate timelines for their own processes. Many commenters questioned whether the Department meant ten calendar days or ten business days. Another commenter suggested shortening the review period from ten to five days. A different commenter stated that the

Department should not mandate any time period as, in their opinion, a uniform rule does not fit every circumstance at every school.

One commenter wrote that the final regulation's timeline is more rigid than a similar proceeding in a courtroom, where courts often expedite hearings when time is of the essence.

A commenter asked for clarification as to whether the proposed regulations would require an extra ten days for re-inspection of the supplemented investigative file. The same commenter also asked what, if any, guidelines should be put in place regarding supplementing the record at each stage of the adjudicative process.

One commenter proposed including a non-disclosure agreement as part of the adjudicative process. Another commenter requested that the final regulations should include a provision to punish institutions that have committed "wrongs" against respondents in the past.

One commenter requested a regulatory provision that would provide meaningful consequences for violations of confidentiality, including punishment for recipients that do not implement reasonable privacy safeguards or do not permit reasonable redaction policies.

One commenter requested clarification on how long institutions would be required to retain records associated with a Title IX proceeding. Another commenter requested that the Department provide an electronic platform for the storing of data associated with Title IX investigations.

A number of commenters raised issues with the implementation of the final regulations in the K-12 context. Commenters stated that the majority of changes in the proposed rules were not written with a clear understanding of their application to the K-12 environment and that the proposed rules may actually hamper a school district's ability to maintain a safe school environment. For example, the commenter stated that the extension of the timeline (for example,

by imposing a ten-day period for review of evidence) impairs a K-12 recipient's ability to effectuate meaningful change to a student's behavior. In addition, the commenter wrote that a "battle of responses" will foster more hostility, not less, where there is a high likelihood that the parties will remain within the same school district. The same commenter suggested that the Department should look to provide, and detail, restorative justice options that align with best practices for effective responses to incidents of sexual harassment and sexual violence. One commenter concluded that sharing the evidence file may be appropriate at the postsecondary level, but is inappropriate at the K-12 level. Another commenter called § 106.45(b)(5)(vi) "overkill" in the K-12 context. A different commenter supported leaving the issue of evidence review to local school officials. One commenter stated that the ten days to review and respond was unnecessary and would needlessly lengthen K-12 investigations.

Many commenters raised concerns over the burden caused by the proposed regulations on small institutions. Those commenters pointed out that sharing evidence with parties, waiting the required time period, and creating the investigative report and the parties' responses to it is onerous, has limited benefits as a truth-seeking process, and is too burdensome for institutions with only one staff member in charge of all of these responsibilities. Another commenter similarly asserted that small institutions do not currently have staff capacity to comply with § 106.45(b)(5)(vi)-(vii). A different commenter argued that continuous updates to the parties is "completely impractical" and "unduly burdensome" on the investigator, especially at small colleges.

Discussion: The Department appreciates commenters' support of § 106.45(b)(5)(vi). We believe that this provision provides complainants and respondents an equal opportunity to inspect and review evidence and provides transparent disclosure of the universe of relevant and potentially

relevant evidence, with sufficient time for both parties to meaningfully prepare arguments based on the evidence that further each party's view of the case, or present additional relevant facts and witnesses that the decision-maker should objectively evaluate before reaching a determination regarding responsibility, including the right to contest the relevance of evidence.

The Department is sensitive to commenters' concerns regarding the parties sharing irrelevant information, as well as relevant information that is relevant but also highly sensitive and personal, as part of the investigative process. This concern, however, must be weighed against the demands of due process and fundamental fairness, which require procedures designed to promote accuracy through meaningful participation of the parties. The Department believes that the right to inspect all evidence directly related to the allegations is an important procedural right for both parties, in order for a respondent to present a defense and for a complainant to present reasons why the respondent should be found responsible. This approach balances the recipient's obligation to impartially gather and objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence, with the parties' equal right to participate in furthering each party's own interests by identifying evidence overlooked by the investigator and evidence the investigator erroneously deemed relevant or irrelevant and making arguments to the decision-maker regarding the relevance of evidence and the weight or credibility of relevant evidence. In response to commenters' suggestions, we have added phrasing in § 106.45(b)(5)(vi) to emphasize that the evidence gathered and sent to the parties for inspection and review is evidence "directly related to the allegations" which must specifically include "inculpatory or exculpatory evidence whether obtained from a party or other source." Such inculpatory or exculpatory evidence (related to the allegations) may, therefore, be gathered by the investigator

from, for example, law enforcement where a criminal investigation is occurring concurrently with the recipient's Title IX grievance process.

While it may be true in some respects that this provision affords parties greater protection than some courts have determined is required under constitutional due process or concepts of fundamental fairness, that does not necessarily mean that protections such as those contained in § 106.45 are not desirable features of a consistent, transparent grievance process that enhances the fairness and truth-seeking function of the process.[1175] In response to commenters' concerns about disclosure of private medical, psychological, and similar treatment records, these final regulations provide in § 106.45(b)(5)(i) that a recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains the party's voluntary, written consent to do so for a grievance process under § 106.45. 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.[1176] Accordingly, a recipient will not access, consider, disclose, or otherwise use some of the most sensitive documents about a party without the party's (or the parent of the party's) voluntary, written consent, regardless of whether the recipient already has possession of such treatment records, even if the records are relevant.

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[1175] For further discussion see the "Role of Due Process in the Grievance Process" section of this preamble.
[1176] 34 CFR 99.3 is part of regulations implementing FERPA; for further discussion of the intersection between FERPA and these final regulations, see the "Section 106.6(e) FERPA" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

This provision adequately addresses commenter's concerns about sensitive information that may be shared with the other party pursuant to § 106.45(b)(5)(vi). Non-treatment records and information, such as a party's financial or sexual history, must be directly related to the allegations at issue in order to be reviewed by the other party under § 106.45(b)(5)(vi), and all evidence summarized in the investigative report under § 106.45(b)(5)(vii) must be "relevant" such that evidence about a complainant's sexual predisposition would never be included in the investigative report and evidence about a complainant's prior sexual behavior would only be included if it meets one of the two narrow exceptions stated in § 106.45(b)(6)(i)-(ii) (deeming all questions and evidence about a complainant's sexual predisposition "not relevant," and all questions and evidence about a complainant's prior sexual behavior "not relevant" with two limited exceptions).

The Department declines to define certain terms in this provision such as "upon request," "relevant," or "evidence directly related to the allegations," as these terms should be interpreted using their plain and ordinary meaning. We note that "directly related" in § 106.45(b)(5)(vi) aligns with requirements in FERPA, 20 U.S.C. 1232g(a)(4)(A)(i).[1177] We also acknowledge that "directly related" may sometimes encompass a broader universe of evidence than evidence that is "relevant." However, the § 106.45 grievance process is geared toward reaching reliable, accurate outcomes in a manner that keeps the burden of collecting and evaluating relevant evidence on the recipient while giving both parties equally strong, meaningful opportunities to present, point out, and contribute relevant evidence, so that ultimately the decision-maker

[1177] For further discussion see the "Section 106.6(e) FERPA" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

objectively evaluates relevant evidence and understands the parties' respective views and arguments about how and why evidence is persuasive or should lead to the outcome desired by the party. The Department therefore believes it is important that at the phase of the investigation where the parties have the opportunity to review and respond to evidence, the universe of that exchanged evidence should include all evidence (inculpatory and exculpatory) that relates to the allegations under investigation, without the investigator having screened out evidence related to the allegations that the investigator does not believe is relevant. The parties should have the opportunity to argue that evidence directly related to the allegations is in fact relevant (and not otherwise barred from use under § 106.45), and parties will not have a robust opportunity to do this if evidence related to the allegations is withheld from the parties by the investigator. For example, an investigator may discover during the investigation that evidence exists in the form of communications between a party and a third party (such as the party's friend or roommate) wherein the party characterizes the incident under investigation. If the investigator decides that such evidence is irrelevant (perhaps from a belief that communications before or after an incident do not make the facts of the incident itself more or less likely to be true), the other party should be entitled to know of the existence of that evidence so as to argue about whether it is relevant. The investigator would then consider the parties' viewpoints about whether such evidence (directly related to the allegations) is also relevant, and on that basis decide whether to summarize that evidence in the investigative report. A party who believes the investigator reached the wrong conclusion about the relevance of the evidence may argue again to the decision-maker (i.e., as part of the party's response to the investigative report, and/or at a live hearing) about whether the evidence is actually relevant, but the parties would not have that opportunity if the evidence had been screened out by the investigator (that is, deemed irrelevant)

without the parties having inspected and reviewed it as part of the exchange of evidence under § 106.45(b)(5)(vi).

In response to commenters' concerns that proposed § 106.45(b)(5)(vi) unduly imposed costly or burdensome restrictions by specifying that the evidence sent to the parties must be "in an electronic format, such as a file sharing platform, that restricts the parties and advisors from downloading or copying the evidence," we have removed reference to a file-sharing platform and revised this provision to state that recipients must send the evidence subject to inspection and review to each party, and the party's advisor (if any), in electronic format or hard copy. Under the final regulations, therefore, recipients are neither required nor prohibited from using a file sharing platform that restricts parties and advisors from downloading or copying the evidence. Recipients may require parties and advisors to refrain from disseminating the evidence (for instance, by requiring parties and advisors to sign a non-disclosure agreement that permits review and use of the evidence only for purposes of the Title IX grievance process), thus providing recipients with discretion as to how to provide evidence to the parties that directly relates to the allegations raised in the formal complaint.

With regard to the sharing of confidential information, a recipient may permit or require the investigator to redact information that is not directly related to the allegations (or that is otherwise barred from use under § 106.45, such as information protected by a legally recognized privilege, or a party's treatment records if the party has not given written consent) contained within documents or other evidence that are directly related to the allegations, before sending the evidence to the parties for inspection and review. Further, as noted above, recipients may impose on the parties and party advisors restrictions or require a non-disclosure agreement not to disseminate any of the evidence subject to inspection and review or use such evidence for any

purpose unrelated to the Title IX grievance process, as long as doing so does not violate these final regulations or other applicable laws. We reiterate that redacting "confidential" information is not the same as redacting information that is not "directly related to the allegations" because information that is confidential, sensitive, or private may still be "directly related to the allegations" and thus subject to review by both parties. Similarly, a recipient may permit or require the investigator to redact from the investigative report information that is not relevant, which is contained in documents or evidence that is relevant, because § 106.45(b)(5)(vii) requires the investigative report to summarize only "relevant evidence."

Section 106.45(b)(5)(vi) is not a "blunt solution" as a commenter suggested. The Department recognizes that Title IX enforcement is, in fact, a nuanced problem, and this recognition has informed the policy formation as well as the drafting and revising of this particular provision. We do not believe, as the commenter thinks, that a concern over false allegations is a "canard," nor does the number of times that a particular word is used in the NPRM suggest that the Department is uninterested in, or unmoved by, best practices in the field. We disagree that § 106.45(b)(5)(vi) fails to acknowledge the "complexity" of sexual misconduct on college campuses, because this provision is part of a carefully prescribed grievance process that aims to ensure that the parties have meaningful opportunities to participate in advancing each party's interests in these high-stakes cases. The provision proposed in the NPRM, and revised in these final regulations, not only takes into account the complexity of sexual misconduct on college campuses, but considers, as fundamental fairness demands, the experiences and challenges faced by both complainants and respondents.

The Department is sensitive to commenters' concerns over whether the final regulations might deter the reporting of sexual harassment. The § 106.45 grievance process is designed to

improve the reliability and legitimacy of recipients' investigations and adjudications of Title IX sexual harassment allegations, and we believe that providing the parties with strong, clear procedural rights improves the fairness and legitimacy of the grievance process. We recognize that a formal grievance process is challenging, difficult, and stressful to navigate, for both complainants and respondents. It is for this reason that these final regulations ensure that parties are not inhibited from seeking support and assistance from any source (see § 106.45(b)(5)(iii)) and that parties have the right to select an advisor of choice to advise and accompany a party throughout the grievance process (see § 106.45(b)(5)(iv)). More broadly, the Department is persuaded by some commenters' concerns that if a complainant is forced to undergo a grievance process whenever a complainant reports sexual harassment, complainants may decide not to report at all, and by other commenters' concerns that without strong, clear procedural rights, recipients' grievance processes will not reach reliable outcomes in which parties and public have confidence. The final regulations therefore increase the obligations on recipients to respond promptly and supportively to every complainant when the recipient receives notice that the complainant has allegedly been victimized by sexual harassment (without requiring any proof or evidence supporting the allegations) irrespective of the existence of a grievance process, promote respect for a complainant's autonomy over whether or not to file a formal complaint that initiates a grievance process, and protect complainants from retaliation for refusing to participate in a grievance process. We have revised § 106.8, § 106.30, and § 106.44 significantly to achieve these aims and have added § 106.71. For example, § 106.8 emphasizes the need for every complainant and all third parties to have clear, accessible options for how to report sexual harassment to the Title IX Coordinator; the definitions of "complainant" and "formal complaint" in § 106.30 have been revised to clarify that the choice to initiate a grievance process must

remain within the control of a complainant unless the Title IX Coordinator has specific reasons justifying the filing of a formal complaint over the wishes of a complainant; § 106.44(a) now requires a recipient to offer supportive measures to a complainant with or without a formal complaint being filed using an interactive process whereby the Title IX Coordinator must discuss and take into account the complainant's wishes regarding the supportive measures to be provided and explain to the complainant the option of filing a formal complaint; and § 106.71 protects the right of any individual to choose not to participate in a grievance process without facing retaliation. The Department intends for these final regulations to assure complainants that complainants may report sexual harassment and receive supportive measures whether or not the complainant also participates in a grievance process, and to assure complainants and respondents that a grievance process will be fair, consistent with constitutional due process, and give both parties meaningful opportunity to advance the party's own interests regarding the case outcome, in an investigation and adjudication overseen by impartial, unbiased Title IX personnel who do not prejudge the facts at issue and objectively evaluate inculpatory and exculpatory evidence before reaching determinations regarding responsibility.

The Department disagrees with commenters' assertions that the final regulations would allow the recipient (or the respondent) to coerce witnesses, turn a "blind eye" to sexual violence, or "revictimize" complainants. As discussed above, § 106.71 prohibits retaliation (which includes coercion) against any person for participating *or refusing to participate* in a Title IX proceeding and § 106.44(a) requires recipients to respond to every complainant by offering supportive measures; these requirements ensure that no recipient may turn a blind eye to reported sexual violence. The § 106.45 grievance process, including allowing both parties the opportunity to inspect and review evidence directly related to the allegations, benefits complainants as much

as respondents by ensuring that each party is aware of evidence and may then make arguments that further the party's own interests based on the evidence.[1178]

The Department disagrees that due process is not implicated until corrective action is proposed. Due process is not only a concern after corrective or punitive action is taken, but throughout the entire process leading to a recipient's decision to impose corrective or disciplinary action.[1179]

The Department disagrees that § 106.45(b)(5)(vi)-(vii) are a barrier to effective investigations and case resolutions, and believes that to the contrary, these provisions work to guarantee effective investigations and resolutions by allowing the parties full access to the evidence gathered, and to the investigative report that summarizes relevant evidence, so the parties may make corrections, provide appropriate context, and prepare their responses and defenses before a decision-maker reaches a determination regarding responsibility.

We appreciate the commenters who stated that the ten-day time frame provision is appropriate for the parties to review and respond to the evidence directly related to the allegations. We agree that the result of this provision will be expedited hearings because the parties will have had the opportunity to see, review, and consider their responses to evidence prior to showing up at a hearing. However, this provision's purpose is not solely to speed up the

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[1178] *E.g.*, Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAPMAN L. REV. 57, 57 (1998) ("In its simplest terms, an adversary system *resolves disputes by presenting conflicting views of fact and law to an impartial and relatively passive arbiter, who decides which side wins what*. . . . Thus, the adversary system represents far more than a simple model for resolving disputes. Rather, it consists of a core of basic rights that recognize and protect the dignity of the individual in a free society.") (emphasis added); *see also* David L. Kirn, *Proceduralism and Bureaucracy: Due Process in the School Setting*, 28 STANFORD L. REV. 841, 847-48 (1976) (due process includes the right of parties to participate in the presentation of evidence, which serves the dual interest of improving the reliability of outcomes and the parties' sense of fairness of the proceeding).

[1179] For further discussion see the "Role of Due Process in the Grievance Process" section of this preamble.

process. The Department believes that this provision, in conjunction with the other provisions in § 106.45, balances the need for reasonably prompt resolution of Title IX grievance processes with the need to ensure that these grievance processes are thorough and fair.

The Department understands commenters' concerns that a ten-day time period for the parties to inspect and review evidence (and then a ten-day time period to review and respond to the investigative report) is too long a timeline, but we do not agree that this timeline is an "overregulation" or that it is more rigid than a similar proceeding in a criminal court. Instead, the Department finds that the time frame is appropriate for the parties to read and respond to the evidence subject to inspection and review, and then to the investigative report. Recipients may choose whether the ten days should be business days or calendar days (or may use a different calculation of "days" that works with the recipient's administrative operations, such as "school days.") Although the recipient is required to provide at least ten days for inspection and review, the recipient may give the parties more than ten days to respond, bearing in mind that the recipient must conclude the grievance process within the reasonably prompt time frames to which the recipient must commit under § 106.45(b)(1)(v).

Section 106.45(b)(5)(vi)-(vii) concerning inspection and review of evidence, and review of the investigative report, are not overbroad or likely to lead to information withholding, and do not force the parties to share irrelevant information. These provisions appropriately focus the investigation on evidence "directly related to the allegations" and to "relevant" evidence in furtherance of each party's interest in permitting pertinent evidence to come to light so that any misunderstandings, confusions, and contradictions can be clarified. As discussed above, the Department has revised § 106.45 to expressly forbid a recipient from using a party's medical, psychological, and similar records without the party's voluntary, written consent, and from using

information protected by a legally recognized privilege, and deems "not relevant" questions and evidence about a complainant's prior sexual behavior (with two limited exceptions).

We appreciate the commenters' suggestions regarding the inclusion of: a requirement that the viewing of the relevant evidence be supervised; the appointment of a special master; and a provision informing parties of the consequences of submitting false information. Commenters have noted that recipients' restrictions on a party's ability to view the evidence gathered in a case (for example, by requiring the party to sit in a certain room in the recipient's facility, for only a certain length of time, with or without the ability to take notes while reviewing the evidence, and perhaps while supervised by a recipient administrator) have reduced the meaningfulness of the party's opportunity to review evidence and use that review to further the party's interests. We believe it is important for the parties to receive a copy of the evidence subject to inspection and review so that the parties and their advisors may, over the course of a ten-day period, carefully consider the evidence directly related to the allegations, prepare arguments about whether all of that evidence is relevant and whether relevant evidence has been omitted, and consider how the party intends to respond to the evidence. On the other hand, we do not believe that the purposes of the parties' right to inspect and review evidence necessitates or justifies the Department requiring recipient to appoint a "special master" to oversee the exchange of evidence. The recipient's investigator will be well-trained in how to conduct an investigation and grievance process and in issues of relevance, under § 106.45(b)(1)(iii). We address warnings about making false statements during a grievance process in § 106.45(b)(2), which requires the written notice of allegations that a recipient sends to both parties upon receipt of a formal complaint to contain a statement about whether the recipient's code of conduct contains a prohibition against making false statements during a grievance process. We do not believe that a further statement about

false statements accompanying sending the evidence to the parties under § 106.45(b)(5)(vi) serves a necessary purpose and decline to require it.

We decline to change the requirement that recipients send the evidence to a party's advisor (if the party has one).[1180] If a party has exercised the party's right to select an advisor of the party's choice, it is for the purpose of receiving that advisor's assistance during the grievance process, and we do not believe that a party's ten-day window to review and respond to the evidence should be narrowed by placing the burden on the party to receive the evidence from the recipient and then send the evidence to the party's advisor. However, nothing in these final regulations precludes a party from requesting that the recipient not send the evidence subject to inspection and review to the party's advisor. Similarly, the final regulations do not preclude the recipient from asking the parties to confirm whether or not the party has an advisor prior to sending the evidence under § 106.45(b)(5)(vi).

The Department disagrees that sending the evidence, or investigative report, to the parties (and their advisors, if any) will lead to an "extreme disparity of potential outcomes." The provisions in § 106.45(b)(5)(vi)-(vii) are focused on providing precisely the opposite of the commenter's conclusion: predictable procedural requirements that respondents and complainants can rely upon to afford them a predictable, fair process.

The Department does not agree that § 106.45(b)(5)(vi)-(vii), or the § 106.45 grievance process as a whole, creates the same rights to discovery afforded to civil litigation parties or criminal defendants. For example, parties to a Title IX grievance process are not granted the

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[1180] We have revised § 106.45(b)(5)(vii) to require the investigative report to be sent to the parties and their advisors (if any), for the same reasons that we decline to remove the requirement to send the evidence subject to inspect and review to the parties and their advisors.

right to depose parties or witnesses, nor to invoke a court system's subpoena powers to compel parties or witnesses to appear at hearings, which are common features of procedural rules governing litigation and criminal proceedings. Recognizing that schools, colleges, and universities are educational institutions and not courts of law, the Department has prescribed a grievance process that incorporates procedures rooted in principles of due process and fundamental fairness, to give parties clear, meaningful opportunities to participate in influencing the case outcome that advances each party's interests, without imposing on recipients the expectation that recipients should function as *de facto* courts.

Similarly, the Department does not agree that § 106.45(b)(5)(vi)-(vii) will prolong proceedings, create ancillary disputes, or invade the privacy of parties and witnesses. As various courts have held,[1181] parties are entitled to constitutional due process from public institutions and a fair process from private institutions during Title IX grievance proceedings. In these final regulations, the Department has prescribed a process that provides sufficient due process protections to resolve allegations of sexual harassment in a recipient's education program or activity, in a manner that permits (and requires) a recipient to conclude its grievance process within designated, reasonably prompt time frames, and has taken care to protect party privacy while ensuring that the parties have access to information that may affect the outcome of the case.

We appreciate the concerns of many commenters about the burden and costs that § 106.45(b)(5)(vi)-(vii) may impose upon recipients. The Department understands that these

[1181] *E.g.*, *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 69 (1st Cir. 2019); *Doe v. Purdue Univ. et al.*, 928 F.3d 652 (7th Cir. 2019); *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018).

provisions have the potential to generate modest burden and costs, but believes that the financial costs and administrative burdens resulting from the provisions are far outweighed by the due process protections ensured by these provisions. We disagree with the assertion that "sharing evidence with parties" results in unacceptable burdens on recipients, because reviewing the universe of evidence that is, or may be, relevant represents a critical part of enabling parties to have a meaningful opportunity to be heard, which is an essential component of due process and fundamental fairness. The Department appreciates that many recipients' Title IX offices are inundated and over-worked, but sacrificing procedures important to concepts of due process and fundamental fairness is not an acceptable means of alleviating administrative burdens. We reiterate that where reasonable, we have revised § 106.45(b)(5)(vi)-(vii) to alleviate unnecessary administrative burdens on recipients, for example by removing reference to a file sharing platform and allowing the recipient to send the evidence and investigative report electronically or by hard copy.

The Department also understands that a potentially different set of issues regarding § 106.45(b)(5)(vi)-(vii) may occur where there are multiple formal complaints arising out of a single incident. To expressly authorize recipients to handle cases that arise out of the same incident of sexual harassment involving multiple complainants, multiple respondents, or both, we have added § 106.45(b)(4) to expressly grant discretion to recipients to consolidate formal complaints involving more than one complainant or more than one respondent, where the allegations of sexual harassment arise out of the same facts or circumstances. The Department also provides in § 106.45(b)(4) that where a grievance process involves more than one complainant or more than one respondent, references in § 106.45 to the singular "party," "complainant," or "respondent" must include the plural, as applicable. These revisions help

clarify that a single grievance process might involve multiple complainants or multiple respondents; we emphasize that in such a situation, each individual party has each right granted to a party under § 106.45 and these final regulations. For example, in a case involving multiple complainants, a recipient would not be permitted to designate one complainant as a "lead complainant" and use such a designation to, for instance, only send the evidence to the "lead complainant" instead of to each complainant individually.

Parties have the opportunity to provide additional information or context in their written response after reviewing the evidence under § 106.45(b)(5)(vi). The final regulations do not directly address an extension of the timeline for responses, should the parties present additional information after reviewing the evidence. These final regulations provide that the parties must have at least ten days to submit a written response after review and inspection of the evidence directly related to the allegations raised in a formal complaint. A recipient may require all parties to submit any evidence that they would like the investigator to consider prior to when the parties' time to inspect and review evidence begins. Alternatively, a recipient may choose to allow both parties to provide additional evidence in response to their inspection and review of the evidence under § 106.45(b)(5)(vi) and also an opportunity to respond to the other party's additional evidence. Similarly, a recipient has discretion to choose whether to provide a copy of each party's written response to the other party to ensure a fair and transparent process and to allow the parties to adequately prepare for any hearing that is required or provided under the grievance process. A recipient's rules or practices other than those required by § 106.45 that a recipient adopts must apply equally to both parties as required by § 106.45(b). If a recipient chooses not to allow the parties to respond to additional evidence provided by a party in these circumstances, the parties will still receive the investigative report that fairly summarizes relevant evidence

under § 106.45(b)(5)(vii) and will receive an opportunity to inspect and review all relevant evidence at any hearing and to refer to such evidence during the hearing, including for purposes of cross-examination at live hearings under § 106.45(b)(5)(vi). If a recipient allows parties to provide additional evidence after reviewing the evidence under § 106.45(b)(5)(vi), any such additional evidence that is summarized in the investigative report will not qualify as new evidence that was reasonably available at the time the determination regarding responsibility was made for purposes of an appeal under § 106.45(b)(8).

The Department agrees with the commenter's concern that the investigative report should contain relevant evidence including exculpatory and inculpatory evidence. Section 106.45(b)(1)(ii) makes clear that the recipient must evaluate relevant evidence including inculpatory and exculpatory evidence. The final regulations add the phrase "and inculpatory or exculpatory evidence whether obtained from a party or other source" to § 106.45(b)(5)(vi) with respect to the evidence sent to the parties for inspection and review. Thus, where § 106.45(b)(5)(vii) requires the investigative report to fairly summarize all the relevant evidence, the final regulations make clear that evidence may be relevant whether it is inculpatory or exculpatory.

We do not agree that sharing the investigative report prior to its finalization would lead to errors, dissatisfaction, and the appearance of bias. In fact, those are the very potential problems that sharing the report with the parties seeks to avoid. The parties' responses may address perceived errors that may be corrected, so that the parties have an opportunity to express and note their contentions for or against the investigative report, and sharing the investigative report at the same time, to both parties, helps avoid any appearance of bias.

We appreciate the commenter's questions regarding how the evidence and the investigative report should be shared with the parties. The final regulations revise § 106.45(b)(5)(vi) to state that "the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy." Similar language is used in § 106.45(b)(5)(vii) regarding sending the parties, and their advisors, copies of the investigative report, electronically or in hard copy format. The Department reminds recipients that these provisions contain baseline requirements, and additional practices to address privacy concerns, such as digital encryption, that do not run afoul of § 106.45(b)(5)(vi)-(vii), or any other provision of the final regulations, are not precluded by these final regulations. The final regulations do not require recipients to provide individual laptops to parties to review the evidence or investigative report, but a recipient may do so at the recipient's discretion, and the option to send parties hard copies under these provisions gives recipients the flexibility to respond to a party's inability to access digital or electronic copies.

The Department does not wish to prohibit the investigator from including recommended findings or conclusions in the investigative report. However, the decision-maker is under an independent obligation to objectively evaluate relevant evidence, and thus cannot simply defer to recommendations made by the investigator in the investigative report. As explained in the "Section 106.45(b)(7)(i) Single Investigator Model Prohibited" subsection of the "Determinations Regarding Responsibility" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, the decision-maker cannot be the same person as the Title IX Coordinator or the investigator and must issue a written determination regarding responsibility, and one of the purposes of that requirement is to ensure

that independent evaluation of the evidence gathered is made prior to reaching the determination regarding responsibility.

The Department appreciates commenters' concerns and requests for clarification regarding the application of the final regulations to the elementary and secondary school environment. We disagree that the grievance process timeline impairs an elementary and secondary school recipient's ability to effectuate meaningful change to a student's behavior. There are many actions a recipient may take with respect to a respondent that constitute permissible supportive measures as defined in § 106.30, which may correct or modify a respondent's behavior without being punitive or disciplinary. Educational conversations with students, for example, and impressing on a student the recipient's anti-sexual harassment policy and code of conduct expectations, need not constitute punitive or disciplinary actions that a school is precluded from taking without following a § 106.45 grievance process. Similarly, we disagree that § 106.45 generally, or § 106.45(b)(5)(vi)-(vii) in particular, foster hostility or hamper a school district's ability to maintain a safe school environment. Providing a predictable, fair grievance process before imposing discipline on students may help reduce hostility and tensions in a school environment, and recipients have many options under the § 106.30 definition of supportive measures for taking action to protect party safety and deter sexual harassment before or during any grievance process and regardless of whether a grievance process is ever initiated. We also remind recipients that § 106.44(c) allows a respondent to be removed from education programs or activities on an emergency basis, without pre-removal notice or hearing, and regardless of whether a grievance process is pending regarding the sexual harassment allegations from which the imminent threat posed by the respondent has arisen.

With regard to records retention, the Department addresses this issue under §106.45(b)(10). We have revised that provision, including by extending the record retention period from three years as proposed in the NPRM, to seven years under these final regulations.

The Department appreciates the commenter's responses to Directed Question 7. After considering the many public comments responsive to this directed question posed in the NPRM, the Department finds that it would be inappropriate to dilute the requirement that there be a direct relationship between the evidence in question and the allegations under investigation. For reasons discussed above, the final regulations require inspection and review of evidence that is directly related to the allegations, including inculpatory and exculpatory evidence obtained from a party or any other source, and require the investigative report to summarize only relevant evidence.

Changes: The Department makes the following changes to 106.45(b)(5)(vi). First, the phrase "and inculpatory or exculpatory evidence whether obtained from a party or other source," is added. Second, we have added "or a hard copy" as an option for sending to the parties and their advisors the evidence subject to inspection and review. Lastly, we have removed the phrase "such as a file sharing platform, that restricts the parties and advisors from downloading or copying the evidence."

Section 106.45(b)(5)(vii) An Investigative Report that Fairly Summarizes Relevant Evidence

Comments: Many commenters expressed support for § 106.45(b)(5)(vii) and asserted that the provision would work to restore fairness and due process for complainants and respondents. A number of commenters stated that, in their experience, the ten-day period response period is a reasonable and appropriate time frame. One commenter characterized the NPRM as a long

overdue correction to the withdrawn 2011 Dear Colleague Letter, which the commenter called a "wrongful repudiation" of due process. The commenter also argued for the Department to adopt a particular recipient's policy as a model for procedures that other recipients should employ in addressing inappropriate sexual activity while simultaneously assuring due process protections.

A number of commenters opposed the provision. Many commenters expressed concern over the mandated ten-day period. Commenters asserted that recipients should determine the appropriate timelines for their process, rather than the Department prescribing this timeline. Similarly, another commenter asserted that "rigid time frames" substantially lengthen investigation and adjudication processes. One commenter requested clarification as to why the investigative report must be completed and made available ten days prior to a hearing. The commenter was concerned that such a requirement results in an overly burdensome process with negligible benefits. A different commenter expressed concern that if new information arises during the review of the report, the timeline should be extended to avoid exploitative efforts by either party. One commenter questioned how institutions should respond when a party requests additional time to review the report before the hearing.

One commenter requested clarification over when the parties' written responses to the investigative report are due and what the investigator is supposed to do with the parties' responses.

Some commenters argued that the proposed provision is unnecessary because the parties could address and respond to evidence during a hearing. Many commenters stated that sharing the investigative report is burdensome and could obstruct the investigation. A number of commenters pointed out that the proposed provision would require them to change processes, causing a disruption in how they handle Title IX enforcement on their campus. Citing the

addition of significant time and resource requirements to their institution's current procedures, one commenter argued that small institutions lack the capacity right now to comply with this requirement. A different commenter concluded that this provision will impose "shadow costs" on institutions.

Another commenter proposed deleting § 106.45(b)(5)(vii) entirely because of concerns over what should be included in the investigative report, the potential for one of the parties to demand a time extension if the report contains a recommendation of responsibility, and the issues raised in multiple complainant proceedings. The same commenter recommended that the investigative report include facts, interview statements from the parties, a preliminary credibility analysis, and the policy applied to the analysis of the alleged behavior. A different commenter suggested that the report only include facts, with no recommended findings or conclusions, stating that summaries can be fraught with "asymmetrical information delivery" and may not provide a means for any party to submit corrections. One commenter proposed removing the mandate to share the investigative report with the student's advisor and allowing the student to choose whether they want their advisor to see the report.

One commenter expressed concern that the provision is too vague and leaves many unanswered questions, such as what the final regulations would allow if the parties need to make changes following their review or if additional evidence is located.

A commenter requested a clarification of, or a change to, the language in § 106.45(b)(5)(vi), which refers to "directly related to the evidence," and § 106.45(b)(5)(vii), which refers to "relevant evidence."

A commenter stated that, as written, this provision would allow institutions to implement access controls that could limit or deny due process, such as declaring that the report is the

property of the institution or creating time limits on viewings. The commenter proposed that the provision should be revised to allow the parties easy access to the report until the final determination is made.

A commenter concluded that provision goes beyond any due process requirement, that they are aware of, to have information in the evidentiary file synthesized into a summary report ten days before the hearing. The commenter also requested clarification as to how the recipient must amend its investigative report in light of the parties' responses.

Many commenters questioned whether the Department meant ten calendar days or ten business days.

Discussion: The Department appreciates commenters' support of § 106.45(b)(5)(vii). We agree that the final regulations seek to provide strong, clear procedural protections to complainants and respondents, including apprising both parties of the evidence the investigator has determined to be relevant, in order to adequately prepare for a hearing (if one is required or otherwise provided) and to submit responses about the investigative report for the decision-maker to consider even where a hearing is not required or otherwise provided.

We appreciate the commenter's proposal to follow policies in place at a particular institution. We acknowledge the efforts of particular institutions and have considered policies in place at various individual institutions, but for reasons described in the "Role of Due Process in the Grievance Process" section and throughout this preamble, we do not adopt any particular institution's policies or procedures wholesale. We believe that the provisions outlined in these final regulations provide necessary and appropriate due process and fundamental fairness protections to complainants and respondents.

As some commenters have noted, § 106.45(b)(5)(vii) aligns with the practice of many recipients who have become accustomed to conducting investigations in Title IX sexual harassment proceedings and create an investigative report as part of such an investigation. We believe that a standardized provision regarding an investigative report is important in the context of Title IX proceedings even though such a step may not be required in civil litigation or criminal proceedings and even though specific parts of this provision may differ from recipients' current practices (i.e., ensuring that parties are sent a copy of the investigative report ten days prior to the time that a determination regarding responsibility will be made). The Department believes that the purpose of § 106.45(b)(5)(vii) and the specific requirements in this provision are appropriate because a Title IX grievance process occurs in an educational institution (not in a court of law) and because a recipient of Federal funds agrees, under Title IX, to operate education programs or activities free from sex discrimination. It is thus appropriate to obligate the recipient (and not the parties to disputed sexual harassment allegations) to take reasonable steps calculated to ensure that the burden of gathering evidence remains on the recipient, yet to also ensure that the recipient gives the parties meaningful opportunity to understand what evidence the recipient collects and believes is relevant, so the parties can advance their own interests for consideration by the decision-maker. A valuable part of this process is giving the parties (and advisors who are providing assistance and advice to the parties) adequate time to review, assess, and respond to the investigative report in order to fairly prepare for the live hearing or submit arguments to a decision-maker where a hearing is not required or otherwise provided. Without advance knowledge of the investigative report, the parties will be unable to effectively provide context to the evidence included in the report.

While we are sensitive to recipients' concerns regarding burden, cost, and capacity, the Department believes that the required process in § 106.45(b)(5)(vii) does not present onerous demands on recipients. Concerns over burden and capacity should be weighed, not only against fundamental fairness and due process, but in the context of the phase of an investigation when this requirement is in place: during the period when the investigative report should be compiled anyway (that is, after evidence has been gathered and before a determination will be made). In the context of a grievance process that involves multiple complainants, multiple respondents, or both, a recipient may issue a single investigative report. We have added § 106.45(b)(4) to expressly authorize a recipient, in the recipient's discretion, to consolidate formal complaints when allegations all arise out of the same facts or circumstances.

Section 106.45(b)(5)(vii) is important for fairness as well as efficiency purposes; it assures that the investigative report is completed in an expeditious manner, provides the opportunity to the parties to prepare their arguments and defenses, and serves the goal of ensuring constructive, meaningful, and effective hearings (where required, or otherwise provided) and informed determinations regarding responsibility even where the determination is reached without a hearing. Section 106.45(b)(5)(vii) presents no obstacle to an effective investigation and reliable resolution because it comes after an investigation has finished gathering evidence.

The Department shares commenters' concerns about recipient practices that limit access to the investigative report. Practices or rules that limit a party's (or party's advisor's) access to the investigative report violate § 106.45(b)(5)(vii) because under this provision recipients must send a copy of the investigative report electronically or by hard copy to each party and the party's advisor, if any. While this provision does not require a recipient to use a file sharing

platform that restricts the parties and advisors from downloading or copying the evidence, recipients may choose to use a file sharing platform that restricts the parties and advisors from downloading or copying the investigative report under § 106.45(b)(5)(vii) and this would constitute sending the parties a copy "in an electronic format," meeting the requirements of this provision.

The Department appreciates commenters' suggestions as to what elements recipients should include in their investigative reports. The Department takes no position here on such elements beyond what is required in these final regulations; namely, that the investigative report must fairly summarize relevant evidence. We note that the decision-maker must prepare a written determination regarding responsibility that must contain certain specific elements (for instance, a description of procedural steps taken during the investigation)[1182] and so a recipient may wish to instruct the investigator to include such matters in the investigative report, but these final regulations do not prescribe the contents of the investigative report other than specifying its core purpose of summarizing relevant evidence.

The Department does not adopt commenters' suggestions to allow institutions to set their own timelines with respect to the parties' window of time to review the investigative report, but the Department has intentionally given recipients flexibility to designate the recipient's own "reasonably prompt time frames" for the conclusion of each phase of the grievance process (including appeals and any informal resolution processes) pursuant to § 106.45(b)(1)(v). While we understand from commenters that some recipients may desire to conclude their grievance process in fewer than 20 days (i.e., the two ten-day timelines prescribed in § 106.45 which, in

[1182] Section 106.45(b)(7)(ii).

combination, preclude a recipient from designating a time frame for conclusion of an entire grievance process in fewer than 20 days), the Department believes that 20 or fewer days has not been widely viewed as a reasonable time frame for conducting and concluding a truly fair investigation and adjudication of allegations that carry such high stakes for all parties involved. This belief is buttressed by commenters who appreciated that the Department has withdrawn the expectation set forth in the withdrawn 2011 Dear Colleague Letter for recipients to conclude a grievance process within 60 calendar days.[1183] We reiterate that a formal complaint of Title IX sexual harassment alleges serious misconduct that has jeopardized a person's equal educational access, and the determination regarding responsibility carries grave consequences for each party; the purpose of the § 106.45 grievance process is to reduce the likelihood of positive or negative erroneous outcomes (i.e., inaccurate findings of responsibility and inaccurate findings of non-responsibility). Ensuring that each party, in each case, receives effective notice and meaningful opportunity to be heard necessitates some procedures that involve some passage of time (e.g., time for parties and their advisors to review evidence, and to review the investigator's summary of relevant evidence). The § 106.45 grievance process aims to balance the need for a thorough, fair investigation that permits the parties' meaningful participation, with the need to conclude a grievance process promptly to bring resolution to situations that are difficult for both parties to navigate.

We appreciate the commenter's suggestion that the student should get to choose what the student's advisor can see in the investigative report. We do not believe that this issue requires

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[1183] 2011 Dear Colleague Letter at 12 ("Based on OCR experience, a typical investigation takes approximately 60 calendar days following receipt of the complaint."). The Department's experience, therefore, has long been that an adequate investigation into sexual harassment allegations typically takes longer than 20 days.

regulation and we do not wish to create unnecessary complexity in the recipient's obligations with respect to sending the investigative report. A party may always request that the recipient not send the investigative report to the party's advisor, but if the party has already indicated that the party has selected an advisor of choice then we believe the better default practice is for the party's advisor to be sent the investigative report, so that the burden of receiving the report, then forwarding it to the party's advisor, does not rest on the party, which would also result in a *de facto* shortening of the ten-day window in which a party – with assistance from an advisor – may review and prepare responses to the investigator's summary of relevant evidence.

The Department acknowledges the difference between the use of "directly related to the allegations" in § 106.45(b)(5)(vi) and "relevant evidence" in § 106.45(b)(5)(vii). As discussed above, in the "Section 106.45(b)(5)(vi) Inspection and Review of Evidence Directly Related to the Allegations, and Directed Question 7" subsection of the "Investigation" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, we acknowledge that "directly related to the allegations" may encompass a broader universe of evidence than evidence that is "relevant," and believe that it is most beneficial for the parties' access to evidence to be limited by what is directly related to the allegations, but for the investigator to determine what is relevant after the parties have reviewed that evidence.

Independent of whether this provision would be required to satisfy constitutional due process of law, § 106.45(b)(5)(vii) (giving the parties copies of the investigative report prior to the live hearing or other time of determination) serves an important function in a Title IX grievance process, placing the parties on level footing with regard to accessing information to allow the parties to serve as a check on any decisions that the recipient makes regarding the relevance of evidence and omission of relevant evidence. Allowing the parties to review and

respond to the investigative report is important to providing the parties with notice of the evidence the recipient intends to rely on in deciding whether the evidence supports the allegations under investigation. The parties cannot meaningfully respond and put forward their perspectives about the case when they do not know what evidence the investigator considers relevant to the allegations at issue.

These final regulations do not prescribe a process for the inclusion of additional information or for amending or supplementing the investigative report in light of the parties' responses after reviewing the report. However, we are confident that even without explicit regulatory requirements, best practices and respect for fundamental fairness will inform recipients' choices and practices with regard to amending and supplementing the report. Recipients enjoy discretion with respect to whether and how to amend and supplement the investigative report as long as any such rules and practices apply equally to both parties, under the revised introductory sentence of § 106.45(b).

A recipient may give the parties the opportunity to provide additional information or context in their written response to the investigative report, as provided in § 106.45(b)(5)(vii), to remedy any "asymmetrical information delivery," but the Department believes that in combination, § 106.45(b)(5)(vi)-(vii) reduce the likelihood of asymmetrical information delivery because the parties each will have the opportunity to review all the evidence related to the allegations and then all the evidence the investigator decides is relevant. A recipient may require all parties to submit any evidence that they would like the investigator to consider prior to the finalization of the investigative report thereby allowing each party to respond to the evidence in the investigative report sent to the parties under § 106.45(b)(5)(vii). A recipient also may provide both parties with an opportunity to respond to any additional evidence the other party proposes

after reviewing the investigative report. If a recipient allows parties to provide additional evidence in response to the investigative report, any such additional evidence will not qualify as new evidence that was reasonably available at the time the determination regarding responsibility was made for purposes of an appeal under § 106.45(b)(8)(i)(B). Similarly, a recipient has discretion to choose whether to provide a copy of each party's written response to the other party as an additional measure to allow the parties to prepare for the hearing (or to be heard prior to the determination regarding responsibility being made, if no hearing is required or provided). As noted above, any rules or practices other than those required by § 106.45 that a recipient adopts must apply equally to both parties, and a recipient must be mindful that rules it chooses to adopt that extend time frames must take into account the recipient's obligation to conclude the entire grievance process within the recipient's own designated time frame, under § 106.45(b)(1)(v).

To conform with the changes we made to §106.45(b)(5)(vi), we have revised § 106.45(b)(5)(vii) to include a provision that requires the investigative report to be sent to each party and the party's advisor, if any, in an electronic format or a hard copy. As stated elsewhere in this preamble, the final regulations do not require a specific method for calculating "days." Recipients retain flexibility to adopt the method that best works for the recipient's operations, including calculating "days" using calendar days, business days, school days, or so forth.

Changes: The Department has revised § 106.45(b)(5)(vii) by changing the parenthetical to refer to "this section" instead of "§ 106.45" and adding "or otherwise provided" after "if a hearing is required by this section," by requiring the investigative report to be sent to parties and their advisors, if any, and by adding the option of sending a copy in electronic format or hard copy.

*Hearings*

Cross-Examination Generally

*Support for Cross-Examination*

Comments: Some commenters expressed support for the proposed rules' requirement in § 106.45(b)(6)(i) that postsecondary institutions allow cross-examination at a live hearing because in a college or university setting, where participants are usually adults, cross-examination is an essential pillar of fair process, and where cases turn exclusively or largely on witness testimony as is often the case in peer-on-peer grievances, cross-examination is especially critical to resolve factual disputes between the parties and give each side the opportunity to test the credibility of adverse witnesses, serving the goal of reaching legitimate and fair results.[1184]

Some commenters supported § 106.45(b)(6)(i) because live hearings with cross-examination are consistent with Supreme Court cases interpreting due process of law,[1185] as well as recent case law in which courts have held that cross-examination must be provided in higher education disciplinary proceedings, particularly when credibility is at issue, to meet standards of fundamental fairness and constitutional due process.[1186] Commenters relied on Sixth Circuit cases in particular[1187] to assert that high-stakes cases involving competing narratives require a mutual test of credibility, and to argue that the cost to a university of providing a live hearing

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[1184] Commenters cited: American Bar Association, ABA Criminal Justice Section Task Force on College Due Process Rights and Victim Protections, *Recommendations for Colleges and Universities in Resolving Allegations of Campus Sexual Misconduct* 9 (2017).
[1185] Commenters cited: *Goss v. Lopez*, 419 U.S. 565 (1975); *Mathews v. Eldridge*, 424 U.S. 319 (1976).
[1186] Commenters cited: *Doe v. Baum* [University of Michigan], 903 F.3d 575, 578 (6th Cir. 2018) ("[t]he ability to cross-examine is most critical when the issue is the credibility of the accuser."); *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 401 (6th Cir. 2017) ("In the case of competing narratives, 'cross-examination has always been considered a most effective way to ascertain truth.'") (internal citations omitted); *Doe v. Alger* [James Madison University], 228 F. Supp. 3d 713, 730 (W.D. Va. 2016); *Doe v. Claremont McKenna Coll.*, 25 Cal. App. 5th 1055, 1070 (2018).
[1187] Commenters cited: *Baum*, 903 F.3d at 581; *Univ. of Cincinnati*, 872 F.3d at 403.

with cross-examination is far outweighed by the benefit of reducing the risk of an erroneous finding of responsibility. Some commenters also pointed to a California appellate court decision[1188] where the court found it ironic that an institution of higher learning, where American history and government are taught, should stray so far from the principles that underlie our democracy, and two other California appellate court decisions[1189] that one commenter characterized together as representing unanimous rulings by nine appellate judges that public and private colleges and universities owe basic due process protections to students in Title IX proceedings. Several commenters argued that the recent Sixth Circuit and California appellate decisions illustrate a trend, or growing judicial consensus, that some kind of cross-examination should be permitted in serious student misconduct cases that turn on credibility.[1190] A few commenters argued that under many State APAs (Administrative Procedure Acts) students in serious misconduct cases have a right to cross-examine an accuser and cited cases from Washington and Oregon as examples.[1191]

Commenters opined that requiring a live hearing with cross-examination for postsecondary institutions is perhaps the single most important change in the proposed rules to ensure that determinations are fair. Commenters referred to cross-examination as a "game-

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[1188] Commenters cited: *Doe v. Regents of Univ. of Cal.*, 28 Cal. App. 5th 44, 61 (2018) (university failed to provide a fair hearing by selectively applying rules of evidence, refusing to show respondent all the evidence against him, and refusing to consider respondent's proffered evidence, and the lack of due process protections resulted in neither the respondent nor the complainant receiving a fair hearing).

[1189] Commenters cited: *Doe v. Allee* [University of Southern California], 30 Cal. App. 5th 1036 (2019); *Doe v. Claremont McKenna Coll.*, 25 Cal. App. 5th 1055 (2018).

[1190] *Cf. Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 70 (1st Cir. 2019) (declining to require the same opportunity for cross-examination as required by the Sixth Circuit but holding that due process of law was satisfied if the university conducted "reasonably adequate questioning" designed to ferret out the truth, if the university declined to grant students the right to cross-examine parties and witnesses at a hearing).

[1191] Commenters cited: *Arishi v. Wash. State Univ.*, 196 Wash. App. 878, 908 (2016); *Liu v. Portland State Univ.*, 281 Or. App. 294, 307 (2016).

changer" because currently many college and university processes require parties to submit written questions in advance, to be asked by a school official, which may or may not occur at a live hearing. Commenters asserted that in numerous instances, college and university administrators have refused to ask some or all of a party's submitted questions, reworded a party's questions in ways that undermined the question's effectiveness, ignored follow-up questions, and simply refused to ask "hard questions" of parties even when evidence such as text messages appeared to contradict a party's testimony. Commenters argued that written questions are not an effective substitute for live cross-examination because credibility can be determined only when questions are asked in real time in the presence of parties and decision-makers who can listen and observe how a witness answers questions, and when immediate follow-up questions are permitted. Commenters argued that cross-examination is necessary to allow the decision-maker to observe each witness answering questions that can bring out contradictions and improbabilities in the witness's testimony. Commenters cited Supreme Court criminal law cases discussing the symbolic and practical value of cross-examination in the context of the Sixth Amendment's Confrontation Clause.[1192]

Some commenters argued that despite other commenters' assumptions that the proposed rules would allow a complainant to be aggressively or abusively questioned by a respondent's advisor, it is unlikely that campus officials will permit an advisor to question a party in an

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[1192] Commenters cited: *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988) (stating that cross-examination has symbolic importance because "there is something deep in human nature that regards face-to-face confrontation between accused and accuser as essential to a fair trial in a criminal prosecution") (internal quotation marks and citation omitted); *id.* at 1019 (noting the practical importance of cross-examination because it "is always more difficult to tell a lie about a person to his [or her] face than behind his [or her] back") (internal quotation marks and citation omitted); *Mattox v. United States*, 156 U.S. 237, 242-43 (1895) (cross-examination provides the trier-of-fact opportunity to judge by the witness's demeanor on the stand and "the manner in which he gives his testimony whether he is worthy of belief.").

inappropriate manner; for example, commenters asserted, under current policies most universities only allow lawyers or other advisors to be "potted plants" in hearings and school officials enforce that potted-plant policy, demonstrating that recipients are capable of controlling advisors. One commenter asserted that universities, which are dedicated to the free flow of information, will figure out an acceptable way for cross-examination to occur so that campus adjudications can meet generally accepted standards of due process. Several commenters asserted that recipients should, and under the proposed rules would be allowed to, adopt measures to prevent irrelevant, badgering questions and ensure respectful treatment of parties and witnesses. Commenters supported requiring cross-examination to be conducted by party advisors because this will mean that the questioning will be left to professionals, or at least to adults better attuned to the nuances of these cases. Commenters asserted that concerns about aggressive attorneys berating complainants are overblown, because attorneys and even non-attorney advisors know better than to alienate the fact-finder, which is what berating a complainant would do. Commenters asserted that the proposed rules reach a balanced solution by allowing cross-examination to determine credibility while disallowing direct student-to-student questioning and permitting questioning to occur with the parties in separate rooms.

Some commenters supported the cross-examination requirement based on belief that confronting an accuser is a part of the fundamental concept of the rule of law that should apply on college campuses. Some commenters believed that cross-examination will change the "kangaroo court" nature of campus Title IX proceedings that lacked basic due process protections, and that asking complainants questions about the allegations does not revictimize a complainant. Several commenters expressed support for cross-examination in the context of belief that the withdrawn 2011 Dear Colleague Letter, and/or the #MeToo movement, have tilted

too many colleges and universities to be predisposed to believing young men guilty of sexual assault.

Many commenters supported cross-examination because of personal experiences being accused of a Title IX violation without any opportunity to confront the complainant, asserting that lack of cross-examination allowed a complainant's version of events to go unchallenged.

Many commenters supported cross-examination as an important part of the proposed rules' restoration of due process and fairness that distinguishes the United States from dictatorial regimes where to be accused is the same as being proved guilty. Several commenters argued that cross-examination is vital for finding the truth, which should be the goal of any investigation, because cross-examination reveals a witness's faulty memory or false testimony. Commenters asserted that cross-examination allows the parties to make a searching inquiry to uncover facts that may have been omitted, confused, or overstated.

Some commenters believed that cross-examination will reduce the likelihood of false allegations being made or succeeding. One commenter argued that regardless of whether false allegations happen infrequently or frequently, every case must be considered individually using a proper investigation process with cross-examination. One commenter opposed the proposed rules as problematic and offensive to victims, but supported the cross-examination provision because due process is an inherent right in the United States. This commenter also supported cross-examination because victims going through a criminal trial get cross-examined, and even though false allegations are rare, where there is one, it should be taken care of in accordance with due process.

A few commenters supported the cross-examination requirement because full and fair adversarial procedures are likely to reduce bias in decision making. One commenter quoted

Supreme Court criminal law decisions for the proposition that the adversarial "system is premised on the well-tested principle that truth – as well as fairness – is 'best discovered by powerful statements on both sides of the question.'"[1193] Another commenter asserted that nothing can completely eliminate sex or racial bias in a system but bias can be reduced by expanding the evidence considered by decision-makers, such as by requiring a full investigation and cross-examination.[1194] One commenter asserted that it is within the Department's jurisdiction to create regulations about cross-examination and other procedures that reduce impermissible implicit bias on the basis of sex stereotypes and unconscious sex-bias.[1195]

A few commenters supported cross-examination because both parties need due process including the right to use cross-examination to establish credibility so that each party has their stated facts scrutinized to find the truth. Some commenters asserted that cross-examination ensures a level of fairness that benefits all parties involved in Title IX cases. A few commenters believed the proposed rules, including the cross-examination requirement, provide a fair and equal opportunity for both sides. One commenter argued that cross-examination holds a great benefit to both parties and allows the investigator and other staff on the case to hear both sides of

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[1193] Commenters cited: *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (quoting Irving R. Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 AM. BAR. ASS'N J. 569, 569 (1975)); *United States v. Cronic*, 466 U.S. 648, 656 (1984) (describing the "crucible of meaningful adversarial testing"); *Cal. v. Green*, 399 U.S. 149, 158 (1970) (describing cross-examination as the "greatest legal engine ever invented for the discovery of truth") (internal quotation marks and citations omitted). Several commenters paraphrased the "greatest legal engine ever invented for discovery of truth" passage without citing to the Supreme Court case or the Wigmore treatise from which it originates.

[1194] Commenters cited: Stephen P. Klein *et al.*, *Race and Imprisonment Decisions in California*, 24 SCIENCE 812 (1990) (for the proposition that most decisions after a full trial are not based on using race as a proxy, but rather on evidence at trial, resulting in racially fair decisions).

[1195] Commenters cited: *Maryland v. Craig*, 497 U.S. 836, 846 (1990) (quoting *Cal. v. Green*, 399 U.S. 149, 158 (1970)) for the proposition that when procedures typical to our adjudicative processes, such as cross-examination, are introduced into university grievance proceedings such procedures allow for the "discovery of the truth" in a manner that reduces stereotyping.

the story; another commenter stated there are two sides to every issue and both sides must be questioned. One commenter supported the cross-examination requirement and stated that current, unfair procedures harm respondents who are women, and who are gay or lesbian, as well as respondents who are men, giving examples such as a young woman the commenter represented who was so drunk she could not have consented to sex and yet was expelled because the male filed with the Title IX office first. Several commenters asserted that cross-examination is as beneficial for the recipient as for the parties because the decision-maker has the opportunity to observe and judge the credibility of parties and witnesses, thereby serving the recipient's interest in reaching accurate determinations.

Another commenter argued that the opportunity to cross-examine witnesses is a procedural protection that should not be controversial given it is a bedrock principle of the American criminal justice system designed to create a more reliable fact finding process. The commenter believed that a reliable process is in the interest of all parties including recipients, because greater reliability will lead to greater acceptance of the legitimacy of the decisions. This commenter also asserted that institutional opposition to basic notions of due process has led to widespread mistrust of the decision-making processes of Title IX offices, evidenced by the prevalence of Federal lawsuits challenging Title IX decisions made by institutions. The commenter argued that institutions must conform their Title IX procedures to basic notions of due process to establish the legitimacy of their decisions.

One commenter argued that it is unfair to a complainant not to be able to cross-examine a respondent or witnesses. At least one commenter argued that cross-examination will provide greater reliability, which should encourage complainants to report harassment and further support Title IX's objective of protecting the educational environment. One commenter argued

that giving respondents a full hearing with cross-examination means that victims of "contemptible rapists" can exact justice, and that even if answering questions about painful memories is difficult it is worth it to make sure that rape accusations are not approached lightly. Another commenter asserted that claiming that having an accusation examined is too traumatic for a complainant infantilizes complainants. Several commenters argued that even though testifying about traumatic events is difficult and uncomfortable, testimony from any party that is never questioned cannot be evaluated for truthfulness.

Some commenters supported the proposed rules, and cross-examination as the opportunity to test the credibility of claims, because, commenters asserted, women reject the trampling of constitutional rights in the name of women's rights. One commenter supported live hearings and cross-examination conducted through advisors, including attorneys, because students will have an opportunity to learn about how misconduct allegations are factually examined and determined.

Some commenters supported § 106.45(b)(6)(i) but requested that the provision be expanded to expressly give parties the right to also cross-examine any investigator or preparer of an investigative report, because the entire grievance procedure is often based on the findings in the investigative report and it is thus essential that the parties be able to cross-examine the individuals who prepared the report to probe how conclusions were reached and whether the report is credible.

Discussion: The Department appreciates commenters' support for the requirement in § 106.45(b)(6)(i) that postsecondary institutions must hold live hearings with cross-examination conducted by party advisors. The Department agrees with commenters who observed that several appellate courts over the last few years have carefully considered the value of cross-examination

in high-stakes student misconduct proceedings in colleges and universities and concluded that part of a meaningful opportunity to be heard includes the ability to challenge the testimony of parties and witnesses. The Department agrees with commenters who noted that this conclusion has been reached by courts both in the context of constitutional due process in public institutions and a fair process in private institutions. The Department agrees with commenters who observed that some States already provide rights to a robust hearing and cross-examination under State APA laws, demonstrating that the notion of live hearings and cross-examination is not new or foreign to many postsecondary institutions. The Department is aware that many postsecondary institutions have created disciplinary systems for sexual misconduct issues that intentionally avoid live hearings and cross-examination, due to concern about retraumatizing sexual assault victims; however, the Department agrees with commenters that in too many instances recipients who have refused to permit parties or their advisors to conduct cross-examination and instead allowed questions to be posed through hearing panels have stifled the value of cross-examination by, for example, refusing to ask relevant questions posed by a party, changing the wording of a party's question, or refusing to allow follow-up questions.

The Department agrees with commenters that cross-examination serves the interests of complainants, respondents, and recipients, by giving the decision-maker the opportunity to observe parties and witnesses answer questions, including those challenging credibility, thus serving the truth-seeking purpose of an adjudication. The Department acknowledges that Title IX grievance processes are not criminal proceedings and thus constitutional protections available to criminal defendants (such as the right to confront one's accuser under the Sixth Amendment) do not apply in the educational context; however, the Department agrees with commenters that cross-examination is a valuable tool for resolving the truth of serious allegations such as those

presented in a formal complaint of sexual harassment. The Department emphasizes that cross-examination that may reveal faulty memory, mistaken beliefs, or inaccurate facts about allegations does *not* mean that the party answering questions is necessarily lying or making intentionally false statements. The Department's belief that cross-examination serves a valuable purpose in resolving factual allegations does not reflect a belief that false accusations occur with any particular frequency in the context of sexual misconduct proceedings. However, the degree to which any inaccuracy, inconsistency, or implausibility in a narrative provided by a party or witness should affect a determination regarding responsibility is a matter to be decided by the decision-maker, after having the opportunity to ask questions of parties and witnesses, and to observe how parties and witnesses answer the questions posed by the other party.

The Department agrees with commenters that the truth-seeking function of cross-examination can be achieved while mitigating any re-traumatization of complainants because under the final regulations: cross-examination is only conducted by party advisors and not directly or personally by the parties themselves; upon any party's request the entire live hearing, including cross-examination, must occur with the parties in separate rooms; questions about a complainant's prior sexual behavior are barred subject to two limited exceptions; a party's medical or psychological records can only be used with the party's voluntary consent;[1196] recipients are instructed that only relevant questions must be answered and the decision-maker must determine relevance prior to a party or witness answering a cross-examination question;

[1196] Section 106.45(b)(5)(i) (providing that a party's treatment records can only be used in a grievance process with that party's voluntary, written consent).

and recipients can oversee cross-examination in a manner that avoids aggressive, abusive questioning of any party or witness.[1197]

The Department agrees with commenters that sex bias is a unique risk in the context of sexual harassment allegations, where the case often turns on plausible, competing factual narratives of an incident involving sexual or sex-based interactions, and application of sex stereotypes and biases may too easily become a part of the decision-making process. The Department agrees with commenters that ensuring fair adversarial procedures lies within the Department's authority to effectuate the purpose of Title IX because such procedures will prevent and reduce sex bias in Title IX grievance processes and better ensure that recipients provide remedies to victims of sexual harassment.

The Department agrees with commenters that cross-examination equally benefits complainants and respondents, and that both parties in a high-stakes proceeding raising contested factual issues deserve equal rights to fully participate in the proceeding. This ensures that the decision-maker observes each party's view, perspective, opinion, belief, and recollection about the incident raised in the formal complaint of sexual harassment. The Department agrees with commenters who note that any person can be a complainant, and any person can be a respondent, regardless of a person's race, sexual orientation, gender identity, or other personal characteristic, and each party, in every case, deserves the opportunity to promote and advocate for the party's unique interests.

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[1197] Section 106.45(b) (introductory sentence as revised in the final regulations 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 Department agrees with commenters that postsecondary-level adjudications with live hearings and cross-examination will increase the reality and perception by parties and the public that Title IX grievance processes are reaching fair, accurate determinations, and that robust adversarial procedures improve the legitimacy and credibility of a recipient's process, making it more likely that no group of complainants or respondents will experience unfair treatment or unjust outcomes in Title IX proceedings (for example, where formal complaints involve people of color, LGBTQ students, star athletes, renowned faculty, etc.).

The Department agrees with commenters that cross-examination is as powerful a tool for complainants seeking to hold a respondent responsible as it is for a respondent, and that a determination of responsibility reached after a robust hearing benefits victims by removing opportunity for the respondent, the recipient, or the public to doubt the legitimacy of that determination. The Department agrees with commenters that there is no tension between providing strong procedural protections aimed at discovering the truth about allegations in each particular case, and upholding the rights of women (and every person) to participate in education programs or activities free from sex discrimination. The Department appreciates a commenter's belief that observing a live hearing with cross-examination may provide students with opportunity to learn about adjudicatory processes, though the Department notes that the purpose of the § 106.45 grievance process is to reach factually reliable determinations so that sex discrimination in the form of sexual harassment is appropriately remedied by recipients so that no student's educational opportunities are denied due to sex discrimination.

The Department understands commenters' point that often a case is shaped and directed by the evidence gathered and summarized by the investigator in the investigative report, including the investigator's findings, conclusions, and recommendations. The Department

emphasizes that the decision-maker must not only be a separate person from any investigator, but the decision-maker is under an obligation to objectively evaluate all relevant evidence both inculpatory and exculpatory, and must therefore independently reach a determination regarding responsibility without giving deference to the investigative report. The Department further notes that § 106.45(b)(6)(i) already contemplates parties' equal right to cross-examine any witness, which could include an investigator, and § 106.45(b)(1)(ii) grants parties equal opportunity to present witnesses including fact and expert witnesses, which may include investigators.

Changes: None.

*Retraumatizing Complainants*

Comments: Many commenters opposed § 106.45(b)(6)(i) requiring postsecondary institutions to hold live hearings with cross-examination conducted by the parties' advisors. Commenters argued that cross-examination is an adversarial, contentious procedure that will revictimize, retraumatize, and scar survivors of sexual harassment; that cross-examination will exacerbate survivors' PTSD (post-traumatic stress disorder),[1198] RTS (rape trauma syndrome), anxiety, and depression; and cross-examination will interrogate victims like they are the criminals, rub salt in

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[1198] Commenters cited: Anke Ehlers & David M. Clark, *A Cognitive Model of Posttraumatic Stress Disorder*, 38 BEHAVIOR RESEARCH & THERAPY 4 (2000); Mary P. Koss, *Blame, Shame, and Community: Justice Responses to Violence Against Women*, 55 AM. PSYCHOL. 11 (2000); Sue Lees, *Carnal Knowledge: Rape on Trial* (Hamish Hamilton 2002); Sue Lees & Jeanne Gregory, *Attrition in Rape and Sexual Assault Cases*, 36 BRITISH J. OF CRIMINOLOGY 1 (1996); Amanda Konradi, *"I Don't Have To Be Afraid of You": Rape Survivors' Emotion Management in Court*, 22 SYMBOLIC INTERACTION 1 (1999); Venezia Kingi & Jan Jordan, *Responding to Sexual Violence: Pathways to Recovery*, Wellington: Ministry of Women's Affairs (2009); Mary P. Koss *et al.*, *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance*, 15 TRAUMA VIOLENCE & ABUSE 3 (2014); Fiona Mason & Zoe Lodrick, *Psychological Consequences of Sexual Assault*, 27 BEST PRACTICE & RESEARCH CLINICAL OBSTETRICS & GYNECOLOGY 1 (2013); National Center on Domestic Violence, Trauma & Mental Health, *Representing Domestic Violence Survivors Who Are Experiencing Trauma and Other Mental Health Challenges: A Handbook for Attorneys* (2011); Kaitlin Chivers-Wilson, *Sexual Assault and Posttraumatic Stress Disorder: A Review of The Biological, Psychological and Sociological Factors and Treatments*, 9 MCGILL J. OF MED.: MJM: AN INT'L FORUM FOR THE ADVANCEMENT OF MEDICAL SCIENCES BY STUDENTS 2 (2006).

victims' wounds, put rape victims through a second rape, and essentially place the victim on trial when victims are already trying to heal from a horrific experience. Commenters argued that no other form of misconduct gives respondents the right to "put on trial" the person accusing the respondent of wrongdoing; one commenter argued that for instance, professors accusing a student of cheating are not "put on trial," a student accusing another student of vandalism is not "put on trial," so singling out sexual misconduct complainants for a procedure designed to intimidate and undermine the complainant's credibility heightens the misperception that the credibility of sexual assault complainants is uniquely suspect. Other commenters acknowledged that some recipients do use cross-examination in non-sexual misconduct hearings because cross-examination can be helpful in getting to the heart of the allegations; these commenters asserted that Title IX hearings are different due to the subject matter and relationships between the parties and cross-examination is inappropriate in sexual misconduct proceedings.

Commenters argued that fear of undergoing such a retraumatizing experience will chill reporting of sexual harassment and cause more victims to stay in the shadows because survivors will have no non-traumatic options in the wake of sexual violence.[1199] Commenters asserted that coming forward is hard enough for victims because often the trauma has resulted in nightmares, intrusive thoughts, inability to concentrate, and hypervigilance, and the prospect of facing

[1199] Many commenters cited to information regarding low rates of reporting of sexual harassment such as the data noted in the "Reporting Data" subsection of the "General Support and Opposition" section of this preamble, in support of arguments that cross-examination will further reduce rates of reporting. Commenters also cited: Joanne Belknap, *Rape: Too Hard to Report and Too Easy to Discredit Victims*, 16 VIOLENCE AGAINST WOMEN 12 (2010); Suzanne B. Goldberg, *Keep Cross-examination Out of College Sexual-Assault Cases*, CHRONICLE OF HIGHER EDUCATION (Jan. 10, 2019).

grueling, retraumatizing cross-examination will result in even fewer students coming forward.[1200] Commenters argued that reporting will be especially chilled with respect to claims against faculty members, where a power differential already exists.

Commenters believed cross-examination creates secondary victimization, which commenters referred to as a result of interacting with community service providers who engage in victim-blaming attitudes.[1201] Some commenters believed it is cruel to let victims be cross-examined by the person who committed the assault, or to force a victim to be face-to-face with the perpetrator. Some commenters believed that a public hearing where a victim must be cross-examined would be severely traumatizing.

Commenters asserted that anyone taken advantage of by sexual harassment should be able to voice that experience without fear of a traumatizing court case. Commenters argued that subjecting a victim courageous enough to come forward to the re-traumatization of cross-examination is an invasion of the victim's right to privacy and safety. Commenters asserted that as survivors, they have experienced stress, anxiety, nausea, and fear simply from passing by their attackers, and the thought of being cross-examined near their attacker makes these commenters believe they would not be able to speak at all due to fear, would feel permanently traumatized,

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[1200] Commenters cited: Judith Lewis Herman, *Justice From the Victim's Perspective*, 11 VIOLENCE AGAINST WOMEN 5 (2005) for the proposition that cross-examination is inherently retraumatizing and can trigger vivid memories forming one of the "psychological barriers that discourage victim participation[.]" Commenters also cited: Gregory Matoesian, *Reproducing Rape: Domination through Talk in the Courtroom* (Univ. of Chicago Press 1993); Michelle J. Anderson, *Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 VILL. L. REV. 907, 932, 936-37 (2001); Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353, 1357 (2005); Anoosha Rouhanian, *A Call for Change: The Detrimental Impacts of Crawford v. Washington on Domestic Violence and Rape Prosecutions*, 37 BOSTON COLL. J. OF L. & SOCIAL JUSTICE 1 (2017).

[1201] Commenters cited to information regarding secondary victimization and institutional betrayal such as the data noted in the "Commonly Cited Sources" subsection of the "General Support and Opposition" section of this preamble, including, for example, Rebecca Campbell, *Survivors' Help-Seeking Experiences With the Legal and Medical Systems*, 20 VIOLENCE & VICTIMS 1 (2005). Commenters also cited: Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims Mental Health*, 23 JOURNAL OF TRAUMATIC STRESS 2 (2010).

would drop out of school, or would even contemplate suicide.[1202] Commenters shared personal experiences feeling traumatized by cross-examination in Title IX proceedings, stating that even where a complainant won the case, the experience of cross-examination was so mentally and emotionally taxing that complainants suffered years of mental health treatment, felt unable to perform academically, or dropped out of school.

Some commenters supported reform of school discipline procedures and agreed that complainants and respondents should be treated the same when it comes to procedural rights including a right of cross-examination, but argued that recipients should be allowed discretion to decide whether, or how, to incorporate cross-examination into Title IX grievance processes so long as the decision applies equally to both parties, and that it is intrusive and myopic for the Department to unilaterally impose procedures onto sexual misconduct processes, especially in a way that, in the commenters' views, tilts the system against victims of sexual harassment.

Discussion: The Department believes that cross-examination as required under § 106.45(b)(6)(i) is a necessary part of a fair, truth-seeking grievance process in postsecondary institutions, and that these final regulations apply safeguards that minimize the traumatic effect on complainants. We have revised § 106.45(b)(6)(i) to clearly state that the entire live hearing (and not only cross-examination) must occur with the parties in separate rooms, at the request of any party; that cross-examination must never be conducted by a party personally; and that only relevant cross-examination questions must be answered and the decision-maker must determine the relevance of a cross-examination question before a party or witness answers. Recipients may adopt rules

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[1202] Commenters cited: Amelia Gentleman, *Prosecuting Sexual Assault: "Raped All Over Again,"* THE GUARDIAN (Apr. 13, 2013) for the story of a woman who committed suicide shortly after being cross-examined in a criminal trial in England.

that govern the conduct and decorum of participants at live hearings so long as such rules comply with these final regulations and apply equally to both parties.[1203] We understand that cross-examination is a difficult and potentially traumatizing experience for any person, perhaps especially a complainant who must answer questions about sexual assault allegations. These final regulations aim to ensure that the truth-seeking value and function of cross-examination applies for the benefit of both parties while minimizing the discomfort or traumatic impact of answering questions about sexual harassment.

While the Department acknowledges that complainants may find a cross-examination procedure emotionally difficult, the Department believes that a complainant can equally benefit from the opportunity to challenge a respondent's consistency, accuracy, memory, and credibility so that the decision-maker can better assess whether a respondent's narrative should be believed. The complainant's advisor will conduct the cross-examination of the respondent and, thus, the complainant will not be retraumatized by having to personally question the respondent. The Department disagrees that cross-examination places a victim (or any party or witness) "on trial" or constitutes an interrogation; rather, cross-examination properly conducted simply constitutes a procedure by which each party and witness answers questions posed from a party's unique perspective in an effort to advance the asking party's own interests. The Department disagrees that cross-examination implies that sexual assault complainants are uniquely unreliable; rather, to the extent that cross-examination implies anything about credibility, the Department notes that by giving both parties *equal* cross-examination rights, the final regulations contemplate that a

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[1203] As revised, the introductory sentence of § 106.45(b) provides: "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."

complainant's allegations, and a respondent's denials, equally warrant probes for credibility and truthfulness.

The Department appreciates commenters' observations that some recipients do not use live hearings or cross-examination for any form of misconduct charges while other recipients use hearings and cross-examination for some types of misconduct but not for sexual misconduct. The Department does not opine through these final regulations as to whether cross-examination is beneficial for non-sexual harassment misconduct allegations because the Department's focus in these final regulations are the procedures most likely to reach reliable outcomes in the context of Title IX sexual harassment. The Department agrees with commenters who note that sexual harassment allegations present unique circumstances, but disagrees that the subject matter or relationships between parties involved in sexual harassment allegations make cross-examination less useful than for other types of misconduct allegations. Rather, the Department believes that precisely because the subject matter involves sensitive, personal matters presenting high stakes and long-lasting consequences for both parties, robust procedural rights for both parties are all the more important so that each party may fully, meaningfully put forward the party's viewpoints and beliefs about the allegations and the case outcome.

The Department acknowledges that predictions of harsh, aggressive, victim-blaming cross-examination may dissuade complainants from pursuing a formal complaint out of fear of undergoing questioning that could be perceived as an interrogation. However, recipients retain discretion under the final regulations to educate a recipient's community about what cross-examination during a Title IX grievance process will look like, including developing rules and

practices (that apply equally to both parties)[1204] to oversee cross-examination to ensure that questioning is relevant, respectful, and non-abusive. We have revised § 106.45(b)(6)(i) to specifically state that only relevant cross-examination questions must be answered and the decision-maker must determine the relevance of a cross-examination question before the party of witness answers. We have revised § 106.45(b)(1)(iii) to specifically require decision-makers to be trained on conducting live hearings and determining relevance (including the non-relevance of questions and evidence about a complainant's prior sexual history). The Department also notes that recipients must comply with obligations under applicable disability laws, and that the final regulations contemplate that disability accommodations (e.g., a short-term postponement of a hearing date due to a party's need to seek medical treatment for anxiety or depression) may be good cause for a limited extension of the recipient's designated, reasonably prompt time frame for the grievance process.[1205]

The Department understands that victims of sexual violence often experience PTSD and other significant negative impacts, and that participating in a grievance process may exacerbate these impacts. The Department believes that the final regulations appropriately provide a framework under which a recipient must offer supportive measures to each complainant (without waiting for a factual adjudication of the complainant's allegations),[1206] and provide remedies for a complainant where the respondent is found responsible following a fair grievance process.[1207]

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[1204] The introductory sentence of § 106.45(b) expressly permits recipients to adopt rules for the Title IX grievance process so long as such rules are applied equally to both parties.
[1205] Section 106.45(b)(1)(v).
[1206] Section 106.44(a) (recipients must offer supportive measures to a complainant, and the Title IX Coordinator must promptly contact the complainant to discuss the availability of 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).
[1207] Section 106.45(b)(1)(i).

Complainants can receive supportive measures from a recipient, and each complainant can decide whether, in addition to supportive measures, participating in a grievance process is a step the complainant wants to take.[1208] In this manner, these final regulations respect the complainant's autonomy. The Department therefore disagrees with commenters who asserted that under the final regulations complainants will have "no non-traumatic options" and will feel deterred from reporting; complainants can report sexual harassment and receive supportive measures without even filing a formal complaint, much less participating in a grievance process or undergoing cross-examination. This option for reporting exists regardless of the identity of the respondent (e.g., whether the respondent is an employee, faculty member, or student), and therefore all complainants have the same non-traumatic reporting option regardless of any real or perceived power differential between the complainant and respondent.

The Department disagrees that including cross-examination as a procedure in the grievance process constitutes institutional betrayal. Cross-examination does not inherently involve victim-blaming attitudes, and as noted above, recipients retain wide discretion under the final regulations to adopt rules and practices designed to ensure that cross-examination occurs in a respectful, non-abusive manner. Further, the reason cross-examination must be conducted by a party's advisor, and not by the decision-maker or other neutral official, is so that the recipient remains truly neutral throughout the grievance process. To the extent that a party wants the other party questioned in an adversarial manner in order to further the asking party's views and interests, that questioning is conducted by the party's own advisor, and not by the recipient.

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[1208] Section 106.71 (prohibiting retaliation for exercise of rights under Title IX and specifically protecting any individual's right to not participate in a grievance process).

Thus, no complainant (or respondent) need feel as though the recipient is "taking sides" or otherwise engaging in cross-examination to make a complainant feel as though the recipient is blaming or disbelieving the complainant.

The Department appreciates the opportunity to clarify that contrary to the fears of some commenters, § 106.45(b)(6)(i) prohibits any complainant from being questioned directly by the respondent; rather, only party *advisors* can conduct cross-examination. We have revised § 106.45(b)(6)(i) specifically to state that cross-examination must occur "directly, orally, and in real-time" by the party's advisor and "never by a party personally." Similarly, § 106.45(b)(6)(i) is revised to require recipients to hold the entire live hearing (and not just cross-examination) with the parties in separate rooms (facilitated by technology) so that the parties need never be face-to-face, upon a party's request. Similarly, the Department notes that the live hearing is not a "public" hearing, and the final regulations add § 106.71 that requires recipients to keep party and witness identities confidential except as permitted by law and as needed to conduct an investigation or hearing.

The Department understands commenters' concerns that sexual harassment victims have already suffered the underlying conduct and that participating in a grievance process may be difficult for victims. However, before allegations may be treated as fact (i.e., before a complainant can be deemed a victim of particular conduct by a particular respondent), a fair process must reach an accurate outcome, and in situations that involve contested allegations, procedures designed to discover the truth by permitting opposing parties each to advocate for their own viewpoints and interests are most likely to reach accurate outcomes based on facts and evidence rather than assumptions and bias.

The Department disagrees that adjudication via a live hearing with cross-examination invades a complainant's privacy or risks a complainant's safety. The final regulations revise § 106.45(b)(5) to ensure that recipients do not access or use any party's treatment records without obtaining the party's written consent, thus limiting the type of sensitive, private information that becomes part of a § 106.45 grievance process without a party's consent. Further, § 106.45(b)(5)(vi) limits the exchange of evidence from an investigation only to evidence directly related to the allegations in the formal complaint. Additionally, § 106.45(b)(6)(i) deems questions and evidence regarding a complainant's prior sexual behavior or sexual predisposition to be irrelevant, with specified exceptions, to further protect complainants' privacy, and upon a party's request the entire live hearing must be held with the parties located in separate rooms. The Department disagrees that an adjudication process that includes a live hearing with cross-examination jeopardizes any party's safety, particularly with the privacy and anti-retaliation provisions referenced above, and the Department further notes that safety-related measures remain available under the final regulations including the ability for a recipient to impose no-contact orders on the parties under § 106.30 defining "supportive measures," or to remove a respondent on an emergency basis under § 106.44(c). Further, a complainant also retains the ability to obtain an order of protection (e.g., a restraining order) from a court of law.

The Department understands commenters' concerns about the prospect of cross-examination, and appreciates commenters' personal experiences with the difficulties of cross-examination, but reiterates that cross-examination essentially consists of questions posed from one party's perspective to advance the asking party's views about the allegations at issue, that recipients retain discretion to control the conduct of cross-examination in a manner that ensures that no party is treated abusively or disrespectfully, that only relevant cross-examination

questions must be answered, and that either party may demand that the live hearing occur with the parties in separate rooms. Based on comments from many recipients, the Department believes that recipients desire to treat all their students and employees with dignity and respect, and that recipients will therefore conduct hearings in a manner that keeps the focus on respectful questioning regarding the allegations at issue while permitting each party (through advisors) to advocate for the party's own interests before the decision-maker.

The Department appreciates commenters' support for ensuring that both parties have equal rights with respect to cross-examination, but disagrees that § 106.45(b)(6)(i) is intrusive or myopic because, for reasons explained throughout this preamble, the Department has determined that in the context of resolution of Title IX sexual harassment allegations the procedures in § 106.45 constitute those procedures necessary to ensure consistent, predictable application of Title IX rights, and does not believe that cross-examination in the postsecondary context tilts the system against sexual harassment victims. An equal right of cross-examination benefits complainants as well as respondents, by permitting complainants to participate in advocating for their own view of the case so that a decision-maker is more likely to reach an accurate determination, and where a respondent is found responsible the victim will receive remedies designed to restore or preserve equal access to education.

Changes: We have revised § 106.45(b)(6)(i) to state that cross-examination must occur "directly, orally, and in real-time" by a party's advisor "and never by a party personally" and that upon a party's request the entire live hearing (not only cross-examination) must occur with the parties located in separate rooms (with technology enabling participants to see and hear each other). We have further revised § 106.45(b)(6)(i) to state that only relevant cross-examination questions must be answered, and the decision-maker must determine the relevance of a cross-examination

or other question before the party or witness answers the question (and explain any decision to exclude a question as not relevant). The final regulations add § 106.71 prohibiting retaliation and providing in relevant part that the recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute or regulations, as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

*Reducing Truth-Seeking*

Comments: Many commenters asserted that cross-examination would mean that complainants are questioned via verbal attacks on the complainant's character rather than sensitively in a respectful manner designed to aid the fact-finding process.[1209] Commenters argued that in criminal cases, it is accepted that the defense counsel's job to put the prosecutor's case in the worst possible light regardless of the truth and to impeach an adverse witness even if the defense attorney believes the witness is telling the truth.[1210]

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[1209] Commenters cited: Abbe Smith, *Representing Rapists: The Cruelty of Cross-Examination and Other Challenges for a Feminist Criminal Defense Lawyer*, 53 AM. CRIM. L. REV. 255, 290 (2016) (noting that a defense attorney recently acknowledged, "Especially when the defense is fabrication or consent – as it often is in adult rape cases – you have to go *at* the witness. There is no way around this fact. Effective cross-examination means exploiting every uncertainty, inconsistency, and implausibility. More, it means attacking the witness's very character.") (emphasis in original).

[1210] Commenters cited: *United States v. Wade*, 388 U.S. 218, 257-58 (1967) (White, J., dissenting in part and concurring in part) for the proposition that Justice Byron White explained five years before Title IX was enacted that cross-examination "in many instances has little, if any, relation to the search for the truth." Instead, at least in criminal cases, it is accepted that defense counsel's job is "to put the State's case in the worst possible light,

Commenters argued that cross-examinations are just emotional beatings to twist survivors' perception and memory and lead them to mistakenly admit to or believe in false information, make the survivor feel insecure about what really happened, challenge the legitimacy of the survivor's experience, and therefore lead to an unjust outcome. Commenters argued that cross-examination took the place of torture in our legal system and remains a brutal exercise.[1211] Commenters stated that when working with victims as clients, victims' number one fear is often cross-examination whether in a civil court or criminal court; while they do not fear the truth, they fear defense lawyers' attempts to confuse them and blame them for not remembering every single part of the story even when it was drug or alcohol induced, and they fear telling their story to near strangers and still not getting the justice and safety they need. Commenters argued that cross-examination is designed to engage in DARVO (deny, attack, reverse victim/offender) strategies that harm victims. Commenters argued that even cases that seem to be "he said/she said" often involve more evidence than just the parties' statements,[1212] so

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regardless of what he thinks or knows to be the truth" and to "cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth." *Id.* Commenters also cited: Louise Ellison, *The Mosaic Art: Cross-Examination and the Vulnerable Witness*, 21 LEGAL STUDIES 353, 366, 368-369, 373-375 (2001); John Spencer, "Conclusions," *in Children and Cross-Examination: Time to Change the Rules?* 189 (John Spencer & Michael Lamb eds., Hart Publishing 2012).

[1211] Commenters cited: David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1027-28 (1990) (examining the legal ethics of cross-examinations in rape cases, even with rape shield laws in place) ("To make it seem plausible that the victim consented and then turned around and charged rape, the lawyer must play to the jurors' deeply rooted cultural fantasies about feminine sexual voracity and vengefulness. All the while, without seeming like a bully, the advocate must humiliate and browbeat the prosecutrix, knowing that if she blows up she will seem less sympathetic, while if she pulls inside herself emotionally she loses credibility as a victim. Let us abbreviate all of this simply as 'brutal cross-examination.'"). Commenters also cited: 5 John Henry Wigmore, *Evidence in Trials at Common Law* § 1367 (James H. Chabourn ed., Little Brown 1974) (Wigmore explained that "in more than one sense" cross-examination took "the place in our system which torture occupied in the medieval system of the civilians.").

[1212] Commenters cited: Eliza Lehner, *Rape Process Templates: A Hidden Cause of the Underreporting of Rape*, 29 YALE J. OF L. & FEMINISM 1 (2018).

cross-examination is unnecessary and may disincentivize recipients from conducting a full investigation that uncovers relevant evidence.

Many commenters believed the negative results of cross-examination would be heightened by the proposed rules' requirement that cross-examination be conducted by a party's advisor, who could be a respondent's angry parent, fraternity brother, roommate, or other person untrained in conducting cross-examination and holding severe bias against the complainant. Some commenters asserted that cross-examination by advisors would turn misconduct hearings into unregulated kangaroo courts where untrained, unskilled non-attorney advisors are "playing attorney" yet eliciting little or no useful information. Commenters argued that in court trials, the parties themselves feel constrained to come across to judges and juries as nice, earnest, and sympathetic, while attorneys feel free to "take the gloves off" when cross-examining the opposing party and the same dynamic would prevail in college disciplinary hearings.

Some commenters asserted that telling complainants that they will be cross-examined by a lawyer or a respondent's parent, roommate, or fraternity brother will make the complainant feel as though the university the complainant should be able to trust is throwing the complainant to proverbial wolves. One commenter recounted being questioned by a respondent's advisor of choice and asserted that the advisor spoke to the commenter in a disempowering, blaming, and condescending way, fueling the commenter's feelings of being traumatized and harming the commenter's ability to function as a student. Some commenters asserted that allowing questioning to take place through an advisor removes accountability students should have for their own actions and will result in students blaming their advisors for poor conduct during a hearing.

Many commenters opposed the cross-examination requirement because the proposed rules do not guarantee procedural protections that accompany cross-examination in criminal or civil trials, such as the right to representation by counsel, rules of evidence,[1213] and a judge ruling on objections. Commenters argued that cross-examination is only potentially useful for discovering the truth when used by skilled lawyers in courtrooms overseen by experienced judges, and that in the hands of untrained, inexperienced advisors will be only a tool to trap, harass, and blame complainants rather than discern truth about allegations.[1214] Commenters asserted that colleges will not adequately protect parties from inappropriate or irrelevant questions, so that cross-examination will intrude into irrelevant details about victims' private lives, reputations, and trustworthiness. Commenters argued that institutions have no power to hold an attorney in contempt, and attorneys are trained to be very aggressive, and thus institutions will not be able to control overly hostile, abusive party advisors who are attorneys. Commenters stated that school administrators are ill equipped to make nuanced legal determinations about the relevant scope of questions and answers, and that schools will be too nervous to act to control lawyers, who will run the show and not respect even the few limits placed on cross-examination.

Commenters asserted that even in court where judges oversee defense attorneys, survivors describe cross-examination as the most distressing part of their experience within the

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[1213] Commenters cited: *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 635 (6th Cir. 2005) for the proposition that Federal or State rules of evidence do not apply to college disciplinary proceedings.

[1214] Commenters cited: Francis P. Karam, *The Truth Engine: Cross-Examination Outside the Box* (Themistocles Books 2018) (describing cross-examination as a tool requiring great skill and experience for lawyers to utilize well); Association of Title IX Administrators (ATIXA), *ATIXA Position Statement on Cross-Examining: The Urge to Transform College Conduct Proceedings into Courtrooms* 1 (Oct. 5, 2018) (without the complex procedural and evidentiary rules that apply to cross-examination in courtrooms, in a college setting "emotional or verbal meltdown is considerably more likely than effective probing for truth").

criminal justice system even when the survivors report feeling reasonably able to give accurate evidence.[1215] Commenters asserted that most rape victims face defense lawyer tactics like interrupting, asking for only yes-no answers, asking illogical questions, grilling on minute details of the incident, and asking irrelevant personal questions.[1216] Commenters argued that cross-examination outside a controlled courtroom setting will subject victims to intrusive, retraumatizing questions designed to humiliate, intimidate, and blame them, with no recourse as a victim would have being questioned in front of a judge, thereby weaponizing university proceedings against victims. At least one commenter argued that even in criminal settings, in-person cross-examination is not always required; under some laws vulnerable witnesses such as children are allowed to pre-record evidence in advance rather than testify live.[1217]

Discussion: The Department is aware that the perception, and in some circumstances the reality, of cross-examination in sexual assault cases has felt to victims like an emotional beating under which a skilled defense lawyer tries to twist a survivor's words, question the survivor's experience, or convince a fact-finder to find the defense lawyer's client is innocent by blaming the victim for the sexual assault or discrediting the victim with irrelevant character aspersions.

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[1215] Commenters cited: Mark R. Kebbell *et al.*, *Rape Victims' Experiences of Giving Evidence in English Courts: A Survey*, 14 PSYCHIATRY, PSYCHOL. & L. 1 (2007); Shana L. Maier, *I Have Heard Horrible Stories . . . : Rape Victim Advocates' Perceptions of the Revictimization of Rape Victims by the Police and Medical System*, 14 VIOLENCE AGAINST WOMEN 7 (2008) for the proposition that rape victims are often traumatized by seeking help from the health care system too, but traumatic processes should only be used when necessary – e.g., when medical care is needed, or when a criminal trial requires cross-examination.

[1216] Commenters cited: Amanda Konradi, *Taking the Stand: Rape Survivors and the Prosecution of Rapists* (Praeger Publishers(2007); American Bar Association Center of Children and the Law, *Handbook On Questioning Children – A Linguistic Perspective* 48-49 (2d ed. 1999); Annie Cossins, *Cross-examination in Child Sexual Assault Trials: Evidentiary Safeguard or Opportunity to Confuse*, 33 MELBOURNE L. REV. 1, 78-79 (2009) (quoting and summarizing Mark Brennan, *The Discourse of Denial: Cross-examining Child Victim Witnesses*, 23 JOURNAL OF PRAGMATICS 1 (1995)).

[1217] Commenters cited: Elizabeth McDonald & Yvette Tinsley, *Use of Alternative Ways of Giving Evidence by Vulnerable Witnesses: Current Proposals, Issues and Challenges*, VICTORIA UNIV. OF WELLINGTON L. REV. (July 2, 2012) (forthcoming Victoria University of Wellington Legal Research Paper No. 2/2011).

The Department reiterates, however, that the essential function of cross-examination is not to embarrass, blame, humiliate, or emotionally berate a party, but rather to ask questions that probe a party's narrative in order to give the decision-maker the fullest view possible of the evidence relevant to the allegations at issue. The Department disagrees with commenters' assertion that cross-examination is the equivalent of torture; while commenters noted Wigmore's observation that cross-examination has taken the place that torture historically occupied in civil law systems (as opposed to our common law system), such an observation implies that cross-examination differs from torture and is the enlightened, humane manner of testing a witness's testimony. The Department purposefully designed these final regulations to allow recipients to retain flexibility to adopt rules of decorum that prohibit any party advisor or decision-maker from questioning witnesses in an abusive, intimidating, or disrespectful manner.

While the Department understands commenters' concerns that cross-examination has in some situations utilized DARVO strategies, cross-examination does not inherently rely on or necessitate DARVO techniques, and recipients retain discretion to apply rules designed to ensure that cross-examination remains focused on relevant topics conducted in a respectful manner. Recipients are in a better position than the Department to craft rules of decorum best suited to their educational environment. To emphasize that cross-examination must focus only on questions that are relevant to the allegations in dispute, we have revised § 106.45(b)(6)(i) to state that only relevant cross-examination or other questions may be asked of a party or witness, and before a party or witness answers a cross-examination question the decision-maker must

determine whether the question is relevant (and explain a decision to exclude a question as not relevant).[1218]

The Department further reiterates that the tool of cross-examination is equally as valuable for complainants as for respondents, because questioning that challenges a respondent's narrative may be as useful for a decision-maker to reach an accurate determination as questioning that challenges a complainant's narrative. The Department agrees with commenters that even so-called "he said/she said" cases often involve evidence in addition to the parties' respective narratives, and the § 106.45 grievance process obligates recipients to bear the burden of gathering evidence and to objectively evaluate all relevant evidence, both inculpatory and exculpatory, including the parties' own statements as well as other evidence. The Department disagrees that cross-examination disincentivizes recipients from conducting a full investigation that uncovers all relevant evidence, in part because § 106.45 obligates recipients to gather relevant evidence, and in part because cross-examination occurs at the end of the grievance process such that the parties have already had an opportunity to inspect and review the evidence collected by the recipient.

The Department acknowledges commenters' concerns that under § 106.45(b)(6)(i) cross-examination is conducted by party advisors, and the final regulations do not require a party's advisor of choice to be an attorney, nor may a recipient restrict a party's choice of advisor, resulting in scenarios where a party's advisor may be the party's friend or relative or other person who may not be trained or experienced in conducting cross-examination. Regardless of

[1218] We have also revised § 106.45(b)(1)(iii) to specifically require that decision-makers are trained on issues of relevance, including application of the "rape shield" protections in § 106.45(b)(6).

the identity, status, or profession of a party's advisor of choice, a recipient retains discretion under the final regulations to apply rules at a live hearing that require participants to refrain from engaging in abusive, aggressive behavior. Further, regardless of who serves as a party's advisor, recipients are responsible for ensuring that only relevant cross-examination and other questions are asked, and decision-makers must determine the relevance of each cross-examination question before a party or witness answers. Thus, recipients retain the ability and responsibility to ensure that hearings in a § 106.45 grievance process are in no way "kangaroo courts" and instead function as truth-seeking processes.

The Department recognizes that party advisors may be, but are not required to be, attorneys and thus in some proceedings cross-examination on behalf of one or both parties will be conducted by non-lawyers who may be emotionally attached to the party whom they are advising. However, the Department believes that requiring cross-examination to be conducted by party advisors is superior to allowing parties to conduct cross-examination themselves; with respect to complainants and respondents in the context of sexual harassment allegations in an education program or activity, the strictures of the Sixth Amendment do not apply. The Department believes that having advisors as buffers appropriately prevents personal confrontation between the parties while accomplishing the goal of a fair, truth-seeking process. Precisely because a Title IX grievance process is neither a civil nor criminal proceeding in a court of law, the Department clarifies here that conducting cross-examination consists simply of posing questions intended to advance the asking party's perspective with respect to the specific allegations at issue; no legal or other training or expertise can or should be required to ask factual questions in the context of a Title IX grievance process. Thus, the Department disagrees that non-lawyer party advisors will be "playing attorney." The Department notes that a recipient is

free to explain to complainants (and respondents) that the recipient is required by these Title IX regulations to provide cross-examination opportunities. The final regulations do not prevent a recipient from adopting rules of decorum for a hearing to ensure respectful questioning, and thus recipients may re-assure parties that the recipient is not throwing a party to the proverbial wolves by conducting a hearing designed to resolve the allegations at issue.

The Department appreciates commenters who described experiences being questioned by party advisors as feeling like the advisor asked questions in a disempowering, blaming, and condescending way; however, the Department notes that such questioning may feel that way to the person being questioned by virtue of the fact that cross-examination is intended to promote the perspective of the opposing party, and this does not necessarily mean that the questioning was irrelevant or abusive. The Department disagrees that allowing questioning to take place through an advisor removes accountability students should have for their own actions. Under the final regulations, the parties themselves retain significant control and responsibility for their own decisions; the role of an advisor is to assist and advise the party. The Department does not agree that the final regulations encourage students to blame their advisors for poor conduct during a hearing; the final regulations do not preclude a recipient from enforcing rules of decorum that ensure all participants, including parties and advisors, participate respectfully and non-abusively during a hearing. If a party's advisor of choice refuses to comply with a recipient's rules of decorum (for example, by insisting on yelling at the other party), the recipient may require the party to use a different advisor. Similarly, if an advisor that the recipient provides refuses to comply with a recipient's rules of decorum, the recipient may provide that party with a different advisor to conduct cross-examination on behalf of that party. This incentivizes a party to work with an advisor of choice in a manner that complies with a recipient's rules that govern the

conduct of a hearing, and incentivizes recipients to appoint advisors who also will comply with such rules, so that hearings are conducted with respect for all participants.

The Department understands that cross-examination in a Title IX grievance process is not the same as cross-examination in a civil or criminal court, that a § 106.45 grievance process need not be overseen by a judge, and that party advisors need not be attorneys. However, the Department believes that recipients are equipped to oversee and implement a hearing process focused on the relevant facts at issue, including relevant cross-examination questions, without converting classrooms into courtrooms or necessitating that participants be attorneys or judges. To ensure that recipients understand that the individuals serving as a recipient's decision-maker(s) must understand how to conduct a live hearing and how to address relevance issues, we have revised § 106.45(b)(1)(iii) to require decision-makers to receive such training.

The Department agrees with commenters who asserted that postsecondary institutions have already become familiar with the concept of party advisors of choice, that many postsecondary institutions routinely enforce a rule that forbids party advisors from speaking during proceedings (often referred to as a "potted plant" rule), and that this practice demonstrates that postsecondary institutions are capable of appropriately controlling party advisors even without the power to hold attorneys in contempt of court. The Department does not believe that determinations about whether certain questions or evidence are relevant or directly related to the allegations at issue requires legal training and that such factual determinations reasonably can be made by layperson recipient officials impartially applying logic and common sense. The Department believes that recipients are capable of, and committed to, controlling a hearing environment to keep the proceeding focused on relevant evidence and ensuring that participants are treated respectfully, such that a recipient's Title IX grievance process will not be

"weaponized" for or against any party. The Department notes that in criminal proceedings, defendants have a right to self-representation raising the potential for a party to personally conduct cross-examination of witnesses, whereas the final regulations do not grant a right of self-representation and thus avoid the risks of ineffectiveness and trauma for complainants that may arise where a perpetrator personally cross-examines a victim.

The Department acknowledges that even in criminal settings, in-person cross-examination is not always required, and § 106.45(b)(6)(i) has adapted the procedure of cross-examination in a way that avoids importation of criminal law standards, for example by requiring the parties to be in separate rooms (upon either party's request), and disallowing a right of self-representation even if a party would otherwise wish to be self-represented. The Department disagrees, however, that allowing pre-recorded testimony in lieu of answering of questions during a live hearing would sufficiently accomplish the function of cross-examination in the postsecondary context, where the parties' and decision-maker's ability to hear parties' and witness's answers to questions and immediate follow-up questions is the better method of "airing out" all viewpoints about the allegations at issue. Pre-recorded testimony does not, for example, allow a party to challenge in real time any inconsistencies and inaccuracies in the other party's testimony by posing follow-up questions.

Changes: None.

*Demeanor Evaluation is Unreliable*

Comments: Commenters argued that cross-examination is an opportunity to evaluate the body language and demeanor of a party under questioning for the purpose of assessing credibility[1219] but that while credibility is typically based on a number of factors such as sufficient specific detail, inherent plausibility, internal consistency, corroborative evidence, and demeanor, the most unreliable factor is demeanor. Commenters asserted that research shows how people interpret another person's demeanor is easily misconstrued, what people "read" in facial expression and body language is "highly ambiguous and cannot be interpreted without reference to pre-existing schemas and assumptions,"[1220] a person's ability to judge truthfulness is not better than 50 percent accuracy, and what people often mistake for signs of deception are often actually indicators of stress-coping mechanisms.[1221] Commenters argued that research shows that cross-examination does not accurately assess credibility or yield accurate testimony, especially for vulnerable witnesses such as sexual abuse victims, individuals with intellectual disabilities, or children, and accuracy of children's testimony may be affected by a child's self-esteem, confidence, and the presence of parents during testimony.[1222] Commenters argued that decisions

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[1219] Commenters cited: H. Hunter Bruton, *Cross-Examination, College Sexual-Assault Adjudications, and the Opportunity for Tuning up the Greatest Legal Engine Ever Invented*, 27 CORNELL J. OF L. & PUB. POL'Y 145 (2017).
[1220] Commenters cited: Susan A. Bandes, *Remorse, Demeanor, and the Consequences of Misinterpretation: The Limits of Law as a Window into the Soul*, 3 JOURNAL OF L., RELIGION & ST. 170, 179 (2014).
[1221] Commenters cited: Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1080 (1991) for the proposition that when interviewees are questioned by "suspicious interviewers, subjects tend to view their responses as deceptive even when they are honest" in part because the interrogation places the interviewee under stress, which induces behavior likely to be interpreted as deceptive.
[1222] Commenters cited: Mark W. Bennett, *Unspringing the Witness Memory and Demeanor Trap: What Every Judge and Juror Needs to Know About Cognitive Psychology and Witness Credibility*, 64 AM. UNIV. L. REV. 1331 (2015); Megan Reidy, *Comment: The Impact of Media Coverage on Rape Shield Laws in High-Profile Cases: Is the Victim Receiving a "Fair Trial",* 54 CATH. UNIV. L. REV. 297, 308 (2005); Jules Epstein, *The Great Engine That Couldn't:*

based on observing demeanor could lead to erroneous findings of responsibility when facts do not warrant that outcome, that decision-makers may be more likely to find a respondent responsible after watching an emotional complainant describe an alleged assault, or unfairly view a respondent as not credible just because the respondent seems nervous when the nervousness is due to the serious potential consequences of the hearing. Thus, commenters argued, injecting cross-examination into a Title IX campus adjudication that likely depends on under-trained volunteers to assess credibility, will not improve accuracy of outcomes or increase

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*Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 STETSON L. REV. 3 (2007); Tim Valentine & Katie Maras, *The Effect of Cross-Examination on the Accuracy of Adult Eyewitness Testimony*, 25 APPLIED COGNITIVE PSYCHOL. 4 (2011); Jacqueline Wheatcroft & Louise Ellison, *Evidence in Court: Witness Preparation and Cross-Examination Style Effects on Adult Witness Accuracy*, 30 BEHAVIORAL SCI. & THE L. 6 (2012); Rachel Zajac & Harlene Hayne, *I Don't Think That's What Really Happened: The Effect of Cross-examination on the Accuracy' of Children's Reports*, 9 JOURNAL OF EXPERIMENTAL PSYCHOL.: APPLIED 3 (2003); Fiona Jack & Rachel Zajac, *The Effect of Age and Reminders on Witnesses' Responses to Cross-Examination-Style Questioning*, 3 JOURNAL OF APPLIED RESEARCH IN MEMORY & COGNITION 1 (2014); Saskia Righarts *et al.*, *Addressing the Negative Effect of Cross-examination Questioning on Children's Accuracy: Can We Intervene?*, 37 LAW & HUM. BEHAVIOR 5 (2013); Lauren R. Shapiro, *Eyewitness Memory for a Simulated Misdemeanor Crime: The Role of Age and Temperament in Suggestibility*, 19 APPLIED COGNITIVE PSYCHOL. 3 (2005); Emily Henderson, *Bigger Fish to Fry: Should the Reform of Cross-examination Be Expanded Beyond Vulnerable Witnesses*, 19 INT'L J. OF EVIDENCE & PROOF 2 (2015); Rachel Zajac *et al.*, *Disorder in the Courtroom: Child Witnesses Under Cross-examination*, 32 DEVELOPMENTAL REV. 3, 198 (2012); "Cross-examination: Impact on Testimony," *Wiley Encyclopedia of Forensic Science* 656 (Allan Jamieson & Andre Moenssens eds., 2009); Caroline Bettenay *et al.*, *Cross-examination: The Testimony of Children With and Without Intellectual Disabilities*, 28 APPLIED COGNITIVE PSYCHOL. 2 (2014); Joyce Plotnikoff & Richard Woolfson, "'Kicking and Screaming': The Slow Road to Best Evidence," *in Children and Cross-examination: Time to Change the Rules?* 28 (John Spencer & Michael Lamb eds., 2012); Rhiannon Fogliati & Kay Bussey, *The Effects of Cross-examination on Children's Coached Reports*, 21 PSYCHOL., PUB. POL'Y, & L. 1 (2015); Saskia Righarts *et al.*, *Young Children's Responses to Cross-examination Style Questioning: The Effects of Delay and Subsequent Questioning*, 21 PSYCHOL., CRIME & L. 3 (2015); Rhiannon Fogliati & Kay Bussey, *The Effects of Cross-examination on Children's Reports of Neutral and Transgressive Events*, 19 LEGAL & CRIM. PSYCHOL. 2 (2014); Rachel Zajac & Harlene Hayne, *The Negative Effect of Cross-examination Style Questioning on Children's Accuracy: Older Children are Not Immune*, 20 APPLIED COGNITIVE PSYCHOL. 3 (2006); Rachel Zajac *et al.*, *Asked and Answered: Questioning Children in the Courtroom*, 10 PSYCHIATRY, PSYCHOL., & L 1 (2003); Rachel Zajac *et al.*, *The Diagnostic Value of Children's Responses to Cross-examination Questioning*, 34 BEHAVIORAL SCI. & THE L. 1 (2016); John E.B. Myers, *The Child Witness: Techniques for Direct Examination, Cross-examination, and Impeachment*, 18 PACIFIC L. REV. 801, 882, 886, 887, 890, 891 (1987); Gail S. Goodman *et al.*, *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, MONOGRAPHS OF THE SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT, Serial no. 229, Vol. 57, No. 5, at p. 85 (1992); Richard S. Ofshe & Richard A. Leo, *The Decision to Confess Falsely, Rational Choice and Irrational Action,* 74 DENV. UNIV. L. REV. 979, 985 (1997); Thomas J. Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 DEVELOPMENTAL PSYCHOL. 608, 615 (1979).

fairness over the status quo but will make survivors reticent even to report sex discrimination.[1223] Commenters asked what the Department's data-driven basis is for concluding that cross-examination is the most effective procedure for determining truth and credibility. Commenters argued that cross-examination will take an emotional toll on all participants[1224] and that complainants, respondents, and witnesses will all be unwilling to endure it, including because cross-examination could compromise their position in criminal and civil proceedings.

Some commenters argued that cross-examination contemplates a decision-maker observing witnesses to assess credibility based on a witness's demeanor, which increases the danger of racial bias and stereotypes infecting the decision-making process. Commenters argued that Black female students are disadvantaged by cross-examination due to negative, unsupportable stereotypes that Black females are aggressive and sexually promiscuous, and that these students are more likely to be falsely seen as the initiator of sexual harassment or abuse upon cross-examination. Commenters asserted that cross-examination will make male victims scared to report sexual assault perpetrated by a male, for fear of facing a skilled cross-examiner whose aim will be to discredit the male survivor by painting him as an instigator or as having consented to gay sexual activity.

A few commenters argued that cross-examination contradicts the concept of an impartial hearing.

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[1223] Commenters cited: Kathryn M. Stanchi, *The Paradox of the Fresh Complaint Rule*, 37 BOSTON COLL. L. REV. 146 (1996); Kathryn M. Stanchi, *Dealing with Hate in the Feminist Classroom*, 11 MICH. J. OF GENDER & L. 173 (2005); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1014 (1991).

[1224] Commenters cited: Eleanor W. Myers & Edward D. Ohlbaum, *Discrediting the Truthful Witness: Demonstrating the Reality of Adversary Advocacy*, 69 FORDHAM L. REV. 1055 (2000).

Discussion: The Department agrees with commenters who asserted that cross-examination provides opportunity for a decision-maker to assess credibility based on a number of factors, including evaluation of body language and demeanor, specific details, inherent plausibility, internal consistency, and corroborative evidence. Even if commenters correctly characterize research that casts doubt on the human ability to discern truthfulness by observing body language and demeanor, with respect to determining the credibility of a narrative or statement, as commenters acknowledged, such credibility determinations are not based solely on observing demeanor, but also are based on other factors (e.g., specific details, inherent plausibility, internal consistency, corroborative evidence). Cross-examination brings those important factors to a decision-maker's attention in a way that no other procedural device does; furthermore, while social science research demonstrates the limitations of demeanor as a criterion for judging deception, studies demonstrate that inconsistency is correlated with deception.[1225] Thus, cross-examination remains an important part of truth-seeking in adjudicative proceedings, partly because of the live, in-the-moment nature of the questions and answers, and partly because cross-examination by definition is conducted by someone whose very purpose is to advance one side's perspective. When that happens on behalf of each side, the decision-maker is more likely to see and hear relevant evidence from all viewpoints and have more information with which to reach a

[1225] *E.g.*, H. Hunter Bruton, *Cross-Examination, College Sexual-Assault Adjudications, and the Opportunity for Tuning up the Greatest Legal Engine Ever Invented*, 27 CORNELL J. OF L. & PUB. POL'Y, 145, 161 (2017) ("While not all inconsistencies arise from deceit, studies have reliably established a link between consistency in testimony and truth telling. And in general, deceitful witnesses have a harder time maintaining consistency under questioning that builds upon their previous answers.") (internal citations omitted).

determination that better reflects the truth of the allegations.[1226] While commenters contended that some studies cast doubt on the effectiveness of cross-examination in eliciting accurate information, many such studies focus on cross-examination of child victims as opposed to adult victims[1227] and in any event that literature has not persuaded U.S. legal systems to abandon cross-examination, particularly with respect to adults, as the most effective – even if imperfect – tool for pursuing reliable outcomes through exposure of inaccuracy or lack of candor on the part of parties and witnesses.

The Department notes that to the extent that commenters correctly characterize research as indicating that what decision-makers may interpret as signs of deception may in fact be signs of stress, many commenters have pointed out that a grievance process is stressful for both complainants and respondents, and therefore that concern exists for both parties. However, it does not negate the value of cross-examination in bringing to light factors other than demeanor that bear on credibility (such as plausibility and consistency). The final regulations require

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[1226] *Id.* at 158-59 ("Cross-examination highlights the errors of well-intentioned and deceptive witnesses alike. Witnesses can neglect to explain their account fully or make mistakes. When a witness first testifies, her words are 'a selective presentation of aspects of what the witness remembers, organized in a willful or at least a purposeful manner.' Cross-examination breaks down carefully curated narratives: '[it] places in the hands of the cross-examiner some of the means to show the gaps between the truth and the telling of it.' What witnesses think they know may in fact be an illusion constructed by the unholy union between the human's brain fallible nature and outside influences. Probing questioning elicits details that did not appear in the witness's first account. As the witness adds details, his story may change or completely contradict original assertions. Each new detail or differing characterization represents information the fact-finder would not have otherwise received. In so doing, adversarial questioning exposes witness error, or at least the source of possible error. The shortcomings of perception and memory are among the errors that remain hidden without cross-examination. Cross-examination reminds fact-finders that the limitations of perception and memory affect the verisimilitude of all testimony. Without this reminder, fact-finders may place undue weight on witness testimony.") (internal citations omitted).

[1227] *Id.* at 164-65 ("Experimental studies suggest that cross-examination can mislead witnesses and cause them to change accurate answers to inaccurate answers. Admittedly, there are more studies documenting how cross-examination negatively affects the accuracy of child-victims' testimony, but the literature suggesting similar results for adult victims continues to grow. A number of factors contribute to the likelihood that a witness will revise what was at first accurate testimony. . . . Put simply, in many cases, 'honest witnesses can be misled by cross-examination.'") (internal citations omitted).

decision-makers to explain in writing the reasons for determinations regarding responsibility;[1228] if a decision-maker inappropriately applies pre-existing assumptions that amount to bias in the process of evaluating credibility, such bias may provide a basis for a party to appeal.[1229] The Department expects that decision-makers will be well-trained in how to serve impartially, including how to avoid prejudgment of the facts at issue and avoid bias,[1230] and the Department notes that judging credibility is traditionally left in the hands of non-lawyers without specialized training, in the form of jurors who serve as fact-finders in civil and criminal jury trials, because assessing credibility based on factors such as witness demeanor, plausibility, and consistency are functions of common sense rather than legal expertise.

The Department acknowledges that cross-examination may be emotionally difficult for parties and witnesses, especially when the facts at issue concern sensitive, distressing incidents involving sexual conduct. The Department recognizes that not every party or witness will wish to participate, and that recipients have no ability to compel a party or witness to participate. The final regulations protect every individual's right to choose whether to participate by including § 106.71, which expressly forbids retaliating against any person for exercising rights under Title IX including participation or refusal to participate in a Title IX proceeding. Further, § 106.45(b)(6)(i) includes language that directs a decision-maker to reach the determination regarding responsibility based on the evidence remaining even if a party or witness refuses to undergo cross-examination, so that even though the refusing party's statement cannot be considered, the decision-maker may reach a determination based on the remaining evidence so

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[1228] Section 106.45(b)(7).
[1229] Section 106.45(b)(8).
[1230] Section 106.45(b)(1)(iii).

long as no inference is drawn based on the party or witness's absence from the hearing or refusal to answer cross-examination (or other) questions. Thus, even if a party chooses not to appear at the hearing or answer cross-examination questions (whether out of concern about the party's position in a concurrent or potential civil lawsuit or criminal proceeding, or for any other reason), the party's mere absence from the hearing or refusal to answer questions does not affect the determination regarding responsibility in the Title IX grievance process.

The Department acknowledges that in any situation where a complainant has alleged sexual misconduct without the complainant's consent, the possibility exists that the respondent will contend that the sexual conduct was in fact consensual, and that cross-examination in those situations might include questions concerning whether consent was present, resulting in discomfort for complainants in such cases, including for complainants alleging male-on-male sexual violence. However, where a sexual offense turns on the existence of consent and that issue is contested, evidence of consent is relevant and each party's advisor can respectfully ask relevant cross-examination questions about the presence or absence of consent.

The Department disagrees that the cross-examination procedure described in § 106.45(b)(6)(i) contradicts the concept of impartiality of the § 106.45 grievance process. Because these final regulations require each party's advisor, and not the recipient (as the investigator, decision-maker, or other recipient official), to conduct cross-examination, the recipient remains impartial and neutral toward both parties throughout the entirety of the grievance process. By contrast, the parties (through their advisors) are not impartial, are not neutral, and are not objective. Rather, the parties involved in a formal complaint of sexual harassment each have their own viewpoints, beliefs, interests, and desires about the outcome of the grievance process and their participation in the process is for the purpose of furthering their

own viewpoints. Cross-examination is conducted by the parties' advisors, who have no obligation to be neutral, while the recipient remains impartial and neutral with respect to both parties by observing the parties' respective advocacy of their own perspectives and interests and reaching a determination regarding responsibility based on objective evaluation of the evidence. Thus, the grievance process remains impartial, even though the parties and their advisors are, by definition, not impartial.

Changes: The final regulations add language to § 106.45(b)(6)(i) stating 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; provided, however, that the decision-maker cannot draw any inference about the determination regarding responsibility based solely on a party's or witness's absence from the hearing or refusal to answer cross-examination or other questions. The final regulations also add § 106.71 prohibiting retaliation and providing in relevant part that no recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or part 106 of the Department's regulations, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part.

*Trauma Responses*

Comments: Some commenters argued that cross-examination is inherently unfair for survivors because any adversarial questioning may trigger a trauma response (manifesting as panic attacks, flashbacks, painful memories, dissociation, or even suicidal ideation) and instead survivors must be able to recount their experience in a non-stressful environment where they feel safe, without the stress and pressure of cross-examination that can result in a survivor not being able to give a

correct account of what happened or mixing up important facts that can affect the outcome of the case. Commenters argued that trauma shapes memory patterns making details of sexual violence difficult to remember, such that traditional cross-examination may lead to a mistaken conclusion that a trauma victim is lying when in reality the victim is being truthful but is unable to recall or answer questions about events in a detailed, linear, or consistent manner. Commenters argued that cross-examination is designed to point out inconsistencies in a person's testimony often by asking confusing, complex, or leading questions,[1231] and neurobiological effects of trauma affect the brain resulting in fragmented or blocked memories of details of the traumatic event.[1232]

Commenters argued that counterintuitive responses to rape, sexual assault, and other forms of sexual violence are common because trauma impacts the body and brain in ways that impact a person's affect, emotions, behaviors, and memory recall, such that these normal responses to abnormal circumstances can seem perplexing to individuals untrained in sexual violence dynamics and research about the neurobiology of trauma, leading people to unfairly undermine a victim's credibility. Commenters argued that research shows that trauma-informed questioning results in potentially more valuable, reliable information than traditional cross-examination.[1233] Commenters asserted that yelling at someone to recall a specific sequence of

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[1231] Commenters cited: Rachel Zajac & Paula Cannan, *Cross-Examination of Sexual Assault Complainants: A Developmental Comparison*, 16 PSYCHIATRY, PSYCHOL. & L. (sup.1) 36 (2009).

[1232] Many commenters cited to information regarding the impact of trauma, such as the data noted in the "Commonly Cited Sources" subsection of the "General Support and Opposition" section of this preamble, in support of arguments that cross-examination may trigger a trauma response and that trauma victims are often unable to recall the traumatic events in a detailed, linear fashion. Commenters also cited: Substance Abuse and Mental Health Services Administration, Center for Substance Abuse Treatment, *Trauma-Informed Care in Behavioral Health Services* (2014); Massachusetts Advocates for Children: Trauma and Learning Policy Initiative, *Helping Traumatized Children Learn: Supportive School Environments for Children Traumatized by Family Violence* (2005).

[1233] Commenters cited: Sara F. Dudley, *Paved with Good Intentions: Title IX Campus Sexual Assault Proceedings and the Creation of Admissible Victim Statements*, 46 GOLDEN GATE UNIV. L. REV. 117 (2016).

events they experienced under traumatic conditions decreases the accuracy of the recall provided.

Commenters asserted that because rape is about power and control, giving a perpetrator more power and control via cross-examination will only intimidate and hurt a victim more.[1234] Commenters argued that while cross-examination is uncomfortable for most people, it can have severe impacts on survivors' mental health[1235] and therefore also on their academic performance. One commenter argued that we would never require our military veterans suffering from PTSD to return from war and sit in a room listening to exploding bombs, so why would we require a rape victim to face interrogation in front of the source of their trauma immediately after the trauma occurred?

Discussion: The Department understands commenters' concerns that survivors of sexual harassment may face trauma-related challenges to answering cross-examination questions about the underlying allegations. 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. Under these final regulations, recipients have discretion to include trauma-informed approaches in the training provided to Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions so long as the training complies with the requirements of § 106.45(b)(1)(iii)

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[1234] Commenters cited: Ryan M. Walsh & Steven E. Bruce, *The Relationships Between Perceived Levels of Control, Psychological Distress, and Legal System Variables in a Sample of Sexual Assault Survivors*, 17 VIOLENCE AGAINST WOMEN 5 (2011).

[1235] Commenters cited: Jacqueline M. Wheatcroft *et al.*, *Revictimizing the Victim? How Rape Victims Experience the UK Legal System*, 4 VICTIMS & OFFENDERS 3 (2009); Mark Littleton, "Sexual Harassment of Students by Faculty Members," *in Encyclopedia of Law and Higher Education* 411-12 (Charles J. Russo ed., 2010).

and other requirements in § 106.45, and nothing in the final regulations impedes a recipient's ability to disseminate educational information about trauma to students and employees. As attorneys and consultants with expertise in Title IX grievance proceedings have noted, trauma-informed practices can be implemented as part of an impartial, unbiased system that does not rely on sex stereotypes, but doing so requires taking care not to permit general information about the neurobiology of trauma to lead Title IX personnel to apply generalizations to allegations in specific cases.[1236] Because cross-examination occurs only after the recipient has conducted a thorough investigation, trauma-informed questioning can occur by a recipient's investigator giving the parties opportunity to make statements under trauma-informed approaches prior to being cross-examined by the opposing party's advisor.

With respect to cross-examination, the Department notes that the final regulations do not prevent a recipient from granting breaks during a live hearing to permit a party to recover from a panic attack or flashback, nor do the final regulations require answers to cross-examinations to be in linear or sequential formats. The final regulations do not require that any party, including a

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[1236] *See, 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); "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."). Because of the lack of a singular definition of "trauma-informed" approaches, and the variety of contexts that such approaches might be applied, the Department does not mandate "trauma-informed" approaches but recipients have flexibility to employ trauma-informed approaches so long as the recipient also complies with all requirements in these final regulations.

complainant, must recall details with certain levels of specificity; rather, a party's answers to cross-examination questions can and should be evaluated by a decision-maker in context, including taking into account that a party may experience stress while trying to answer questions. Because decision-makers must be trained to serve impartially without prejudging the facts at issue, the final regulations protect against a party being unfairly judged due to inability to recount each specific detail of an incident in sequence, whether such inability is due to trauma, the effects of drugs or alcohol, or simple fallibility of human memory. We have also revised § 106.45(b)(6)(i) in a manner that builds in a "pause" to the cross-examination process; before a party or witness answers a cross-examination question, the decision-maker must determine if the question is relevant. This helps ensure that content of cross-examination remains focused only on relevant questions and that the pace of cross-examination does not place undue pressure on a party or witness to answer immediately.

The Department reiterates that recipients retain the discretion to control the live hearing environment to ensure that no party is "yelled" at or asked questions in an abusive or intimidating manner. The Department further reiterates that cross-examination is as valuable a tool for complainants to challenge a respondent's version of events as it is for a respondent to challenge a complainant's narrative. Because cross-examination is conducted only through party advisors, we believe that the cross-examination procedure helps to equalize power and control, because both parties have equal opportunity to ask questions that advocate the party's own perspectives and beliefs about the underlying incident regardless of any power, control, or authority differential that exists between the parties.

The Department agrees that cross-examination is likely an uncomfortable experience for most people, including complainants and respondents; numerous commenters have informed the

Department that navigating a grievance process as a complainant or as a respondent has caused individuals to feel stressed, have difficulty focusing on academic performance, and feel anxious and depressed. The final regulations offer both parties protection against feeling forced to participate in a grievance process and equal procedural protections when an individual does participate. To that end, the final regulations require recipients to offer complainants supportive measures regardless of whether a formal complaint is filed[1237] (and encourage supportive measures for respondents as well),[1238] and where a party does participate in a grievance process the party has the right to an advisor of choice.[1239] Additionally, the final regulations add § 106.71 prohibiting retaliation and specifically protecting an individual's right to participate or not participate in a grievance process.

The Department appreciates a commenter's analogy to a military veteran experiencing PTSD; however, the we believe that § 106.45(b)(6)(i) anticipates the potential for re-traumatization of sexual assault victims and mitigates such an effect by ensuring that a complainant (or respondent) can request being in separate rooms for the entire live hearing (including during cross-examination) so that the parties never have to face each other in person, by leaving recipients flexibility to design rules (applied equally to both parties) that ensure that no party is questioned in an abusive or intimidating manner, and by requiring the decision-maker to determine the relevance of each cross-examination question before a party or witness answers. Further, the Department notes that there is no statute of limitations setting a time frame for filing

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[1237] Section 106.44(a).
[1238] Section 106.30 (defining "supportive measures" and expressly indicating that such individualized services may be provided to complainants or respondents); § 106.45(b)(1)(ix) (requiring a recipient's grievance process to describe the range of supportive measures available to complainants and to respondents).
[1239] Section 106.45(b)(5)(iv).

a formal complaint,[1240] and that completing the investigation under § 106.45 requires a reasonable amount of time (for example, the parties must be given an initial written notice of the allegations, the recipient must gather evidence, give the parties ten days to review the evidence, prepare an investigative report, and give the parties ten days to review the investigative report)[1241], and therefore it is unlikely that a complainant would ever be required to "immediately" undergo cross-examination following a sexual assault covered by Title IX.

Changes: None.

*Reliance on Rape Myths*

Comments: Many commenters cited an article[1242] by Sarah Zydervelt *et al.*, (herein, "Zydervelt 2016") describing cross-examination of rape victims as often involving detailed, personal, humiliating questions rooted in sex stereotypes and rape myths that tend to blame victims for incidents of sexual violence.[1243] Commenters argued that because cross-examination relies on rape myths, requiring cross-examination contradicts § 106.45(b)(1)(iii) which forbids training materials for Title IX personnel from relying on sex stereotypes.

Commenters argued that the Department's insistence on cross-examination for rape victims when victims of non-sexual crimes do not have to undergo cross-examination

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[1240] Section 106.30 (defining "formal complaint" and providing that a complainant must be "participating or attempting to participate" in the recipient's education program or activity at the time of filing a formal complaint). Even a complainant who has graduated may, for instance, be "attempting to participate" in the recipient's education program or activity by, for example, desiring to apply to a graduate program with the recipient, or desiring to remain involved alumni events and organizations.

[1241] *E.g.*, § 106.45(b)(2); § 106.45(b)(5)(i); § 106.45(b)(5)(vi); § 106.45(b)(5)(vii).

[1242] Commenters cited: Sarah Zydervelt, *et al.*, *Lawyers' Strategies for Cross-examining Rape Complainants: Have we Moved Beyond the 1950s?*, 57 BRITISH J. OF CRIMINOLOGY 3 (2016); Olivia Smith & Tina Skinner, *How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials*, 26 SOCIAL & LEGAL STUDIES 4 (2017).

[1243] Many commenters cited to information regarding negative impacts of sexual harassment and harmful effects of institutional betrayal, such as the data noted in the "Impact Data" and "Commonly Cited Sources" subsections of the "General Support and Opposition" section of this preamble, in support of arguments that cross-examination will further reduce rates of reporting.

demonstrates "rape exceptionalism," an unfounded notion that sexual assault and rape are different kinds of cases because rape victims lie more than victims of other crimes.[1244]

Discussion: The study cited most often by commenters for the proposition that cross-examination relies on questions rooted in sex stereotypes and rape myths, Zydervelt 2016, is a research study in which the authors compared strategies and tactics employed by defense attorneys in criminal trials in Australia and New Zealand during two time periods (from 1950-1959, and from 1996-2011) to analyze whether the strategies and tactics differed in those time periods (the earlier time period representing pre-legal reforms in the area of rape law, and the later time period representing contemporary legal reforms such as defining rape to include marital rape, eliminating the requirement of corroborating evidence and the requirement that the victim showed physical resistance to the sexual attack, and imposing rape shield protections limiting questions about a victim's sexual history and sexual behavior).[1245] Zydervelt 2016 identified four strategies employed by defense attorneys to challenge a rape victim's testimony: questions designed to challenge plausibility, consistency, credibility, and reliability. Zydervelt 2016 further

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[1244] Commenters cited: Naomi Mann, *Taming Title IX Tensions*, 20 UNIV. PA. J. OF CONSTITUTIONAL L. 631, 666 (2018); Michelle Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L. J. 1940, 2000 (2016) (Title IX is a civil rights mechanism about institutional accountability for providing equal education); *id.* at 1943, 1946-50 (the tendency to treat rape victims as distinct from other crime victims has roots in criminal justice and civil litigation where rules have required victim testimony to be corroborated and victims have carried extra burdens to show they resisted rape); *cf.* Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 AKRON L. REV. 957, 957 (2008) ("Rape is an exceptional area of law.").

[1245] Sarah Zydervelt *et al.*, *Lawyers' Strategies for Cross-examining Rape Complainants: Have we Moved Beyond the 1950s?*, 57 BRITISH J. OF CRIMINOLOGY 3 (2016), at 2. Page numbers referenced in this section are to the version of this article located at: https://www researchgate net/profile/Sarah_Zydervelt/publication/295084744_Lawyers%27_Strategies_for_Cross-Examining_Rape_Complainants_Have_we_Moved_Beyond_the_1950s/links/56f35e4208ae95e8b6cb4ceb/Lawyers-Strategies-for-Cross-Examining-Rape-Complainants-Have-we-Moved-Beyond-the-1950s.pdf?origin=publication_detail, pp. 1-19.

identified tactics used to further each of those four strategies;[1246] for example, the most common strategy identified in the study was challenging plausibility, and the most common tactic used in that strategy involved questions about the complainant's behavior immediately before or after the alleged attack.[1247]

Zydervelt 2016 defined "rape myths" as "beliefs about rape that serve to deny, downplay or justify sexually aggressive behavior that men commit against women" which "can be descriptive, reflecting how people believe instances of sexual assault typically unfold, or they can be prescriptive, reflecting beliefs about how a victim of sexual assault should react" and further identified common rape myths as "the belief that victims invite sexual assault by the way that they dress, their consumption of alcohol, their sexual history or their association with males with whom they are not in a relationship; the belief that many women make false allegations of rape; the belief that genuine assault would be reported to authorities immediately; and the belief that victims would fight back—and therefore sustain injury or damage to clothing—during an assault."[1248] Zydervelt 2016 concluded that historically and contemporarily, defense attorneys employ similar strategies and tactics when cross-examining rape victims in criminal trials, and that rape victims still report cross-examination as a distressing and demeaning experience.[1249]

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[1246] *Id.* at 8-10. For the strategy of challenging plausibility, the study identified the following tactics used by defense attorneys during cross-examination questions: defendant's good character; lack of injury or clothing damage; complainant's behavior immediately before and after offense; lack of resistance; delayed report; continued relationship. For the strategy of challenging credibility, the study identified the following tactics used by defense attorneys during cross-examination questions: prior relationship with the defendant; sexual history; personal traits; previous sexual assault complaint; ulterior motive. For the strategy of challenging reliability, the study identified the following tactics used by defense attorneys during cross-examination questions: alcohol/drug intoxication; barriers to perception; memory fallibility. For the strategy of challenging consistency, the study identified the following tactics used by defense attorneys during cross-examination questions: inconsistency with complainant's own account, with defendant's account, with another witness's account, and with physical evidence.

[1247] *Id.* at 11.

[1248] *Id.* at 3-4 (internal quotation marks and citations omitted).

[1249] *Id.* at 15.

Zydervelt 2016 concluded that leveraging rape myths was a common tactic when cross-examining rape victims,[1250] for example, asking questions suggesting that willingly accompanying a defendant alone to a room implied consent to a sexual act, or that a "real" victim would not have returned to a party with a defendant if they had just been sexually assaulted.

The authors of Zydervelt 2016 opined in conclusion that the extent to which misconceptions about rape shape cross-examination questions in rape cases likely reflects the extent to which society adheres to particular beliefs about rape.[1251] The study's authors also noted that more research is required to assist policy makers to make informed decisions about how best to address these issues,[1252] and further surmised that because the strategies and tactics used in cross-examination during rape cases remained similar over time, investigators, prosecutors, and advocates could preemptively assist rape victims who need to testify by better preparing the victim to anticipate the kinds of questions that commonly arise during rape cross-examinations.[1253]

The Department understands commenters' concerns that Zydervelt 2016 indicates that misconceptions about rape and sexual assault victims permeate cross-examination strategies and tactics in the criminal justice system. However, this study indicates that to the extent that misconceptions or negative stereotypes about sexual assault affect cross-examination in rape

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[1250] *Id.*

[1251] *Id.* at 16-17 ("The root of the problem with cross-examination likely lies in the combative nature of proceedings" where it is a defense lawyer's job "to create reasonable doubt. . . . Perhaps, then, cross-examination will not change until social beliefs about rape do. . . . Judges and juries are not imbued with a special ability to determine the truth; instead, their rely on their understanding of human nature and common sense. . . . To the extent that putting these myths in front of the jury has a good chance of creating reasonable doubt, it is likely that lawyers will continue to use them.") (internal citations omitted).

[1252] *Id.* at 17.

[1253] *Id.* at 16.

cases, the problem lies with societal beliefs about sexual assault and not with cross-examination as a tool for resolving competing narratives in sexual assault cases. The final regulations require recipients to ensure that decision-makers are well-trained in conducting a grievance process and serving impartially, using materials that avoid sex stereotypes, and specifically on issues of relevance including application of the rape shield protections in § 106.45(b)(6). Further, as noted above, nothing in the final regulations precludes a recipient from including in that training information about the impact of trauma on victims or other aspects of sexual violence dynamics, so long as any such training promotes impartiality and avoidance of prejudgment of the facts at issue, bias, conflicts of interest, and sex stereotypes. Thus, unlike a civil or criminal court system, where jurors who act as fact-finders are not trained, the § 106.45 grievance process requires recipients to use decision-makers who have been trained to avoid bias and sex stereotypes and to focus proceedings on relevant questions and evidence, such that even if a cross-examination question impermissibly relies on bias or sex stereotypes while attempting to challenge a party's plausibility, credibility, reliability, or consistency, it is the trained decision-maker, and not the party advisor asking a question, who determines whether the question is relevant and if it is relevant, then evaluates the question and any resulting testimony in order to reach a determination regarding responsibility. For the same reasons, the Department disagrees that cross-examination violates or contradicts § 106.45(b)(1)(iii), which forbids training materials for Title IX personnel from relying on sex stereotypes; the latter provision serves precisely to ensure that decision-makers do *not* allow sex stereotypes to influence the decision-maker's determination regarding responsibility.

The Department disagrees that the § 106.45 grievance process, including cross-examination at live hearings in postsecondary institutions, reflects adherence to rape

exceptionalism or any belief that women (or complainants generally) tend to lie about rape more than other offenses. The Department believes that cross-examination as a tool for testing competing narratives serves an important truth-seeking function in a variety of types of misconduct allegations; these final regulations focus on the procedures designed to prescribe a consistent framework for recipients' handling of formal complaints of sexual harassment so that a determination is likely to be accurate in each particular case, regardless of how infrequently false allegations are made. The Department reiterates that cross-examination provides complainants with the same opportunity through an advisor to question and expose inconsistencies in the respondent's testimony and to reveal any ulterior motives. In this manner, cross-examination levels the playing field by giving a complainant as much procedural control as a respondent, regardless of the fact that exertion of power and control is often a dynamic present in perpetration of sexual assault.

Changes: None.

*Cross-Examination as a Due Process Requirement*

Comments: Commenters argued that cross-examination is not necessary because neither the Constitution, nor other Federal law, requires cross-examination in school conduct proceedings.[1254] Commenters characterized recent Sixth Circuit cases, holding that cross-examination must be provided, as anomalous rather than indicative of a judicial trend favoring

[1254] Commenters cited: *Goss v. Lopez*, 419 U.S. 565, 583 (1975) (holding that a ten-day suspension imposed on high school students by a public school district required due process of law under the U.S. Constitution, including notice and opportunity to be heard, but did not require opportunity to cross-examine witnesses); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Dixon v. Ala. St. Bd. of Educ.*, 294 F.2d 150, 158 (5th Cir. 1961); *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993) (holding no violation of constitutional due process where college student was expelled without a right of cross-examination); *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 247 (D. Vt. 1994); *Coplin v. Conejo Valley Unified Sch. Dist.*, 903 F. Supp. 1377, 1383 (C.D. Cal. 1995).

live cross-examination in college disciplinary proceedings.[1255] Commenters asserted that the Department's cross-examination requirement does not contain the limitations that the Sixth Circuit delineated in *Baum*; namely, that cross-examination is required only for public colleges, in situations where credibility is in dispute and material to the outcome, where potential sanctions are suspension or expulsion, and where the burden on the university is minimal because the university already holds hearings for some types of misconduct.

Commenters argued that Federal case law shows a split in how courts view cross-examination in college disciplinary proceedings with the weight of Federal case law favoring significant limits on cross-examination by requiring, at most, questioning through a panel or submission of written questions rather than traditional, adversarial cross-examination, for both public and private institutions.[1256] Commenters argued that colleges and universities should not be required to ignore judicial precedent simply because the Department currently finds a recent

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[1255] 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) (arguing that *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018) is anomalous); William J. Migler, *Comment: An Accused Student's Right to Cross-Examination in University Sexual Assault Adjudicatory Proceedings*, 20 CHAP. L. REV. 357, 380 (2017) ("Lower federal courts and state courts have applied both *Goss* and *Eldridge* (or similar reasoning behind these cases) to the question of whether cross-examination is a due process requirement in university disciplinary proceedings, resulting in a split amongst the jurisdictions. Among the states that have directly decided on the issue, courts in eleven states have held that an accused student has the right to some form of cross-examination of witnesses. Likewise, the Ninth Circuit and district courts in the First, Second, Third, and Eighth Circuits have held accused students have the right to some form of cross-examination. Conversely, courts in sixteen states, the First, Second, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits, and district courts in the Seventh and Eighth Circuits, have found that cross-examination is not required to protect a student's Due Process rights in a disciplinary proceeding.") (internal citations omitted); *cf. Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018).

[1256] Commenters cited: Sara O'Toole, *Campus Sexual Assault Adjudication, Student Due Process, and a Bar on Direct Cross-Examination*, 79 UNIV. OF PITT. L. REV. 511 (2018) (examining due process cases law in educational settings and arguing that parties directing questions to each other through a hearing panel is constitutionally sufficient); commenters also cited, *e.g., Dixon v. Ala. St. Bd. of Educ.,* 294 F.2d 150, 159 (5th Cir. 1961); *Winnick v. Manning,* 460 F.2d 545, 549 (2d Cir.1972); *Boykins v. Fairfield Bd. of Edu.*, 492 F.2d 697, 701 (5th Cir. 1974); *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987); *Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 16 (1st Cir. 1988); *Donohue v. Baker*, 976 F. Supp. 136, 147 (N.D.N.Y. 1997); *Schaer v. Brandeis Univ.*, 432 Mass. 474, 482 (2000).

two-to-one decision from the Sixth Circuit (i.e., *Baum*) more persuasive than the many other Federal court decisions that do not require live cross-examination as part of constitutional due process or fundamental fairness, and that principles of federalism, administrative law, and general rule of law demand that the Department refrain from overreaching by imposing this requirement.

Several commenters argued that regardless of how cross-examination is viewed under a constitutional right to due process, private colleges and universities owe contractual obligations to their students and employees, not constitutional ones, and requiring live hearings and cross-examination marks a substantial governmental intrusion into the relationship between private institutions and their students. Several commenters asserted that private institutions should remain free to craft their own adjudication rules so long as such rules are fair and equitable.

Commenters argued that unless lawmakers specifically direct universities to grant cross-examination rights, or the right to counsel, in civil or administrative hearings,[1257] such elevated procedures cannot be expected of universities.

Commenters argued that cross-examination by skilled defense counsel is the most aggressive means of testing a witness's credibility and, by requiring this, the proposed rules seem based on a premise that a complainant's credibility is highly suspect. Commenters asserted that because a university Title IX grievance process is neither a civil lawsuit (where a plaintiff seeks money damages against the defendant) or a criminal trial (where a criminal defendant faces loss of liberty), the highest degree of credibility-testing is neither necessary nor reasonable.

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[1257] Commenters cited: North Carolina Gen. Stat. § 116-40.11 (student's right to be represented by counsel, at student's expense, in campus disciplinary hearings); Mass. Gen. c.71 § 37H-3/4 (student facing expulsion or suspension longer than ten days for bullying has right to cross-examination and right to counsel).

Commenters argued that State laws restricting Sixth Amendment rights to confront accusers can be constitutionally permissible due to policy concerns for protecting sexual assault victims from suffering further psychological harms,[1258] and thus similar or greater restrictions can be part of a noncriminal proceeding like a Title IX process.

Commenters argued that fairness, including testing credibility, can be fully achieved without live, adversarial cross-examination, through questioning by a neutral college administrator,[1259] referred to by some commenters as "indirect cross-examination." Commenters similarly argued that allowing parties to submit questions to be asked by a hearing officer or panel is sufficiently reliable without causing trauma to any involved party,[1260] a practice commenters asserted should be adopted from the withdrawn 2011 Dear Colleague Letter. Commenters asserted that this method allows the parties and decision-maker to hear parties and witnesses answer questions in "real time" but without the adversarial purpose and tone of cross-examination. Commenters asserted a similar version of this practice, used by Harvard Law School and endorsed by the American Bar Association Criminal Justice Section, and by the University of California Post SB 169 Working Group, should be called "submitted questions" instead of "cross-examination" and would invite both parties to submit questions to the presiding

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[1258] Commenters cited: Linda Mohammadian, *Sexual Assault Victims v. Pro Se Defendants*, 22 CORNELL J. OF L. & PUB. POL'Y 491 (2012) (arguing that a Washington State law providing that sexual assault victims in criminal trials may receive court-appointed "standby" counsel and use closed-circuit television to testify is constitutionally adequate under Sixth Amendment case law).

[1259] Commenters cited: Sara O'Toole, *Campus Sexual Assault Adjudication, Student Due Process, and a Bar On Direct Cross-Examination*, 79 UNIV. OF PITT. L. REV. 511, 511-14 (2018) (review of relevant case law demonstrates that live cross-examination is not a due process requirement in the university setting and questioning through a hearing panel is constitutionally sufficient) (finding "the appropriate balance" between rights for complainants and for accused students "is essential to the goal of creating a more equal and safe educational environment, as moving too far in one direction may lead to a detrimental backlash and thus prevent effective solutions").

[1260] Commenters cited: The Association of Title IX Administrators (ATIXA), *The 7 Deadly Sins of Title IX Investigations: The 2016 White Paper* (2016).

decision-maker who must then ask all the questions unless the questions are irrelevant, excluded by a rule clearly adopted in advance, harassing, or duplicative.

Commenters argued that indirect cross-examination, or submitted questions, is sufficient to meet constitutional due process requirements under the Supreme Court's *Mathews v. Eldridge* balancing test[1261] and avoids risks inherent to cross-examination in an educational rather than courtroom setting, namely, that outside a courtroom lawyers or other advisors could engage in hurtful, harmful techniques that may impede educational access for the parties. Commenters argued that a trained fact-finder listening to party advisors ask questions and introduce evidence is a reactionary approach and a proactive approach is preferable, whereby the trained decision-maker elicits appropriate, relevant information from the parties and witnesses. Commenters argued that most postsecondary institutions currently use a trauma-informed method of questioning such as indirect cross-examination or submitted questions,[1262] and that such practices have been upheld by nearly all Federal court decisions considering them.

Commenters argued that because credibility is determined by the decision-maker, and not by parties or witnesses, there should be no right for parties to directly question the other party or witnesses. Commenters stated that if the Department's assumption that live cross-examination is better than submission of questions through a neutral hearing officer rests on concern that the

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[1261] Commenters cited: *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976) (setting forth a three-part balancing test for evaluating the sufficiency of due process procedures – the private interest being affected, the risk of erroneous deprivation of that interest through the procedures at issue, and the government's interest, including financial and administrative burden that additional procedures would entail).

[1262] Commenters cited: Tamara Rice Lave, *A Critical Look at How Top Colleges and Universities are Adjudicating Sexual Assault*, 71 UNIV. OF MIAMI L. REV. 377, 396 (2017) (survey of 35 highly-ranked colleges and universities determined that only six percent of surveyed institutions permitted traditional cross-examination, while 50 percent permitted questioning through the hearing panel and 30 percent did not allow a respondent to ask questions of the complainant in any capacity).

hearing officer might unfairly refuse to ask a party's questions, the proposed rules address that concern by requiring the decision-maker to explain the reasons for exclusion of any questions, so live cross-examination is not a necessity on that basis. One commenter argued that although cross-examination may be the greatest legal engine ever invented for discovery of truth, engines come in different shapes and sizes for a reason, and the effective, appropriate version of the engine of cross-examination in the Title IX context is questioning by neutral hearing officers.

Some commenters proposed that the decision-maker act as a liaison between the parties, such that each party's advisor would ask a question one at a time, live and in full hearing of the other party, and the decision-maker would then decide whether the other party should or should not answer the question; commenters asserted that this version of live cross-examination would better filter out abusive, irrelevant questions while preserving the opportunity of party advisors to ask the cross-examination questions. Commenters argued that some States such as New York have better embodied the settled state of the law by requiring a fair campus adjudicatory process that does not include cross-examination. Commenters asserted that the final regulations should follow the process used by the U.S. Senate during the confirmation hearings for the Honorable Brett Kavanaugh, Associate Justice, Supreme Court of the United States, which process was described by commenters as disallowing any interaction between the accuser and accused, while conducting questioning of each party separately by the Senators and a designated neutral questioner.

Discussion: The Department acknowledges that the Supreme Court has not ruled on what procedures satisfy due process of law under the U.S. Constitution in the specific context of a Title IX sexual harassment grievance process held by a postsecondary institution, and that Federal appellate courts that have considered this particular issue in recent years have taken

different approaches. The Department, as an agency of the Federal government, is subject to the U.S. Constitution, including the Fifth Amendment, and cannot interpret Title IX to compel a recipient, whether public or private, to deprive a person of due process rights.[1263] Procedural due process requires, at a minimum, notice and a meaningful opportunity to be heard.[1264] Due process "'is flexible and calls for such procedural protections as the particular situation demands.'"[1265] "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[1266]

The Department has determined that the procedures contained in § 106.45 of these final regulations best achieve the purposes of (1) effectuating Title IX's non-discrimination mandate by ensuring fair, reliable outcomes viewed as legitimate in resolution of formal complaints of sexual harassment so that victims receive remedies, (2) reducing and preventing sex bias from affecting outcomes, and (3) ensuring that Title IX regulations are consistent with constitutional due process and fundamental fairness. The procedures in § 106.45 are consistent with constitutional requirements and best serve the foregoing purposes, including the right for both parties to meaningfully be heard by advocating for their own narratives regarding the allegations in a formal complaint of sexual harassment. In recognition that what is a meaningful opportunity to be heard may depend on particular circumstances, the final regulations apply different procedures in different contexts; for example, where an emergency situation presents a threat to physical health or safety, § 106.44(c) permits emergency removal with an opportunity to be

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[1263] *E.g.*, *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Truax v. Raich*, 239 U.S. 33, 38 (1915).
[1264] *Goss v. Lopez*, 419 U.S. 565, 580 (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."); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).
[1265] *Id*. at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).
[1266] *Id.* at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

heard that occurs after removal. Where a grievance process is initiated to adjudicate the respondent's responsibility for sexual harassment, a live hearing with cross-examination is required in the postsecondary context but not in elementary and secondary schools. These differences appropriately acknowledge that different types of process may be required in different circumstances while prescribing a consistent framework in similar circumstances so that Title IX as a Federal civil rights law protects every person in an education program or activity.

As commenters supportive of cross-examination pointed out, and as commenters opposed to cross-examination acknowledge, the Sixth Circuit has held that cross-examination, at least conducted through a party's advisor, is necessary to satisfy due process in sexual misconduct cases that turn on party credibility. "Due process requires cross-examination in circumstances like these because it is the greatest legal engine ever invented for uncovering the truth."[1267] The Sixth Circuit reasoned, "Cross-examination is essential in cases like Doe's because it does *more* than uncover inconsistencies – it takes aim at credibility like no other procedural device."[1268] The Sixth Circuit in *Baum* disagreed with the institution's argument that written statements could substitute for cross-examination, explaining that "[w]ithout the back-and-forth of adversarial questioning, the accused cannot probe the witness's story to test her memory, intelligence, or potential ulterior motives. . . . Nor can the fact-finder observe the witness's demeanor under that questioning. . . . For that reason, written statements cannot substitute for cross-examination. . . . Instead, the university must allow for some form of *live* questioning *in front of* the fact-finder,"

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[1267] *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018) (internal quotation marks and citations omitted).
[1268] *Id.* at 582 (internal quotation marks and citations omitted) (emphasis in original); *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 401 (6th Cir. 2017) ("Few procedures safeguard accuracy better than adversarial questioning.").

though this requirement can be facilitated through modern technology, for example by allowing a witness to be questioned via Skype.[1269] The Sixth Circuit carefully distinguished this cross-examination requirement from the Sixth Amendment right of a criminal defendant to confront witnesses, reasoning that administrative proceedings need not contain the same protections accorded to the accused in criminal proceedings.[1270] The Sixth Circuit further reasoned that "[u]niversities have a legitimate interest in avoiding procedures that may subject an alleged victim to further harm or harassment . . . [but] the answer is not to deny cross-examination altogether. Instead, the university could allow the accused student's agent to conduct cross-examination on his behalf. After all, an individual aligned with the accused student can accomplish the benefits of cross-examination – its adversarial nature and the opportunity for follow-up – without subjecting the accuser to the emotional trauma of directly confronting her alleged attacker."[1271]

The Department agrees with the Sixth Circuit's reasoning that a Title IX grievance process should strike an appropriate balance between avoiding retraumatizing procedures, and ensuring both parties have the right to question each other in a manner that captures the real-time, adversarial benefits of cross-examination to a truth-seeking process. Section 106.45(b)(6)(i) follows the Sixth Circuit's reasoning by requiring recipients to give both parties opportunity for cross-examination, allowing either party to request that cross-examination (and the entire live hearing) be conducted with the parties in separate rooms, ensuring that only party advisors conduct cross-examination and expressly forbidding personal confrontation between

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[1269] *Baum*, 903 F.3d at 582-83 (internal citations omitted) (emphasis in original).
[1270] *See id.* at 583.
[1271] *Id.*

parties, and requiring the decision-maker to determine the relevance of a cross-examination question before a party or witness answers.

Commenters correctly note that the Sixth Circuit's rationale in *Baum* rested on certain limitations or circumstances that justified requiring cross-examination: the *Baum* opinion was in the context of a public university that owes constitutional due process of law to students and employees; cross-examination is of greatest benefit where a sexual misconduct case turns on credibility and involves serious consequences; and a university that already provided hearings for other types of misconduct could not argue that it faced more than a minimal burden to provide a live hearing for sexual misconduct cases. As explained in the "Role of Due Process in the Grievance Process" section of this preamble, the Department understands that some recipients are public institutions that owe constitutional protections to students and employees while other recipients are private institutions that do not owe constitutional protections. However, consistent application of a grievance process to accurately resolve allegations of sexual harassment under Title IX is as important in private institutions as public ones, and the Department therefore adopts a § 106.45 grievance process that results in fair, reliable outcomes in all postsecondary institutions with procedures that, while likely to satisfy constitutional due process requirements, remain independent of constitutional requirements.

The Department notes that while commenters are correct that not every formal complaint of sexual harassment subject to § 106.45 turns on party or witness credibility, other commenters noted that most of these complaints do involve plausible, competing narratives of the alleged incident, making party participation in the process vital for a thorough evaluation of the

available, relevant evidence.[1272] The final regulations revise § 106.45(b)(6)(i) to clarify that where a party or witness does not appear at a live hearing or refuses to answer cross-examination questions, the decision-maker must disregard statements of that party or witness but must reach a determination without drawing any inferences about the determination regarding responsibility based on the party or witness's failure or refusal to appear or answer questions. Thus, for example, where a complainant refuses to answer cross-examination questions but video evidence exists showing the underlying incident, a decision-maker may still consider the available evidence and make a determination. The Department thus disagrees with commenters who argued that the proposed rules force a party to undergo cross-examination even where the case does not turn on credibility; if the case does not depend on party's or witness's statements but rather on other evidence (e.g., video evidence that does not consist of "statements" or to the extent that the video contains non-statement evidence) the decision-maker can still consider that other evidence and reach a determination, and must do so without drawing any inference about the determination based on lack of party or witness testimony. This result thus comports with the Sixth Circuit's rationale in *Baum* that cross-examination is most needed in cases that involve the need to evaluate credibility of parties as opposed to evaluation of non-statement evidence.[1273]

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[1272] *See* H. Hunter Bruton, *Cross-Examination, College Sexual-Assault Adjudications, and the Opportunity for Tuning up the Greatest Legal Engine Ever Invented*, 27 CORNELL J. OF L. & PUB. POL'Y, 145, 180-81 (2017) ("Participation in these cases becomes all the more necessary because the hearing's resolution often depends on weighing the victim's credibility against the accused's credibility. In the vast majority of cases, no one else witnesses the act and no other evidence exists.") (internal citations omitted).

[1273] *See Baum*, 903 F.3d at 583-84 (despite the university's contention that prior Sixth Circuit precedent, in *Univ. of Cincinnati*, 872 F.3d at 395, 402, meant that a respondent is not entitled to cross-examination where the university's decision did not depend *entirely* on a credibility contest between Roe and Doe, the *Baum* Court clarified that *University of Cincinnati* merely held that cross-examination was unnecessary when the university's decision did not rely on *any testimonial evidence at all* but that case, and Baum, stand for the proposition that if "credibility is in dispute and material to the outcome, due process requires cross-examination."); § 106.45(b)(6)(i) is consistent with this *Baum* holding inasmuch as the provision bars reliance on statements from witnesses who do not submit to cross-examination, leaving a decision-maker able to consider non-statement evidence that may exist in a particular case.

Furthermore, § 106.45(b)(9) permits recipients to facilitate informal resolution processes (thus avoiding the need to hold a live hearing with cross-examination), which may be particularly desirable by the parties and the recipient in situations where the facts about the underlying incident are not contested by the parties and thus resolution does not turn on resolving competing factual narratives.

With respect to the other limitations commenters asserted that the Sixth Circuit noted in its rationale requiring cross-examination (i.e., that it is a procedure justified where serious consequences such as suspension or expulsion are at issue, and where the burden on a university is minimal), the Department notes that the *Baum* Court did not rest its rationale on situations where only suspension or expulsion was at issue, but rather the Sixth Circuit observed that "[b]eing labeled a sex offender by a university has both an immediate and lasting impact on a student's life" whereby the student "may be forced to withdraw from his classes and move out of his university housing. His personal relationships might suffer. . . . And he could face difficulty obtaining educational and employment opportunities down the road, *especially if he is expelled*."[1274] The Sixth Circuit thus recognized the high stakes involved with sexual misconduct allegations regardless of whether the sanction is expulsion. Further, the Department doubts that recipients are likely to determine that the type of conduct captured under the § 106.30 definition of sexual harassment would not potentially warrant suspension or expulsion. Additionally, the final regulations revise § 106.45(b)(6)(i) to permit a recipient to hold live hearings virtually, using technology, to ameliorate the administrative burden on colleges and universities that do not already conduct hearings for any type of misconduct allegation.

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[1274] *Baum*, 903 F.3d at 582 (internal citations omitted) (emphasis added).

The Department is aware that after the public comment period on the NPRM closed, the First Circuit decided a Title IX sexual misconduct case in which the First Circuit disagreed with the Sixth Circuit's holding regarding cross-examination.[1275] In *Haidak*, the First Circuit held that a university could satisfy due process requirements by using an inquisitorial rather than adversarial method of cross-examination, by having a neutral school official pose probing questions of parties and witnesses in real-time, designed to ferret out the truth about the allegations at issue.[1276] The First Circuit reasoned that "[c]onsiderable anecdotal experience suggests that cross-examination in the hands of an experienced trial lawyer is an effective tool" but cross-examination performed by the respondent personally might devolve into "acrimony" rather than a truth-seeking tool that reduces the risk of erroneous outcomes, while cross-examination conducted by lawyers risks university proceedings mimicking court trials.[1277] Also after the public comment period on the NPRM closed, the First Circuit decided a case[1278] under Massachusetts State law involving discipline of a student by a private college for sexual misconduct, in which the student argued that failure of the recipient to provide any form of "real-time" cross-examination violated the recipient's contractual obligation of "basic fairness" but the First Circuit held that the private college owed no constitutional due process to the student and that State law did not require any form of real-time cross-examination as part of contractual basic fairness.[1279] As noted elsewhere throughout this preamble, while private colleges do not owe

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[1275] *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 68-70 (1st Cir. 2019) ("[D]ue process in the university disciplinary setting requires some opportunity for real-time cross-examination, even if only through a hearing panel.").
[1276] *Id.* at 69-70.
[1277] *Id.*
[1278] *Doe v. Trustees of Boston Coll.*, 942 F.3d 527 (1st Cir. 2019).
[1279] *Id.*

constitutional protections to students or employees, the Department is obligated to interpret Title IX consistent with constitutional guarantees, including the Fifth and Fourteenth Amendment guarantees of due process of law, and the Department believes that § 106.45(b)(6)(i) comports with constitutional due process and notions of fundamental fairness while effectuating the non-discrimination mandate of Title IX, even if State laws or a recipient's contract with its students would not impose the same requirements on private colleges.

The Department understands the concerns expressed by commenters, and echoed in the reasoning of the First Circuit in *Haidak*, that cross-examination conducted personally by students may not effectively contribute to the truth-seeking purpose of a live hearing. Thus, the Department has crafted § 106.45(b)(6)(i) to require postsecondary institution recipients to provide parties with an advisor for the purpose of conducting cross-examination, if a party does not have an advisor of choice at the hearing. This provision avoids the possibility of self-representation where a party personally conducts cross-examination of the opposing party and witnesses, and as commenters supporting cross-examination pointed out, this provision ensures that advisors conducting cross-examination will be either professionals (e.g., attorneys or experienced advocates) or at least adults capable of understanding the purpose and scope of cross-examination. Although no Federal circuit court has interpreted constitutional due process to require recipients to provide counsel to parties in a disciplinary proceeding, the Department has the authority to effectuate the purposes of Title IX by prescribing administrative requirements even when those requirements do not purport to represent a definition of discrimination under the Title IX statute. The Department has determined that requiring postsecondary institutions to provide advisors to parties for the purpose of conducting cross-examination best serves Title IX's non-discrimination mandate by ensuring that adversarial

cross-examination occurs, thereby ferreting out the truth of sexual harassment allegations, while protecting sexual harassment victims from personal confrontation with a perpetrator. At the same time, these final regulations expressly state that no party's advisor of choice, and no advisor provided to a party by a recipient, needs to be an attorney, furthering the Department's intent that the § 106.45 grievance process is suitable for implementation in an educational institution without trying to mimic a court trial.

The Department agrees with commenters that Federal case law is split on the specific issue of whether constitutional due process, or basic fairness under a contract theory between a private college and student, requires live cross-examination in sexual misconduct proceedings. The Department disagrees that § 106.45(b)(6)(i) represents overreach, violations of federalism, administrative law, or rule of law, and contends instead that the final regulations prescribe a grievance process carefully tailored to be no more prescriptive than necessary to (1) be consistent with constitutional due process and fundamental fairness, even if § 106.45 includes procedures that exceed minimal guarantees, and (2) address the challenges inherent in resolving sexual harassment allegations so that recipients are effectively held responsible for redressing sex discrimination in the form of sexual harassment in recipients' education programs or activities. As noted elsewhere in this preamble, when a recipient draws conclusions about whether sexual harassment occurred in its education program or activity, the recipient is not merely making an internal, private decision about its own affairs; rather, the recipient is making determinations that implicate the recipient's obligation to comply with a Federal civil rights law that requires a recipient to operate education programs or activities free from sex discrimination. The Department therefore has regulatory authority to prescribe a framework for consistent, reliable determinations regarding responsibility for sexual harassment under Title IX.

The Department appreciates that some State laws already require universities to grant cross-examination rights in administrative hearings that apply to students or employees, but the Department disagrees that a university may be required to utilize the cross-examination procedure only if a State law has specifically directed that result. The fact that some States already require public universities to allow cross-examination demonstrates that the concept is familiar to many recipients. The Department is regulating only as far as necessary to enforce the Federal civil rights law at issue; the final regulations govern only student and employee misconduct that constitutes sex discrimination in the form of sexual harassment under Title IX, and does not purport to require postsecondary institutions to utilize cross-examination in non-Title IX matters. The procedures in § 106.45 are consistent with constitutional requirements and best further the purposes of Title IX, including the right for both parties to meaningfully be heard by advocating for the party's own narratives regarding the allegations in a formal complaint of sexual harassment.

A cross-examination procedure does not imply that the credibility of sexual assault complainants is particularly suspect; rather, wherever allegations of serious misconduct involve contested facts, cross-examination is one of the time-tested procedural devices recognized throughout the U.S. legal system as effective in reaching accurate determinations resolving competing versions of events. The Department notes that § 106.45(b)(6)(i) grants the right of cross-examination equally to complainants and respondents, and cross-examination is as useful and powerful a truth-seeking tool for a complainant's benefit as for a respondent, so that a complainant may direct the decision-maker's attention to implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility in the respondent's statements. While the purpose of the Sixth Amendment's right to confront accusers via cross-examination in a criminal

proceeding may be to protect the criminal defendant from deprivation of liberty unless guilt is certain beyond a reasonable doubt,[1280] the Department recognizes, and the final regulations reflect, that the purpose of a Title IX grievance process differs from that of a criminal proceeding. Under § 106.45, cross-examination is not for the protection only of respondents, but is rather a device for the benefit of the recipient and both parties, by assisting the decision-maker in reaching a factually accurate determination regarding responsibility so that deprivations of a Federal civil right may be appropriately remedied.

The Department disagrees with commenters who argued that indirect cross-examination conducted by a neutral college administrator, or a submitted questions procedure, which is permissible for elementary and secondary schools under these final regulations,[1281] can adequately ensure a fair process and reliable outcome in postsecondary institutions. Whether or not such a practice would meet constitutional due process requirements, the Department believes that § 106.45 appropriately and reasonably balances the truth-seeking function of live, real-time, adversarial cross-examination in the postsecondary institution context with protections against personal confrontation between the parties. Thus, regardless of whether the provisions in § 106.45(b)(6)(i) are required under constitutional due process of law, the Department believes that these procedures meet or exceed the due process required under *Mathews*,[1282] and the Department

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[1280] *E.g.*, Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 14 (2006) ("The body of criminal due process precedents is highly protective of defendants in many regards.").
[1281] Section 106.45(b)(6)(ii) (expressly providing that recipients that are not postsecondary institutions need not hold a hearing (live or otherwise) but must provide the parties equal opportunity to submit written questions to be asked of the other party and witnesses).
[1282] *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976) (setting forth a three-part balancing test for evaluating the sufficiency of due process procedures – the private interest being affected, the risk of erroneous deprivation of that interest through the procedures at issue, and the government's interest, including financial and administrative burden that additional procedures would entail).

is exercising its regulatory authority under Title IX to adopt measures that the Department has determined best effectuate the purpose of Title IX.[1283] The § 106.45 grievance process requires recipients to remain neutral and impartial throughout the grievance process, including during investigation and adjudication. To require a recipient to step into the shoes of an advocate by asking each party cross-examination questions designed to challenge that party's plausibility, credibility, reliability, motives, and consistency would place the recipient in the untenable position of acting partially (rather than impartially) toward the parties,[1284] or else failing to fully probe the parties' statements for flaws that reflect on the veracity of the party's statements. The Department does not believe that it is acceptable or necessary to place recipients in such a position, because as the Sixth Circuit has outlined, there is an alternative approach that balances the need for adversarial testing of testimony with protection against personal confrontation between the parties. Therefore, § 106.45(b)(6)(i) respects and reinforces the impartiality of the recipient by requiring adversarial questioning to be conducted by party advisors (who by definition need not be impartial because their role is to assist one party and not the other). Precisely because the recipient must provide a neutral, impartial decision-maker, the function of adversarial questioning must be undertaken by persons who owe no duty of impartiality to the parties. Rather, the impartial decision-maker benefits from observing the questions and answers

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[1283] *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979) (noting that the primary congressional purposes behind Title IX were "to avoid the use of Federal resources to support discriminatory practices" and to "provide individual citizens effective protection against those practices."); s*ee also Gebser*, 524 U.S. at 291-92 (refusing to allow plaintiff to pursue a claim under Title IX based on the school's failure to comply with the Department's regulatory requirement to adopt and publish prompt and equitable grievance procedures, stating "And in any event, the failure to promulgate a grievance procedure does not itself constitute 'discrimination' under Title IX. Of course, the Department of Education could enforce the requirement administratively: Agencies generally have authority to promulgate and enforce requirements that effectuate the statute's non-discrimination mandate, 20 U.S.C. 1682, even if those requirements do not purport to represent a definition of discrimination under the statute.").

[1284] *Doe v. Miami Univ.*, 882 F.3d 579, 601 (6th Cir. 2018) ("School officials responsible for deciding to exclude a student from school must be impartial.") (internal quotation marks and citation omitted).

of each party and witness posed by a party's advisor advocating for that party's particular interests in the case. The Department believes that § 106.45(b)(6)(i) prescribes an approach that is both proactive and reactive, for the benefit of the recipient and both parties; that is, the decision-maker has the right and responsibility to ask questions and elicit information from parties and witnesses on the decision-maker's own initiative to aid the decision-maker in obtaining relevant evidence both inculpatory and exculpatory, and the parties also have equal rights to present evidence in front of the decision-maker so the decision-maker has the benefit of perceiving each party's unique perspectives about the evidence.

The Department notes, with respect to commenters' arguments in favor of the Harvard Law School's submitted questions model, that a decision-maker must exclude irrelevant questions, and nothing in the final regulations precludes a recipient from adopting and enforcing (so long as it is applied clearly, consistently, and equally to the parties[1285]) a rule that deems duplicative questions to be irrelevant, or to impose rules of decorum that require questions to be asked in a respectful manner; however, any such rules adopted by a recipient must ensure that all *relevant* questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decision-maker). Thus, for example, where the substance of a question is relevant, but the manner in which an advisor attempts to ask the question is harassing, intimidating, or abusive (for example, the advisor yells, screams, or physically "leans in" to the witness's personal space), the recipient may

[1285] The introductory sentence to § 106.45(b) provides that any rules a recipient adopts to use in the grievance process, other than those necessary to comply with § 106.45, must apply equally to both parties.

appropriately, evenhandedly enforce rules of decorum that require relevant questions to be asked in a respectful, non-abusive manner.

The Department disagrees that the provision in § 106.45(b)(6)(i) requiring the decision-maker to explain any decision that a cross-examination question is irrelevant means that submission of written questions adequately substitutes for real-time, adversarial questioning. For the reasons explained by the Sixth Circuit, written submission of questions is no substitute for live cross-examination.[1286] The Department agrees with the commenter who argued that engines come in different shapes and sizes, so that the engine of cross-examination may appropriately look different in a Title IX grievance process than in a criminal proceeding. In recognition of these different purposes and contexts, § 106.45 does not attempt to incorporate protections constitutionally guaranteed to criminal defendants such as the Sixth Amendment right to confront accusers face to face, the right of self-representation, or the right to effective assistance of counsel.

The Department appreciates commenters' proposal to modify the real-time cross-examination requirement by requiring party advisors to ask questions one at a time, in full hearing of the other party, while the decision-maker decides whether or not the question should be answered, to better screen out irrelevant or abusive questions. We have revised § 106.45(b)(6)(i) to reflect the commenters' suggestion; this provision now provides that "Only

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[1286] *E.g.*, *Doe v. Baum*, 903 F.3d 575, 582-83 (6th Cir. 2018) ("Without the back-and-forth of adversarial questioning, the accused cannot probe the witness's story to test her memory, intelligence, or potential ulterior motives. . . . Nor can the fact-finder observe the witness's demeanor under that questioning. . . . For that reason, written statements cannot substitute for cross-examination. . . . Instead, the university must allow for some form of *live* questioning *in front of* the fact-finder" though this requirement can be facilitated through modern technology, for example by allowing a witness to be questioned via Skype.") (internal quotation marks and citations omitted; emphasis in original).

relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination question, the decision-maker must first determine whether the question is relevant and explain any decision to exclude a question as not relevant." We agree that such a provision better ensures that cross-examination in the out-of-court setting of a campus Title IX proceeding remains focused only on relevant questions and answers.

The Department appreciates commenters' descriptions of State laws that have prescribed grievance procedures for campus sexual misconduct allegations, and of the process utilized by the U.S. Senate during the confirmation hearings for Justice Kavanaugh. The Department has considered sexual misconduct disciplinary proceeding models in use by various individual recipients, prescribed under State laws, used by the U.S. Senate, and suggested by advocacy organizations, and for the reasons previously stated, the Department has carefully selected those procedures in § 106.45 as procedures rooted in principles of due process and appropriately adapted for application when a formal complaint of sexual harassment requires reaching accurate outcomes in education programs or activities.

Changes: We have revised § 106.45(b)(6)(i) to provide that only relevant cross-examination and other questions may be asked of a party or witness, and before a complainant, respondent, or witness answers a cross-examination question, the decision-maker must first determine whether the question is relevant and explain to the party's advisor asking cross-examination questions any decision to exclude a question as not relevant.

*Discourages Participation*

Comments: Commenters argued that any process that requires cross-examination will discourage many students, including complainants, respondents, and witnesses, from participating in a Title

IX grievance process.[1287] Commenters similarly argued that overseeing cross-examination will discourage recipients' employees, staff, and volunteers from serving as decision-makers or party advisors. At least one commenter argued that undocumented students, and LGBTQ students, will be particularly deterred from reporting sexual assault because cross-examination will make Title IX proceedings more legalistic and undocumented students, and LGBTQ students, are already wary of the criminal justice system.

Discussion: The Department understands commenters' concerns that participation in a formal grievance process may be difficult for participants, including students and employees. The final regulations require recipients to notify students and employees of the recipient's grievance process,[1288] and to train personnel whom the recipient designates to serve as a Title IX Coordinator, investigator, decision-maker, or person who facilitates an informal resolution.[1289] The final regulations require recipients to allow each party involved in a grievance process to select an advisor of the party's choice, for the purpose of accompanying, advising, and assisting the party with navigating the grievance process. The Department recognizes that the § 106.45 grievance process, including live hearings and cross-examination at postsecondary institutions, constitutes a serious, formal process, and these final regulations ensure that a recipient's educational community is aware of that process and, when involved in the process, each party

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[1287] Commenters cited to information regarding reasons for not reporting such as the data noted in the "Reporting Data" subsection of the "General Support and Opposition" section of this preamble, in support of arguments that fear of the ordeal of a potential trial already discourages many sexual assault victims from reporting to law enforcement, and making Title IX grievance processes more court-like by requiring cross-examination will have a similar chilling effect on reporting sexual assault to universities.

[1288] Section 106.8(c) (requiring recipients to adopt and publish, and send notice of, the recipient's grievance procedures for complaints of sex discrimination and grievance process for formal complaints of sexual harassment); § 106.45(b)(2) (requiring recipients to send written notice to parties involved in a formal complaint of sexual harassment notice of the recipient's grievance process).

[1289] Section 106.45(b)(1)(iii).

has the right to assistance from an attorney or non-attorney advisor throughout the process. The final regulations also protect an individual's right to decide not to participate in a grievance process, by including § 106.71 that prohibits retaliation against any person for exercising rights under Title IX, whether by participating or refusing to participate in a Title IX grievance process. While participation in a formal process may be difficult or challenging for a participant, the Department believes that sex discrimination in the form of sexual harassment is a serious matter that warrants a predictable, fair grievance process with strong procedural protections for both parties so that reliable determinations regarding responsibility are reached by the recipient.

While the formality of the § 106.45 grievance process may seem "legalistic," the process is very different from a civil lawsuit or criminal proceeding, such that Title IX grievance processes retain their character as administrative proceedings in an educational environment, focused on resolving allegations that a respondent committed sex discrimination in the form of sexual harassment against a complainant. Recipients retain discretion to communicate with their students and employees (including undocumented students and others who may be wary of the criminal justice system) about the nature of the § 106.45 grievance process and the differences between that process and the criminal justice system, including for example, that the § 106.45 grievance process in a postsecondary institution involves cross-examination by a party's advisor overseen by a trained decision-maker with authority to control the live hearing environment to prevent abusive questioning and make determinations free from bias or sex stereotypes that may constitute evidence of sex discrimination. To make it easier for participants to participate in a live hearing, the final regulations expressly authorize a recipient, in the recipient's discretion, to allow any or all participants to participate in the live hearing virtually.

Changes: The final regulations revise § 106.45(b)(6)(i) to expressly allow a recipient to hold the live hearing virtually, with technology enabling participants to see and hear each other.

*Financial Inequities*

Comments: Many commenters argued that requiring cross-examination will lead to sharp inequities between parties who can afford to hire an attorney and those who cannot afford an attorney, and the credibility of a victim's case will be contingent on the effectiveness of the advisor doing the cross-examination rather than on the merits of the case. Some commenters asserted that this disparity will disfavor complainants because if there is a pending criminal case, a respondent likely will have a court-appointed attorney while a victim is likely to be left without an attorney. At least one commenter pointed to a study showing that only three percent of universities provide victims with legal support.[1290] Commenters asserted that often it is respondents who bring lawyers while complainants more often bring non-lawyer advocates, so requiring advisors to cross-examine will disadvantage complainants.[1291] Commenters argued that the financial disparity will fall hardest on students of color including children of immigrants, international students, and first-generation students, as they are more likely to come from an economically disadvantaged background and cannot afford expensive lawyers. Commenters expressed concern that LGBTQ students will be at greater financial disadvantage than other students.

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[1290] Commenters cited: Kristen N. Jozkowski & Jacquelyn D. Wiersma-Mosley, *The Greek System: How Gender Inequality and Class Privilege Perpetuate Rape Culture*, 66 FAMILY RELATIONS 1 (2017).
[1291] Commenters cited: Sarah Jane Brubaker, *Campus-Based Sexual Assault Victim Advocacy and Title IX: Revisiting Tensions Between Grassroots Activism and the Criminal Justice System*, 14 FEMINIST CRIMINOLOGY 3 (2018).

Discussion: The Department disagrees that the final regulations create inequity between parties based on the financial ability to hire a lawyer as a party's advisor of choice. The final regulations clarify that a party's advisor may be, but is not required to be, an attorney,[1292] and clarify that where a recipient must provide a party with an advisor to conduct cross-examination at a live hearing that advisor may be of the recipient's choice, must be provided without fee or charge to the party, and may be, but is not required to be, an attorney.[1293] The Department understands that complainants and respondents may believe that hiring an attorney as an advisor may be beneficial for the party and that parties often will have different financial means, but the § 106.45 grievance process is designed to permit both parties to navigate the process with assistance from any advisor of choice. The Department disagrees that cross-examination at a live hearing means that a complainant's case will be contingent on the effectiveness of the complainant's advisor. Because cross-examination questions and answers, as well all relevant evidence, is evaluated by a decision-maker trained to be impartial, the professional qualifications of a party's advisor do not determine the outcome. The Department wishes to emphasize that the status of any party's advisor (i.e., whether a party's advisor is an attorney or not) must not affect the recipient's compliance with § 106.45, including the obligation to objectively evaluate relevant evidence. Thus, determinations regarding responsibility will turn on the merits of each case, and not on the professional qualifications of a party's advisor. Regardless of whether certain demographic groups are more or less financially disadvantaged and thus more or less likely to hire an attorney as an advisor of choice, decision-makers in each case must reach determinations based on the

[1292] Section 106.45(b)(5)(iv).
[1293] Section 106.45(b)(6)(i).

evidence and not solely based on the skill of a party's advisor in conducting cross-examination. The Department also notes that the final regulations require a trained investigator to prepare an investigative report summarizing relevant evidence, and permit the decision-maker on the decision-maker's own initiative to ask questions and elicit testimony from parties and witnesses, as part of the recipient's burden to reach a determination regarding responsibility based on objective evaluation of all relevant evidence including inculpatory and exculpatory evidence. Thus, the skill of a party's advisor is not the only factor in bringing evidence to light for a decision-maker's consideration.

The Department disagrees that respondents are advantaged due to having a court-appointed lawyer for a concurrent criminal case, because a Title IX grievance process is independent from a criminal case and a court-appointed lawyer in a criminal matter would not be court-appointed to represent the criminal defendant in a recipient's Title IX grievance process.

The Department disagrees that LGBTQ students are necessarily at a greater financial disadvantage than other students; however, the final regulations ensure that all students, including LGBTQ students, have an equal opportunity to select an advisor of choice.

Changes: The final regulations revise § 106.45(b)(6)(i) to specify that where a recipient must provide a party with an advisor to conduct cross-examination at a live hearing, that advisor may be of the recipient's choice, must be provided without fee or charge to the party, and may be, but is not required to be, an attorney.

*Changes the Nature of the Grievance Process*

Comments: Some commenters asserted that cross-examination shifts the burden of adjudication from the recipient onto the parties. Many commenters asserted that extensive training will be necessary for hearing panelists and advisors conducting cross-examination, and recipients will

not have the resources, time, and money to make cross-examination workable, leading to chaos.[1294]

Many commenters argued that requiring adversarial cross-examination will fundamentally change the nature of educational disciplinary proceedings, converting them into quasi-legal trials. Commenters argued that requiring postsecondary institutions to hold live hearings with cross-examination deprives institutions of the freedom to structure their processes according to their individual needs, resources, and educational communities and compels institutions to abandon alternative models they have carefully developed over many years, constituting an overly prescriptive mandate that fails to defer to school officials' expertise in developing adjudication models that are fair, humane, in alignment with State and Federal laws, and address a recipient's unique circumstances. Other commenters argued that requiring live hearings with cross-examination fails to recognize Federal court admonitions that universities are ill-equipped to handle the formalities and procedural complexities common to criminal trials, that education is a university's first priority with adjudication of student disputes "at best, a distant second,"[1295] and due process does not require a university to "transform its classrooms into courtrooms."[1296]

One commenter argued that the cross-examination requirement could violate court-issued restraining orders prohibiting contact between the parties.

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[1294] Commenters cited: Naomi Mann, *Taming Title IX Tensions*, 20 UNIV. OF PA. J. OF CONSTITUTIONAL L. 631, 657 (2018), for the propositions that requiring mandatory counsel would "complicate the proceedings by importing outside legal rules based on adversarial systems" such that institutions would need to "learn to navigate and utilize these foreign systems" and that the "use of counsel would shift the burden of investigating and proving allegations from the educational institution to the students[.]"
[1295] Commenters cited: *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 400 (6th Cir. 2017).
[1296] Commenters cited: *Id*; *Doe v. Cummins*, 662 F. App'x 437, 448-49 (6th Cir. 2016); *Doe v. Univ. of Ky.,* 860 F.3d 365, 370 (6th Cir. 2017); *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 925-26 (6th Cir. 1988).

Discussion: The final regulations ensure that the burden of gathering evidence, and the burden of proof, remain on the recipient, not on either party.[1297] While the parties have strong procedural rights to participate and advocate for their own position throughout the § 106.45 grievance process, the right to meaningfully participate does not shift the burden away from the recipient or onto the parties. The Department notes that while decision-makers must be trained to serve impartially and avoid prejudgment of the facts at issue, bias, and conflicts of interest, the final regulations do not require training for advisors of choice. This is because the recipient is responsible for reaching an accurate determination regarding responsibility while remaining impartial, yet a party's ability to rely on assistance from an advisor should not be limited by imposing training requirements on advisors, who by definition need not be impartial because their function is to assist one particular party. While the Department understands that recipients will need to dedicate resources to train Title IX personnel, including decision-makers overseeing live hearings, the benefits of a fair grievance process for resolving formal complaints of sexual harassment under Title IX outweigh the costs of training personnel to implement that fair grievance process. For similar reasons, the benefits of a consistent, predictable grievance process outweigh commenters' concerns that the § 106.45 grievance process leaves too little flexibility for recipients to craft their own processes. As noted elsewhere in this preamble, when resolving factual allegations of sexual harassment under Title IX, recipients are not simply applying a recipient's own code of conduct; rather, recipients are reaching determinations affecting rights of students and employees under a Federal civil rights law. Far from turning classrooms into courtrooms, the § 106.45 grievance process incorporates procedures the Department has

[1297] Section 106.45(b)(5)(i).

determined are most needed in the Title IX sexual harassment context to result in reliable outcomes viewed as legitimate by the parties and the public. Cross-examination in the postsecondary institution context is widely viewed as a critical part of a fair process, and as such giving both parties the right to cross-examination improves the reality and perception that recipients' Title IX grievance processes are fair and legitimate.[1298] Each aspect of the grievance process, while rooted in principles of due process, is adapted for implementation by recipients in the context of education programs or activities, thereby acknowledging that schools, colleges, and universities exist first and foremost to educate, and not to mirror courts of law. Thus, for the benefit of all students including those who are wary of the criminal justice system, a Title IX grievance process remains a separate, distinct forum.

The Department disagrees that the final regulations require recipients to violate court-issued restraining orders. Section 106.45(b)(6)(i) requires recipients to conduct the entire live hearing (not only cross-examination) with the parties located in separate rooms, upon any party's request, and cross-examination must be conducted by a party's advisor and never by the party personally. Further, the final regulations revise § 106.45(b)(6)(i) to expressly allow a recipient to hold the live hearing virtually (including for witness participation), with technology enabling participants to see and hear each other. Thus, where a court-issued restraining order prohibits

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[1298] *See* H. Hunter Bruton, *Cross-Examination, College Sexual-Assault Adjudications, and the Opportunity for Tuning up the Greatest Legal Engine Ever Invented*, 27 CORNELL J. OF L. & PUB. POL'Y 145, 172 (2017) ("[O]ur judicial system and constitutional law jurisprudence have selected cross-examination as the best legal innovation for approximating perfect procedural parity. The ability of the accused to participate in the proceedings against him prevents the accused from becoming merely the subject of a trial where inquisitors determine his fate. Similarly, endeavoring for procedural parity between adversaries increases institutional legitimacy in the eyes of the accused and society, which some maintain is a value in and of itself.") (internal citations omitted); *id.* at 173 (cross-examination contributes to both the fairness and accuracy of a hearing because of its "ability to expose errors and contextualize evidence").

contact between the parties, the final regulations do not require any in-person proximity between the parties, or any direct communication between the parties (even virtually, using technology).

Changes: None.

*Section 106.45(b)(6)(ii) Should Apply to Postsecondary Institutions*

Comments: Several commenters argued that because the Department permits written questioning in elementary and secondary schools, there is no reason to believe that the same process would not be equally effective in postsecondary institutions, especially when students of the same age could be subjected to the two different processes (e.g., a 17 year old high school student, versus a 17 year old college student). One commenter argued that cross-examination is either important in a quest for truth or it is not, and that if elementary and secondary schools have discretion to decide whether cross-examination is beneficial, postsecondary institutions should have the same discretion. One commenter stated that community colleges often enroll high school students in dual enrollment programs, and under the proposed rules a high school student would face a different process depending on whether a sexual assault occurred at their high school or at the community college where they are taking classes.

Commenters argued that the same "sensitivities associated with age and developmental ability" relied on by the Department to justify not requiring live hearings and cross-examination in elementary and secondary schools[1299] remain a consideration with young adults in college, especially in cases about personal, intimate details of a sexual nature. Commenters argued that modern neuroscience has established that adolescence, in terms of brain development, extends well beyond the teenage years, and the prefrontal cortex – the part of the brain primarily

[1299] Commenters cited: 83 FR 61476.

responsible for executive functioning – typically does not fully develop until the early to mid-twenties,[1300] when many students have already graduated from college and thus until approximately age 25 students do not function as rational adults and rely heavily on their emotions when making decisions.[1301]

Commenters argued that when OCR conducts an investigation into violations of Title IX, schools have no right to question witnesses (or even to know who the witnesses are), and because the Department nevertheless presumably believes the procedures set out in its OCR Case Processing Manual are fair and produce reliable results there is no reason why a recipient needs to include cross-examination of parties and witnesses in a sexual misconduct case in order to have a fair process that reaches reliable results.

Commenters noted that Title IX and student conduct experts oppose the proposed rules' cross-examination requirement and instead favor submission of written questions or asking questions posed by a neutral school official, referencing publications from organizations such as the Association of Title IX Administrators (ATIXA), the Association for Student Conduct Administration (ASCA), and the American Bar Association (ABA) Criminal Justice Section. One commenter described a survey the commenter distributed regarding the proposed rules and stated that out of the 597 people surveyed, 81 percent disapproved of the proposed rules' cross-examination requirement. Another commenter pointed to a different public opinion poll that

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[1300] Commenters cited: Heidi Ledford, *Who Exactly Counts as an Adolescent?*, NATURE (Feb. 21, 2018); Mariam Arain *et al.*, *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE & TREATMENT 449, 451 (2013); Lucy Wallis, *Is 25 the New Cut-Off Point for Adulthood?*, BBC.com (September 23, 2013).

[1301] Commenters cited: University of Rochester Medical Center, *Understanding the Teen Brain*, https://www.urmc.rochester.edu/encyclopedia/content.aspx?ContentTypeID=1&ContentID=3051.

indicated that 61 percent of those surveyed agreed that students accused of sexual assault on college campuses should have the right to cross-examine their accuser.

One commenter suggested that the final regulations should require the recipient to provide a neutral person to conduct cross-examination of parties and witnesses. One commenter asked whether parties' submission of questions to be asked through a hearing board chair fulfills the proposed rules' cross-examination requirement; whether students may choose to conduct the cross-examination themselves instead of through an advisor; and whether a Title IX Coordinator who filed a formal complaint must then be cross-examined at the hearing.

Discussion: The Department appreciates commenters' support for § 106.45(b)(6)(ii) making hearings optional and requiring submission of written questions by parties directed to other parties and witnesses, in the elementary and secondary school context, and understands commenters' arguments that the same procedures should apply in postsecondary institutions. The Department acknowledges that there is no clear line between the ages of students in elementary and secondary schools versus in postsecondary institutions (e.g., a 17 year old might be in high school, or might be in college, or might be dually enrolled). As discussed in the "Directed Questions" section of this preamble, the Department appreciates commenters' arguments for and against differences in provisions based on the age of a student versus differentiating between elementary and secondary schools on the one hand, and postsecondary institutions on the other hand. The Department believes that it is desirable, to the extent feasible, to achieve consistency in application of Title IX rights across all recipients, because all students participating in education programs or activities regardless of age deserve the protections of Title IX's non-discrimination mandate. The Department also believes that with respect to the unique circumstances presented by sex discrimination in the form of sexual harassment, a consistent,

predictable framework can be prescribed while also adapting certain procedures for elementary and secondary schools so that the general framework is more reasonable and effective for students in elementary and secondary schools, who tend to be younger than the average college student. Thus, for example, the final regulations revise the definition of actual knowledge to include notice of sexual harassment to any employee in the elementary and secondary school context,[1302] and revise § 106.45(b)(6)(ii) to more clearly state that elementary and secondary school recipients do not need to use a hearing model to adjudicate formal complaints of sexual harassment.

Similarly, with respect to cross-examination, the Department has concluded that the approach utilized for postsecondary institutions, whereby party advisors conduct cross-examination during a live hearing, is not necessarily effective in elementary and secondary schools where most students tend to be under the age of majority and where (especially for very young students) parents or guardians would likely exercise a party's rights.[1303] Therefore, for example, a parent writing out answers to questions about a sexual harassment incident on behalf of a second-grade student is likely to be a more reasonable procedure than expecting the second-grader to answer questions in real-time during a hearing. Conversely, in the postsecondary institution context where students generally are young adults, such a party can reasonably be expected to answer questions during a live hearing and to benefit from the procedural right to question the other party (through the asking party's advisor). The Department's cross-

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[1302] Section 106.30 (defining "Actual knowledge").

[1303] We have added § 106.6(g) to expressly acknowledge the legal rights of parents and guardians to act on behalf of complainants, respondents, and other individuals with respect to exercise of Title IX rights, including but not limited to the filing of a formal complaint. The legal right of a parent or guardian to act on a party's behalf extends throughout the grievance process.

examination requirement in postsecondary institutions is based on a practical determination that cross-examination is a valuable procedural tool benefiting both parties, whereas in the elementary and secondary school context the parties are likely to be under the age of majority and would not necessarily benefit from cross-examination as a procedural device. The Department notes that current regulations and guidance do not require consistency between the procedures applied in a high school, and in a college, such that a 17 year old in high school, or in college, would face potentially different grievance procedures in these situations; the final regulations do not increase that discrepancy.

The Department acknowledges the research pointed to by commenters indicating that the brains of young adults are still developing until a person is in their early or even mid-twenties. However, the laws of nearly every State recognize a person age 18 or older as capable of legally acting on the person's own behalf[1304] (for example, by entering into binding contracts), and the Department maintains that individuals developmentally capable enough to enroll in college are also capable enough to make decisions about and participate in a grievance process designed to advance the person's rights.[1305]

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[1304] *E.g.*, LawServer.com, "Age of Majority," https://www.lawserver.com/law/articles/age-of-majority ("The age of majority is the legal age established by state law at which a person is no longer considered a child. In most states, a person has reached the age of majority at 18. Two states (Alabama and Nebraska) set the age of majority to be 19 and one, Mississippi, sets the age of majority at 21."). The legal voting age in the U.S. is age 18. USA.Gov, "Voter Registration Age Requirements By State," https://www.usa.gov/voter-registration-age-requirements. The age of consent to sexual activity varies across States, from age 16 to age 18. *See* https://www.ageofconsent.net/states. The ages of licensing privileges varies across States, for example with respect to driver's licenses where the age for an unrestricted license ranges from age 16 to age 18. Very Well Family, "Driving Age By State," https://www.verywellfamily.com/driving-age-by-state-2611172#driving-age-by-state. Similarly, regarding marriage licenses, the age for marrying without parental consent is age 18 in all states except Mississippi and Nebraska, where the age is 19, and 21, respectively. FindLaw.com, "State-By-State Marriage 'Age Of Consent' Laws," https://family findlaw.com/marriage/state-by-state-marriage-age-of-consent-laws.html.

[1305] For example, when a student is 18 years of age or attends an institution of postsecondary education, the rights accorded to, and consent required of, parents under FERPA and its implementing regulations transfer from the parents to the student. 20 U.S.C. 1232g(d); 34 CFR 99.3; 34 CFR 99.5(a)(1).

The Department reiterates that in recognition that young adults may find navigating a grievance process challenging, the final regulations preserve each party's right to select an advisor of choice to assist the party. The Department's concern for each party's ability to receive emotional and personal support though a grievance process is also discussed in this preamble under § 106.45(b)(5)(iii), providing that a recipient cannot restrict a party's ability to discuss the allegations; this applies to a young adult's desire to discuss the allegations with a parent, friend, or advocate to receive emotional, practical, or strategic advice and support, as well as the right to discuss the allegations with a professional (such as a lawyer). The Department believes that a young adult in college is capable of participating in a grievance process, including answering questions at a live hearing, even if the young adult's frontal cortex is still developing, and the Department respects the legal and policy determinations of the vast majority of States that have granted legal rights and responsibilities to young adults age 18 or older. In recognition that sexual misconduct matters involve sensitive, often traumatic issues for victims of any age, the final regulations ensure that any complainant regardless of age can insist that cross-examination (and the entire live hearing) occur with the parties in separate rooms, and revise § 106.45(b)(6)(i) further to grant recipients the discretion to hold the entire live hearing virtually with use of technology so that witnesses also may appear virtually.

The Department appreciates commenters' observations that the Department's OCR investigations utilize procedures that do not include allowing a recipient under investigation for Title IX violations to cross-examine witnesses interviewed by OCR. For the reasons discussed in the "Role of Due Process in the Grievance Process" section of this preamble, the Department has determined that the procedures reflected in § 106.45 represent those procedures most likely to result in fair, reliable outcomes in the particular context of a recipient's need to accurately

resolve sexual harassment allegations in order to provide remedies to sexual harassment victims – a context and purpose that differs from that of the Department's investigation into a recipient's compliance with Title IX.

The Department acknowledges that various experts in Title IX matters support a process of posing questions through a hearing officer or neutral school official, and that public opinion surveys may show various levels of support or opposition to the idea of cross-examination in college disciplinary proceedings. However, for the reasons discussed above, the Department has determined that in the postsecondary institution context, the tool of cross-examination benefits both parties and contributes to the truth-seeking purpose of the § 106.45 grievance process. The Department appreciates commenters' proposed revision that recipients simply be directed to give the parties opportunity to challenge credibility and require the decision-maker to "reasonably assess credibility." The Department believes that the final regulations accomplish that directive, by giving the parties equal opportunity to challenge credibility (through written questions for non-postsecondary institutions, and through cross-examination for postsecondary institutions) and by obligating the decision-maker to reach a determination regarding responsibility by objectively evaluating all relevant evidence. The Department appreciates a commenter's suggestion that recipients be required to provide a neutral person to conduct cross-examination on behalf of both parties. However, for the reasons discussed above, the Department does not believe that the benefits of adversarial cross-examination can be achieved when conducted by a person ostensibly designated as a "neutral" official. This is because the function of cross-examination is precisely *not* to be neutral but rather to point out in front of the neutral decision-maker each party's unique perspective about relevant evidence and desire regarding the outcome of the case.

In response to a commenter's question as to whether requiring written submission of questions at a live hearing would fulfill the cross-examination requirement described in § 106.45(b)(6)(i), the final regulations revise that provision to add the phrase "directly, orally, and in real time" to describe how cross-examination must be conducted, to clarify that submission of written questions, even during a live hearing, is not compliant with § 106.45(b)(6)(i). In answer to a commenter's further question, the Department has revised § 106.45(b)(6)(i) to expressly preclude a party from conducting cross-examination personally; the only method for conducting cross-examination is by a party's advisor.

In response to a commenter's question about whether a Title IX Coordinator must be cross-examined in situations where the Title IX Coordinator filed the formal complaint that triggered the grievance process, the final regulations revise § 106.30 defining "formal complaint" to clarify that where a formal complaint is signed by a Title IX Coordinator, the Title IX Coordinator does not become a party and must comply with all provisions in § 106.45, including the training requirement and the avoidance of bias and conflict of interest. Thus, where the Title IX Coordinator signed the formal complaint that initiated the grievance process, neither § 106.45(b)(6)(i) nor other provisions in § 106.45 treat the Title IX Coordinator as a party. Even where the Title IX Coordinator testifies as a witness, the Title IX Coordinator is still expected to serve impartially without prejudgment of the facts at issue. The Department notes that the recipient would not be obligated to provide the Title IX Coordinator with an advisor because that obligation attaches only where *a party* does not have an advisor of choice at a hearing.

Changes: The final regulations add to § 106.45(b)(6)(i) that cross-examination at a live hearing must be conducted directly, orally, and in real time by the party's advisor of choice, notwithstanding the discretion paragraph (b)(5)(iv) to otherwise restrict the extent to which

advisors may participate in the proceedings. The final regulations further revise § 106.45(b)(6)(i) to provide that recipients may hold the live hearing virtually, with technology enabling participants to see and hear each other. The final regulations revise the definition of "formal complaint" in § 106.30 to clarify that even where a Title IX Coordinator signs a formal complaint, this does not make the Title IX Coordinator a "party" in the grievance process.

*False Accusations Occur Infrequently*

Commenters: Many commenters argued that because false allegations occur infrequently,[1306] it is unnecessary to give the accused extra protections like cross-examination; commenters urged the Department to replace cross-examination with submission of written questions, or asking questions through a neutral school official, to better protect survivors instead of protecting a minority of falsely-accused students. Commenters argued that an adequate regulatory provision would simply say "The recipient's grievance procedure must include an opportunity for parties to challenge the credibility of witnesses and the other party. The decision-maker must reasonably assess credibility of witnesses and parties" thus leaving recipients discretion to decide how to meet those requirements.

Discussion: The Department disagrees that cross-examination in the Title IX grievance process is intended only to protect respondents against false allegations; rather, as discussed above, cross-examination in the § 106.45 grievance process is intended to give both parties equal opportunity to meaningfully challenge the plausibility, reliability, credibility, and consistency of the other party and witnesses so that the outcome of each individual case is more likely to be factually

[1306] Commenters cited to information regarding infrequency of false allegations such as the data noted in the "False Allegations" subsection of the "General Support and Opposition" section of this preamble.

accurate, reducing the likelihood of either type of erroneous outcome (i.e., inaccurately finding a respondent to be responsible, or inaccurately finding a respondent to be non-responsible). For that reason, we do not believe the alternate regulatory language suggested by the commenters is sufficient. Despite commenters' assertions, the Department has not designed these final regulations to specifically address false allegations, or in response to any preconceived notions about the frequency of false allegations.

Changes: None.

*Excluding Cross-Examination Questions*

Comments: Commenters noted that the proposed regulations impose a duty on recipients to objectively evaluate relevant evidence, and deem questions about a complainant's prior sexual behavior to be irrelevant (with two exceptions), but commenters argued that the proposed rules failed to clarify whether recipients have discretion to exclude relevant cross-examination questions on other public policy grounds on which rules of evidence in civil and criminal matters often exclude evidence, for example, party statements made during mediation discussions, out of court statements that constitute hearsay, evidence of a party's general character or prior bad acts, or evidence that is cumulative, duplicative, or unduly prejudicial. Commenters argued that the final regulations should either identify admissibility rules in addition to relevance, or clarify whether decision-makers have the authority to exclude relevant evidence for these kinds of policy reasons (or because State law requires exclusion of types of evidence). Commenters wondered what standards the Department would apply to review whether the recipient's evidentiary rules comply with these final regulations, if recipients do have authority to promulgate rules excluding certain types of evidence. Commenters argued that if relevance is the only allowable admissibility rule then hearings will become even more protracted and unwieldy

and decision-makers should thus have discretion to identify appropriate grounds, other than relevance, for excluding evidence.

Discussion: Commenters correctly observed that the proposed rules impose a duty on recipients to objectively evaluate all relevant evidence including inculpatory and exculpatory evidence.[1307] The final regulations revise the language in § 106.45(b)(6)(i)-(ii) to state more clearly that (subject to the two exceptions in those provisions[1308]) questions and evidence about a complainant's prior sexual behavior or predisposition are not relevant, bar the use of information protected by any legally recognized privilege,[1309] and provide that a recipient cannot use a party's treatment records without the party's voluntary, written consent.[1310] (Pursuant to § 106.45(b)(5)(i), if the party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3.) The Department appreciates the opportunity to clarify here that the final regulations do not allow a recipient to impose rules of evidence that result in exclusion of relevant evidence; the decision-maker must consider relevant evidence and must not consider irrelevant evidence.

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[1307] Section 106.45(b)(1)(ii).

[1308] As discussed below, the rape shield language in § 106.45(b)(6)(i)-(ii) bars questions or evidence about a complainant's sexual predisposition (with no exceptions) and about a complainant's prior sexual behavior subject to two exceptions: if offered to prove that someone other than the respondent committed the alleged sexual harassment, or if the question or evidence concerns sexual behavior between the complainant and the respondent and is offered to prove consent.

[1309] Section 106.45(b)(1)(x) (protecting any legally recognized privileged information from disclosure or use during a grievance process). This provision would therefore prohibit cross-examination (or other) questions that seek disclosure of, for example, information protected by attorney-client privilege.

[1310] Section 106.45(b)(5)(i) (stating that the recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process. If the party is not an "eligible student," as defined in 34 CFR 99.3 (i.e., FERPA regulations), then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3.).

The Department appreciates commenters' concerns that comprehensive rules of evidence adopted in civil and criminal courts throughout the U.S. legal system apply detailed, complex rules to certain types of evidence resulting in exclusion of evidence that is otherwise relevant to further certain public policy values (e.g., exclusion of statements made during settlement negotiations, exclusion of hearsay subject to specifically-defined exceptions, exclusion of character or prior bad act evidence subject to certain exceptions, exclusion of relevant evidence when its probative value is substantially outweighed by risk of prejudice, and other admissibility rules). The Department desires to prescribe a grievance process adapted for an educational environment rather than a courtroom, and declines to impose a comprehensive, detailed set of evidentiary rules for resolution of contested allegations of sexual harassment under Title IX. Rather, the Department has carefully considered the procedures most needed to result in fair, accurate, and legitimate outcomes in Title IX grievance processes. To that end, the Department has determined that recipients must consider relevant evidence with the following conditions: a complainant's prior sexual behavior is irrelevant (unless questions or evidence about prior sexual behavior meet one of two exceptions, as noted above); information protected by any legally recognized privilege cannot be used; no party's treatment records may be used without that party's voluntary, written consent;[1311] and statements not subject to cross-examination in postsecondary institutions cannot be relied on by the decision-maker. The Department notes that where evidence is duplicative of other evidence, a recipient may deem the evidence not relevant.

[1311] Pursuant to § 106.45(b)(5)(i), if the party is not an "eligible student," as defined in 34 CFR 99.3 (i.e., FERPA regulations), then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3.

The Department does not believe that requiring recipients to evaluate relevant evidence results in unfairness or inaccuracy. Unlike court trials where often the trier of fact consists of a jury of laypersons untrained in evidentiary matters, the final regulations require decision-makers to be trained in how to conduct a grievance process and how to serve impartially, and specifically including training in how to determine what questions and evidence are relevant. The fact that decision-makers in a Title IX grievance process must be trained to perform that role means that the same well-trained decision-maker will determine the weight or credibility to be given to each piece of evidence, and the training required under § 106.45(b)(1)(iii) allows recipients flexibility to include substantive training about how to assign weight or credibility to certain types or categories of evidence, so long as any such training promotes impartiality and treats complainants and respondents equally. Thus, for example, where a cross-examination question or piece of evidence is relevant, but concerns a party's character or prior bad acts, under the final regulations the decision-maker cannot exclude or refuse to consider the relevant evidence, but may proceed to objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level of weight or credibility, so long as the decision-maker's evaluation treats both parties equally[1312] by not, for instance, automatically assigning higher weight to exculpatory character evidence than to inculpatory character evidence. While the Department will enforce these final regulations to ensure that recipients comply with the § 106.45 grievance process, including accurately determining whether evidence is relevant, the Department notes that § 106.44(b)(2) assures recipients that, when enforcing these final

[1312] The final regulations revise the introductory sentence of § 106.45(b) to provide: "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."

regulations, the Department will refrain from second guessing a recipient's determination regarding responsibility based solely on whether the Department would have *weighed* the evidence differently. That provision therefore reinforces the approach to the grievance process throughout § 106.45 under which a recipient must objectively evaluate all relevant evidence (inculpatory and exculpatory) but retains discretion, to which the Department will defer, with respect to how persuasive a decision-maker finds particular evidence to be.

Changes: The final regulations revise § 106.45(b)(6)(i)-(ii) to clarify questions and evidence about the complainant's sexual predisposition is never relevant and about a complainant's prior sexual behavior are not relevant with two exceptions: where the question or evidence about sexual behavior is offered to prove that someone other than the respondent committed the alleged misconduct, or where the question or evidence relates to sexual behavior between the complainant and respondent and is offered to prove consent. The final regulations add § 106.45(b)(1)(x) to prevent disclosure or use during a grievance process of information protected by a legally recognized privilege. The final regulations revise § 106.45(b)(5)(i) to bar a recipient from using a party's treatment records without the party's voluntary, written consent. The final regulations also revise the introductory sentence of § 106.45(b) to provide that any provisions, rules, or practices other than those required by § 106.45 that a recipient adopts as part of its grievance process must apply equally to both parties.

Section 106.45(b)(6)(i) Postsecondary Institution Recipients Must Provide Live Hearing with Cross-Examination

*Self-Representation Versus Cross-Examination Conducted by Advisors*

Comments: Some commenters opposed § 106.45(b)(6)(i) because that provision restricts cross-examination to being conducted by a party's advisor, foreclosing the option for a respondent (or

complainant) to be self-represented and conduct cross-examination personally. Commenters argued that the right of self-representation has a long history under U.S. constitutional law, and that the Supreme Court has held that States cannot force an attorney on an unwilling criminal defendant,[1313] that the Sixth Amendment's right to confront witnesses applies to the accused, not to lawyers,[1314] and that representing oneself affirms the dignity and autonomy of the accused.[1315] Commenters asserted that the final regulations should be modified so that "in the event that the advisor assigned by a recipient is unacceptable to the respondent, the respondent must have the right to self-represent in all cross-examinations."

Some commenters suggested that this provision should be modified to allow students to confer with their advisors and for advisors to actively represent the student during any part of a live hearing. At least one commenter argued that students should be allowed to have a confidential advisor, or confidential advocate, allowed to accompany the party to the hearing, in addition to an advisor of choice or assigned advisor for cross-examination purposes.

Some commenters supported the proposed rules' requirement that if a party does not have an advisor of choice at a hearing, the recipient would be required to provide an advisor "aligned with that party" to ensure that each party's interest is represented during the hearing. At least one commenter urged the Department to require that such an appointed advisor be "genuinely aligned" with the party, because recipient employees appointed as advisors may be loyal to the

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[1313] Commenters cited: *Faretta v. Cal.*, 422 U.S. 806, 816 (1974) (the right to represent oneself stems in part from the premise that the defense may be made easier if the accused is permitted to bypass lawyers and conduct the trial himself); *id.* at 834 (even if a lawyer could more aptly represent an accused, the advantage of a lawyer's training and experience can be realized only with the accused's cooperation).

[1314] Commenters cited: *id.* at 819-20.

[1315] Commenters cited: *McKaskle v. Wiggins*, 465 U.S. 168, 176-77 (1984).

institution and not to the party, or may hold ideological beliefs that align with complainants or respondents.

Many commenters opposed the provision in § 106.45(b)(6)(i) that requires recipients to provide a party with an advisor to conduct cross-examination if a party does not have an advisor at a live hearing. Commenters particularly objected to the language in the NPRM requiring a recipient-provided advisor to be "aligned with that party" because: recipients will find it impossible to ensure parity between the parties; recipients will face additional litigation risks stemming from the recipient's provision of advisors for parties (such as claims by parties that the recipient provided an incompetent advisor, an advisor not sufficiently "aligned with the party," or ineffective assistance of counsel); the NPRM provided no guidance about how a recipient should determine whether an advisor is "aligned with" a party; especially in smaller institutions, a recipient's obligation to appoint an advisor who must conduct cross-examination adverse to another student or employee presents potential conflicts of interest (particularly because appointed advisors are likely to be administrators, professors, or other recipient staff who interact with both parties outside the grievance process) and pitting a recipient's employee against a recipient's student is antithetical to recipients' educational mission.[1316] Commenters argued that requiring recipients to appoint party-aligned advisors contradicts the expectation that the

[1316] Commenters cited studies for the proposition that frequent, positive interactions with faculty and staff not only strongly influence academic achievement and scholastic self-concept, but motivation, institutional retention, and persistence towards a degree as well, particularly for students of color; commenters cited, e.g., Meera Komarraju *et al.*, *Role of Student-Faculty Interactions in Developing College Students' Academic Self-Concept, Motivation, and Achievement*, 51 JOURNAL OF COLL. STUDENT DEVELOPMENT 3 (2010). Commenters cited studies for the proposition that negative interactions between faculty and students significantly damage students' self-esteem, academic performance, mental health, and ultimately, retention and persistence; commenters cited, e.g., Kevin A. Nadal *et al.*, *The Adverse Impact of Racial Microaggressions on College Students' Self-esteem*, 55 JOURNAL OF COLL. STUDENT DEVELOPMENT 5 (2014).

recipient is neutral and impartial toward the parties, and that educational disciplinary processes are not about building a case for or against a party but simply gathering as much information as possible; these commenters stated that § 106.45(b)(6)(i) abandons institutions' processes that are "built to assemble the voices and experiences of the parties involved, not the voices of third-party advisors."

Commenters asserted that many recipient employees will not wish to be viewed as providing support or advocacy to one party over another, including in instances where the advisor believes the party to whom the advisor is assigned is lying. Commenters asserted that currently, many recipients provide advisors to parties but such advisors are neutral, advising a party about the grievance process itself but not advocating on behalf of the party or serving as a party's proxy, and commenters argued that instead of requiring assigned advisors to be "aligned with" the party the provision should require that assigned advisors be knowledgeable about university processes and able to give neutral advice to the party. Other commenters asserted that this provision should require recipients to give parties advice about selecting advisors but not require recipients to provide advisors to parties. Commenters argued that the final regulations should state that a party's advisor cannot be a person who exercises any administrative or academic authority over the other party. Commenters asserted that party advisors should be required to agree to a code of conduct prohibiting hostile, abusive, or irrelevant questioning.

Some commenters argued that it is vital that both parties have advisors of equal competency during the hearing and thus requested that the final regulations require recipients to

appoint attorneys for both parties, or wherever one party has hired an attorney,[1317] or upon the request of a party. Commenters suggested that this provision be modified to allow any party without an advisor of choice at a hearing to select an advisor of the party's choice from a panel of advisors whom the recipient has trained to be familiar with the recipient's grievance process.

Other commenters expressed concern that the requirement for advisors to conduct cross-examination and for recipients to provide advisors for parties who do not have one risks a *de facto* "arms race" whereby if a respondent hires an attorney, recipients will feel pressured to hire an attorney for the complainant to ensure equity, and this will be too costly for many recipients. Commenters similarly asserted that recipients will feel compelled to ensure that assigned advisors are attorneys because it will be crucial that a party and an assigned advisor communicate candidly which requires attorney-client privilege so that conversations are non-discoverable in subsequent civil or criminal matters. Commenters argued that it is likely that State bar associations will find that conducting cross-examination constitutes practice of law and thus recipients will end up being required to hire attorneys for parties, and not simply assign non-attorney advisors.[1318] Commenters argued that this amounts to a costly, unfunded mandate that will create a niche market for litigation-attorney advisors.

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[1317] Commenters cited: Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289, 341 (1999) (discussing the right to counsel in cases involving academic wrongdoing).

[1318] Commenters asserted that, for example, in Ohio where the Sixth Circuit's *Baum* decision applies, rape crisis advocate centers who typically have provided *pro bono* advocates to serve as advisors of choice for complainants have, because of *Baum*, forbidden staff to serve as advisors of choice to prevent claims of unauthorized practice of law, based on opinions of the Ohio Bar Association and the American Bar Association. These commenters asserted that the NPRM would make this result widespread and cut off an avenue of consistent, informed support that should be available to complainants.

Commenters argued that a party disappointed about the outcome of the hearing should not be allowed to challenge the adequacy of the advisor provided by the university, either on appeal or in subsequent litigation.

Commenters argued that the Department lacks statutory authorization under Title IX to require recipients to provide advisors to students, and that such a requirement does not serve to further Title IX's non-discrimination mandate.

Commenters requested clarification of this provision to answer questions such as: who may determine whether an assigned advisor is aligned with the party, and what factors should be used in making that determination? Is the assigned advisor expected to assume the party's version of events is accurate? If one party hires an attorney as an advisor of choice and the recipient must provide an advisor for the other party, must the recipient assign that party an attorney? Can recipients limit the participation of advisors in a hearing, other than conducting cross-examination? May a recipient impose cost or fee limitations on attorneys chosen by parties to make equity and parity more likely? Could a school allow advisors of choice but appoint separate advisors to conduct cross-examination? If a party shows up at a hearing without an advisor, must the recipient stop the hearing to appoint an advisor for the party? May a decision-maker punish a party if the party's advisor breaks rules during the hearing? Can a party decide during a hearing to "fire" the assigned advisor? Can a party delay a hearing by refusing to accept a recipient's assigned advisor perhaps by arguing that the advisor is not "aligned with" the party? May the party advisors also conduct direct examination of the party they are advising, or only cross-examination of the other parties and witnesses? Must a recipient provide an advisor for a party who is also an employee of the recipient, including at-will employees? May a recipient require certain training and competency assessments for assigned advisors? Some commenters

asserted that the final regulations should require training for appointed advisors, including at a minimum how to conduct cross-examination and how to respond to cross-examination conducted by an attorney, so that parties feel adequately represented.

Discussion: The Department understands commenters who argued for a right of self-representation, but the Department has concluded that self-representation by parties in a live hearing in the context of a Title IX adjudication presents substantial risk of diminishing the effectiveness and benefits of cross-examination while increasing the probability that parties will feel traumatized by the prospect and reality of personal confrontation. As explained above, the Department believes that cross-examination is a valuable tool serving the truth-seeking function of a Title IX grievance process. However, the right to cross-examination is not unfettered and the effectiveness of cross-examination depends on the circumstances presented in many Title IX sexual harassment cases whereby a complainant and respondent have alleged and denied commission of traumatic, violative acts. To retain the benefits of cross-examination in this sensitive, high-stakes context, the Department has concluded that restrictions on the right of cross-examination best serve the purposes of a Title IX adjudication.

The context and purpose of a Title IX adjudication differ significantly from that of a criminal trial. The Sixth Amendment rights guaranteed to a criminal defendant are not constitutionally guaranteed to a respondent in a Title IX adjudication,[1319] and the Department does not believe that a right of self-representation would best effectuate the purposes of Title IX. The Department believes that the final regulations appropriately give respondents and

[1319] *E.g.*, *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing.").

complainants equal and meaningful opportunity to select their own advisors of choice and to thereby direct and control the manner by which a party exercises a right of cross-examination. The final regulations thus do not "force an attorney" onto a respondent (or complainant). Rather, the final regulations provide as a back-stop that if a party does not (or cannot) take the opportunity to select an advisor of choice, rather than conducting cross-examination personally the recipient will provide the party an advisor for that purpose. A party always retains the right not to participate in a grievance process, but where the party does wish to participate and advance the party's interests in the case outcome, with respect to testing the credibility of testimony via cross-examination, the party must do this by selecting an advisor of choice, or else working with an advisor provided to the party (without fee or charge) by the recipient. The Department notes that the final regulations, § 106.45(b)(5)(iv) and § 106.45(b)(6)(i), make clear that the choice or presence of a party's advisor cannot be limited by the recipient. To meet this obligation a recipient also cannot forbid a party from conferring with the party's advisor, although a recipient has discretion to adopt rules governing the conduct of hearings that could, for example, include rules about the timing and length of breaks requested by parties or advisors and rules forbidding participants from disturbing the hearing by loudly conferring with each other.

With respect to allowing parties to be accompanied by a confidential advisor or advocate in addition to a party's chosen or assigned advisor, the Department notes that § 106.71 states "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 as required by law, or to carry out the purposes of [34 CFR part 106], including the conduct of any investigation, hearing, or judicial proceeding arising thereunder" and this restriction may limit a recipient's ability to authorize the parties to be accompanied at the hearing by persons other than advisors. For example, a person assisting a party with a disability, or a language interpreter, may accompany a party to the hearing without violating § 106.71(a) because such a person's presence at the hearing is required by law and/or necessary to conduct the hearing. The sensitivity and high stakes of a Title IX sexual harassment grievance process weigh in favor of protecting the confidentiality of the identity and parties to the extent feasible (unless otherwise required by law), and the Department thus declines to authorize that parties may be accompanied to a live hearing by persons other than the parties' advisors, or other persons for reasons "required by law" as described above.

The Department is persuaded by commenters' concerns that the "aligned with that party" language in this provision posed unnecessary confusion and potential problems. As a result, the Department has removed that language from § 106.45(b)(6)(i). Accordingly, the Department declines to adopt a commenter's suggestion to specify that the assigned advisor must be "genuinely aligned" with the party. The Department does not believe it is feasible, necessary, or appropriate to ask recipients to screen potential assigned advisors' ideological beliefs or ties of loyalty to the recipient. The Department is persuaded by commenters' concerns that a condition of "alignment" with a party exposes recipients to claims by parties that, in the party's subjective view, an assigned advisor was not sufficiently "aligned with" the party, and this open-ended potential to accuse recipients of violating these regulations does not serve the Department's interest in prescribing a predictable framework under which recipients understand and comply

with their legal obligations. We have revised § 106.45(b)(6)(i) to state: "If a party does not have an advisor present at the hearing, the recipient must provide without fee or charge to that party an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party." This directive addresses many of the commenters' concerns about providing an advisor. By explicitly acknowledging that advisors provided by a recipient may be – but need not be – attorneys, expressly stating that the provided advisor is "of the recipient's choice," and limiting the role of provided advisors to conducting cross-examination on behalf of a party, the final regulations convey the Department's intent that a recipient enjoys wide latitude to fulfill this requirement. Claims by a party, for instance, that a recipient failed to provide "effective assistance of counsel" would not be entertained by the Department because this provision does not require that advisors be lawyers providing legal counsel nor does this provision impose an expectation of skill, qualifications, or competence. An advisor's cross-examination "on behalf of that party" is satisfied where the advisor poses questions on a party's behalf, which means that an assigned advisor could relay a party's own questions to the other party or witness, and no particular skill or qualification is needed to perform that role. These changes in the final regulations similarly address commenters' concerns that the assigned advisors need be "adverse" to or "pitted against" members of the recipient's community. While an assigned advisor may have a personal or professional belief in, or dedication to, the position of the party on whose behalf the advisor conducts cross-examination, such a belief or dedication is not a requirement to function as the assigned advisor. Whether a party's cross-examination is conducted by a party's advisor of choice or by the advisor provided to that party by the recipient, the recipient itself remains neutral, including the decision-maker's obligation to serve impartially and objectively evaluate relevant evidence. The Department

emphasizes that advisors of choice, and advisors provided to a party by the recipient, are not subject to the requirements of § 106.45(b)(1)(iii) which obligates Title IX personnel (Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions) to serve impartially without conflicts of interest or bias for or against complainants or respondents generally, or for or against an individual complainant or respondent.

The Department understands commenters' point that educational processes have been designed to let the voices and perspectives of the parties be heard, and not the voices and perspectives of third-party advisors. For reasons described above and in § 106.45(b)(5)(iv), the Department believes that giving each party the opportunity to be assisted and supported by an advisor of choice yields important benefits to both parties participating in a grievance process. The final regulations carefully balance the right of parties to rely on and be assisted by advisors with the interest of an educational institution in focusing the institution's process on the institution's own students and employees rather than on third parties. The final regulations allow recipients to limit the active participation of advisors, with the one exception in § 106.45(b)(6)(i) that an advisor must conduct cross-examination on behalf of a party. As noted above, the Department believes that the risks of allowing personal confrontation between parties in sexual harassment cases outweigh the downsides of allowing advisors to actively participate in the limited role of conducting cross-examination.

The Department understands commenters' assertions that many recipient's employees will not wish to serve as party advisors because they do not want to be viewed as supporting or assisting one party over the other. The Department notes that § 106.45(b)(6)(i) applies only to postsecondary institutions, and institutions of higher education that receive Federal student aid under Title IV of the Higher Education Act of 1965, as amended, already must comply with the

Clery Act, which permits parties to have advisors of choice, and commenters have noted that many recipients' practice is to allow parties to choose advisors from among recipient employees, and that some recipients already provide advisors to parties. For the reasons explained above, these final regulations do not change that landscape qualitatively, because even conducting cross-examination "on behalf of a party" need not mean more than relaying that party's questions to the other parties and witnesses. That function could therefore equate to serving as a party's proxy, or advocating for a party, or neutrally relaying the party's desired questions; this provision leaves recipients and assigned advisors wide latitude in deciding how to fulfill the role of serving as an assigned advisor. For the same reason, the Department does not believe it is necessary to forbid assigned advisors from being persons who exercise any administrative or academic authority over the other party; assigned advisors are not obligated to avoid conflicts of interest and can fulfill the limited role described in § 106.45(b)(6)(i) regardless of the scope of the advisor's other duties as a recipient's employee.

For reasons described above, the Department retains the requirement for recipients to provide parties with an advisor to conduct cross-examination, instead of merely requiring recipients to advise a party about how to select an advisor. In order to foreclose personal confrontation between the parties during cross-examination while preserving the neutrality of the recipient's decision-maker, that procedure must be conducted by advisors rather than by parties, and where a party does not take the opportunity to select an advisor of the party's choice, that choice falls to the recipient. As noted above, the final regulations do not preclude a recipient from adopting and applying codes of conduct and rules of decorum to ensure that parties and advisors, including assigned advisors, conduct cross-examination questioning in a respectful and

non-abusive manner, and the decision-maker remains obligated to ensure that only relevant questions are posed during cross-examination.

The Department understands commenters' desire that both parties have advisors of equal competency during a hearing. However, the Department does not wish to impose burdens and costs on recipients beyond what is necessary to achieve a Title IX grievance process with robust procedural protections leading to a reliable outcome. The Department believes that giving both parties equal *opportunity* to select advisors of choice, who may be, but are not required to be attorneys, and assuring parties who cannot or do not select their own advisor that the party can still accomplish cross-examination at a hearing because the recipient will provide an advisor for that limited purpose, sufficiently achieves the purpose of a Title IX grievance process without imposing additional burdens on recipients to hire attorneys for the parties. Nothing in the final regulations precludes a recipient from offering to provide attorney representation or non-attorney advisors to both parties throughout the entire grievance process or just for a live hearing, though § 106.45(b)(5)(iv) ensures that parties would retain the right to select their own advisor of choice and refuse any such offer by a recipient. To allow recipients to meet their obligations with as much flexibility as possible, the Department declines to require recipients to pre-screen a panel of assigned advisors from which a party could make a selection at a hearing, or to require provided advisors to receive training from the recipient. The final regulations do not preclude a recipient from taking such steps, in the recipient's discretion, and the final regulations require decision-makers to be trained specifically in issues of relevance. The Department reiterates that a recipient may fulfill its obligation to provide an advisor for a party to conduct cross-examination at a hearing without hiring an attorney to be that party's advisor, and that remains true regardless of whether the other party has hired a lawyer as an advisor of choice. The final regulations do not

create an "arms race" with respect to the hiring of attorneys by recipients, and recipients remain free to decide whether they wish to incur the cost or burden of providing attorneys when they must provide an advisor to a party at a hearing to conduct cross-examination. This provision does not impose an unfunded mandate on recipients because recipients retain discretion whether to incur the cost of hiring attorney or non-attorney advisors.

The Department does not believe that the final regulations' expectation for an advisor to "conduct cross-examination on behalf of a party" constitutes the practice of law; a Title IX adjudication is not a civil or criminal trial so the advisor is not representing a party in a court of law, and the advisor is not required to perform any function beyond relaying a party's desired questions to the other party and witnesses. However, to the extent that a recipient is concerned that State bar associations do, or may, consider party advisors at a live hearing to be practicing law, the recipient retains discretion to select attorneys as assigned party advisors. Whether attorneys become more involved in Title IX adjudications as a result is not the Department's concern; the final regulations focus on those procedural protections necessary to ensure that a Title IX grievance process is designed to reach accurate determinations.

The Department believes that § 106.45(b)(6)(i), as revised in the final regulations, addresses commenters' concerns that parties will challenge the outcome based on the recipient's choice of advisor. This provision clarifies that the choice of advisor where one must be provided by the recipient lies in the recipient's sound discretion, and removes the "aligned with that party" criterion so that a party cannot challenge the recipient's choice by claiming the assigned advisor was not sufficiently aligned. Whether or not the recipient complied with this provision is now more objectively determined, i.e., by observing whether the assigned advisor "conducted cross-examination on behalf of the party" which in essence only needs to mean relaying the party's

desired questions to the other party and witnesses. The Department does not have control over claims made by parties against recipients in private litigation, but clarifies here that this provision does not impose a burden on the recipient to ensure the "adequacy" of an assigned advisor, merely that the assigned advisor performs the role described in this provision.

The Department disagrees that this provision exceeds the Department's statutory authority under Title IX. The Department believes this provision furthers Title IX's non-discrimination mandate by contributing to a fair grievance process leading to reliable outcomes, which is necessary in order to ensure that recipients appropriately remedy sexual harassment occurring in education programs or activities. The Department is authorized to promulgate rules and regulations to effectuate the purpose of Title IX, including regulatory requirements that do not, themselves, purport to represent a definition of discrimination. Particular requirements of a grievance process are no different in kind from the regulatory requirements the Supreme Court has expressly acknowledged fall under the Department's regulatory authority. For example, the Department's regulations have long required recipients to have grievance procedures in place even though the absence of grievance procedures does not, itself, constitute discrimination,[1320] because adopting and publishing grievance procedures for the "prompt and equitable" resolution of sex discrimination[1321] makes it more likely that a recipient will not engage in sex

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[1320] *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979) (noting that the primary congressional purposes behind Title IX were "to avoid the use of Federal resources to support discriminatory practices" and to "provide individual citizens effective protection against those practices."); *see also Gebser*, 524 U.S. at 291-92 (refusing to allow plaintiff to pursue a claim under Title IX based on the school's failure to comply with the Department's regulatory requirement to adopt and publish prompt and equitable grievance procedures, stating "And in any event, the failure to promulgate a grievance procedure does not itself constitute 'discrimination' under Title IX. Of course, the Department of Education could enforce the requirement administratively: Agencies generally have authority to promulgate and enforce requirements that effectuate the statute's non-discrimination mandate, 20 U.S.C. 1682, even if those requirements do not purport to represent a definition of discrimination under the statute.").

[1321] 34 CFR 106.9; § 106.8(c).

discrimination and will remedy any discrimination brought to the recipient's attention by a student or employee. Similarly, the Department has carefully considered what procedures appropriately address allegations of sex discrimination in the form of sexual harassment and has determined that the § 106.45 grievance process, including cross-examination conducted through advisors in postsecondary institutions, effectuates Title IX's non-discrimination mandate by making it less likely that a recipient will fail to accurately determine whether a student or employee has been victimized by sexual harassment and needs remedies to restore or preserve equal access to the recipient's education programs or activities.

The Department appreciates commenters' requests for clarification of this provision. Some clarification requests have been answered by the modifications made to this provision, such as removal of the "aligned with that party" language and specification that when a recipient must provide an advisor during a hearing the selection of that advisor is "of the recipient's choice" and the assigned advisor "may be, but is not required to be, an attorney."

As to commenters' additional questions about this provision: the assigned advisor is not required to assume the party's version of events is accurate, but the assigned advisor still must conduct cross-examination on behalf of the party. The only limitation on recipients' discretion to restrict advisors' active participation in proceedings is this provision's requirement that advisors conduct cross-examination, so recipients remain free to apply rules (equally applicable to both parties) restricting advisor participation in non-cross examination aspects of the hearing. Recipients cannot impose a cost or fee limitation on a party's advisor of choice and if required to provide a party with an advisor at a hearing, the recipient may not charge the party any fee. The final regulations require the recipient to keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a

report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute or regulations, 20 U.S.C. 1232g and 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any hearing. These confidentiality obligations may affect a recipient's ability to offer parties a recipient-provided advisor to conduct cross-examination *in addition* to allowing the parties' advisors of choice to appear at the hearing. The final regulations do not preclude recipients from adopting a rule that requires parties to inform the recipient in advance of a hearing whether the party intends to bring an advisor of choice to the hearing; but if a party then appears at a hearing without an advisor the recipient would need to stop the hearing as necessary to permit the recipient to assign an advisor to that party to conduct cross-examination. A party cannot "fire" an assigned advisor during the hearing, but if the party correctly asserts that the assigned advisor is refusing to "conduct cross-examination on the party's behalf" then the recipient is obligated to provide the party an advisor to perform that function, whether that means counseling the assigned advisor to perform that role, or stopping the hearing to assign a different advisor. If a party to whom the recipient assigns an advisor refuses to work with the advisor when the advisor is willing to conduct cross-examination on the party's behalf, then for reasons described above that party has no right of self-representation with respect to conducting cross-examination, and that party would not be able to pose any cross-examination questions. Whether advisors also may conduct direct examination is left to a recipient's discretion (though any rule in this regard must apply equally to both parties). This provision applies to parties who are a recipient's employees, including at-will employees; recipients may not impose training or competency assessments on advisors of choice selected by parties, but nothing in the final

regulations prevents a recipient from training and assessing the competency of its own employees whom the recipient may desire to appoint as party advisors.

The Department declines to require training for assigned advisors because the goal of this provision is not to make parties "feel adequately represented" but rather to ensure that the parties have the opportunity for their own view of the case to be probed in front of the decision-maker. Whether a party views an advisor of choice as "representing" the party during a live hearing or not, this provision only requires recipients to permit advisor participation on the party's behalf *to conduct cross-examination*; not to "represent" the party at the live hearing. A recipient may, but is not required to, allow advisors to "represent" parties during the entire live hearing (or, for that matter, throughout the entire grievance process).[1322]

The Department notes that nothing in these final regulations infringes on a recipient's ability to enforce its own codes of conduct with respect to conduct other than Title IX sexual harassment, and thus if a party or advisor "breaks a recipients' rules" during a hearing the recipient retains authority to respond in accordance with its codes of conduct, so long as the recipient is also complying with all obligations under § 106.45. If a party's advisor of choice refuses to comply with a recipient's rules of decorum (for example, by insisting on yelling at the other party), the recipient may provide that party with an advisor to conduct cross-examination on behalf of that party. If a provided advisor refuses to comply with a recipient's rules of decorum, the recipient may provide that party with a different advisor to conduct cross-examination on behalf of that party. The Department also notes that § 106.71 protects participants in a Title IX grievance process against retaliation so an action taken against any

[1322] Section 106.45(b)(5)(iv).

participant in a hearing may not be taken for the purpose of interfering with any right or privilege secured by Title IX or because the individual has participated in any manner in a hearing.

Changes: The Department has revised § 106.45(b)(6)(i) to remove the phrase "aligned with that party" and clarify that if a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

We have also added § 106.71, prohibiting retaliation and providing in pertinent part that no recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing; and 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 required by the FERPA statute or regulations, 20 U.S.C. 1232g and 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation or hearing.

*Explain Decision to Exclude Questions*

Comments: Some commenters supported the requirement in § 106.45(b)(6)(i) that decision-makers explain to the party's advisor posing a question any decision to exclude a question as not relevant. Commenters asserted that they have observed Title IX proceedings in which recipients refused to allow a party's questions to be asked of the opposing party with no explanation as to how or why the question was not relevant to the allegations. Commenters asserted that this

requirement may reveal and prevent bias in proceedings by making the decision-maker explain the rationale for deciding that a question is not relevant.

Other commenters opposed the requirement that decision-makers explain any reason for excluding a question as not relevant, arguing that decision-makers are usually not lawyers or judges and are not legally trained to make complex rulings, so that requiring on-the-spot decisions about relevance will expose recipients to legal liability. Commenters argued that this provision exceeds procedural norms in criminal courts where rules of procedure do not demand that judges provide explanation for rulings. Commenters argued that parties should have the right to appeal wrongful decisions to exclude evidence and thus it is unnecessary to require decision-makers to explain exclusion decisions during the hearing. Commenters wondered whether the parties are allowed to argue with the decision-maker upon hearing a decision-maker's explanation about the relevance of a question and expressed concern that protracted arguments over relevance would lengthen hearings and feel tortuous for students. Commenters expressed concern that the requirement to explain irrelevancy decisions will disincentivize decision-makers from properly excluding questions that violate the rape shield protections.

Commenters proposed that the provision be modified to require decision-makers to explain the decision to exclude questions in writing after the hearing rather than during the hearing. Commenters suggested that the final regulations also give decision-makers the right to screen questions before the hearing so the decision-maker has adequate time to consider whether the questions are relevant. Commenters wondered what type of information a decision-maker is required to give to meet this provision. Commenters argued this provision is meaningless because if a decision-maker decides a question is irrelevant, presumably the decision-maker believes the question does not tend to prove the matter at issue and thus, telling the decision-

maker to state self-evidently during the hearing: "This question is not relevant because it is not relevant" adds no value to the proceeding and only allows party advisors to bog down the hearing by demanding that rote explanation.

Discussion: The Department agrees with commenters that a decision-maker's refusal to explain why questions are excluded has caused problems with the accuracy and perception of legitimacy of recipients' Title IX proceedings and thus believes that this provision reasonably prevents those problems and helps ensure that decision-makers are making relevance determinations without bias for or against complainants or respondents.

The Department disagrees that this provision requires legal expertise on the part of a decision-maker. One of the benefits to the final regulations' refusal to import wholesale any set of rules of evidence is that the legal sophistication required to navigate rules of evidence results often from determining the scope of exceptions to admissibility rules. By contrast, the decision-maker's only evidentiary threshold for admissibility or exclusion of questions and evidence is whether the question or evidence is relevant – not whether it would then still be excluded under the myriad of other evidentiary rules and exceptions that apply under, for example, the Federal Rules of Evidence. While this provision does require "on the spot" determinations about a question's relevance, the decision-maker must be trained in how to conduct a grievance process, specifically including how to determine relevance within the scope of this provision's rape shield language and the final regulations' protection of privileged information and parties' treatment records. Contrary to some commenters' assertions, judges in civil and criminal trials often do make "on the spot" relevance determinations, and while this provision requires the decision-maker to "explain" the decision in a way that rules of procedure do not require of judges, the Department believes that this provision will aid parties in having confidence that Title IX

decision-makers are appropriately considering all relevant evidence. The final regulations contemplate that decision-makers often will be laypersons, not judges or lawyers. A judge's relevance ruling from the bench needs no in-the-moment explanation because a judge has the legal sophistication to have reached a ruling against the backdrop of the judge's legal knowledge. By contrast, a layperson's determination that a question is not relevant is made by applying logic and common sense, but not against a backdrop of legal expertise. Thus, an explanation of how or why the question was irrelevant to the allegations at issue, or is deemed irrelevant by these final regulations (for example, in the case of sexual predisposition or prior sexual behavior information) provides transparency for the parties to understand a decision-maker's relevance determinations.

Commenters correctly note that parties may appeal erroneous relevance determinations, if they affected the outcome, because § 106.45(b)(8) allows the parties equal appeal rights on grounds that include procedural irregularity that affected the outcome. However, asking the decision-maker to also explain the exclusion of questions during the hearing does not affect the parties' appeal rights and may reduce the number of instances in which a party feels the need to appeal on this basis because the decision-maker will have explained the decision during the hearing. The final regulations do not preclude a recipient from adopting a rule (applied equally to both parties) that does, or does not, give parties or advisors the right to discuss the relevance determination with the decision-maker during the hearing. If a recipient believes that arguments about a relevance determination during a hearing would unnecessarily protract the hearing or become uncomfortable for parties, the recipient may adopt a rule that prevents parties and advisors from challenging the relevance determination (after receiving the decision-maker's explanation) during the hearing.

The Department does not believe this requirement will negatively affect a decision-maker's incentive to properly exclude questions under this provision's rape shield protections. The decision-maker is under an obligation to exclude such questions and evidence, and to only evaluate relevant evidence in reaching a determination. Requiring the decision-maker to explain relevance decisions during the hearing only reinforces the decision-maker's responsibility to accurately determine relevance, including the irrelevance of information barred under the rape shield language. Further, we have revised § 106.45(b)(1)(iii) to require decision-makers (and investigators) to be trained in issues of relevance, including how to apply the rape shield protections in these final regulations.

Requiring the decision-maker to explain decisions about irrelevance also helps reinforce the provision in § 106.45(b)(1)(iii) that a decision-maker must not have a bias for or against complaints or respondents generally or an individual complainant or respondent. Providing a reason for the decision reveals whether the decision-maker is maintaining a neutral, objective position throughout the hearing. The explanation for the decision may reveal any bias for a particular complainant or respondent or a bias for or against complainants or respondents generally.

The Department declines to change § 106.45(b)(6)(i) to require after-hearing explanation of relevance determinations, but nothing in the final regulations precludes a recipient from adopting a rule that the decision-maker will, for example, send to the parties after the hearing any revisions to the decision-maker's explanation that was provided during the hearing. In order to preserve the benefits of live, back-and-forth questioning and follow-up questioning unique to cross-examination, the Department declines to impose a requirement that questions be submitted for screening prior to the hearing (or during the hearing); the final regulations revise this

provision to clarify that cross-examination must occur "directly, orally, and in real time" during the live hearing, balanced by the express provision that questions asked of parties and witnesses must be relevant, and before a party or witness answers a cross-examination question the decision-maker must determine relevance (and explain a determination of irrelevance).

This provision does not require a decision-maker to give a lengthy or complicated explanation; it is sufficient, for example, for a decision-maker to explain that a question is irrelevant because the question calls for prior sexual behavior information without meeting one of the two exceptions, or because the question asks about a detail that is not probative of any material fact concerning the allegations. No lengthy or complicated exposition is required to satisfy this provision. Accordingly, the Department does not believe this requirement will "bog down" the hearing. We have revised this provision by moving the requirement for the decision-maker to explain determinations of irrelevance to be combined with a sentence that did not appear in the NPRM, instructing the decision-maker to determine the relevance of a cross-examination question before the party or witness answers the question and to explain any decision to exclude a question as not relevant.

Changes: The Department has revised § 106.45(b)(6)(i) to add the phrase "directly, orally, and in real time" to describe how cross-examination must be conducted, thereby precluding a requirement that questions be submitted or screened prior to the live hearing. We have further revised this provision by moving the requirement for the decision-maker to explain determinations of irrelevance to be combined with a sentence that did not appear in the NPRM, instructing the decision-maker to determine the relevance of a cross-examination or other question before the party or witness answers the question and to explain any decision to exclude a question as not relevant. We have also revised § 106.45(b)(1)(iii) to require training for

decision-makers on issues of relevance, including application of the rape shield protections in § 106.45(b)(6).

*No Reliance on Statements of a Party Who Does Not Submit to Cross-Examination*

Comments: Some commenters supported the provision in § 106.45(b)(6)(i) prohibiting a decision-maker from relying on statements made by a party or witness who does not submit to cross-examination in a postsecondary institution live hearing, because this requirement ensures that only statements that have been tested for credibility, in the "crucible" of cross-examination, will be considered. Commenters asserted that Title IX sexual misconduct cases often concern accusations of a "he said/she said" nature where accounts differ between complainant and respondent and corroborating evidence is inconclusive or non-existent, thus making cross-examined party statements critical to reaching a fair determination.

Other commenters supported this provision but argued that one exception should apply: statements against a party's own interest should remain admissible even where the party refuses to appear or testify. Commenters argued that without this change, this provision incentivizes respondents who have already been convicted criminally not to appear for hearings because the respondent's absence would ensure that any admission, such as part of a plea bargain, could not be considered.

Other commenters opposed the provision that a decision-maker cannot rely on statements of a party or witness who does not submit to cross-examination. Some commenters argued that if

a party refuses to submit to cross-examination, the consequence should be dismissal of the proceeding, not exclusion of the refusing party's statements.[1323]

Commenters argued that a respondent may refuse to submit to cross-examination in a Title IX hearing when criminal charges are also pending against the respondent due to concerns about self-incrimination and that this provision should prevent a decision-maker from drawing any adverse inferences against a respondent based on a respondent's refusal to submit to cross-examination because a decision by an accused not to testify has no probative value and is irrelevant to the issue of culpability. Commenters expressed concern that public institutions could be opened up to legal challenges alleging violation of respondents' Fifth Amendment right against self-incrimination because where a respondent answered some questions, but refused to answer other questions due to refusal to self-incriminate, the proposed rules would demand exclusion of all the respondent's statements, even as to the information about which the respondent was subjected to cross-examination. Commenters argued this provision is unfair to respondents because a respondent may not want to appear for a Title IX hearing for fear that oral testimony could be admitted in a future criminal or civil proceeding, yet § 106.45(b)(6)(i) will "all but require" the adjudicator to make a finding of responsibility against the respondent if the reporting party testifies, is cross-examined, and is credible. Other commenters argued that it is unfair that a complainant's entire statement would be excluded where a respondent refused to appear and thus the complainant could not be cross-examined by the respondent's advisor.

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[1323] Commenters cited: *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 401-02 (6th Cir. 2017) ("Given the parties' competing claims, and the lack of corroborative evidence to support or refute Roe's allegations, the present case left the [recipient] with a choice between believing an accuser and an accused. Yet, the [recipient] resolved this problem of credibility without assessing Roe's credibility. In fact, it decided plaintiff's fate without seeing or hearing from Roe at all. That is disturbing and, in this case, a denial of due process.") (internal quotation marks and citations omitted).

Commenters argued that this provision makes cross-examination mandatory and forces survivors into a Hobson's choice by requiring the decision-maker to disregard the statement of a complainant who does not agree to be cross-examined. Commenters argued that it is unfair to exclude a complainant's statements from consideration when often a complainant will not wish to submit to cross-examination due to fear of retaliation by a respondent, or chooses not to participate in a grievance process initiated against the complainant's wishes (such as where the Title IX Coordinator signs a formal complaint). Commenters argued that this provision requires exclusion of a complainant's statements even where the complainant's absence from a hearing is because the respondent wrongfully procured the complainant's absence, in contravention of the doctrine of forfeiture by wrongdoing.[1324]

Commenters argued that in criminal cases, the right to cross-examine the prosecution's hearsay declarants only extends to declarants who, at the time of their statement, understood they were giving evidence likely to be used in a later prosecution, and the proposed regulations thus inappropriately exclude a common category of statements gathered in Title IX investigations: statements to friends and family who are consoling a victim and are not aware that any crime is under investigation.[1325] Commenters argued that excluding a complainant's statement, including the initial formal complaint, just because a survivor does not want to undergo cross-examination is prejudicial and not a trauma-informed practice, when even reporting sexual misconduct requires bravery. Commenters argued that this provision is punitive when survivors are already

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[1324] Commenters cited: *Reynolds v. United States*, 98 U.S. 145, 158 (1878) for the proposition that forfeiture by wrongdoing is a doctrine that says a respondent gives up his right to confront the witness when he has procured that person's absence, and arguing that the NPRM requires exclusion of a complainant's statements even if the complainant's absence is due to the respondent's wrongdoing.

[1325] Commenters cited: *Crawford v. Washington*, 541 U.S. 36 (2004).

required to participate in an investigation that can last for months. Commenters argued it is unfair to punish a survivor by denying relief for a meritorious claim just because key witnesses refuse to testify or refuse to submit to cross-examination.

Commenters argued that this provision may make it difficult for schools to address situations where they know of predators operating on their campuses, as victim after victim declines to participate in cross-examination, potentially creating incentives for schools to coerce unwilling victims into participating in traumatizing processes, leading to further breakdown in trust between students and their institutions.

Commenters argued that the statements of witnesses should not be excluded due to non-appearance or refusal to submit to cross-examination, because witnesses may be unavailable for legitimate reasons such as studying abroad, illness, graduation, out-of-state residency, class activities, and so forth. Some commenters suggested that for witnesses (but not parties) written statements or telephonic testimony should be sufficient.

Commenters argued that parties and witnesses may be unavailable for a hearing for a variety of reasons unrelated to the reliability of their statements, including death, or disability that occurs after an investigation has begun but before the hearing occurs.

Commenters argued that the Federal Rules of Evidence[1326] allow out-of-court statements to be admitted in certain circumstances and for limited purposes, while § 106.45(b)(6)(i) creates a "draconian" rule that excludes even relevant, reliable statements, a result that is particularly unfair in light of the fact that recipients do not have subpoena powers to compel parties and witnesses to attend hearings. Commenters argued that courts do not impose cross-examination as

[1326] Commenters cited: Fed. R. Evid. 804, 805.

a due process requirement where the legislature has not granted subpoena power to an administrative body because to do so would allow the administrative body to act in a manner contrary to its enabling statute, and public universities do not have subpoena power; thus, commenters argued, the university cannot be foreclosed from relying on hearsay testimony of absent witnesses.[1327] Commenters argued that this provision should be modified so that a recipient may consider all information presented during the investigation and hearing regardless of who appears at the hearing, so that videos, texts, and statements are all evaluated on their own merits. Commenters argued that this provision creates a blanket exclusion of hearsay evidence, yet the Supreme Court has never announced a "blanket rejection . . . of administrative reliance on hearsay irrespective of reliability and probative value" and hearsay evidence may constitute substantial evidence supporting an administrative finding.[1328]

Commenters suggested that this provision be modified so that the consequence of a party failing to appear or answer questions is a change of the standard of evidence, not exclusion of the party's statements, so that if a complainant refuses to testify, the standard of evidence is increased to the clear and convincing evidence standard, while if the respondent refuses to testify, the standard of evidence is decreased to the preponderance of the evidence standard.

Commenters requested clarification that where a respondent fails to appear for a hearing, the recipient may still enter a default finding against the respondent and implement protective measures for the complainant.

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[1327] Commenters cited: *Pub. Employees' Ret. Sys. v. Stamps*, 898 So.2d 664, 676 (Sup. Ct. Miss. 2005).
[1328] Commenters cited: *Richardson v. Perales*, 402 U.S. 389, 407 (1971); *Johnson v United States*, 628 F.2d 187, 190-91 (D.C. Cir. 1980) ("We have rejected a per se approach that brands evidence as insubstantial solely because it bears the hearsay label. . . . Instead, we evaluate the weight each item of hearsay should receive according to the item's truthfulness, reasonableness, and credibility.").

Commenters argued that the final regulations should allow for evidence not subject to cross-examination ("uncrossed") to be taken into account "for what it's worth" by the decision-maker who may assign appropriate weight to uncrossed statements rather than disregarding them altogether, so as to provide more due process and fundamental fairness to both parties in the search for truth.

Commenters asked for clarification of a number of questions including: Does this provision exclude only statements made during the hearing or to all of a party's statements even those made during the investigation, or prior to a formal complaint being filed? What is the threshold for not submitting to cross-examination (e.g., if a party answers by saying "I don't want to answer that" or answers several questions but refuses to answer one particular question, has the party "submitted to cross-examination" or not, and does the reason for refusing to answer matter, for instance where a respondent refuses to answer due to self-incrimination concerns, or a complainant refuses to answer due to good faith belief that the question violates rape shield protections and disagrees with the decision-maker's decision to the contrary)? Does exclusion of "any statement" include, for example, text messages or e-mail sent by the party especially where one party submitted to cross-examination and the other did not, but the text message exchange was between the two parties? Are decision-makers able to consider information provided in documents during the investigation stage (e.g., police reports, SANE (sexual assault nurse examiner) reports etc.), if certain witnesses referenced in those documents (e.g., police officers and SANE nurses) do not submit to cross-examination or refuse to answer a specific question during cross-examination? If a party or witness refuses to answer a question posed by the decision-maker (not by a party advisor) must the decision-maker exclude the party's statements? Commenters suggested making this provision more precise by replacing "does not submit to

cross-examination" with "does not appear for cross-examination." Commenters asserted that parties should have the right to "waive a question" without the party's entire statement being disregarded.

Discussion: The Department appreciates commenters' support for this provision in § 106.45(b)(6)(i) and agrees that it ensures that in the postsecondary context, only statements that have been tested for credibility will be considered by the decision-maker in reaching a determination regarding responsibility. Where a Title IX sexual harassment allegation does not turn on the credibility of the parties or witnesses, this provision allows the other evidence to be considered even though a party's statements are not relied on due to the party's or witness's non-appearance or refusal to submit to cross-examination. The Department declines to add exceptions to this provision, such as permitting reliance on statements against a party's interest. Determining whether a statement is against a party's interest, and applying the conditions and exceptions that apply in evidentiary codes that utilize such a rule,[1329] would risk complicating a fact-finding process so that a non-attorney decision-maker – even when given training in how to impartially conduct a grievance process – may not be equipped to conduct the adjudication.

The Department declines to change this provision so the consequence of refusal to submit to cross-examination is dismissal of the case rather than non-reliance on the refusing party or witness's statement. Such a change would operate only against complainants' interests because a respondent could choose to refuse cross-examination knowing the result would be dismissal (which, presumably, is a positive result in a respondent's view). This would essentially give

[1329] *E.g.*, Fed. R. Evid. 804(a) (describing conditions that constitute "unavailability" of a declarant); Fed. R. Evid. 804(b) (listing various exceptions to hearsay exclusion where declarant is unavailable).

respondents the ability to control the outcome of the hearing, running contrary to the purpose of the final regulations in giving both parties equal opportunity to meaningfully be heard before an impartial decision-maker reaches a determination regarding responsibility.

As commenters acknowledged, not all Title IX sexual harassment allegations rely on party testimony; for example, in some situations video evidence of the underlying incident is available, and in such circumstances even if both parties fail to appear or submit to cross-examination the decision-maker would disregard party statements yet proceed to evaluate remaining evidence, including video evidence that does not constitute statements or to the extent that the video contains non-statement evidence. If a party or witness makes a statement in the video, then the decision-maker may not rely on the statement of that party or witness in reaching a determination regarding responsibility. The Department understands commenters' arguments that courts have noted the unfairness of reaching a determination without ever probing or testing the credibility of the complainant.[1330] But § 106.45(b)(6)(i) does not raise such unfairness, because the central unfairness is where a decision-maker "resolved this problem of credibility" in favor of the party whose statements remained untested. The nature of such unfairness is not present under the final regulations where, if a party does not appear or submit to cross-examination the party's statement cannot be relied on – this provision does not allow a decision-

[1330] *See, e.g., Doe v. Univ. of Cincinnati*, 872 F.3d 393, 401-02 (6th Cir. 2017) ("Given the parties' competing claims, and the lack of corroborative evidence to support or refute Roe's allegations, the present case left the [recipient] with a choice between believing an accuser and an accused. Yet, the [recipient] resolved this problem of credibility without assessing Roe's credibility. In fact, it decided plaintiff's fate without seeing or hearing from Roe at all. That is disturbing and, in this case, a denial of due process.") (internal quotation marks and citations omitted); *Doe v. Purdue Univ. et al.*, 928 F.3d 652, 664 (7th Cir. 2019) (finding it "particularly concerning" that the university concluded the complainant "was the more credible witness – in fact, that she was credible at all – without ever speaking to her in person. Indeed, they did not even receive a statement written by Jane herself, much less a sworn statement.").

maker to "resolve" credibility in favor of a party whose statements remain untested through cross-examination.

The Department understands commenters concerns that respondents, complainants, and witnesses may be absent from a hearing, or may refuse to submit to cross-examination, for a variety of reasons, including a respondent's self-incrimination concerns regarding a related criminal proceeding, a complainant's reluctance to be cross-examined, or a witness studying abroad, among many other reasons. In response to commenters' concerns, the Department has revised the proposed regulations as follows: (1) We have revised § 106.45(b)(6)(i) to state that where a decision-maker must not rely on an absent or non-cross examined party or witness's statements, the decision-maker cannot draw any inferences about the determination regarding responsibility based on such absence or refusal to be cross-examined; (2) We have revised § 106.45(b)(6)(i) to grant a recipient discretion to hold the entire hearing virtually using technology that enables any or all participants to appear remotely; (3) § 106.71 expressly prohibits retaliation against any party, witness, or other person exercising rights under Title IX, including the right to participate or refuse to participate in a grievance process; (4) § 106.45(b)(3)(ii) grants a recipient discretion to dismiss a formal complaint, or allegations therein, where the complainant notifies the Title IX Coordinator in writing that the complainants wishes to withdraw the allegations, or the respondent is no longer enrolled or employed by the recipient, or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination. These changes address many of the concerns raised by commenters stemming from reasons why parties or witnesses may not wish to participate and the consequences of non-participation.

It is possible that one party's refusal to submit to cross-examination could result in the other party's statements remaining under consideration by the decision-maker even though the refusing party's statements are excluded (e.g., where one party refuses to submit to cross-examination, yet that party's advisor cross-examines the opposing party, whose statements are then considered by the decision-maker), but the opportunity of the refusing party to conduct cross-examination of the opposing party ensures that the opposing party's statements are not considered unless they have been tested via cross-examination. Because the final regulations preclude a decision-maker from drawing any inferences about the determination regarding responsibility based solely on a party's refusal to be cross-examined, the adjudication can still yield a fair, reliable outcome even where, for example, the refusing party is a respondent exercising a Fifth Amendment right against self-incrimination.

Where one party appears at the hearing and the other party does not, § 106.45(b)(6)(i) still states: "If a party does not have an advisor present at the hearing, the recipient must provide without fee or charge to that party an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party." Thus, a party's advisor may appear and conduct cross-examination even when the party whom they are advising does not appear. Similarly, where one party does not appear and that party's advisor of choice does not appear, a recipient-provided advisor must still cross-examine the other, appearing party "on behalf of" the non-appearing party, resulting in consideration of the appearing party's statements but not the non-appearing party's statements (without any inference being drawn based on the non-appearance). Because the statements of the appearing party were tested via cross-examination, a fair, reliable outcome can result in such a situation.

The Department disagrees that this provision leaves complainants (or respondents) in a Hobson's choice. The final regulations address a complainant's fear of retaliation, the inconvenience of appearing at a hearing, and the emotional trauma of personal confrontation between the parties. Further, as noted above, if a complainant still does not wish to appear or be cross-examined, an appointed advisor may conduct cross-examination of the respondent (if the respondent does appear) so that a decision-maker only considers the respondent's statements if the statements have been tested for credibility. Where a grievance process is initiated because the Title IX Coordinator, and not the complainant, signed the formal complaint, the complainant who did not wish to initiate a grievance process remains under no obligation to then participate in the grievance process, and the Department does not believe that exclusion of the complainant's statements in such a scenario is unfair to the complainant, who did not wish to file a formal complaint in the first place yet remains eligible to receive supportive measures protecting the complainant's equal access to education. If the respondent "wrongfully procures" a complainant's absence, for example, through intimidation or threats of violence, and the recipient has notice of that misconduct by the respondent (which likely constitutes prohibited retaliation), the recipient must remedy the retaliation, perhaps by rescheduling the hearing to occur at a later time when the complainant may appear with safety measures in place.

The Department disagrees that this provision needs to be modified so that a party's statements to family or friends would still be relied upon even when the party does not submit to cross-examination. Even if the family member or friend did appear and submit to cross-examination, where the family member's or friend's testimony consists of recounting the statement of the party, and where the party does not submit to cross-examination, it would be unfair and potentially lead to an erroneous outcome to rely on statements untested via cross-

examination.[1331] Further, such a modification would likely operate to incentivize parties to avoid submitting to cross-examination if a family member or friend could essentially testify by recounting the party's own statements. The Department understands that courts of law operate under comprehensive, complex rules of evidence under the auspices of judges legally trained to apply those rules of evidence (which often intersect with other procedural and substantive legal rules, such as rules of procedure, and constitutional rights). Such comprehensive rules of evidence admit hearsay (generally, out-of-court statements offered to prove the truth of the matter asserted) under certain conditions, which differ in criminal and civil trials. Because Title IX grievance processes are not court proceedings, comprehensive rules of evidence do not, and need not, apply. Rather, the Department has prescribed procedures designed to achieve a fair, reliable outcome in the context of sexual harassment in an education program or activity where the conduct alleged constitutes sex discrimination under Title IX. While judges in courts of law are competent to apply comprehensive, complicated rules of evidence, the Department does not believe that expectation is fair to impose on recipients, whose primary function is to provide education, not to resolve disputes between students and employees.

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[1331] *E.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004) (although decided under the Sixth Amendment's Confrontation Clause which only applies to criminal trials, the Supreme Court discussed how the Confrontation Clause stands for the principle that written statements are no substitute for cross-examination of witnesses in front of the trier of fact); *id.* at 49 (noting that cross-examining the witness who simply reads or recounts the statements of another witness in no way accomplishes the purposes and benefits of cross-examination) *id.* at 50, 51, 53 ("Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court") (referring to the trial of Sir Walter Raleigh as a "paradigmatic confrontation violation"). Although the Confrontation Clause does not apply in a noncriminal trial, the principle of cross-examining witness before allowing statements to be used is so deeply rooted in American jurisprudence that ensuring that these final regulations reflect that fundamental American notion of justice increases party and public confidence in the legitimacy of Title IX adjudications in postsecondary institutions.

Absent importing comprehensive rules of evidence, the alternative is to apply a bright-line rule that instructs a decision-maker to either consider, or not consider, statements made by a person who does not submit to cross-examination. The Department believes that in the context of sexual harassment allegations under Title IX, a rule of non-reliance on untested statements is more likely to lead to reliable outcomes than a rule of reliance on untested statements. If statements untested by cross-examination may still be considered and relied on, the benefits of cross-examination as a truth-seeking device will largely be lost in the Title IX grievance process. Thus, the Department declines to import a rule of evidence that, for example, allows a witness's statement to be relied on where the statement was made to friends or family without awareness that a crime was under investigation.

The Department notes that the Supreme Court case cited to by some commenters urging a rule that would essentially allow non-testimonial statements to be considered without having been tested by cross-examination, analyzed a judicially-implied hearsay exception in light of the constitutional (Sixth Amendment's Confrontation Clause) right of a criminal defendant to confront witnesses; the Court reasoned that the plain language of the Confrontation Clause refers to "witnesses," that the dictionary definition of a witness is one who "bears testimony" and thus the Confrontation Clause generally does not allow testimonial statements – such as formal statements, solemn declarations, or affirmations, intended to prove or establish a fact – to be used against a criminal defendant unless such statements are made by a person subject to cross-examination in court, or where the defendant had a previous opportunity to cross-examine the person making the statement.[1332] The Court reasoned that hearsay exceptions as applied to non-

[1332] *Crawford v. Washington*, 541 U.S. 36, 50-55 (2004).

testimonial statements, such as business records, did not raise the core concern of the Confrontation Clause and, thus, rules of evidence permitting admission of non-testimonial statements under specific hearsay exceptions did not raise constitutional problems.[1333] While commenters correctly observe that the Confrontation Clause is concerned with use of *testimonial* statements against criminal defendants, even if use of a non-testimonial statement poses no constitutional problem under the Sixth Amendment, the statement would still need to meet a hearsay exception under applicable rules of evidence in a criminal court. For reasons discussed above, the Department does not wish to impose a complex set of evidentiary rules on recipients, whether patterned after civil or criminal rules. Even though a party's statements that are not subject to cross-examination might be admissible in a civil or criminal trial under rules of evidence that apply in those contexts, the Department has determined that such untested statements, whether testimonial or non-testimonial, should not be relied on in a Title IX grievance process. Reliance on party and witness statements that have not been tested for credibility via cross-examination undermines party and public confidence in the fairness and accuracy of the determinations reached by postsecondary institutions. This provision need not result in failure to consider relevant evidence because parties and witnesses retain the opportunity to have their own statements considered, by submitting to cross-examination.

In cases where a complainant files a formal complaint, and then does not appear or refuses to be cross-examined at the hearing, this provision excludes the complainant's statements, including allegations in a formal complaint. The Department does not believe this is prejudicial or punitive against a complainant because the final regulations provide complainants

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[1333] *Id.* at 56.

with opportunities to submit to cross-examination and thus have their statements considered, in ways that lessen the inconvenience and potential trauma of such a procedure. Complainants may request (and the recipient must grant the request) for the live hearing to be held with the parties in separate rooms so as not to come face to face with the respondent; questioning cannot be conducted by the respondent personally; the recipient may allow parties to appear virtually for the live hearing; complainants have the right to an advisor of choice to support and assist the party throughout the grievance process; and recipients may establish rules of decorum to ensure questioning is conducted in a respectful manner. Further, recipients must offer supportive measures to a complainant which may, for example, forbid contact or communication between the parties. The Department believes that without the credibility-testing function of cross-examination, whether the complainant's claim is meritorious cannot be ascertained with sufficient assurance. The Department understands that complainants (and respondents) often will not have control over whether witnesses appear and are cross-examined, because neither the recipient nor the parties have subpoena power to compel appearance of witnesses. Some absences of witnesses can be avoided by a recipient thoughtfully working with witnesses regarding scheduling of a hearing, and taking advantage of the discretion to permit witnesses to testify remotely. Where a witness cannot or will not appear and be cross-examined, that person's statements will not be relied on by the decision-maker, but the Department believes that any determination reached under this provision will be more reliable than a determination reached based on statements that have not been tested for credibility.

The Department notes that the final regulations expressly allow a recipient to remove a respondent on an emergency basis and do not prescribe cross-examination as a necessary

procedure during the post-removal opportunity to challenge the removal.[1334] Recipients may also implement supportive measures that restrict students' or employees' contact or communication with others. Recipients thus have avenues for addressing serial predator situations even where no victim chooses to participate in a grievance process. A recipient is prohibited from coercing unwilling victims to participate in a grievance process,[1335] even where the recipient's goal is to investigate a possible predator on campus.

The final regulations grant recipients discretion to allow participants, including witnesses, to appear at a live hearing virtually; however, technology must enable all participants to see and hear other participants, so a telephonic appearance would not be sufficient to comply with § 106.45(b)(6)(i). For reasons discussed above, written statements cannot be relied upon unless the witness submits to cross-examination, and whether a witness's statement is reliable must be determined in light of the credibility-testing function of cross-examination, even where non-appearance is due to death or post-investigation disability. The Department notes that recipients have discretion to apply limited extensions of time frames during the grievance process for good cause, which may include, for example, a temporary postponement of a hearing to accommodate a disability.

The Department understands commenters' concerns that a blanket rule against reliance on party and witness statements made by a person who does not submit to cross-examination is a broader exclusionary rule than found in the Federal Rules of Evidence, under which certain

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[1334] Section 106.44(c).

[1335] Section 106.71 provides: "No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated *or refused to participate* in any manner in an investigation, proceeding, or hearing under this part." (emphasis added).

hearsay exceptions permit consideration of statements made by persons who do not testify in court and have not been cross-examined. The Department understands that postsecondary institutions lack subpoena power to compel parties or witnesses to appear and testify at a live hearing. The final regulations do not purport to grant recipients the authority to compel appearance and testimony. However, where a party or witness does not appear and is not cross-examined, the statements of that party or witness cannot be determined reliable, truthful, or credible in a non-courtroom setting like that of an educational institution's proceeding that lacks subpoena powers, comprehensive rules of evidence, and legal professionals. As many commenters noted, recipients are educational institutions that should not be converted into *de facto* courtrooms. The final regulations thus prescribe a process that simplifies evidentiary complexities while ensuring that determinations regarding responsibility result from consideration of relevant, reliable evidence. The Department declines to adopt commenters' suggestion that instead the decision-maker should be permitted to rely on statements that are not subject to cross-examination, if they are reliable; making such a determination without the benefit of extensive rules of evidence would likely result in inconsistent and potentially inaccurate assessments of reliability. Commenters correctly note that courts have not imposed a blanket rule excluding hearsay evidence from use in administrative proceedings. However, cases cited by commenters do not stand for the proposition that every administrative proceeding *must*

be permitted to rely on hearsay evidence, even where the agency lacks subpoena power to compel witnesses to appear.[1336]

The Department acknowledges that the evidence gathered during an investigation may be broader than what is ultimately deemed relevant and relied upon in making a determination regarding responsibility, but the procedures in § 106.45 are deliberately selected to ensure that all evidence directly related to the allegations is reviewed and inspected by the parties, that the investigative report summarizes only relevant evidence, and that the determination regarding responsibility relies on relevant evidence. Because party and witness statements so often raise credibility questions in the context of sexual harassment allegations, the decision-maker must consider only those statements that have benefited from the truth-seeking function of cross-examination. The recipient, and the parties, have equal opportunity (and, for the recipient, the obligation) to gather and present relevant evidence including fact and expert witnesses, and face the same limitations inherent in a lack of subpoena power to compel witness testimony. The Department believes that the final regulations, including § 106.45(b)(6)(i), strike the appropriate balance for a postsecondary institution context between ensuring that only relevant and reliable evidence is considered while not over-legalizing the grievance process.

The Department declines to tie reliance on statements that are not subject to cross-examination to the standard of evidence used. For reasons discussed in the "Section

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[1336] *E.g.*, *Johnson v United States*, 628 F.2d 187, 190-91 (D.C. Cir. 1980) (holding that substantial evidence supported U.S. Civil Service Commission's termination determination even though it relied on hearsay statements of three witnesses, where the agency's procedural rules expressly allowed introduction of witness statements and the statements were found to be reliable because they were from disinterested witnesses, consistent with each other, and the defense had seen the witness statements prior to the hearing); *Richardson v. Perales*, 402 U.S. 389, 407, 410 (1971) (Social Security Administration hearing regarding disability benefits eligibility did not deprive claimant of due process by relying on written medical consultant reports, where those written reports were relevant and the claimant could have compelled the doctors to appear for cross-examination but did not do so).

106.45(b)(7)(i) Standard of Evidence and Directed Question 6" subsection of the "Determinations Regarding Responsibility" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, the Department believes that it is appropriate to leave recipients flexibility to choose between two standards of evidence but has made changes in the final regulations to clarify that a recipient's choice must then apply to *all* formal complaints of sexual harassment subject to a § 106.45 grievance process. Making the standard of evidence dependent on whether a decision-maker relies on party or witness statements that are not subject to cross-examination would effectively remove a recipient's discretion to select a standard of evidence, and would not achieve the benefits of a recipient implementing a predictable grievance process.

The Department appreciates commenters' requests for clarification of this provision. As noted above, even where a respondent fails to appear for a hearing, the decision-maker may still consider the relevant evidence (excluding statements of the non-appearing party) and reach a determination regarding responsibility, though the final regulations do not refer to this as a "default judgment." If a decision-maker does proceed to reach a determination, no inferences about the determination regarding responsibility may be drawn based on the non-appearance of a party. The Department notes that under § 106.45(b)(3)(ii) a recipient may in its discretion, but is not required to, dismiss a formal complaint where the respondent is no longer enrolled or employed by the recipient or where specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination regarding responsibility (or where a complainant informs the Title IX Coordinator in writing that the complainant wishes to withdraw the formal complaint).

The prohibition on reliance on "statements" applies not only to statements made during the hearing, but also to *any* statement of the party or witness who does not submit to cross-examination. "Statements" has its ordinary meaning, but would not include evidence (such as videos) that do not constitute a person's intent to make factual assertions, or to the extent that such evidence does not contain a person's statements. Thus, police reports, SANE reports, medical reports, and other documents and records may not be relied on to the extent that they contain the statements of a party or witness who has not submitted to cross-examination. While documentary evidence such as police reports or hospital records may have been gathered during investigation[1337] and, if directly related to the allegations inspected and reviewed by the parties,[1338] and to the extent they are relevant, summarized in the investigative report,[1339] the hearing is the parties' first opportunity to argue to the decision-maker about the credibility and implications of such evidence. Probing the credibility and reliability of *statements* asserted by witnesses contained in such evidence requires the parties to have the opportunity to cross-examine the witnesses making the statements.

The Department appreciates the opportunity to clarify here that to "submit to cross-examination" means answering those cross-examination questions that are relevant; the decision-maker is required to make relevance determinations regarding cross-examination in real time during the hearing in part to ensure that parties and witnesses do not feel compelled to answer irrelevant questions for fear of their statements being excluded. If a party or witness disagrees

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[1337] The Department notes that the final regulations add to § 106.45(b)(5)(i) a provision that restricts a recipient from accessing or using a party's treatment records without the party's voluntary, written consent. 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.
[1338] Section 106.45(b)(5)(vi).
[1339] Section 106.45(b)(5)(vii).

with a decision-maker's determination that a question is relevant, during the hearing, the party or witness's choice is to abide by the decision-maker's determination and answer, or refuse to answer the question, but unless the decision-maker reconsiders the relevance determination prior to reaching the determination regarding responsibility, the decision-maker would not rely on the witness's statements.[1340] The party or witness's reason for refusing to answer a relevant question does not matter. This provision does apply to the situation where evidence involves intertwined statements of both parties (e.g., a text message exchange or e-mail thread) and one party refuses to submit to cross-examination and the other does submit, so that the statements of one party cannot be relied on but statements of the other party may be relied on. If parties do not testify about their own statement and submit to cross-examination, the decision-maker will not have the appropriate context for the statement, which is why the decision-maker cannot consider that party's statements. This provision requires a party or witness to "submit to cross-examination" to avoid exclusion of their statements; the same exclusion of statements does not apply to a party or witness's refusal to answer questions posed by the decision-maker. If a party or witness refuses to respond to a decision-maker's questions, the decision-maker is not precluded from relying on that party or witness's statements.[1341] This is because cross-examination (which differs from questions posed by a neutral fact-finder) constitutes a unique opportunity for parties to present a decision-maker with the party's own perspectives about evidence. This adversarial testing of credibility renders the person's statements sufficiently reliable for consideration and fair for

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[1340] Parties have the equal right to appeal on three bases including procedural irregularity that affects the outcome, so if a party disagrees with a decision-maker's relevance determination, the party has the opportunity to challenge the relevance determination on appeal. § 106.45(b)(8).

[1341] The decision-maker still cannot draw any inference about the determination regarding responsibility based solely on a party's refusal to answer questions posed *by the decision-maker*; the final regulations refer in § 106.45(b)(6)(i) to not drawing inferences based on refusal to answer "cross-examination *or other* questions" (emphasis added).

consideration by the decision-maker, in the context of a Title IX adjudication often overseen by laypersons rather than judges and lacking comprehensive rules of evidence that otherwise might determine reliability without cross-examination.

The Department disagrees that the phrase "does not appear for cross-examination" is clearer or leads to better results than this provision's language, "does not submit to cross-examination." The former would permit a party or witness to appear but not engage in the cross-examination procedure, which would not achieve the benefits of cross-examination discussed above. For similar reasons, the Department declines to allow a party or witness to "waive" a question because such a rule would circumvent the benefits and purposes of cross-examination as a truth-seeking tool for postsecondary institutions' Title IX adjudications.

Changes: The Department has revised § 106.45(b)(6)(i) to clarify that although a decision-maker cannot rely on the statement of a party or witness who does not submit to cross-examination, the decision-maker cannot draw any inference about the determination regarding responsibility based solely on a party's or witness's absence from the hearing or refusal to answer cross-examination or other questions. This provision has been further revised to allow recipients discretion to hold live hearings with any or all parties, witnesses, and other participants appearing virtually, with technology enabling participants simultaneously to see and hear each other. The Department has also added § 106.71, prohibiting retaliation against any person exercising rights under Title IX including participating or refusing to participate in any grievance process. Section 106.45(b)(3)(ii), added in the final regulations, grants a recipient discretion to dismiss a formal complaint, or allegations therein, where the complainant notifies the Title IX Coordinator in writing that the complainants wishes to withdraw the allegations, or the

respondent is no longer enrolled or employed by the recipient, or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination.

*Rape Shield Protections*

Comments: Some commenters supported the rape shield protections in § 106.45(b)(6)(i) (prohibiting questions or evidence about a complainant's prior sexual behavior or sexual predisposition, with two exceptions – where evidence of prior sexual behavior is offered to prove someone other than the respondent committed the alleged offense, or where prior sexual behavior evidence is specifically about the complainant and the respondent and is offered to prove consent) because prohibiting asking about a complainant's sexual history will give victims more control when bringing claims, and because these provisions protect victims' privacy.

Some commenters opposed the rape shield protections in § 106.45(b)(6)(i), arguing that the ban on evidence concerning a complainant's sexual history is too broad because evidence of a complainant's sexual history with the respondent should also be allowed to prove motive to fabricate or conceal a sexual interaction, and not only to prove consent. Commenters argued that Fed. R. Evid. 412 allows such evidence if the probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party, and because the rape shield language in § 106.45(b)(6)(i) is based on Fed. R. Evid. 412, the final regulations should incorporate that exception as well. Commenters argued that Fed. R. Evid. 412(b)(1)(B) allows sexual history evidence to be offered by a criminal defendant without restriction but Fed. R. Evid. 412(b)(2) provides that in civil cases, sexual history evidence is admissible to prove consent only if its probative value substantially outweighs the danger of harm and unfair prejudice to a victim or any party; commenters argued that because a Title IX grievance process is more analogous to a

civil trial than a criminal trial, the rape shield language in § 106.45(b)(6)(i)-(ii) should include the limitation contained in Fed. R. Evid. 412(b)(2).

Commenters argued that the prohibition against questions or evidence about sexual predisposition or sexual history should also apply to respondents so that the questioning focuses on the allegation at issue and does not delve into irrelevant details about a respondent's sexual history. At least one commenter mistakenly understood this provision to allow questions about a complainant's sexual history but not allow the same questions about a respondent's sexual history such that a respondent's propensity to violence or past behaviors speaking to a pattern could not be considered.

Commenters argued that an additional provision of Fed. R. Evid. 412 should be added into the final regulations: allowance of "evidence whose exclusion would violate the defendant's constitutional rights."

Other commenters supported the rape shield language but expressed concern that the protections will be ineffective without comprehensive rules of evidence. Some commenters cited a study that found lawyers in many cases routinely attempt to circumvent rape shield limitations.[1342] Other commenters argued that because the rape shield protections are patterned after Fed. R. Evid. 412, the final regulations should incorporate the explanatory information in the Advisory Committee notes to Fed. R. Evid. 412[1343] so that parties and decision-makers better understand the parameters of what kind of questioning is off-limits. Commenters argued that

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[1342] Commenters cited: Claire McGlynn, *Rape Trials and Sexual History Evidence*, 81 J. CRIM. L. 5 (2017).
[1343] Commenters cited: Advisory Committee Notes, Fed. R. Evid. 412, stating sexual behavior "connotes all activities that involve actual physical conduct, i.e., sexual intercourse and sexual contact, or that imply sexual intercourse or sexual contact" including the victim's use of contraceptives, evidence of the birth of a child, and sexually transmitted diseases, and that the definition of sexual behavior also includes "the behavior of the mind," while "sexual predisposition" is defined to include the victim's "mode of dress, speech, or life-style."

without further guidance on how to apply the rape shield limitations, the exceptions contained in this provision may still subject complainants to unwarranted invasions of privacy, character attacks, and sex stereotyping, and suggested that the final regulations specify how recipients should enforce the rape shield protections. Commenters argued that the two exceptions to the rape shield protections should be eliminated because having non-legal professionals try to determine the scope of the exceptions will result in the exceptions swallowing the rape shield protections. Commenters argued that the evidence exchange provision in § 106.45(b)(5)(vi) risks negating the rape shield protections in § 106.45(b)(6)(i)-(ii). Commenters asserted that because the proposed rules fail to define consent, the scope of the rape shield protections is unclear.

Commenters argued that the two rape shield exceptions are too favorable to respondents and unfair to complainants because those exceptions let respondents discuss a complainant's sexual history any time the respondent wants to point the finger at a third party or show consent was present due to consent being present in past sexual interactions, a problem that commenters argued will frequently arise since a significant number of sexual assaults are committed by intimate partners.[1344] Commenters argued that the rape shield exceptions expose a thinly disguised reworking of the rape myth that women in sexual harassment cases are so unreliable that they may be mistaken about who committed the act, and allow slut-shaming (implications that a woman with an extensive sexual history likely consented to sexual activity) to be used as a defense to a sexual assault accusation. Commenters argued that research shows that during sexual assault trials victims are routinely asked about their sexual history to imply the presence

[1344] Commenters cited: U.S. Dep't. of Justice, Bureau of Justice Statistics, *Special Report: Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013* (2016).

of consent, often relying on an incorrect assumption that women with more sexual experience are more likely to make a false allegation.[1345]

Commenters argued that the "offered to prove consent" exception should be eliminated because past sexual encounters, even with the respondent, are always irrelevant to issues of consent because valid consent can only ever be given in the particular moment.[1346] Commenters asserted that experts believe that there is no evidentiary theory under which sexual history is relevant to any claim or defense except when establishing a pattern of inappropriate behavior on the part of the harasser.[1347]

Commenters argued that this provision violates State laws, such as in New York, that have legislated an affirmative consent standard for campus sexual misconduct. Commenters asserted that this provision should: state that evidence of sexual behavior is never allowed to prove reputation or character (or only allowed if the complainant has placed the complainant's own reputation or character at issue);[1348] require that sexual behavior evidence that ostensibly meets one of the rape shield exceptions be allowed only if a neutral evaluator decides in advance that the evidence meets an exception and that its probative value outweighs potential harm or

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[1345] Commenters cited: Olivia Smith & Tina Skinner, *Observing Court Responses to Victims of Rape and Sexual Assault*, 7 FEMINIST CRIMINOLOGY 4, 298, 300 (2012).
[1346] Commenters cited: 10 U.S.C. 920(g)(8)(a) (governing rape and sexual assault in the armed forces) ("A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.").
[1347] Commenters cited: Linda J. Krieger & Cindi Fox, *Evidentiary Issues in Sexual Harassment Litigation*, 1 BERKELEY WOMEN'S L. J. 115 (1985); Megan Reidy, *Comment: The Impact of Media Coverage on Rape Shield Laws in High-Profile Cases: Is the Victim Receiving a "Fair Trial",* 54 CATH. UNIV. L. REV. 297, 308 (2005).
[1348] Commenters cited: Seth I. Koslow, *Rape Shield Laws and the Social Media Revolution*, 29 TOURO L. REV. 3, Art. 19 (2013), for the proposition that so many students use social media that those platforms have become a significant means through which a complainant might be said to have placed their reputation in controversy or at issue.

prejudice to the complainant; and require recipients to inform complainants in advance if such evidence will be allowed.

Commenters objected to use of the phrase "sexual predisposition" claiming the phrase harkens back to the past and puts on trial the sexual practices and identity of the complainant, which have no relevance to the adjudication of particular allegations.

Commenters wondered if the rape shield protected complainants during all stages of a grievance process, for example during the collection of evidence phase or during an informal resolution process, or only during a live hearing. Commenters stated that the rape shield provision, though well-intentioned, conflicts with other provisions in § 106.45 such as allowing the parties during investigation to review and respond to evidence gathered by the recipient as well as offer additional evidence during the investigation; these commenters asserted that while greater transparency in the grievance process is warranted and welcome, the unfettered right to introduce and review evidence conflicts with both the rape shield protections in the proposed rules and with some State laws that also prevent admission of prior sexual behavior evidence. Commenters argued that respondents should only be allowed to ask questions, especially about sexual behavior, after presenting an adequate foundation and where the questions do not rely on hearsay or speculation.

Commenters asserted that this provision does not accurately mirror Fed. R. Evid. 412 because the latter allows the evidence where it is "offered by the defendant to prove consent or if offered by the prosecutor," and commenters argued that the final regulations should allow prior sexual behavior evidence "if offered by the defendant to prove consent or welcomeness, or if offered by the institution or complainant." Commenters argued that this modification would appropriately allow testimony to be impeached when welcomeness is at issue in non-sexual

assault situations, in addition to where consent is at issue in sexual violence situations, and would give a complainant or the institution equal opportunity to use such evidence where welcomeness or consent is contested. Other commenters argued that the rape shield language appeared not to take into account the full range of sexual harassment because under the second prong of the sexual harassment definition in § 106.30, consent is not an element but rather the issue might be whether the conduct was unwelcome versus invited, but, commenters asserted, even if sexual history was relevant in those situations, the relevance would be outweighed by potential harm to the complainant and so should be excluded.

Commenters argued that this provision's wording in the NPRM, referring to "cross-examination must exclude evidence of the complainant's sexual behavior or predisposition" lacked clarity because questions are not evidence, though questions can lead to testimony that is evidence, and the provision was thus ambiguous as to whether the rape shield protections applied solely to "questions" or also to "evidence" that concerns a complainant's sexual behavior or predisposition. Commenters widely used the phrase "prior sexual behavior" or "prior sexual history" in reference to the rape shield provision in § 106.45(b)(6)(i). Commenters noted that some State laws, for example Maryland and New York, address the same issue with rules prohibiting "prior" sexual history.

Discussion: The Department agrees with commenters that the rape shield protections serve a critically important purpose in a Title IX sexual harassment grievance process: protecting complainants from being asked about or having evidence considered regarding sexual behavior, with two limited exceptions. The final regulations clarify that such questions, and evidence, are not only excluded at a hearing, but are deemed irrelevant.

The Department disagrees that the rape shield language is too broad. Scenarios described by commenters, where a respondent might wish to prove the complainant had a motive to fabricate or conceal a sexual interaction, do not require admission or consideration of the complainant's sexual behavior. Respondents in that scenario could probe a complainant's motive by, for example, inquiring whether a complainant had a dating or romantic relationship with a person other than the respondent, without delving into a complainant's sexual behavior; sexual behavior evidence would remain irrelevant in such circumstances. Commenters correctly note that the Department adapted the rape shield language in § 106.45(b)(6)(i) from Fed. R. Evid. 412.[1349] As with other determinations about what procedures should be part of a § 106.45 grievance process, the Department carefully considered whether Fed. R. Evid. 412 would be useful in formulating rape shield provisions for application in Title IX adjudications. However, the final regulations do not import wholesale Fed. R. Evid. 412. The Department believes the protections of the rape shield language remain stronger if decision-makers are not given discretion to decide that sexual behavior is admissible where its probative value substantially outweighs the danger of harm to a victim and unfair prejudice to any party. If the Department permitted decision-makers to balance ambiguous factors like "unfair prejudice" to make admissibility decisions, the final regulations would convey an expectation that a non-lawyer decision-maker must possess the legal expertise of judges and lawyers. Instead, the Department expects decision-makers to apply a single admissibility rule (relevance), including this

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[1349] 83 FR 61476 (regarding § 106.45(b)(6)(i)-(ii), the NPRM stated "These sections incorporate language from (and are in the spirit of) the rape shield protections found in Federal Rule of Evidence 412, which is intended to safeguard complainants against invasion of privacy, potential embarrassment, and stereotyping. *See* Fed. R. Evid. 412 Advisory Committee's Note. As the Court has explained, rape shield protections are intended to protect complainants 'from being exposed at trial to harassing or irrelevant questions concerning their past sexual behavior.' *Michigan* v. *Lucas*, 500 U.S. 145, 146 (1991).").

provision's specification that sexual behavior is irrelevant with two concrete exceptions. This approach leaves the decision-maker discretion to assign weight and credibility to evidence, but not to deem evidence inadmissible or excluded, except on the ground of relevance (and in conformity with other requirements in § 106.45, including the provisions discussed above whereby the decision-maker cannot rely on statements of a party or witness if the party or witness did not submit to cross-examination, a party's treatment records cannot be used without the party's voluntary consent, and information protected by a legally recognized privilege cannot be used).

The Department declines to extend the rape shield language to respondents. The Department does not wish to impose more restrictions on relevance than necessary to further the goals of a Title IX sexual harassment adjudication, and does not believe that a respondent's sexual behavior requires a special provision to adequately protect respondents from questions or evidence that are *irrelevant*. By contrast, in order to counteract historical, societal misperceptions that a *complainant's* sexual history is somehow always relevant to sexual assault allegations, the Department follows the rationale of the Advisory Committee's Note to Fed. R. Evid. 412, and the Supreme Court's observation in *Michigan v. Lucas*,[1350] that rape shield protections are intended to protect *complainants* from harassing, irrelevant questions at trial. The Department cautions recipients that some situations will involve counter-claims made between two parties, such that a respondent is also a complainant, and in such situations the recipient must take care to apply the rape shield protections to any party where the party is designated as a "complainant"

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[1350] 500 U.S. 145, 146 (1991) ("Like most States, Michigan has a 'rape-shield' statute *designed to protect victims* of rape from being exposed at trial to harassing or irrelevant questions concerning their past sexual behavior.") (emphasis added).

even if the same party is also a "respondent" in a consolidated grievance process.[1351] The Department clarifies here that the rape shield language in this provision considers all questions and evidence of a complainant's sexual *predisposition* irrelevant, with no exceptions; questions and evidence about a complainant's prior *sexual behavior* are irrelevant unless they meet one of the two exceptions; and questions and evidence about a *respondent's* sexual predisposition or prior sexual behavior are not subject to any special consideration but rather must be judged like any other question or evidence as relevant or irrelevant to the allegations at issue.

For two reasons, the Department also declines to import the additional provision in Fed. R. Evid. 412 that would allow in evidence "whose exclusion would violate the defendant's constitutional rights." First, this exception to the preclusion of sexual behavior evidence is intended to protect the constitutional rights of *criminal* defendants, and respondents in a Title IX grievance process are not due the same rights as criminal defendants. Second, the Department believes that the procedures in § 106.45, including the use of relevance as the only admissibility criterion, ensure that trained, layperson decision-makers are capable of making relevance determinations and then evaluating relevant evidence with discretion to decide how persuasive certain evidence is to a determination regarding responsibility, whereas imposing a complex set of evidentiary rules would make it less likely that a non-lawyer would feel competent to be a recipient's decision-maker. The final regulations permit a wide universe of evidence that may be "relevant" (and thus not subject to exclusion), and the Department believes it is unlikely that a recipient applying the § 106.45 grievance process with its robust procedural protections would be

[1351] Section 106.45(b)(4) allows consolidation of formal complaints, in a recipient's discretion, when allegations arise from the same facts or circumstances.

found to have violated any respondent's constitutional rights, whether under due process of law Supreme Court cases like *Mathews* and *Goss*, or the Sixth Circuit's due process decision in *Baum*.[1352] As discussed above, we have revised § 106.45(b)(6)(i) to direct a decision-maker who must not rely on the statement of a party who has not appeared or submitted to cross-examination not to draw any inference about the determination regarding responsibility based on the party's absence or refusal to be cross-examined (or refusal to answer other questions, such as those posed by the decision-maker). This modification provides protection to respondents exercising Fifth Amendment rights against self-incrimination (though it applies equally to protect complainants who choose not to appear or testify).

For reasons discussed above, the Department believes that well-trained decision-makers are fully capable of determining relevance of questions and evidence, including the special consideration given to a complainant's sexual history under this provision. Section 106.45(b)(1)(iii) has been revised to require decision-makers to be trained on issues of relevance, including specifically application of the rape shield protections. Regardless of studies that show that lawyers routinely try to circumvent rape shield protections, the Department expects recipients to ensure that decision-makers accurately determine the relevance and irrelevance of a complainant's sexual history in accordance with these regulations. The Department disagrees that the two exceptions in the rape shield provisions should be eliminated because non-lawyer decision-makers will misapply this provision and end up allowing questions and evidence

[1352] As acknowledged in § 106.6(d), the Department will not enforce these regulations in a manner that requires any recipient to violate the U.S. Constitution, including the First Amendment, Fifth and Fourteenth Amendment, or any other constitutional provision. The Department believes that the § 106.45 grievance process allows, and expects, recipients to apply the grievance process in a manner that avoids violation of any party's constitutional rights.

contrary to this provision. Nothing in the final regulations precludes a recipient from including in its training of decision-makers information about the purpose and scope of rape shield language in Fed. R. Evid. 412, including the Advisory Committee Notes, so long as the training remains focused on applying the rape shield protections as formulated in these final regulations.

The Department disagrees that the evidence exchange provision in § 106.45(b)(5)(vi) negates the rape shield protections in § 106.45(b)(6)(i)-(ii). As noted by the Supreme Court, rape shield protections generally are designed to protect complainants from harassing, irrelevant inquiries into sexual behavior *at trial*.[1353] The final regulations permit exchange of all evidence "directly related to the allegations in a formal complaint" during the investigation, but require the investigator to only summarize "relevant" evidence in the investigative report (which would exclude sexual history information deemed by these final regulations to be " not relevant"), and require the decision-maker to objectively evaluate only "relevant" evidence during the hearing and when reaching the determination regarding responsibility. To further reinforce the importance of correct application of the rape shield protections, we have revised § 106.45(b)(6)(i) to explicitly state that only relevant questions may be asked, and the decision-maker must determine the relevance of each cross-examination question before a party or witness must answer.

Commenters correctly observe that the final regulations do not define "consent." For reasons explained in the "Consent" subsection of the "Section 106.30 Definitions" section of this preamble, the final regulations clarify that the Department will not require recipients to adopt a

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[1353] *Michigan v. Lucas*, 500 U.S. 145, 146 (1991) ("Like most States, Michigan has a 'rape-shield' statute designed to protect victims of rape from being exposed *at trial* to harassing or irrelevant questions concerning their past sexual behavior.") (emphasis added).

particular definition of consent. This provision in § 106.30 allows recipients flexibility to use a definition of sexual consent that best reflects the recipient's values and/or complies with State laws that require recipients to adopt particular definitions of consent for campus sexual misconduct proceedings. The second of the two exceptions to the rape shield protections refers to "if offered to prove consent" and thus the scope of that exception will turn in part on the definition of consent adopted by each recipient. Decision-makers will be trained in how to conduct a grievance process and specifically on how to apply the rape shield protections, which will include the recipient's adopted definition of consent, and thus the decision-maker will understand how to apply the rape shield language in accordance with that definition. Because of the flexibility recipients have under these final regulations to adopt a definition of consent, the Department disagrees that the scope of the second exception to the rape shield protections is too broad or favors respondents. Rather, the scope of the "offered to prove consent" exception is determined in part by a recipient's definition of consent, which may be broad or narrow at the recipient's discretion. The Department disagrees that the first exception ("offered to prove that someone other than the respondent" committed the alleged misconduct) is too broad, because in order for that exception to apply a respondent's contention must be that someone other than the respondent is the person who committed the sexual harassment; commenters have informed the Department that this defense is not common compared to the defense that a sexual interaction occurred but consent was present, a conclusion buttressed by commenters' assertions that a significant number of sexual assaults are committed by intimate partners. When a respondent has evidence that someone else committed the alleged sexual harassment, a respondent must have opportunity to pursue that defense, or else a determination reached by the decision-maker may be

an erroneous outcome, mistakenly identifying the nature of sexual harassment occurring in the recipient's education program or activity.[1354]

Neither of the two exceptions to the rape shield protections promote the notion that women, or complainants generally, are unreliable and that they may be mistaken about who committed an assault, or allow slut-shaming as a defense to sexual assault accusations. Rather, the first exception applies to the narrow circumstance where a respondent contends that someone other than the respondent committed the misconduct, and the second applies narrowly to allow sexual behavior questions or evidence *concerning incidents between the complainant and respondent* if offered to prove consent. The second exception does not admit sexual history evidence of a complainant's sexual behavior with someone other than the respondent; thus, "slut-shaming" or implication that a woman with an extensive sexual history probably consented to sexual activity with the respondent, is not validated or promoted by this provision. As noted above, the scope of when sexual behavior between the complainant and respondent might be relevant to the presence of consent regarding the particular allegations at issue depends in part on a recipient's definition of consent. Not all definitions of consent, for example, require a verbal expression of consent; some definitions of consent inquire whether based on circumstances the respondent reasonably understood that consent was present (or absent), thus potentially making relevant evidence of past sexual interactions between the complainant and the respondent. The Department reiterates that the rape shield language in this provision does not pertain to the

[1354] The Department notes that where a decision-maker determines, for example, that the respondent is not responsible for the allegations in the formal complaint, but also determines that the complainant did suffer the alleged sexual harassment but it was perpetrated by someone other than the respondent, the recipient is free to provide supportive measures to the complainant designed to restore or preserve equal access to education.

sexual predisposition or sexual behavior of respondents, so evidence of a pattern of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be.

As discussed above, the Department defers to recipients on a definition of consent, and thus recipients subject to State laws imposing particular definitions may comply with those State laws during a § 106.45 grievance process. The recipient's definition of consent will determine the scope of the rape shield exception that refers to "consent." The Department does not believe that the provision needs to expressly state that a complainant's sexual behavior can never be allowed to prove a complainant's reputation or character; rather, this provision already deems irrelevant all questions or evidence of a complainant's prior sexual behavior unless offered to prove that someone other than the respondent committed the alleged offense or if the questions or evidence concern specific sexual behavior between the complainant and respondent and are offered to prove consent. No other use of a complainant's sexual behavior is authorized under this provision.

The Department declines to require questions or evidence that may meet one of the rape shield exceptions to be allowed to be asked or presented at a hearing only if a neutral evaluator first decides that one of the two exceptions applies. As discussed above, the decision-maker will be trained in how to conduct a grievance process, including how to determine relevance and how to apply the rape shield protections, and at the live hearing the decision-maker must determine the relevance of a cross-examination question before a party or witness must answer. As discussed above, the Department declines to import a balancing test that would exclude sexual behavior questions and evidence (even meeting the two exceptions) unless probative value substantially outweighs potential harm or undue prejudice, because that open-ended, complicated standard of admissibility would render the adjudication more difficult for a layperson decision-

maker competently to apply. Unlike the two exceptions in this provision, a balancing test of probative value, harm, and prejudice contains no concrete factors for a decision-maker to look to in making the relevance determination.

The Department's use of the phrase "sexual predisposition" is mirrored in Fed. R. Evid. 412; far from indicating intent to harken back to the past where sexual practices of a complainant were used against a complainant, the final regulations take a strong position that questions or evidence of a complainant's "sexual predisposition" are simply irrelevant, without exception.

The final regulations clarify the rape shield language to state that questions and evidence subject to the rape shield protections are "not relevant," and therefore the rape shield protections apply wherever the issue is whether evidence is relevant or not. As noted above, this means that where § 106.45(b)(5)(vi) requires review and inspection of evidence "directly related to the allegations" that universe of evidence is not screened for relevance, but rather is measured by whether it is "directly related to the allegations." However, the investigative report must summarize "relevant" evidence, and thus at that point the rape shield protections would apply to preclude inclusion in the investigative report of irrelevant evidence. The Department believes these provisions work consistently and logically as part of the § 106.45 grievance process, under which all evidence is evaluated for whether it is directly related to the allegations, evidence summarized in the investigative report must be relevant, and evidence (and questions) presented in front of, and considered by, the decision-maker must be relevant. The Department declines to require respondents to "lay a foundation" before asking questions, or to impose rules excluding questions based on hearsay or speculation. For reasons described above, relevance is the sole gatekeeper evidentiary rule in the final regulations, but decision-makers retain discretion regarding the weight or credibility to assign to particular evidence. Further, for the reasons

discussed above, while the final regulations do not address "hearsay evidence" as such, § 106.45(b)(6)(i) does preclude a decision-maker from relying on statements of a party or witness who has not submitted to cross-examination at the live hearing.

The Department notes that the rape shield language does not limit the "if offered to prove consent" exception to when the question or evidence is offered *by the respondent*. Rather, such questions or evidence could be offered by either party, or by the investigator, or solicited on the decision-maker's own initiative. The Department appreciates commenters' suggestion that the rape shield exception regarding "to prove consent" apply to proof of "welcomeness" so that it would apply to allegations of sexual harassment that turn on welcomeness and not on consent of the victim. However, as explained in the "Sexual Harassment" subsection of the "Section 106.30 Definitions" section of this preamble, the Department interprets the "unwelcome" element in the first and second prongs of the § 106.30 definition of sexual harassment subjectively; that is, if conduct is unwelcome to the complainant, that is sufficient to support that element of an allegation of sexual harassment. By contrast, the final regulations impose a reasonable person standard on the other elements in the second prong of the § 106.45 definition – whether the unwelcome conduct was so "severe, pervasive, and objectively offensive" that it "effectively denied a person equal access" to education. The Department therefore declines to extend the rape shield language to encompass situations where the respondent wishes to prove the conduct was "welcome" as opposed to "unwelcome." The Department rejects the premise that a respondent may need to use a complainant's sexual behavior to challenge a complainant's subjective interpretation of conduct as unwelcome. Respondents facing allegations under the first or second prong of the § 106.30 definition may defend by, for example, arguing that the unwelcome conduct was not "conditioning any aid or benefit" on participation in the unwelcome sexual

activity, or that the unwelcome conduct was not "severe" or was not "pervasive," etc. A complainant's sexual behavior is simply irrelevant to those defenses. Contrary to commenters' concerns, the rape shield language deems irrelevant *all* questions or evidence of a complainant's sexual behavior *unless* offered to prove consent (and it concerns specific instances of sexual behavior with the respondent); thus, if "consent" is not at issue – for example, where the allegations concern solely unwelcome conduct under the first or second prong of the § 106.30 definition – then that exception does not even apply, and the rape shield protections would then bar *all* questions and evidence about a complainant's sexual behavior, with no need to engage in a balancing test of whether the value of the evidence is outweighed by harm or prejudice.

The Department is persuaded by commenters who argued that the NPRM's wording of the rape shield language lacked clarity as to whether "exclusion" applied only to questions, or also to evidence. The Department has revised this provision in the final regulations to refer to both questions and evidence, and replace reference to "exclusion" with deeming the sexual predisposition and sexual behavior questions or evidence to be "not relevant" (subject to the same two exceptions as stated in the NPRM). To conform the final regulations with the intent of the rape shield provision and with commenters' widely understood view of this provision, we have added the word "prior" before "sexual behavior" in § 106.45(b)(6)(i), and in § 106.45(b)(6)(ii) that contains the same rape shield language.[1355]

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[1355] The Department notes that "prior" sexual behavior is a phrase widely used by commenters to discuss rape shield protections, and commenters noted that various State laws, such as New York and Maryland, use the word "prior" to distinguish a complainant's sexual behavior that is unrelated to the sexual misconduct allegations at issue. The Department emphasizes that "prior" does not imply admissibility of questions or evidence about a complainant's sexual behavior that occurred after the alleged sexual harassment incident, but rather must mean anything "prior" to

Changes: The Department has revised the rape shield language in § 106.45(b)(6)(i)-(ii) to clarify that questions and evidence about the complainant's prior sexual behavior or predisposition are not relevant unless offered to prove that someone other than the respondent committed the offense or if the sexual history evidence concerns specific sexual incidents with the respondent and is offered to prove consent. We have also revised § 106.45(b)(1)(iii) to require decision-makers to be trained on issues of relevance, including application of the rape shield protections in § 106.45(b)(6).

*Separate Rooms for Cross-Examination Facilitated by Technology; Directed Question 9*

Comments: Some commenters supported the provision in § 106.45(b)(6)(i) that upon request of any party a recipient must permit cross-examination to occur with the parties located in separate rooms with technology facilitating the ability of all participants to see and hear the person answering questions. Commenters asserted that this provision appropriately acknowledges the intimidating nature of cross-examination. Commenters also asserted that this provision reaches a reasonable balance between allowing cross-examination and protecting victims from personal confrontation with a perpetrator. Some commenters supported this provision but expressed concern that the live question-and-answer format, even avoiding face-to-face trauma, will still impose significant trauma for both parties. Commenters stated that many recipients already effectively utilize technology to enable parties to testify at live hearings without being physically

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conclusion of the grievance process. This aligns with the intent of Fed. R. Evid. 412, which prohibits evidence of a victim's "other" sexual behavior; the Advisory Committee Notes on that rule explain that use of the word "other" is to "suggest some flexibility in admitting evidence 'intrinsic' to the alleged sexual misconduct." The Department chooses to use the phrase "prior sexual behavior" rather than "other sexual behavior" because based on public comments, "prior sexual behavior" is a widely understood reference to evidence unrelated to the alleged sexual harassment at issue.

present in the same room at the same time, including asking the non-testifying party to wait in a separate room listening by telephone or watching by videoconference while the testifying party is in the same room as the decision-maker, and then the parties switch rooms with safety measures imposed so the parties do not encounter each other during transitions.

At least one commenter opposed this provision, arguing that there is no substitute for direct eye contact and full view of a person's mannerisms and gestures, which will not be as effective using technology, even though face-to-face confrontation may cause trauma to both complainants and respondents.

Some commenters opposed this provision, asserting that complainants should not be forced to be "live streamed" and instead should have the right to remain anonymous. Some commenters argued that "watering down" the Sixth Amendment right to face-to-face confrontation just to avoid traumatizing victims is not appropriate because the Constitution expects victims to endure the experience of making their accusations directly in front of an accused[1356] and the proposed rules do not even require a threshold showing of the potential for trauma before granting a request to permit virtual testimony.

Other commenters argued that separating the parties does not adequately diminish the intimidating, retraumatizing prospect of a live hearing. Commenters shared personal examples of being cross-examined during Title IX proceedings and feeling traumatized even with the respondent located in a separate room; one commenter described being cross-examined during a hearing with the perpetrator telling each question to a judge, who then asked the question over

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[1356] Commenters cited: *Maryland v. Craig*, 497 U.S. 836, 851 (1990) for the proposition that a limited exception to a criminal defendant's Sixth Amendment right to confront witnesses was approved by the Supreme Court in the context of protecting child sex abuse victims by permitting a child victim to testify via closed circuit television.

Skype if the judge approved the question, and the commenter stated that even with technology separating the commenter from the perpetrator, the commenter was still diagnosed a week later with PTSD (post-traumatic stress disorder). Commenters argued that survivors of sexual violence will still be aware that their attacker is witnessing the proceedings and may feel less safe as a result. At least one commenter argued that accommodating a complainant's request to testify from a separate room puts the complainant at a disadvantage because, for example, the respondent might be located in the same room as the decision-maker who would thus have a greater opportunity to "develop a personal connection" with the respondent than with the complainant, and advantage the respondent by allowing the respondent to observe the decision-maker's reactions to testimony while the complainant cannot observe those reactions when located in a separate room. At least one commenter argued that remote cross-examination puts survivors at a distinct disadvantage because assessing non-verbal and behavioral evidence of trauma is necessary in sexual violence incidents.

At least one commenter argued that witnesses must also be given the right to request to testify in a separate room. One commenter recounted a case in which a witness had also been raped by the respondent but the recipient did not allow the witness to testify in a separate room and the witness had to frequently leave the room during testimony due to sobbing too hard to speak.

Commenters opposed requiring testimony in separate rooms on the basis that internet functionality on campus is not always reliable, and thus a rule that depends on technology is not realistic. Commenters supported use of technology to facilitate parties being in separate rooms as "ideal" but expressed concern that the cost of technology that is both reliable and secure could be prohibitive for some recipients because while software enabling simultaneous viewing of parties

in separate rooms may be relatively inexpensive, acquiring additional hardware that may be necessary and expensive, such as audio-visual equipment, monitors, and microphones. Commenters stated that some recipients do not currently have technology set up in the spaces used for Title IX proceedings and acquiring the requisite technology would be costly.[1357] Commenters asserted that complying with this provision may also require acquisition of, or renovations to, facilities that are not currently used for Title IX purposes by the recipient, or specialized technology that meets the needs of individuals with disabilities, resulting in expenditures that will only be used for the limited purpose of Title IX hearings. Commenters requested that the Department provide grant funding for acquiring technology needed to meet this provision.

Other commenters asserted that it is reasonable for separate rooms to be used to ensure complete, comfortable honesty by each party and that numerous low cost, secure presentation videoconferencing technologies are available and already in use by many recipients to ensure that participants can view and hear questions and responses in real time.[1358] Some commenters stated that while this provision would require some monetary investment in technology the requirement was reasonable and beneficial to allow the parties to participate in a hearing from separate rooms.

Discussion: The Department appreciates commenters' support for the provision in § 106.45(b)(6)(i) that requires recipients, upon any party's request, to permit cross-examination to

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[1357] At least one commenter cited: ezTalks.com, "How Much Does Video Conferencing Equipment Cost?," https://www.eztalks.com/video-conference/video-conference-equipment-cost html, for the proposition that room-based video conferencing could cost $10,000 to $100,000 to set up.

[1358] Commenters listed GoTo Meeting, Skype, Skype for Business, Zoom, and Google Hangouts as examples of existing technology platforms.

occur with the parties in separate rooms using technology that enables participants to see and hear the person answering questions. Commenters correctly asserted that this provision is a direct acknowledgment of the potential for cross-examination to feel intimidating and retraumatizing in sexual harassment cases. Because the decision-maker cannot know until the conclusion of a fair, reliable grievance process whether a complainant is a victim of sexual harassment perpetrated by the respondent, cross-examination is necessary to test party and witness statements for veracity and accuracy, but the Department has determined that the full value of cross-examination can be achieved while shielding the complainant from being in the physical presence of the respondent. The Department disagrees that only in-person, face-to-face confrontation enables parties and decision-makers to adequately evaluate credibility,[1359] and declines to remove this shielding provision. As discussed above, assessing demeanor is just one of the ways in which cross-examination tests credibility, which includes assessing plausibility, consistency, and reliability; judging truthfulness based solely on demeanor has been shown to be less accurate than, for instance, evaluating credibility based on consistency.[1360] Thus, any minimal reduction in the ability to gauge demeanor by use of technology is outweighed by the benefits of shielding victims from testifying in the presence of a perpetrator. The Department disagrees that complainants should have to make a threshold showing that trauma is likely because the Department is persuaded by the many commenters who asserted that facing a perpetrator is

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[1359] H. Hunter Bruton, *Cross-Examination, College Sexual-Assault Adjudications, and the Opportunity for Tuning up the Greatest Legal Engine Ever Invented*, 27 CORNELL J. OF L. & PUB. POL'Y, 145, 169 (2017) ("For example, studies comparing live-video or videotaped testimony to traditional live-testimony formats show no significant differences across mediums in observers' ability to detect deception.").

[1360] *E.g.*, Susan A. Bandes, *Remorse, Demeanor, and the Consequences of Misinterpretation: The Limits of Law as a Window into the Soul*, JOURNAL OF L., RELIGION & ST. 3, 170, 179 (2014); *cf.* H. Hunter Bruton, *Cross-Examination, College Sexual-Assault Adjudications, and the Opportunity for Tuning up the Greatest Legal Engine Ever Invented*, 27 CORNELL J. L. & PUB. POL'Y, 145, 161 (2017).

inherently traumatic for a victim. Further, the Sixth Amendment's Confrontation Clause protects *criminal* defendants, and the Department is not obligated to ensure that this provision would comply with the Confrontation Clause, which does not apply to a respondent in a noncriminal adjudication under Title IX.

The Department notes that recipients are obligated under § 106.71 to "keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness" in a Title IX grievance process except as permitted by FERPA, required by law, or as necessary to conduct the hearing or proceeding; this cautions recipients to ensure that technology used to comply with this provision does not result in "live streaming" a party in a manner that exposes the testimony to persons outside those participating in the hearing.

The Department understands commenters' assertions that even with shielding, cross-examination by a respondent's advisor may still be a daunting prospect. The final regulations provide both parties with the right to be supported and assisted by an advisor of choice, and protect the parties' ability to discuss the allegations freely, including for the purpose of seeking out emotional support or strategic advice.[1361] The final regulations do not preclude a recipient from adopting rules (applied equally to complainants and respondents) that govern the taking of breaks and conferences with advisors during a hearing, to further ameliorate the stress and

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[1361] For further discussion see the "Section 106.45(b)(5)(iii) Recipients Must Not Restrict Ability of Either Party to Discuss Allegations or Gather and Present Relevant Evidence" subsection of the "Investigation" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

emotional difficulty of answering questions about sensitive, traumatic events. We have also revised § 106.45(b)(6)(i) to provide that upon a party's request the entire live hearing (and not only cross-examination) must occur with the parties located in separate rooms. These measures are intended to balance the need for statements to be tested for credibility so that accurate outcomes are reached, with accommodations for the sensitive nature of the underlying matters at issue.

The Department disagrees that shielding under § 106.45(b)(6)(i) disadvantages complainants (or respondents) and reiterates that both parties' meaningful opportunity to advance their own interests in a case may be achieved by party advisors conducting cross-examination virtually. The Department notes that decision-makers are obligated to serve impartially and thus should not endeavor to "develop a personal relationship" with one party over another regardless of whether one party is located in a separate room or not. For the same reasons that judging credibility solely on demeanor presents risks of inaccuracy generally, the Department cautions that judging credibility based on a complainant's demeanor through the lens of whether observed demeanor is "evidence of trauma" presents similar risks of inaccuracy.[1362]

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[1362] *E.g.,* Jeffrey J. Nolan, *Fair, Equitable Trauma-Informed Investigation Training* 10 (Holland & Knight updated July 19, 2019) (while counterintuitive behaviors may be driven by trauma-related hormones or memory issues, counterintuitive behavior may also bear on a witness's credibility, and thus training about whether or how trauma or stress may influence a person's demeanor should be applied equally to interviewing any party or witness); "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.").

The Department reiterates that while assessing demeanor is one part of judging credibility, other factors are consistency, plausibility, and reliability. Real-time cross-examination presents an opportunity for parties and decision-makers to test and evaluate credibility based on all these factors.

The Department declines to grant witnesses the right to demand to testify in a separate room, but revises § 106.45(b)(6)(i) to allow a recipient the discretion to permit any participant to appear remotely. Unlike complainants, witnesses usually do not experience the same risk of trauma through cross-examination. Witnesses also are not required to testify and may simply choose not to testify because the determination of responsibility usually does not directly impact, implicate, or affect them. With respect to a witness who claims to also have been sexually assaulted by the respondent, the recipient has discretion to permit the witness to testify remotely, or to hold the entire live hearing virtually.

The Department appreciates commenters' assertions that some recipients already effectively use technology to enable virtual hearings, and other commenters' concerns that acquiring technology may cause a recipient to incur costs. The Department agrees with some commenters who asserted that even where this provision requires a monetary investment in technology, low-cost technology is available and the importance of this shielding provision outweighs the burden of setting up the requisite technology. Although this shielding provision requires that a Title IX live hearing would be held in two "separate rooms" the Department is not persuaded that such a requirement necessitates any recipient's capital investment in renovations or acquiring new real property, because the Department is unaware of a recipient whose existing facilities consist of a single room. These final regulations do not address the eligibility or

purpose of grant funding for recipients, and the Department thus declines to provide technology grants via these regulations.

Changes: We have revised § 106.45(b)(6)(i) to allow recipients, in their discretion, to hold live hearings virtually or for any participant to appear remotely, using technology to enable participants to see and hear each other, and to require a recipient to grant any party's request for the entire live hearing to be held with the parties located in separate rooms.

*Discretion to Hold Live Hearings and Control Conduct of Hearings*

Comments: Many commenters supported the requirement in § 106.45(b)(6)(i) that postsecondary institutions hold live hearings at the conclusion of an investigation of a formal complaint, because a live hearing ensures that the decision-maker hears from the parties and witnesses, which gives both parties an opportunity to present their side of the story to the decision-maker and reduces opportunity for biased decision making. Commenters argued that in the college or university setting, where the participants are usually adults, live hearings provide the most transparent mechanism for ensuring all parties have the opportunity to submit, review, contest, and rebut evidence to be considered by the fact-finder in reaching a determination, and this is critical where both parties' interests are at stake and potential sanctions are serious.[1363] Commenters stated that live hearings are the only method by which deciding parties can accurately assess the veracity of both the complainant's and respondent's statements, and where allegations have been tested in a live hearing and the determination finds the respondent to be

[1363] Commenters cited: American Bar Association, ABA Criminal Justice Section Task Force on College Due Process Rights and Victim Protections, *Recommendations for Colleges and Universities in Resolving Allegations of Campus Sexual Misconduct* 3 (2017) (expressing a preference for the "adjudicatory model," defined as "a hearing in which both parties are entitled to be present, evidence is presented, and the decision-maker(s) determine(s) whether a violation of school policy has occurred").

responsible that outcome is more likely to be reliable and less likely to be overturned on appeal or in litigation. Commenters argued that requiring a live hearing ensures that all parties see the same evidence and testimony as the fact-finder, so that each party can fully rebut or buttress that evidence and testimony to serve the party's own interest. Commenters argued that live hearings also decrease the chance that the bias of a single investigator or fact-finder may warp the process by reaching determinations not by the facts and a desire for a just outcome, but by prejudice, well-intentioned or otherwise.

Many commenters opposed the live hearing requirement. Commenters argued that even though the withdrawn 2011 Dear Colleague Letter caused many recipients to overcorrect their sexual misconduct policies by shirking due process responsibilities,[1364] commenters asserted that recipients should have the option but not the mandate to provide live hearings to preserve recipients' flexibility to design a fair process. Commenters argued that live hearings make campus proceedings so much like court proceedings that the benefit of going through an equitable Title IX process instead of formal court trials will be lost.[1365] Commenters argued that while hearings and cross-examination may be deeply rooted in the legal system, such procedures are not deeply rooted in school disciplinary processes. Commenters also argued that requiring live hearings is going "a bridge too far" because recipients are not equipped to conduct court-like hearings.

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[1364] Commenters cited: Blair Baker, *When Campus Sexual Misconduct Policies Violate Due Process Rights*, 26 CORNELL J. OF L. & PUB. POL'Y 533, 535 (2017) (in response to the 2011 Dear Colleague Letter "colleges overcorrected their sexual assault policies by adopting policies that shirk the legally mandated due process rights of students accused of misconduct and effectively presume their guilt").

[1365] Commenters cited: Alexandra Brodsky, *A Rising Tide: Learning About Fair Disciplinary Process from Title IX*, 77 JOURNAL OF LEGAL EDUC. 4 (2017).

Commenters argued that requiring an adversarial, high-stakes live hearing ignores many cultures that rely on the inquisitorial system to achieve justice, under which decision makers are vested with the duty of fact finding instead of pitting the parties against each other to offer competing versions of the truth.

Commenters asserted that live hearings add no value to the fact-finding process so long as a full, fair investigation was conducted. Commenters described experiences with particular recipients where the recipient used a live hearing model for a significant period of time but stopped using a live hearing model after experiencing pitfalls that outweighed its usefulness, stating that hearings became a springboard to introduce new evidence and witnesses, embarrassed parties in ways that derailed the hearing, and hearing panels were left needing legal advice on a myriad of issues like evidentiary determinations. Commenters argued that while school employees who are asked to adjudicate are well-intentioned, they lack the legal expertise and immunity available in court proceedings, and an investigative model has been more efficient than a live hearing model, has resulted in fewer contested outcomes, and has led to increased reporting of sexual harassment.

Commenters asserted that a live hearing contains no mechanism to act as a check against bias[1366] and that decision-makers are capable of being impartial and reaching unbiased decisions without the parties and witnesses appearing at a live hearing.

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[1366] Commenters cited: Jessica A. Clarke, *Explicit Bias*, 113 NORTHWESTERN UNIV. L. REV. 505 (2018); Cara A. Person *et al.*, *"I Don't Know That I've Ever Felt Like I Got the Full Story": A Qualitative Study of Courtroom Interactions Between Judges and Litigants in Domestic Violence Protective Order Cases*, 24 VIOLENCE AGAINST WOMEN 12 (2018); Lee Ross, *From the Fundamental Attribution Error to the Truly Fundamental Attribution Error and Beyond*, 13 PERSPECTIVES ON PSYCHOL. SCIENCE 6 (2018); Margit E. Oswald & Ingrid Stucki, *Automatic Judgment and Reasoning About Punishment*, 23 SOCIAL SCIENCE RESEARCH 4 (2018); Eve Hannan, *Remorse Bias*, 83 MISSOURI L. REV. 301 (2018).

Likening campus disciplinary proceedings to administrative proceedings, commenters argued that courts permit a wide variety of administrative proceedings to utilize less formal procedures and still comport with constitutional due process, for example allowing consideration of hearsay evidence, not requiring a live hearing, and not requiring cross-examination, even when such proceedings implicate liberty and property interests.[1367]

Commenters asserted that sometimes a witness is a friend of a party and must truthfully share information that damages the witness's friendship with the party, and that while a witness might be willing to put truth above friendship by privately talking to an investigator, a witness is less likely to do this when it requires testimony at a live hearing in front of the witness's friend. Commenters argued that the live hearing requirement puts a burden on the parties to pressure or cajole their friends into appearing as witnesses because the recipient has no subpoena power to compel witness participation.

Commenters argued that requiring the formal process of a live hearing demonstrates that the proposed regulations value the potential future of respondents more than the safety and well-being of complainants. Commenters asserted that the formalities of a live hearing with cross-examination "swing the pendulum" too far when schools need a refined approach to reach balanced fairness.

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[1367] Commenters cited, e.g., *Richardson v. Perales*, 402 U.S. 389, 402 (1971) (cross-examination is not an absolute requirement in a Social Security Disability benefits case); *Wolff v. McDonnell*, 418 U.S. 539, 567-68 (1974) (prison officials may rely on hearsay evidence to add to a prisoner's sentence); *Johnson v United States*, 628 F.2d 187 (D.C. Cir. 1980) (cross-examination not required where professional licensing was at stake); *Williams v U.S. Dep't. of Transp.*, 781 F.2d 1573 (11th Cir. 1986) (cross-examination not required for a Coast Guard finding that a pilot negligently operated a boat); *Matter of Friedel v. Bd. of Regents*, 296 N.Y. 347, 352-353 (N.Y. Ct. App. 1947) (limitation on right to confront investigators in suspension hearing for performing illegal procedures); *Delgado v. City of Milwaukee Employees' Ret. Sys./Annuity and Pension Bd.*, 268 Wis.2d 845 (Wisc. Ct. App. 2003) (cross-examination is not required at a hearing to revoke a police officer's duty disability payments); *In re J.D.C.*, 284 Kan. 155, 170 (Kan. 2007) (child welfare officials may depend on hearsay to determine child custody if it is relevant and probative, particularly where the parent waives the right to cross-examine the child).

Commenters asserted that recipients have spent time and resources developing non-hearing adjudication models and should have the flexibility to continue using such models so long as the procedures are fair and equitable. Commenters asserted that requiring live hearings will force recipients to abandon hybrid investigatory models that recipients have carefully developed over the last several years.

Commenters argued that where the facts are not contested, or where the respondent has admitted responsibility, or video evidence of the incident in question exists, there is no need to put parties through the ordeal of a live hearing yet the proposed rules would force an institution to hold a live hearing anyway, straining the limited resources of all schools but especially smaller institutions. One commenter argued that if, for example, a respondent video-taped the respondent raping a student and the hearing officer watches the video and hears from the complainant who confirms the incident did happen, and the respondent denies doing it, a live hearing with cross-examination would not be useful in such a scenario.

Commenters suggested that this provision be modified to require the parties to attempt mediation, so that a live hearing is required only if mediation fails. Commenters stated that some recipients use an administrative disposition model where a respondent may accept responsibility based on an investigator's findings and the final regulations should permit the recipient, or the respondent, in that situation to waive the right to a live hearing. Commenters asserted that the final regulations should include a provision allowing the parties to enter into a voluntary resolution agreement (VRA) that includes disciplinary action against the respondent, where the recipient could offer the VRA to both parties in advance of a live hearing, and if the parties accepted the VRA it would become the final outcome, or the parties could reject the VRA and demand a live hearing. Other commenters argued that either party should have the right to waive

a live hearing so that a live hearing should only occur if both parties and the recipient agree it is the appropriate method of resolution for a particular case.

Commenters argued that the proposed regulations do not allow universities to follow State APAs (Administrative Procedure Acts), for example in Washington State where a student may appeal a responsibility finding made in an investigation to a live hearing, or in New York where New York Education Law Article 129-B (known as "Enough is Enough") allows written submission of questions instead of live cross-examination. Commenters argued that some public universities are already subject to State APAs that impose the kind of live hearings and cross-examination procedures required by these final regulations, and recipients find these procedures to be burdensome, costly, and lengthy.

Commenters quoted a Federal district court memorandum from 1968 setting forth guidelines on how that district court should evaluate claims against tax-funded colleges and universities, where the court memorandum stated the nature and procedures of college discipline should not be required to conform to Federal criminal law processes which are "far from perfect" and designed for circumstances unrelated to the academic community.[1368] Commenters argued that most Federal courts adopt that approach, acknowledging that student discipline is part of the education process and is not punitive in the criminal sense; rather, expelled students may suffer damaging effects but do not face imprisonment, fines, disenfranchisement, or probation. Commenters asserted that deference to a college or university's chosen disciplinary system is

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[1368] Commenters cited: *General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education*, ED025805 (1968); *Esteban v. Cent. Mo. State Coll.*, 415 F.2d 1077, 1090 (8th Cir. 1969) ("school regulations are not to be measured by the standards which prevail for the criminal law and for criminal procedure.").

even more warranted for private institutions that do not owe constitutional due process to students or employees.[1369]

Many commenters argued that the NPRM gave recipients too little flexibility to determine how hearings should be conducted, and that the final regulations should grant recipients discretion to adopt rules to control the conduct and environment of hearings in a manner that is effective and fair to all parties and witnesses. Some commenters suggested that the final regulations should state more broadly that recipients must offer parties reasonable mitigating measures during a live hearing, of which locating the parties in separate rooms is but one example.

Commenters asked for clarification such as: Can recipients limit the hearing to consideration only of evidence previously included in the investigative report? Can recipients impose rules of evidence left unaddressed by the proposed regulations, such as excluding questions that are misleading, assume facts not in evidence, or call for disclosure of attorney-client privileged information, or questions that are cumulative, repetitive, or abusive? Can recipients impose time limits on hearings so that parties and witnesses do not spend multiple days in a hearing rather than fulfilling their academic or work responsibilities? Can a recipient specify who may raise objections to evidence during the hearing?

Commenters asserted that live hearings are administratively time-consuming and will lengthen the grievance process by requiring both parties and their advisors to be on campus simultaneously, which is impractical and often undesirable. Commenters urged the Department

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[1369] Commenters cited: William A. Kaplin & Barbara A. Lee, *The Law of Higher Education* § 10.2.3 (5th ed. 2013) ("Private institutions, not being subject to federal constitutional constraints, have even more latitude than public institutions do in promulgating disciplinary rules.").

to authorize recipients to hold the entire live hearing virtually, with parties in separate locations, using technology so that each party can see and hear all other parties, because some recipients offer mostly online courses such that parties might reside significant distances from any physical campus, or parties may move or be called to military service after a formal complaint has been filed, or the alleged harassment itself may have occurred entirely online and the parties may not reside close to campus. Commenters asserted that since the proposed rules already allow the parties to be located in separate rooms, there is no reason not to also allow a recipient to hold the entire hearing virtually using technology. At least one commenter asserted that even allowing participation virtually would not make this provision fair because the commenter had a case in which a key witness was studying abroad in a country with a large time zone difference making it impossible for the witness to testify even remotely using technology. Commenters argued that coordinating the schedules of parties, advisors, hearing panels, and witnesses to appear for a live hearing will delay proceedings. Other commenters stated that some rural university systems have satellite campuses in remote locations off the road system, with insufficient internet access even to allow videoconferencing, posing significant barriers to complying with a live hearing requirement.

Commenters asserted that all hearings should be recorded and either a transcript or video or audio recording should be provided to each party following the hearing, so the parties have access to it when appealing decisions or possibly for later use in litigation, because too many Title IX proceedings have occurred in secret, behind closed doors, with no record of the proceedings. According to this commenter, universities typically forbid parties from recording hearings and not having such a record can allow a grievance board's illegal bias against a party to fester and remain unchecked by the university, regulatory agencies, or the courts.

One commenter asserted that hearings should be closed and attended only by the parties, their advisors, witnesses, and school officials relevant to the hearing, and requested that confidentiality of the hearing be written into the final regulations.

Discussion: The Department appreciates commenters' support for this provision, requiring postsecondary institutions to hold live hearings. The Department agrees that a live hearing gives both parties the most meaningful, transparent opportunity to present their views of the case to the decision-maker, reducing the likelihood of biased decisions, improving the accuracy of outcomes, and increasing party and public confidence in the fairness and reliability of outcomes of Title IX adjudications.

The Department agrees with commenters that hearings and cross-examination of witnesses are deeply rooted concepts in American legal systems, but disagrees that the principles underlying those procedures should be absent from postsecondary institutions' adjudications under Title IX. Administrative law "seeks to ensure that those whose rights are affected by the decisions of administrative tribunals are given notice of hearings, guaranteed an oral, often public hearing, have a right to be represented, are granted disclosure of the case against them, are able to introduce evidence, call witnesses and cross-examine those testifying against them, have access to reason for decision, and an opportunity to appeal an adverse outcome. . . . The process assumes the value of an adversarial hearing in which impartial adjudicators are exposed to representations from those asserting a claim and those seeking a contrary finding."[1370]

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[1370] Farzana Kara & David MacAlister, *Responding to academic dishonesty in universities: a restorative justice approach*, 13 CONTEMPORARY JUSTICE REV. 4, 443-44 (2010) (internal citations omitted).

Furthermore, while not all recipients use a hearing model in student misconduct matters, many do or have in the recent past.[1371]

The Department agrees that postsecondary institutions are not equipped to act as courts of law. The final regulations acknowledge this reality by prescribing a grievance process that intentionally avoids importation of comprehensive rules of procedure (including discovery procedures) and rules of evidence that govern civil or criminal court trials. Instead, the § 106.45 grievance process requires procedures rooted in fundamental concepts of due process and fairness that layperson recipient officials are capable of applying without professional legal training. The Department disagrees that live hearings transform Title IX adjudications into court proceedings; the advantages to reaching determinations about sex discrimination in the form of sexual harassment without going through a civil or criminal trial remain distinct under the final regulations.

The Department disagrees that live hearings add no value to the fairness or accuracy of outcomes even where an investigation was full and fair. Despite some commenters' contention that recipients prefer moving to an investigative model rather than a hearing model, the Department believes that an adversarial adjudication model better serves the interests of fairness, accuracy, and legitimacy that underlie the § 106.45 grievance process.

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[1371] *See* Tamara Rice Lave, *Ready, Fire, Aim: How Universities Are Failing The Constitution In Sexual Assault Cases*, 48 ARIZ. STATE L. J. 637, 656 (2016) (in a survey of 50 American universities, 84 percent reported that they use an adjudicatory model with a hearing at which witnesses testify in front of a fact-finder); Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUMBIA L. REV. 289 (1999) (authors surveyed 200 public and private colleges and universities, and 90 percent of public institutions and 80 percent of private institutions reported using adjudicatory hearings with cross-examination rights).

The adversarial system "stands with freedom of speech and the right of assembly as a pillar of our constitutional system."[1372] Just as the final regulations reflect acute awareness of the importance of freedom of speech and academic freedom, these regulations are equally concerned with reflecting the importance of the adversarial model with respect to adjudications of contested facts. "Rights like trial by jury and the assistance of counsel – the cluster of rights that comprise constitutional due process of law – are most important when the individual stands alone against the state as an accused criminal. The fundamental characteristics of the adversary system also have a constitutional source, however, in our administration of civil justice" to redress grievances, resolve conflicts, and vindicate rights.[1373] "The Supreme Court has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as plaintiffs attempting to redress grievances or as defendants trying to maintain their rights."[1374] The final regulations recognize the importance of due process principles in a noncriminal context by focusing on procedures that apply equally to complainants and respondents and give both parties equal opportunity to actively pursue the case outcome they desire.

In addition to representing core constitutional values, an adversarial system yields practical benefits. "[T]he available evidence suggests that the adversary system is the method of dispute resolution that is most effective in determining truth" and that "gives the parties the

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[1372] Geoffrey C. Hazard, Jr., *Ethics in the Practice of Law* 122-23 (Yale Univ. Press 1978).
[1373] Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAPMAN L. REV. 57, 66-67 (1998) ("In fact, the adversary system in civil litigation has played a central role in fulfilling the constitutional goals 'to . . . establish Justice, insure domestic Tranquility, . . . promote the general Welfare, and secure the Blessings of Liberty . . . .'") (quoting U.S. CONST. PREAMBLE).
[1374] *Id.* at 67.

greatest sense of having received justice."[1375] "An adversary presentation seems the only effective means for combating this natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known."[1376] With respect to "the idea of individual autonomy – that each of us should have the greatest possible involvement in, if not control over, those decisions that affect our lives in significant ways [--] . . . empirical studies that have been done suggest, again, a preference for the adversary system over the inquisitorial."[1377] Studies conducted to determine "whether a litigant's acceptance of the fairness of the actual decision is affected by the litigation system used" have concluded that "the perception of the fairness of an adversary procedure carries over to create a more favorable reaction to the verdict . . . regardless of the outcome."[1378] As to commenters' contention that moving to an investigatory rather than hearing model resulted in increased reporting of sexual harassment, the Department emphasizes that the final regulations ensure that every complainant may report and receive supportive measures *without* undergoing an investigation or adjudication.[1379]

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[1375] *Id.* at 73-74; David L. Kirn, *Proceduralism and Bureaucracy: Due Process in the School Setting*, 28 STANFORD L. REV. 841, 847-49 (1976) ("In the classic due process hearing, the disputants themselves, not the decisionmaker, largely determine what evidence bearing on the issue is to be introduced. The veracity of that evidence is tested through questioning of witnesses, a procedure structured to uncover both lapses of memory and falsehoods, conducted by an advocate skilled in this enterprise. During the course of the hearing, the decisionmaker acts only to contain the colloquy within the bounds of the actual dispute. He is a disinterested and impartial arbiter, constrained to reach a judgment based exclusively on facts presented at the hearing, with respect to which there has been opportunity for rebuttal. His decision is a reasoned one that explicitly resolves disagreements concerning facts and relates a determination in the case before him to the governing rule. Subject to the availability of appeal, that decision is dispositive of the matter. These several elements of the ideal due process hearing are intended primarily to assure that factual determinations have been reliably made, and hence to promote the societal interest in just outcomes."); *id*. ("Reliability, valued by society, is not the only end held to be promoted by due process. The participants to the dispute are themselves seen as better off. . . . Participation also assures that the individual is not being treated as a passive creature, but rather as a person whose dignitary rights include an interest in influencing what happens to his life. Personal involvement, it is argued, promotes fairness in individual perception as well as fairness in fact.").

[1376] Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAPMAN L. REV. 57, 76 (1998).

[1377] *Id.* at 87.

[1378] *Id.* at 89 (internal quotation marks and citations omitted).

[1379] Section 106.44(a).

The Department does not dispute that other countries rely on an inquisitorial rather than adversarial model of adjudication, but Title IX is a Federal civil rights statute representing the American value placed on education programs and activities free from sex discrimination, and Title IX must be applied and interpreted in accordance with American law rather than laws and systems that prevail elsewhere.[1380] While commenters cited research studies calling into doubt the truth-seeking effectiveness of the adversarial process and calling for reforms including moving toward inquisitorial models, the adversarial system remains deeply embedded in the U.S. Constitution and in American legal systems and civic values, and "the research that has been done provides no justification for preferring the inquisitorial search for truth or for undertaking radical changes in our adversary system."[1381]

The Department appreciates commenters' concerns that based on experience holding hearings, a hearing model was abandoned by particular recipients in favor of an investigatory model, but the Department disagrees that properly conducted hearings will become a springboard to introduce new evidence, derail hearings by embarrassing the parties, or require hearing panels to seek out extensive legal advice. The Department reiterates that recipients may adopt rules to govern a Title IX grievance process in addition to those required under § 106.45, so long as such

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[1380] Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAPMAN L. REV. 57, 74 (1998) (observing that sophisticated critics of the adversarial system of criminal and civil litigation "have turned to the inquisitorial systems of continental European democracies for an alternative to the adversary system. The central characteristic of the inquisitorial model is the active role of the judge, who is given the principal responsibility for searching out the relevant facts. In an adversary system the evidence is presented in dialectical form by opposing lawyers; in an inquisitorial system the evidence is developed in a predominantly unilateral fashion by the judge, and the lawyers' role is minimal.") (internal citation omitted).

[1381] *Id.* at 80; *Crawford v. Washington*, 541 U.S. 36, 43-44 (2004). Although decided under the Sixth Amendment's Confrontation Clause which only applies to criminal trials, the Supreme Court analyzed the history of American legal systems' insistence that adversarial procedures rooted in English common law (as opposed to inquisitorial procedures utilized by civil law countries in Europe) represented fundamental notions of due process of law, and American founders deliberately rejected devices that English common law borrowed from civil law.

rules apply equally to both parties.[1382] Thus, recipients may decide whether or how to place limits on evidence introduced at a hearing that was not gathered and presented prior to the hearing, and rules controlling the conduct of participants to ensure that questioning is done in a respectful manner. The Department reiterates that the procedures in § 106.45 have been selected with awareness that decision-makers in Title IX grievance processes need not be judges or lawyers, and the Department believes that each provision of these final regulations may be complied with and applied by layperson recipient officials.

The Department does not dispute that decision-makers are capable of being impartial and unbiased without the parties appearing at a live hearing, and the final regulations expect that decision-makers will serve impartially without bias. However, adversarial procedures make it even less likely that any bias held by a decision-maker will prevail because the parties' own views about the evidence are presented to the decision-maker, and the decision-maker observes the parties as individuals which makes it more difficult to apply even unconsciously-held stereotypes or generalizations about groups of people.

The Department agrees that a variety of administrative agency proceedings have been declared by courts to comport with constitutional due process utilizing procedures less formal than those that apply in criminal or even civil courts. The Department believes that the procedures embodied in the § 106.45 grievance process meet or exceed constitutional due

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[1382] The introductory sentence of revised § 106.45(b) provides: "For the purpose of addressing formal complaints of sexual harassment, a recipient's grievance process must comply with the requirements of this section. Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties."

process of law, while being adapted for application with respect to an education program or activity, and do not mirror civil or criminal trials.

The Department realizes that witnesses with information relevant to sexual harassment allegations that involve the witness's friends or co-students may feel disinclined to provide information during an investigation, and perhaps more so at a live hearing. However, the importance of both parties' opportunity to present and challenge evidence – particularly witness statements – requires that a witness make statements in front of the decision-maker, with both parties' advisors able to cross-examine. This does not permit parties to coerce witnesses into appearing at a hearing. No person should coerce or intimidate any witness into participating in a Title IX proceeding, and § 106.71(a) protects every individual's right not to participate free from retaliation.

The final regulations, and the live hearing requirement in particular, benefit complainants and respondents equally by granting both parties the same rights and specifying the same consequences for lack of participation. The safety of complainants can be addressed in numerous ways consistent with these final regulations, including holding the hearing virtually, having the parties in separate rooms, imposing no-contact orders on the parties, and allowing advisors of choice to accompany parties to the hearing. For the reasons described above, the Department believes that the final regulations balance the pendulum rather than swing the pendulum too far, in terms of balancing the rights of both parties in a contested sexual harassment situation to pursue their respective desires regarding the case outcome.

The Department believes that the time and resources recipients have spent over the past several years developing non-hearing adjudication models can largely be applied to a recipient's obligations under these final regulations. For example, recipients who have developed thorough

and fair investigative processes may continue to conduct such investigations. The benefits of a full, fair investigation will continue to be an important part of the § 106.45 grievance process. Even though postsecondary institutions will reach actual determinations regarding responsibility after holding a live hearing, the time and resources dedicated to developing recipients' current systems will largely carry over into compliance with the final regulations.

Where the facts alleged in a formal complaint are not contested, or where the respondent has admitted, or wishes to admit responsibility, or where both parties want to resolve the case without a completed investigation or adjudication, § 106.45(b)(9) allows a recipient to facilitate an informal resolution of the formal complaint that does not necessitate a full investigation or adjudication.[1383] As noted above, even if no party appears for the live hearing such that no party's statements can be relied on by the decision-maker, it is still possible to reach a determination regarding responsibility where non-statement evidence has been gathered and presented to the decision-maker. Commenters' descriptions of an administrative disposition model, or a proposed voluntary resolution agreement, are permissible under the final regulations if applied as part of an informal resolution process in conformity with § 106.45(b)(9), which requires both parties' written, voluntary consent to the informal process. The Department declines to authorize one or both parties, or the recipient, simply to "waive" a live hearing, and § 106.45(b)(9) in the final regulations impresses upon recipients that a recipient cannot condition enrollment, employment, or any other right on the waiver of rights under § 106.45, nor may a recipient ever require parties to participate in an informal resolution process. Participating in

[1383] Section 106.45(b)(9) does not permit recipients to offer or facilitate informal resolution of allegations that an employee sexually harassed a student.

mediation, which is a form of informal resolution, should remain a decision for each party, individually, to make in a particular case, and the Department will not require the parties to attempt mediation.

The Department appreciates commenters' concerns that State APAs may prescribe grievance procedures that differ from those in a § 106.45 grievance process. To the extent that a recipient is able to comply with both, it must do so, and if compliance with both is not possible these final regulations, which constitute Federal law, preempt conflicting State law.[1384] The Department cautions, however, that preemption may not be necessary where, for example, a State law requires fewer procedures than do these final regulations, such that a recipient complying with § 106.45 is not violating State law but rather providing more or greater procedures than State law requires. To the extent that recipients find hearings under State APAs to be burdensome, the Department contends that the value of hearings outweighs such burdens, a policy judgment ostensibly shared by State legislatures that already require recipients to hold hearings.

The Department generally does not disagree with the general propositions set forth in the Federal district court memorandum cited by commenters to explain that college discipline differs from Federal criminal processes.[1385] The Department observes that the memorandum notes that "Only where erroneous and unwise actions in the field of education deprive students of federally protected rights or privileges does a federal court have power to intervene in the educational

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[1384] For further discussion see the "Section 106.6(h) Preemptive Effect" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

[1385] *General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education*, ED025805 (1968).

process."[1386] These final regulations precisely protect the rights and privileges owed to every person participating in an education program or activity under Title IX, a Federal civil rights law. In so doing, these final regulations reflect that a Title IX grievance process is not a criminal proceeding and defer to all recipients (public and private institutions) to make their own decisions within a consistent, predictable framework.

In response to commenters' concerns that the NPRM was unclear about the extent of recipients' discretion to adopt rules and practices to govern the conduct of hearings (and other aspects of a grievance process) the Department has added to the introductory sentence of § 106.45(b): "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." Under this provision a recipient may, for instance, adopt rules that instruct party advisors to conduct questioning in a respectful, non-abusive manner, decide whether the parties may offer opening or closing statements, specify a process for making objections to the relevance of questions and evidence, place reasonable time limitations on a hearing, and so forth. The Department declines to require recipients to offer "mitigating measures" during hearings in addition to the shielding provision in § 106.45(b)(6)(i) that requires a recipient to allow parties to participate in the live hearing in separate rooms upon any party's request. Similarly, recipients may adopt evidentiary rules (that also must apply equally to both parties), but any such rules must comport with all provisions in § 106.45, such as the obligation to summarize all relevant evidence in an investigative report, the obligation to evaluate all relevant evidence both inculpatory and exculpatory, the right of parties

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[1386] *Id.*

to gather and present evidence including fact and expert witnesses, the right to pose relevant cross-examination questions, and the rape shield provisions that deem sexual behavior evidence irrelevant subject to two exceptions. Thus, a recipient's additional evidentiary rules may not, for example, exclude *relevant* cross-examination questions even if the recipient believes the questions assume facts not in evidence or are misleading. In response to commenters' concerns that relevant questions might implicate information protected by attorney-client privilege, the final regulations add § 106.45(b)(1)(x) to bar the grievance process from requiring, allowing, relying on, or otherwise using questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege. This bar on information protected under a legally recognized privilege applies at all stages of the § 106.45 grievance process, including but not limited to the investigator's gathering of evidence, inspection and review of evidence, investigative report, and the hearing. This protection of privileged information also applies to a privilege held by a recipient. Additionally, questions that are duplicative or repetitive may fairly be deemed not relevant and thus excluded.

In response to commenters' concerns that holding live hearings is administratively time-consuming and presents challenges coordinating the schedules of all participants, the Department has revised this provision to allow a recipient discretion to conduct hearings virtually, facilitated by technology so participants simultaneously see and hear each other. The Department appreciates the concerns of commenters that some recipients operate programs or activities that are difficult to access via road systems and are in remote locations where technology is not accessible or reliable. The final regulations permit a recipient to apply temporary delays or limited extensions of time frames to all phases of a grievance process where good cause exists. For example, the need for parties, witnesses, and other hearing participants to secure

transportation, or for the recipient to troubleshoot technology to facilitate a virtual hearing, may constitute good cause to postpone a hearing.

The Department is persuaded by commenters' suggestions that all hearings should be recorded or transcribed, and has revised § 106.45(b)(6)(i) to require recipients to create an audio or audiovisual recording, or transcript, of any live hearing and make that recording or transcript available to the parties for inspection and review. As the commenters asserted, such a recording or transcript will help any party who wishes to file an appeal pursuant to § 106.45(b)(8) and also will reinforce the requirement that a decision-maker not have a bias for or against complainants or respondents generally or an individual complainant or respondent as set forth in § 106.45(b)(1)(iii).

The Department appreciates the opportunity to clarify here that hearings under § 106.45(b)(6) are not "public" hearings, and § 106.71(a) states that recipients 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 permitted by the FERPA statute or regulations, 20 U.S.C. 1232g and 34 CFR part 99, or as required by law, or as necessary to conduct the hearing.

Changes: The Department has revised § 106.45(b)(6)(i) to add language authorizing recipients to conduct live hearings virtually, specifically providing that live hearings pursuant to this subsection may be conducted with all parties physically present in the same geographic location, or at the recipient's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear

each other. We have also revised this provision so that upon a party's request the parties must be in separate rooms for the live hearing, and not only for cross-examination. We have also revised § 106.45(b)(6)(i) to add a requirement that recipients create an audio or audiovisual recording, or transcript, of any live hearing held and make the recording or transcript available to the parties for inspection and review.

Additionally, we have revised the introductory sentence of § 106.45(b) to provide 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.

We have revised § 106.45(b)(9) to provide that a recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with § 106.45. We have also added § 106.71 prohibiting retaliation and stating that recipients 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 as required by law, or to carry out the purposes of 34 CFR part 106, including these final regulations.

Finally, we have added § 106.45(b)(1)(x) to bar the grievance process from requiring, allowing, relying on, or otherwise using questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege.

Section 106.45(b)(6)(ii) Elementary and Secondary School Recipients May Require Hearing and Must Have Opportunity to Submit Written Questions

Comments: Many commenters supported § 106.45(b)(6)(ii), making hearings optional for elementary and secondary schools and prescribing a right for parties to submit written questions to other parties and witnesses prior to a determination regarding responsibility whether a hearing is held or not. Commenters asserted that high school students deserve due process protections as much as college students, and believed that this provision provides adequate due process in elementary and secondary schools while taking into account that students in elementary and secondary schools are usually under the age of majority.

Other commenters recounted personal experiences with family members being accused of sexual misconduct as high school students and argued that the required live hearings with cross-examination in § 106.45(b)(6)(ii) should also apply in high schools.

Some commenters asserted that this provision should be modified to require live hearings and cross-examination in elementary and secondary schools, but only for peer-on-peer sexual harassment allegations; commenters argued that this level of due process was more consistent with *Goss* and *Mathews*[1387] and where the allegations involve peers, the parties are on equal footing such that a hearing will effectively reduce risk of erroneous outcomes.

Commenters requested that this provision be modified to expressly state that live hearings are *not* required in elementary and secondary schools, instead of the phrasing that the grievance process "may require a live hearing."

[1387] Commenters cited: *Goss v. Lopez*, 419 U.S. 565 (1975); *Mathews v Eldridge*, 419 U.S. 565 (1975).

Commenters called the written question process in this provision appropriately fair, flexible, and trauma-informed, and consistent with recommendations in the withdrawn 2011 Dear Colleague Letter. Commenters asserted that this provision, more so than § 106.45(b)(6)(i), balances the potential benefits of cross-examination with the drawbacks of a live hearing, including the chilling effect on complainants, the significant cost to recipients, and the potential for errors and poor spur-of-the-moment judgment calls in a setting with critically high stakes. Many commenters approved of this provision and urged the Department to make it apply also to postsecondary institutions in replacement of § 106.45(b)(6)(i) under which live hearings and cross-examination are required.

Some commenters opposed this provision, asserting that even a written form of cross-examination exposes elementary and secondary school students to unnecessarily hostile proceedings and limits the discretion of local educators who are more knowledgeable about their students and school communities, obligating schools to expend valuable resources in an unwarranted manner. Commenters argued that this provision would allow five year old students (or their parents or advisors) to face off against other five year old students about the veracity of allegations with written questions and responses being exchanged. Commenters argued this is inappropriate because it does not take into account how to obtain information from young children or students with disabilities, creates an air of intimidation and potential revictimization, allows confidential information to be shared with "countless individuals" whereas an appeal could address concerns about the investigation without sharing FERPA-protected information, and formal discipline proceedings involving potential exclusion of a public school student are already subject to State laws giving sufficient due process protections to an accused student.

Commenters argued that in elementary and secondary schools, a formal investigation process is not always needed or advisable because often State law may require school interventions prior to when exclusionary discipline is considered. Commenters argued that this provision perpetuates America's patriarchal culture that already does not believe survivors, because this provision allows survivors to be questioned when we do not question someone who goes to the police and says they were robbed or someone who reports being hit by a car, so questioning sexual assault victims just gives perpetrators a chance to terrorize the victim again and fails to convey to the victim respect, belief, or justice.

Commenters asserted that this provision essentially provides the non-hearing equivalent of cross-examination via the written submission of questions, but argued this will be difficult for elementary and secondary school officials to implement without significant legal guidance because the purpose of cross-examination is to judge credibility and officials will not know how to accomplish that purpose. Commenters argued it is unclear how many back-and-forth follow-up questions need to be allowed in this "quasi-cross examination process" and asserted that this process will result in even greater hesitation among classmates to offer information about the parties involved, because peer pressure looks different among susceptible children and adolescents than with college-age students and already works against "tattling" or "ratting" on fellow students. Commenters expressed concern that the written "cross-examination" procedure will delay the ability of schools to timely respond to sexual harassment complaints, that this procedure is not already in use by schools, and that a cycle of written questions at the end of already overly formal, prescribed procedures will only serve to extend the time frame for completing investigations impairing an elementary and secondary school recipient's ability to effectuate meaningful change to student behavior if the behavior is found to be misconduct.

Commenters opposed this provision and urged the Department to remove the option for live hearings, because even permitting elementary and secondary schools the discretion to hold live hearings adds the possibility of a new layer to the investigative process that could subject a young student to cross-examination, which would intimidate and retraumatize victims.[1388] Commenters argued that research has consistently shown the extreme importance of handling investigations and interviews properly when dealing with childhood sexual abuse situations, that subjecting child victims of sexual abuse to multiple interviews is re-traumatizing and that the interview process should be conducted with an interdisciplinary team and trained mental health professionals utilizing trauma-informed practices, yet § 106.45(b)(6)(ii) would allow school administrators to ignore all of these best practices that are in the interest of protecting young victims,[1389] subjecting abused children to secondary victimization.[1390]

Commenters argued that the Supreme Court has held, even in the criminal law context, that a State's interest in protecting child abuse victims outweighs an accused's constitutional right to face-to-face confrontation of witnesses.[1391] Commenters argued that child sexual abuse is far too common an experience among America's schoolchildren, and teachers, counselors, and

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[1388] Commenters cited the Zydervelt 2016 study discussed in the "Section 106.45(b)(6)(i) Postsecondary Institution Recipients Must Provide Live Hearings with Cross-Examination" subsection of the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, for the proposition that cross-examination often relies on victim-blaming attitudes, sex stereotypes, and rape myths.

[1389] Commenters cited: Monit Cheung & Needha McNeil Boutté-Queen, *Assessing the Relative Importance of the Child Sexual Abuse Interview Protocol Items to Assist Child Victims in Abuse Disclosure*, 25 JOURNAL OF FAMILY VIOLENCE 11 (2010); John F. Tedesco & Steven V. Schnell, *Children's Reactions to Sex Abuse Investigation and Litigation*, 11 CHILD ABUSE & NEGLECT 2 (1987); Joseph H. Beitchman *et al.*, *A Review of the Long-term Effects of Child Sexual Abuse*, 16 CHILD ABUSE & NEGLECT 1 (1992).

[1390] Commenters cited: Janet Leach Richards, *Protecting Child Witnesses in Abuse Cases*, 34 FAMILY L. QUARTERLY 393 (2000).

[1391] Commenters cited: *Maryland v. Craig*, 497 U.S. 836 (1990).

principals have no training in, and are not, forensic interviewers, criminal investigators, judges, or evidence technicians, and thus no school district should even be allowed to choose a live hearing model for sexual misconduct allegations. Commenters stated that live hearings place a sharp spotlight on both parties, and students in elementary and secondary schools typically lack the maturity necessary to participate. Commenters argued that live hearings should not even be optional in elementary and secondary schools because it is difficult to imagine any positive effects of a respondent's attorney cross-examining a sixth grader alleging sexual harassment at school or a complainant's attorney cross-examining the alleged perpetrator. Commenters argued that live hearings should only be allowed for elementary and secondary schools if otherwise required under State law. Commenters stated that if live hearings are even an option, school districts will be inundated with requests to hold adversarial live hearings.

Commenters asked for clarity as to which circumstances require an elementary and secondary school recipient to hold a live hearing, who would preside over a hearing, whether the hearing would need to be held on school grounds, and what responsibility the school district would have to mitigate re-traumatization, or whether if a school district opts to hold live hearings all the provisions in § 106.45(b)(6)(i) would then apply.

Commenters inquired whether a vocational school that is neither an elementary or secondary school, nor an institution of higher education, would have to follow § 106.45(b)(6)(i), § 106.45(b)(6)(ii), or some other process for Title IX adjudications.

Commenters suggested that this provision be modified to state that a minor has the right for a parent to help the minor student pose questions and answer questions but that the parent (or advisor) is not allowed to write the questions or answers without input from the minor student; commenters reasoned that it would be unfair if a respondent was an adult capable of strategically

posing questions while a minor complainant lacked the developmental ability to do the same. Other commenters argued that written submission of questions by the parties should never be allowed in the elementary and secondary school context because the procedure is likely to devolve into a fight between the parents of the complainant and parents of the respondent, further traumatizing both children involved.

Discussion: The Department appreciates commenters' support for § 106.45(b)(6)(ii) making hearings optional for elementary and secondary schools while providing opportunity for the parties to submit written questions and follow-up questions to other parties and witnesses with or without a hearing. The Department agrees that this provision ensures due process protections and fairness while taking into account that students in elementary and secondary schools are usually under the age of majority. Thus, the Department declines to mandate hearings and cross-examination for elementary and secondary schools, including only as applied to allegations of peer-on-peer harassment, or to high schools. Even where the parties are in a peer age group, parties in elementary and secondary schools generally are not adults with the developmental ability and legal right to pursue their own interests on par with adults. The Department is persuaded by commenters' concerns that the language in this provision should state even more clearly that hearings are optional and not required, and has revised this provision to state that "the recipient's grievance process may, but need not, provide for a hearing." For the reasons explained in the "Section 106.45(b)(6)(i) Postsecondary Institution Recipients Must Provide Live Hearing with Cross-Examination" subsection of the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, the Department declines to make § 106.45(b)(6)(ii) applicable to postsecondary institutions.

The Department disagrees that the written submission of questions procedure in this provision exposes students to hostile proceedings, unnecessarily limits the discretion of local school officials, or obligates school districts to expend resources in an unwarranted manner. While due process of law is a flexible concept, at a minimum it requires notice and a meaningful opportunity to be heard, and the Department has determined that with respect to sexual harassment allegations under Title IX, both parties deserve procedural protections that translate those due process principles into meaningful rights for parties and increase the likelihood of reliable outcomes. This provision prescribes written submission of questions prior to adjudication, a procedure that benefits the truth-seeking purpose of the process even when the rights of a young student are exercised by a parent or legal guardian.

The final regulations do not preclude a recipient from providing training to an investigator concerning effective interview techniques applicable to children or to individuals with disabilities. Even when a party's rights are being exercised by a parent, each party's interest in the case is best advanced when the parties have the right to review and present evidence; the Department disagrees that the § 106.45 grievance process results in confidential information being shared with "countless individuals" or in violation of FERPA.[1392] Section 106.71 directs recipients to keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted

[1392] For further discussion see the "Section 106.6(e) FERPA" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

by the FERPA statute or regulations, 20 U.S.C. 1232g and 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including these final regulations.

The Department appreciates commenters' concerns that State laws already govern disciplinary proceedings, especially with respect to exclusionary discipline. The Department has determined that the procedural protections in § 106.45 best serve the interests implicated in resolution of allegations of sexual harassment under Title IX, a Federal civil rights law, and discipline for non-Title IX matters does not fall under the purview of these final regulations. To the extent that these final regulations provide the same protections as State laws governing student discipline already provide, these final regulations pose no challenge for recipients; to the extent that a recipient cannot comply with both State law and these final regulations, these final regulations, as Federal law, would control.[1393]

The Department disputes a commenter's contention that only sexual assault survivors are "questioned" when they report being assaulted; contrary to the commenter's assertion, robbery victims and hit-and-run victims are also "questioned" during criminal or civil proceedings. Similarly, students accused of cheating also are often questioned. Whether or not commenters accurately describe American culture as "patriarchal," the Department believes that these final regulations further the sex-equality mandate of Title IX by ensuring fair, accurate determinations regarding responsibility where sexual harassment is alleged under Title IX, so that sexual harassment victims receive remedies from recipients to promote equal educational access.

[1393] For further discussion see the "Section 106.6(h) Preemptive Effect" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

The Department disagrees that this provision will require significant legal guidance for school officials to comply. The provision gives each party the opportunity to submit written questions to be asked of other parties and witnesses, including limited follow-up questions. The decision-maker then objectively evaluates the answers to such questions, and any other relevant evidence gathered and presented during the investigation and reaches a determination regarding responsibility. Although observing demeanor is not possible without live cross-examination, a decision-maker may still judge credibility based on, for example, factors of plausibility and consistency in party and witness statements. Specialized legal training is not a prerequisite for evaluating credibility, as evidenced by the fact that many criminal and civil court trials rely on jurors (for whom no legal training is required) to determine the facts of the case including the credibility of witnesses.

This provision requires "limited follow-up questions" and leaves recipients discretion to set reasonable limits in that regard. The Department understands commenters' concerns that witnesses face peer pressure in many sexual harassment situations, and that stating factual information may be viewed as "tattling" or "ratting out" friends or fellow students which may be very uncomfortable for witnesses. Nothing in these final regulations purports to authorize recipients to compel witness participation in a grievance process, and § 106.71(a) protects every individual from retaliation for participating or refusing to participate in a Title IX proceeding.

The Department understands commenters' concerns that the written submission of questions procedure in § 106.45(b)(6)(ii) may be a new procedure in elementary and secondary schools, and the concern that such a procedure may create a "cycle" that extends the time frame for concluding a grievance process. To clarify that the written submission of questions procedure need not delay conclusion of the grievance process, we have revised § 106.45(b)(6)(ii) to state

that the opportunity for each party to submit written questions to other parties and witnesses must take place after the parties are sent the investigative report, and before the determination regarding responsibility is reached. Because § 106.45(b)(5)(vii) gives the parties ten days[1394] to submit a response to the investigative report, this revision to § 106.45(b)(6)(ii) makes it clear that the written submission of questions procedure may overlap with that ten-day period, so that the written questions procedure need not extend the time frame of the grievance process.

In order to leave school districts as much flexibility as possible while creating a consistent, predictable grievance process framework, the Department declines to foreclose the option of holding hearings (whether "live" or otherwise) in elementary and secondary schools. Local school officials, for example, could determine that their educational community is best served by holding live hearings for high school students, for students above a certain age, or not at all.[1395] State law may prescribe hearings for school discipline matters, in which case by leaving hearings optional these final regulations makes a conflict with State laws less likely. Further, the final regulations clarify that this provision applies not only to elementary and secondary schools but also to any other recipient that is not a postsecondary institution, and the nature of such a recipient's operations may lead such a recipient to desire a hearing model for

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[1394] As noted in the "Other Language/Terminology Comments" subsection of the "Section 106.30 Definitions" section of this preamble, the final regulations allow recipients to choose how to calculate "days" as used in these final regulations; a recipient may, for instance, calculate a ten-day period by calendar days, school days, business days, or other method.

[1395] The Department notes that this provision states that non-postsecondary institution recipients' grievance processes may, but need not, provide for a hearing. Therefore, the recipient has flexibility to make a hearing available on a case by case basis, for example where the Title IX Coordinator determines a hearing is needed, so long as the grievance process (of which the recipient's students and employees receive notice, pursuant to § 106.8) clearly identifies the circumstances under which a hearing may, or may not, be held. A recipient's discretion in this regard is limited by the introductory sentence in § 106.45(b) that any rules adopted by a recipient must apply equally to both parties. Thus, a recipient's grievance process could not, for example, state that a hearing will be held only if a respondent requests it, or only if a complainant agrees to it, but could state that a hearing will be held only if *both parties* request it or consent to it.

adjudications. For these reasons the final regulations leave hearings optional regardless of whether State law requires hearings. The Department understands commenters' concerns that if hearings are an option, school districts may become "inundated" with requests to hold hearings. The Department reiterates that this provision does not require elementary or secondary schools to use hearings (live or otherwise) to adjudicate formal complaints under Title IX, and any choice to do so remains within a recipient's discretion.

As noted above, nothing in the final regulations precludes a recipient from training investigators in best practices for interviewing children, and the final regulations minimize the number of times a young victim might have to be interviewed, by not requiring appearances at live hearings. The Department understands that school officials are not forensic or criminal investigation experts, and recognizes that in many situations, conduct that constitutes sexual harassment as defined in § 106.30 will also constitute sexual abuse resulting in law enforcement investigations. These final regulations contemplate the intersection of a recipient's investigation under Title IX with concurrent law enforcement activity, expressly stating that good cause may exist to temporarily delay the Title IX grievance process to coordinate or cooperate with a concurrent law enforcement investigation. The Department disagrees that these final regulations require schools to disregard best practices with respect to interviewing child sex abuse victims and reiterate that the final regulations do not preclude a recipient from training Title IX personnel in interview techniques sensitive to the unique needs of traumatized children.

If an elementary and secondary school recipient chooses to hold a hearing (live or otherwise), this provision leaves the recipient significant discretion as to how to conduct such a hearing, because § 106.45(b)(6)(i) applies only to postsecondary institutions. The Department desires to leave elementary and secondary schools as much flexibility as possible to apply

procedures that fit the needs of the recipient's educational environment. The Department notes that § 106.45(b) requires any rules adopted by a recipient for use in a Title IX grievance process, other than those required under § 106.45, must apply equally to both parties. Within that restriction, elementary and secondary school recipients retain discretion to decide how to conduct hearings if a recipient selects that option.

In response to commenters wondering whether hearings are optional or required for a recipient that is neither a postsecondary institution nor an elementary and secondary school, the Department has revised § 106.30 to define "postsecondary institution" and "elementary and secondary school" and clarify that § 106.45(b)(6)(ii) applies to elementary and secondary schools and any "other recipient that is not a postsecondary institution."

In response to commenters concerned about whether a minor party has the right to have a parent help pose questions and answers under this provision, we have added § 106.6(g) to clarify that nothing in these regulations changes or limits the legal rights of parents or guardians to act on behalf of a party. The Department declines to specify whether a parent writing out questions or answers on behalf of the student-party must consult their child; this matter is addressed by other laws concerning the scope of a parent's legal right to act on behalf of their child. The Department understands commenters' concerns that the written submission of questions procedure may "devolve into a fight" between parents of minor parties, but reiterates that recipients retain discretion to adopt rules of decorum that, for example, require questions to be posed in a respectful manner (e.g., without using profanity or irrelevant *ad hominem* attacks). Further, the decision-maker has the obligation to permit only relevant questions to be asked and must explain to the party posing the question any decision to exclude a question as not relevant.

Changes: The Department has revised § 106.45(b)(6)(ii) to clarify that it applies to elementary and secondary schools and to "other recipients that are not postsecondary institutions," and to clarify that "the recipient's grievance process may, but need not, provide for, a hearing." We have further revised § 106.45(b)(6)(ii) to provide that, with or without a hearing, after the recipient has sent the investigative report to the parties pursuant to § 106.45(b)(5)(vii) and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

We have added definitions of "elementary and secondary schools" and "postsecondary institutions" in § 106.30. We have also added § 106.6(g) acknowledging that nothing in these final regulations abrogates the legal rights of parents or guardians to act on behalf of party. We have added § 106.71 directing recipients to keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute or regulations, 20 U.S.C. 1232g and 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including these final regulations.

Comments: Some commenters supported or opposed the rape shield protections in § 106.45(b)(6)(ii) for the same reasons stated in support of or opposition to the same language in § 106.45(b)(6)(ii); see discussion under the "Section 106.45(b)(6)(i) Postsecondary Institution Recipients Must Provide Live Hearings with Cross-Examination" subsection of the "Hearings"

subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

Some commenters argued that the two exceptions should be eliminated with respect to minors because the sexual behavior of children should never be relevant or asked about or because minors cannot legally consent and thus an exception where "offered to prove consent" serves no purpose with respect to minors.

Discussion: The Department's incorporates here its response to commenters' support and opposition for the rape shield language stated in the "Section 106.45(b)(6)(i) Postsecondary Institution Recipients Must Provide Live Hearings with Cross-Examination" subsection of the "Hearings" subsection of "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

The Department disagrees that the two exceptions (or even the exception that refers to "consent") should be eliminated in this provision because minors cannot legally consent to sexual activity. While this fact may make the issue of "consent" irrelevant in certain sexual harassment cases, consent may be relevant in other formal complaints investigated and adjudicated by elementary and secondary school recipients; for example, where the parties are over the age of consent in the relevant jurisdiction, or the age difference between the two minor parties is such that State law decriminalizes consensual sexual activity between the two individuals.[1396] The Department will defer to State law regarding the age when a person has the

[1396] The age of consent to sexual activity varies across States, from age 16 to age 18, and many States have a "close in age exemption" to decriminalize consensual sex between two individuals who are both under the age of consent. Age of Consent net, *United States Age of Consent Map*, "What is the legal Age of Consent in the United States?," https://www.ageofconsent net/states.

ability to consent. Further, we have revised this provision in the final regulations to clarify that it applies not only to elementary and secondary schools but also to other recipients that are not postsecondary institutions, and parties associated with such "other recipients" may be adults rather than children. The Department thus retains the rape shield language in this provision, including the two exceptions, mirroring the rape shield language used in § 106.45(b)(6)(i).

Changes: For the same reasons as discussed under § 106.45(b)(6)(i), the Department has revised the rape shield language in § 106.45(b)(6)(ii) by clarifying that questions and evidence about the complainant's prior sexual behavior or predisposition are not relevant unless such questions or evidence are offered for one of the two exceptions (offered to prove someone other than the respondent committed the alleged conduct, or offered to prove consent).

Comments: Some commenters supported or opposed the requirement in § 106.45(b)(6)(ii) that decision-makers explain the reason for excluding any question proposed by a party as not relevant, for the same reasons stated in support or opposition for similar language in § 106.45(b)(6)(i); see discussion under the "Section 106.45(b)(6)(i) Postsecondary Institution Recipients Must Provide Live Hearings with Cross-Examination" subsection of the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

Some commenters opposed this requirement because it would essentially force an elementary and secondary school administrator to make evidentiary determinations that can be difficult even for lawyers and judges. Commenters opposed this requirement based on personal experience handling questions from minor parties and their parents in Title IX proceedings and observing that many questions posed by parents are irrelevant, so having to explain the relevance of each excluded question would draw out the length of proceedings unnecessarily.

Discussion: The Department incorporates here its response to commenters' support of and opposition to the similar provision in § 106.45(b)(6)(i) under which the decision-maker must explain any decision to exclude questions as not relevant; see the "Section 106.45(b)(6)(i) Postsecondary Institution Recipients Must Provide Live Hearings with Cross-Examination" subsection of the "Hearings" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

The Department appreciates commenters' concerns that based on experience with parents exercising rights on behalf of students during Title IX proceedings, parents tend to pose a lot of irrelevant questions. The Department believes the burden of this requirement is outweighed by the right of parties (including when a party's rights are exercised by parents) to meaningfully participate in the grievance process through posing questions to the other party and witnesses, and understanding why a question has been deemed irrelevant is important to ensure that the parties feel confident that their perspectives about the facts and evidence are appropriately taken into account prior to the determination regarding responsibility being reached.

Changes: None.

*Determinations Regarding Responsibility*

Section 106.45(b)(7)(i) Single Investigator Model Prohibited

*Benefits of Ending the Single Investigator Model*

Comments: Many commenters supported the NPRM's prohibition on the single investigator model because it would reduce the risk of bias and unfairness. Commenters argued that ending the single investigator model would decentralize power from one individual, allow for checks and balances, reduce the risk of confirmation bias, and increase the overall fairness and reliability of Title IX proceedings. Commenters stated that a strict separation of investigative and

decision-making functions is essential because it is unrealistic to expect a person to fairly review their own investigative work. One commenter argued that procedural protections are necessary but not sufficient to render fair outcomes; the commenter stated it is also necessary to prohibit, detect, and eliminate bias. The commenter argued that unbiased adjudicators are a bedrock principle of any disciplinary proceeding, and this principle has been well understood since the founding of this country and development of the common law.[1397] Several commenters asserted that schools are currently facing significant pressure from the media and general public to achieve "social justice" and find respondents guilty. Commenters argued that blending the investigative and adjudicative functions increases the risk of false positives (i.e., inaccurate findings of responsibility).

Several commenters submitted personal stories where investigators under the single investigator model acted improperly, for instance by meeting with complainants but not respondents, failing to promptly notify the respondent of charges, withholding evidence, ignoring exculpatory evidence, ignoring inconsistencies in complainant's testimony, framing language in an inflammatory way against the respondent, relying on triple hearsay favoring the complainant, and entering a suspected personal relationship with the complainant. Commenters stated that improper or biased actions by an investigator might at least be recognized and corrected where the decision-maker is a different person. A few commenters asserted that ending the single investigator model would reinforce a genuine live hearing process with cross-examination. One

[1397] Commenters cited: The Federalist No. 10 (J. Madison) ("No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."). At least one commenter cited: *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 867, 877 (2009) (common law recognized the need for unbiased adjudicators, and the U.S. Constitution incorporated and expanded upon the protections at common law against biased adjudicators).

commenter suggested that the single investigator model precludes effective confrontation of witnesses because even where there is a live hearing the investigator's finding is a "heavy thumb on the scale." Commenters noted that under the single investigator model often there is no live hearing at all where parties can probe each other's credibility, and no opportunity for parties to know what evidence the investigator is considering before rendering an ultimate decision.

Discussion: The Department appreciates the support from commenters for § 106.45(b)(7)(i) of the final regulations which, among other things, would require the decision-maker to be different from any person who served as the Title IX Coordinator or investigator, thus foreclosing recipients from utilizing a "single investigator" or "investigator-only" model for Title IX grievance processes. The Department believes that fundamental fairness to both parties requires that the intake of a report and formal complaint, the investigation (including party and witness interviews and collection of documentary and other evidence), drafting of an investigative report, and ultimate decision about responsibility should not be left in the hands of a single person (or team of persons each of whom performed all those roles). Rather, after the recipient has conducted its impartial investigation, a separate decision-maker must reach the determination regarding responsibility; that determination can be made by one or more decision-makers (such as a panel), but no decision-maker can be the same person who served as the Title IX Coordinator or investigator.

Commenters correctly noted that separating the investigative and decision-making functions will not only increase the overall fairness of the grievance process but also will increase the reliability of fact-finding and the accuracy of outcomes, as well as improve party and public confidence in outcomes. Combining the investigative and adjudicative functions in a single individual may decrease the accuracy of the determination regarding responsibility,

because individuals who perform both roles may have confirmation bias and other prejudices that taint the proceedings, whereas separating those functions helps prevent bias and prejudice from impacting the outcome.

Changes: None.

*Consistency with Case Law*

Comments: Several commenters contended that ending the single investigator model would be consistent with case law. Commenters cited cases where courts overturned recipient findings against respondents, raised concerns regarding preconceptions and biases that may arise where a single person has the power to investigate, prosecute, and convict, and asserted that a single investigator model can impede effective cross-examination and credibility determinations.[1398] On the other hand, some commenters cited case law to suggest the single investigator model can be fair and appropriate.[1399]

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[1398] Commenters cited: *Doe v. Claremont McKenna Coll.*, 25 Cal. App. 5th 1055, 1072-73 (Cal. App. 2018) (all decision makers "must make credibility determinations, and not simply approve the credibility determinations of the one Committee member who was also the investigator."); *Doe v. Miami Univ.*, 882 F.3d 579, 601, 605 (6th Cir. 2018) (court found "legitimate concerns" raised by the investigator's "alleged dominance on the three-person [decision making] panel," because "she was the only one of the three with conflicting roles."); *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 573 (D. Mass. 2016) (referring to the "obvious" "dangers of combining in a single individual the power to investigate, prosecute, and convict, with little effective power of review"); *Doe v. Allee*, 30 Cal. App. 5th 1036, 1068 (Cal. App. 2019) ("As we have explained, in USC's system, no in-person hearing is ever held, nor is one required. Instead, the Title IX investigator interviews witnesses, gathers other evidence, and prepares a written report in which the investigator acts as prosecutor and tribunal, making factual findings, deciding credibility, and imposing discipline. The notion that a single individual, acting in these overlapping and conflicting capacities, is capable of effectively implementing an accused student's right of cross-examination by posing prepared questions to witnesses in the course of the investigation ignores the fundamental nature of cross-examination: adversarial questioning at an in-person hearing at which a neutral fact finder can observe and assess the witness' credibility.").

[1399] Commenters cited: *Withrow v. Larkin*, 421 U.S. 35, 49 (1975) (rejecting the argument that a "combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias"); *Hess v. Bd. of Trustees of So. Ill. Univ.*, 839 F.3d 668 (7th Cir. 2016) (bias of decision-maker would violate due process, but combination of investigative and adjudicative functions into a single person does not, by itself, demonstrate that the decision-maker is actually biased); *Pathak v. Dep't. of Veterans Affairs*, 274 F.3d 28, 33 (1st Cir. 2001); *Doe v. Purdue Univ.*, 281 F. Supp. 3d 754, 779 (N.D. Ind. 2017), *aff'd, Doe v. Purdue Univ.*, 928 F.3d 652 (7th Cir. 2019).

Discussion: The Department appreciates commenters' input on the consistency of the single investigator model with case law. We acknowledge that the Supreme Court has held that a biased decision-maker violates due process but that combining the investigative and adjudicative functions in a *single agency* does not present a constitutional due process problem.[1400] The final regulations comport with that holding, inasmuch as a single recipient is expected to perform the investigative and adjudicative roles in a Title IX grievance process. As noted by commenters, lower courts have reached mixed results as to whether a *single person* performing the investigative and adjudicative functions in a student misconduct process violates due process.[1401]

Notwithstanding whether the single investigator model withstands constitutional scrutiny under due process requirements, the Department believes that combining these functions raises an unnecessary risk of bias that may unjustly impact one or both parties in a given Title IX proceeding.[1402] Particularly because the stakes are so high in these cases, with potentially life-

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[1400] Kenneth Oshita, *Home Court Advantage? The SEC and Administrative Fairness*, 90 S. CAL. L. REV. 879, 902 (2017) (noting that the Supreme Court established that "the combination of investigative and adjudicative functions does not, without more, constitute a due process violation" but continuing, "Interestingly, the *Withrow* Court recognized that a biased adjudicator is 'constitutionally unacceptable' and that 'our system of law has always endeavored to prevent even the probability of unfairness.' Yet, even recognizing the importance of fairness in this constitutional principle, the Court reasoned that the combination of functions within an agency is constitutionally acceptable.") (citing *Withrow v. Larkin*, 421 U.S. 35, 49 (1975)).

[1401] *E.g.*, Richard H. Underwood, *Administrative Adjudication in Kentucky: Ethics and Unauthorized Practice Considerations*, 29 N. KY. L. REV. 359, 361 (2002) ("[T]he case law generally rejects the proposition that a *combination of functions in one agency* necessarily creates an unconstitutional risk of bias, or that such a combination automatically constitutes a denial of due process such as to warrant disqualification of the involved administrative adjudicator. On the other hand, *when functions are combined in a single individual*, the case for disqualification for 'unfairness' or bias is stronger. How can an administrative adjudicator deal fairly with a party or parties if he or she has performed other functions - investigatory or prosecutorial - in the same matter?") (internal quotation marks and citations omitted; emphasis added).

[1402] Michael R. Lanzarone, *Professional Discipline: Unfairness and Inefficiency in the Administrative Process*, 51 FORDHAM L. REV. 818, 827 (1983) (noting that the "commingling of investigatory and adjudicatory functions" is a "daily occurrence in [professional] disciplinary proceedings. The Supreme Court in [*Withrow v. Larkin*, 421 U.S. 35 (1975)], however, concluded that the Constitution tolerates such commingling. *Entirely apart from any specific*

altering consequences that may flow from a decision in favor of either party, the Department believes that separating investigation from decision making is important to promote the overall fairness of the process.

Changes: None.

*Alternative Approaches to Ending Single Investigator Model*

Comments: Some commenters asserted that ending the single investigator model is unnecessary to reduce bias and may in fact increase the risk of unfairness. Commenters argued that Title IX investigators are highly-trained professionals who are often most familiar with the evidence and best-positioned to make credibility determinations and render consistent decisions. These commenters suggested that requiring different decision-makers may increase the risk of overlooked details and incorrect outcomes because other persons may not be as close to the evidence as investigators.

Some commenters argued that hybrid models are adequate and can satisfy due process concerns because, for example, hybrid models in use by some recipients use an investigator (or team of investigators) to gather evidence and write up recommendations about responsibility yet allow both parties to review gathered evidence and pose questions to each other, and hold live hearings for the sanctioning and appeals processes, while parties may resort to civil litigation to challenge the school's proceedings. One commenter acknowledged the possibility of bias within

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*constitutional infirmities, the question remains whether the basic unfairness of the procedure counsels against its use*.") (internal citations omitted); *id.* at fn. 60 ("There are dangers in allowing an individual who has investigated misconduct and determined that there is probable cause to suspend a professional's license to sit as a trier of fact in a later de novo hearing. The state board that is responsible for professional discipline may view its role as more of a prosecutor than as a disinterested finder of fact. A board of education may find it difficult to be unbiased when the chief executive of the school district has already recommended dismissal of a tenured teacher. And the danger of bias undoubtedly increases when an individual actually conducts an investigation (as opposed to passing upon another's work) and then sits as the trier of fact to hear and pass upon the credibility of witnesses.").

the single investigator model and recommended a hybrid system involving investigation by an impartial investigator followed by referral to a student conduct system for live hearing. One commenter proposed that the Department's concern regarding bias with the single investigator model could be addressed through less restrictive means, such as by allowing parties to assert alleged bias before or during an investigation and by offering an appeal to a different decision-maker to consider alleged bias during the investigation. One commenter suggested that the Department allow recipients who use two investigators to also use them as decision-makers. This commenter argued that two investigators are in the best position to review all the evidence and determine responsibility and appropriate sanction; moreover, ensuring two investigators assigned to each case prevents any one person from being decision-maker and allows the second person to serve as an effective check. Other commenters asserted that prohibiting the single investigator model is unnecessary because the Department already carefully safeguarded the selection process for investigators, Title IX Coordinators, and decision-makers by prohibiting bias and conflicts of interest in § 106.45(b)(1)(iii).

Discussion: The Department believes the robust training and impartiality requirements for all individuals serving as Title IX Coordinators, investigators, or decision-makers contained in § 106.45(b)(1)(iii) of the final regulations[1403] will effectively promote the reliability of fact-finding and the overall fairness and accuracy of the grievance process. In addition, the final regulations require that any materials used to train Title IX personnel must not rely on sex stereotypes. We believe these measures will promote consistent outcomes, addressing commenters' concerns

[1403] The final regulations revise § 106.45(b)(1)(iii) to include training for persons who facilitate informal resolution processes, in addition to Title IX Coordinators, investigators, and decision-makers.

about decision-makers not having the same level of training or expertise as investigators. Furthermore, § 106.45(b)(5)(vii) requires the investigator to prepare an investigative report that fairly summarizes all relevant evidence, and therefore the parties and decision-maker will be aware of the evidence gathered during the investigation.

The Department appreciates commenters' suggestion that a "hybrid" model could provide many of the same checks against bias and inaccuracy as complete separation of the investigation and adjudication roles. However, the Department believes that formally separating the investigative and adjudicative roles in the Title IX grievance process is important to reduce the risk and perception of bias, increase the reliability of fact-finding, and promote sound bases for responsibility determinations. As such, the Department concludes that adopting the various less restrictive means that commenters suggested to reduce the bias inherent in the single investigator model, such as permitting two investigators to also serve as decision-makers, would not go far enough to promote these important goals. Consistent with the commenters' suggestion, however, the Department also emphasizes that § 106.45(b)(8), in addition to requiring that recipients offer appeals for both parties, explicitly permits either party to assert that the Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias. These provisions are meant to reinforce each other in increasing the fairness of Title IX proceedings.

Changes: None.

*Chilling Reporting and Other Harmful Effects*

Comments: Commenters suggested that ending the single investigator model would increase the number of people who must be involved in the Title IX process, and this may increase the risk of untrained and biased people shaming survivors and not believing in them, and also lead to re-traumatization for survivors having to share their stories multiple times. Commenters suggested

that ending the single investigator model reinforces the requirement for traumatizing and unnecessary live hearings with cross-examination, which could discourage reporting. Commenters argued that the single investigator model reduces pressure on both parties because the investigator can interact with each party in a less stressful, less adversarial setting.

Commenters asserted that the NPRM's prohibition of the single investigator model could be problematic under Title IX and potentially harmful to parties who want closure, because requiring a separate decision-maker could lengthen the adjudicative process, make it less efficient, and delay resolutions. One commenter argued that ending the single investigator model could frustrate the NPRM's due process goals, by perversely incentivizing recipients to avoid the NPRM's formal grievance process through informal resolution, or incentivize schools to not provide an appeal process due to added compliance costs.

Discussion: The Department does not believe that precluding a single investigator model for investigations and adjudications will discourage reporting, traumatize parties, unreasonably lengthen the grievance process, or incentivize recipients to forgo important due process protections for parties. Rather, the purpose of formally separating the investigative and adjudicative functions is to reduce the risk of bias, increase the reliability of fact-finding, and promote sound bases for determinations of responsibility. The Department acknowledges that without a requirement that the decision-maker be separate from any person that performed the role of Title IX Coordinator and investigator, a complainant potentially could give a statement only once – to the single person or team of people performing all those functions, and that complainants may feel intimidated by needing speak with more than one person during the course of the grievance process. Such a necessity, however, is not different from participation in any typical adjudicative process, whether civil or criminal, where a complainant (or civil

plaintiff, or victim-witness in a criminal case) would also need to recount the allegations and answer questions several times during the course of an investigation and adjudication. Because a grievance process must contain consistent procedural protections in order to reach factually accurate outcomes, the final regulations ensure that a complainant retains control over deciding whether to participate in a grievance process[1404] and ensures that a complainant can receive supportive measures to restore or preserve the complainant's equal access to education regardless of whether a grievance process is undertaken.[1405] The final regulations also permit recipients to offer and facilitate informal resolution processes which can resolve allegations without a full investigation and adjudication.[1406]

Contrary to the claims made by some commenters that increasing the number of people who must be involved in the formal grievance process would increase the risk of using untrained personnel and causing unfairness, the Department believes that the robust training and impartiality requirements contained in § 106.45(b)(1)(iii) that apply to all individuals

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[1404] *E.g.*, § 106.30 specifies that only a complainant, or a Title IX Coordinator, can sign or file a formal complainant initiating the grievance process such that even if a report about the complainant's alleged victimization is made to the recipient by a third party, the complainant retains autonomy to decide whether to file a formal complaint; § 106.30 revises the definition of "complainant" to remove the phrase "or on whose behalf the Title IX Coordinator files a formal complaint" to clarify that even when a Title IX Coordinator does sign a formal complaint initiating a grievance process, that action is not taken "on behalf of" the complainant, so that the complainant remains in control of when a formal process is undertaken on the complainant's behalf. The final regulations removed proposed § 106.44(b)(2) that would have required a Title IX Coordinator to file a formal complaint upon receipt of multiple reports against the same respondent, in order to avoid situations where a Title IX Coordinator would have been forced (by the proposed rules) to sign a formal complaint over the wishes of a complainant. The final regulations add § 106.71 prohibiting retaliation and including under prohibited actions those taken to dissuade a complainant from reporting or filing and those taken to punish a complainant (or anyone else) from refusing to participate in a Title IX proceeding.

[1405] *E.g.*, § 106.44(a) requires the Title IX Coordinator promptly to contact each complainant to discuss the availability of supportive measures (with or without a formal complaint being filed), consider the wishes of the complainant with respect to supportive measures, and explain to the complainant the process for filing a formal complaint.

[1406] Section 106.45(b)(9) (permitting informal resolutions of any formal complaint except where the allegations are that an employee has sexually harassed a student).

participating as Title IX Coordinators, investigators, decision-makers, or persons facilitating informal resolution processes, reduce these risks. Furthermore, ensuring that the investigative and adjudicative functions are performed by different individuals is critical for effective live cross-examination, as other commenters noted, because under the single investigator model the decision-maker may be biased in favor of the decision-maker's own investigative recommendations and conclusions rather than listening to party and witness statements during a hearing impartially and with an open mind; similarly, if the decision-maker is the same person as the Title IX Coordinator the decision-maker may be influenced by information gleaned from a complainant due to implementation of supportive measures rather than by information relevant to the allegations at issue. Moreover, under the single investigator model often there is no live hearing where parties can probe each other's credibility and as discussed under § 106.45(b)(6)(i), the Department believes that live hearings are a critical part of a fair process in the postsecondary context.

The Department acknowledges concerns that separating the investigative and adjudicative functions may lengthen the adjudicative process in some cases. However, we emphasize that § 106.45(b)(1)(v) of the final regulations requires that the grievance process be completed within a reasonably prompt time frame, including completion of a live hearing (for postsecondary institutions). We do not believe that eliminating the single investigator model will incentivize recipients to offer informal resolution process to avoid the grievance process. We have revised § 106.45(b)(9) so that informal resolutions must be voluntarily agreed to by each party, forbidding recipients from requiring any party to participate in an informal process, and preventing recipients from conditioning enrollment, employment, or any other right on a party's participation in informal resolution. We have also revised § 106.45(b)(8) to require recipients to

offer appeals equally to both parties, which also must be subject to a recipient's designated, reasonably prompt time frames; this revision also ensures that recipients cannot rationalize removal of the single investigator model as a reason to refuse to offer an appeal.

Changes: We have revised § 106.45(b)(9) governing informal resolutions, to forbid recipients from requiring parties to participate in informal resolution and to preclude recipients from conditioning enrollment, employment, or enjoyment of rights on a party's participation in informal resolution. We have revised § 106.45(b)(8) governing appeals to require recipients to offer appeals equally to both parties, on three specified bases: procedural irregularity, newly discovered evidence, or conflict of interest or bias on the part of Title IX personnel.

*Respecting the Roles of Title IX Coordinators and Investigators*

Comments: A few commenters asserted that excluding Title IX Coordinators and investigators from any decision-making role is inherently insulting to them because it undervalues their training, professionalism, and expertise. One commenter proposed that the Department require separate investigators and decision-makers, but not prohibit Title IX Coordinators from being decision-makers. This commenter reasoned that Title IX Coordinators are highly trained professionals and Title IX subject matter experts who are reliably impartial and that removing their expertise from the equation may increase the risk of bias, unfairness, and inconsistency across cases.

Discussion: The Department appreciates the integrity and professionalism of individuals serving as Title IX Coordinators. However, and as discussed above, given the high stakes involved for all parties in Title IX cases, the Department believes that separating the investigative and adjudicative functions is essential to mitigate the risk of bias and unfairness in the grievance process. The final regulations would not remove the expertise of Title IX Coordinators from the

grievance process. Section 106.45(b)(7)(i) does not prevent the Title IX Coordinator from serving as the investigator; rather, this provision only prohibits the decision-maker from being the same person as either the Title IX Coordinator or the investigator. As other commenters have pointed out, the final regulations place significant responsibilities on Title IX Coordinators. Separating the functions of a Title IX Coordinator from those of the decision-maker is no reflection on the ability of Title IX Coordinators to serve impartially and with expertise. Rather, requiring different individuals to serve in those roles acknowledges that the different phases of a report and formal complaint of sexual harassment serve distinct purposes. At each phase, the person responsible for the recipient's response likely will receive information and have communications with one or both parties, for different purposes. For example, the Title IX Coordinator must inform every complainant about the availability of supportive measures and coordinate effective implementation of supportive measures, while the investigator must impartially gather all relevant evidence including party and witness statements, and the decision-maker must assess the relevant evidence, including party and witness credibility, to decide if the recipient has met a burden of proof showing the respondent to be responsible for the alleged sexual harassment. Placing these varied responsibilities in the hands of a single individual (or even team of individuals) risks the person(s) involved improperly relying on information gleaned during one role to affect decisions made while performing a different role. For example, a Title IX Coordinator may have a history of communications with the complainant before any formal complaint has been filed (for instance, due to implementing supportive measures for the complainant), which may influence the Title IX Coordinator's perspective about the complainant's situation before the Title IX Coordinator (if allowed to be the "decision-maker") has even spoken with the respondent. Similarly, an investigator may obtain information from a

party that is not related to the allegations under investigation during an interview with a party, and if the investigator also serves as the decision-maker, such unrelated information may influence that person's decision making, resulting in a determination that is not based on relevant evidence. Separating the roles of investigation from adjudication therefore protects both parties by making a fact-based determination regarding responsibility based on objective evaluation of relevant evidence more likely.

Changes: None.

*Preserving Recipient Autonomy*

Comments: Several commenters contended that ending the single investigator model constitutes Federal overreach into recipient decision making. Commenters emphasized that recipients vary widely in size, resources, mission, and composition of students, faculty, and staff, and that imposing a one-size-fits-all approach on them by ending the single investigator model is unwise. Commenters argued that, currently, disciplinary processes are tailored to fit each recipient's unique needs, including the single investigator model where a recipient has deemed that to best fit the recipient's needs. Commenters argued that the Department should not limit school autonomy or dictate how private institutions allocate their staff.

Discussion: The Department respects the importance of granting recipients flexibility and discretion to design and implement policies and procedures that reflect their unique values and the needs of their educational communities. However, this interest must be balanced with other important goals, including increasing the reliability of fact-finding, the overall fairness in the process, and the accuracy of responsibility determinations. Title IX is a Federal civil rights law that requires recipients to operate education programs and activities free from sex discrimination, and when a recipient is presented with allegations of sexual harassment, the Department and the

recipient have an interest in ensuring that the recipient applies procedures designed to accurately identify the nature of sexual harassment that has occurred in the recipient's education program or activity. The Department believes that separating the investigative and adjudicative functions most effectively balance the goals of ensuring accurate identification of sexual harassment and respecting recipients' autonomy. The Department notes that the final regulations leave significant flexibility to recipients, including whether the Title IX Coordinator can also serve as the investigator, whether to use a panel of decision-makers or a single decision-maker, and whether to use the recipient's own employees or outsource investigative and adjudicative functions to professionals outside the recipient's employ.

Changes: None.

*Consistency with Federal Law and Employment Practices*

Comments: Some commenters argued that ending the single investigator model would conflict with Federal and State laws and employment practices. One commenter reasoned that if the respondent is an employee, then the site administrator with line authority may be in best position to investigate due to confidentiality with personnel issues and the Department should not create a conflicting process. Commenters argued that the NPRM's prohibition of the single investigator model is unworkable in the employee context, especially where schools take disciplinary action against at-will employees because at-will employees do not have the same due process rights to their jobs as students do to their education. Commenters asserted that ending the single investigator model could conflict with existing collective bargaining agreements and faculty handbooks. Commenters also asserted that the NPRM's application to the employment context is problematic because workplace harassment is already addressed by Title VII and State non-discrimination laws.

Discussion: The Department acknowledges efficiency interests and the value of a recipient's flexibility and discretion to address sexual misconduct situations involving the recipient's employees, such as by using site administrators to investigate and adjudicate complaints against employee-respondents. However, these interests must be balanced with other important goals, including increasing the reliability of fact-finding, the overall fairness in the process, and the accuracy of responsibility determinations. The Department believes that separating the investigative and adjudicative functions most effectively promotes these goals. As such, the prohibition of the single investigator model contained in § 106.45(b)(7)(i) of the final regulations would apply to all recipients, including elementary and secondary schools and postsecondary institutions, and it would also equally apply to student and employee respondents. For reasons 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, these final regulations apply to any person, including employees, in an education program or activity receiving Federal financial assistance.

A recipient may use a site administrator to conduct the investigation into a formal complaint of sexual harassment against an employee, as long as the site administrator is not the decision-maker, as set forth in § 106.45(b)(7)(i). In that situation, the recipient must designate someone other than the site administrator to serve as the decision-maker. If the recipient would like the site administrator to serve as the decision-maker, then the recipient must designate someone other than the site administrator to serve as the investigator.

The Department appreciates the concerns raised by several commenters that ending the single investigator model may pose untenable conflict with State laws, the nature of at-will employment relationships where the respondent is an employee, and with existing collective

bargaining agreements and faculty handbooks. With respect to potential conflict with State laws regarding the prohibition of the single investigator model contained in § 106.45(b)(7)(i) of the final regulations, the final regulations preclude the decision-maker from being the same person as the Title IX Coordinator or the investigator, but do not preclude the Title IX Coordinator from serving as the investigator. Further, the final regulations do not prescribe which recipient administrators are in the most appropriate position to serve as a Title IX Coordinator, investigator, or decision-maker, and leave recipients discretion in that regard, including whether a recipient prefers to have certain personnel serve in certain Title IX roles when the respondent is an employee. To generally address commenters' questions about preemption, the Department has added § 106.6(h) which provides that to the extent of a conflict between State or local law and Title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

The Department acknowledges that Title VII and Title IX impose different requirements and that some recipients will need to comply with both Title VII and Title IX, as reflected in § 106.6(f) of these final regulations. The Department believes that recipients may comply with different regulations implementing Title VII and Title IX. These final regulations require all recipients with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, to respond promptly in a manner that is not deliberately indifferent, irrespective of whether the complainant and respondent are students or employees. The grievance process in § 106.45 does not contradict Title VII or its implementing regulations in any manner and at most may provide more process than Title VII requires (such as specifying that a decision-maker must be a different person than the Title IX Coordinator or investigator). These final regulations, however, do not expand Title VII, as these final

regulations are promulgated under Title IX. For further discussion of the intersection between Title VII and these final regulations, 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.

With respect to the general at-will employment doctrine, or the fact that recipients often have employment contracts or collective bargaining agreements in place that govern employee misconduct, where Title IX is implicated the Department has determined that the protections and rights set forth in these final regulations represent the most effective ways to promote Title IX's non-discrimination mandate, and recipients of Federal financial assistance agree to comply with Title IX obligations as a condition of receiving Federal funds. Recipients' contractual arrangements with employees must conform to Federal law, as a condition of receipt of Federal funds.

Changes: None.

*Limiting the Prohibition of the Single Investigator Model*

Comments: Some commenters supported ending the single investigator model but argued against a categorical prohibition. One commenter proposed that the Department only prohibit the single investigator model where the respondent faces the possibility of expulsion or dismissal. This commenter argued that more minor cases, such as sexual harassment claims against respondents for making inappropriate jokes, can be fairly investigated and resolved by a single person without bias. However, the commenter reasoned, where the stakes are higher, such as with a sexual assault allegation and the possibility of dismissal, then a strict separation of the investigative and adjudicative functions is justified. The commenter asserted that this is a logical cost/benefit analysis, especially for smaller recipients. One commenter suggested that the

Department should only prohibit the single investigator model for larger schools (such as those with over 3,000 students) or for schools that have greater numbers of Title IX complaints that result in formal investigations (such as ten or more per year). One commenter requested that the Department prohibit the single investigator model but exempt recipients that submit a reasoned written explanation as to why their disciplinary system is fair and necessary. One commenter urged the Department to allow the single investigator model, but only where both parties consent to it. Another commenter emphasized that postsecondary institutions generally have more resources than elementary and secondary school districts, and therefore the Department should initially apply the single investigator prohibition only to postsecondary institutions, and see how effective it is before applying it to elementary and secondary schools.

Discussion: The Department appreciates the logistical concerns raised by some commenters regarding an across-the-board prohibition on the single investigator model contained in the final regulations and the suggestions for alternative approaches. However, the Department believes, as discussed above, that separating requiring investigative and adjudicative roles to be filled by different individuals is critical for reducing the risk of unfairness, increasing the reliability of fact-finding, and enhancing the accuracy of Title IX adjudications. Furthermore, we do not see the propriety in crafting different sets of procedural requirements under Title IX for recipients based on their size, the number of Title IX complaints they typically receive on an annual basis, or the potential severity of the punishment the respondent may receive if determined to be responsible for the alleged sexual harassment. It is unclear what criteria would justify an exemption to the general requirement that the same person cannot investigate and adjudicate a case, particularly because all the conduct described as "sexual harassment" under § 106.30 is serious conduct that jeopardizes a victim's equal access to education, and the Department resists

attempts to characterize certain forms of sexual harassment defined under § 106.30 as automatically warranting more or less severe sanctions. The Department notes that § 106.45(b)(9) of the final regulations permits informal resolutions as long as both parties voluntarily consent to attempt an informal process. Informal resolutions under the final regulations would not require more than one person to facilitate the process. In this regard, the Department recognizes the importance of giving recipients flexibility and discretion to satisfy their Title IX obligations in a manner consistent with their unique values and the needs of their educational communities, and the wishes of the parties to each formal complaint.

Changes: None.

*Requests for Clarification*

Comments: Commenters sought clarification on several issues regarding the NPRM's prohibition of the single investigator model. A few commenters asked whether the NPRM requires that the Title IX Coordinator be different than the investigator and, if so, how a Title IX Coordinator can remain fair and unbiased in situations where the NPRM requires the Title IX Coordinator to file a formal complaint. One commenter inquired as to whether the Title IX Coordinator can make preliminary determinations of responsibility that are then passed along to the decision-maker. Another commenter requested more clarity as to whether the NPRM's prohibition on a Title IX Coordinator serving as decision-maker also applies to appeal decisions. One commenter asked whether the decision-maker and hearing officer presiding over the live hearing can be different individuals. Another commenter asserted that § 106.45(b)(7)(i) has been understood to require different individuals to assume each of three different roles: decision-maker, investigator, and Title IX Coordinator. This commenter inquired as to what the Title IX Coordinator's role would be regarding investigations under the NPRM.

Discussion: The Department appreciates the questions commenters raised regarding the implications of the prohibition of the single investigator model contained in § 106.45(b)(7)(i) of the final regulations. The Department wishes to clarify that the final regulations require the Title IX Coordinator and investigator to be different individuals from the decision-maker, but nothing in the final regulations requires the Title IX Coordinator to be an individual different from the investigator. Nothing in the final regulations prevents Title IX Coordinators from offering recommendations regarding responsibility to the decision-maker for consideration, but the final regulations require the ultimate determination regarding responsibility to be reached by an individual (i.e., the decision-maker) who did not participate in the case as an investigator or Title IX Coordinator.

The final regulations have removed proposed § 106.44(b)(2) that would have required Title IX Coordinators to file formal complaints upon receiving multiple reports of sexual harassment against the same respondent; however, the final regulations leave Title IX Coordinators with discretion to decide to sign a formal complaint on the recipient's behalf. Although signing a formal complaint initiates a grievance process, for reasons discussed in the "Formal Complaint" subsection of the "Section 106.30 Definitions" section of this preamble, we do not believe that taking such an action necessarily renders a Title IX Coordinator biased or poses a conflict of interest, and we have revised the § 106.30 definition of "formal complaint" to clarify that Title IX Coordinators must comply with § 106.45(b)(1)(iii) even in situations where the Title IX Coordinator decides to sign a formal complaint.

The final regulations revise § 106.45(b)(8) to provide that appeals on specified bases must be offered equally to both parties and that the appeal decision-maker cannot be the same person as the decision-maker who reached the determination regarding responsibility, the Title

IX Coordinator, or the investigator. With respect to the roles of a hearing officer and decision-maker, the final regulations leave recipients discretion to decide whether to have a hearing officer (presumably to oversee or conduct a hearing) separate and apart from a decision-maker, and the final regulations do not prevent the same individual serving in both roles. Lastly, regarding the role of the Title IX Coordinator, as discussed above, § 106.8(a) of the final regulations requires recipients to designate and authorize at least one employee to serve as Title IX Coordinator and coordinate the recipient's efforts to comply with the final regulations. Among other things, the Title IX Coordinator is responsible for responding to reports and complaints of sex discrimination (including reports and formal complaints of sexual harassment), informing complainants of the availability of supportive measures and of the process for filing a formal complaint, offering supportive measures to complainants designed to restore or preserve equal access to the recipient's education program or activity, working with respondents to provide supportive measures as appropriate, and coordinating the effective implementation of both supportive measures (to one or both parties) and remedies (to a complainant). As noted previously, the Title IX Coordinator is not precluded from also serving as the investigator, under these final regulations.

Changes: None.

Section 106.45(b)(7)(i) Standard of Evidence and Directed Question 6

*Mandating a Higher Standard of Evidence*

Comments: Several commenters asserted that the Department should mandate a higher standard of evidence than the preponderance of the evidence standard. Commenters cited cases describing the preponderance of the evidence standard as inadequate in sexual misconduct cases given the seriousness of allegations, the lack of other procedural safeguards found in civil litigation, and

the reputational and socioeconomic damage resulting from a finding of sexual misconduct responsibility. Some commenters argued that the Department should mandate, or at least permit, recipients to use the criminal "beyond a reasonable doubt" standard in Title IX adjudications.[1407] One commenter suggested that the Department mandate the clear and convincing evidence standard but only where the alleged sexual misconduct is a Clery Act/VAWA offense or where the potential sanction is expulsion or suspension. One commenter asserted that Supreme Court case law requires application of the beyond a reasonable doubt standard in school Title IX proceedings.[1408]

Commenters asserted that the clear and convincing evidence standard would enhance the overall accuracy of the system by reducing false positives as compared to the preponderance of the evidence standard. One commenter argued that requiring the clear and convincing evidence standard is essential to protect academic freedom and free speech because it would be unjust to have a mere 50 percent threshold to punish professors for "improper" or controversial speech in their classrooms. One commenter asserted that it is especially important to raise the standard of evidence because in the current #MeToo environment women are automatically believed and men are assumed guilty; this commenter argued that sexual misconduct cases often boil down to credibility and such allegations are virtually impossible to disprove.

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[1407] Commenters cited: Valerie Wilson, *The Problem with Title IX and Why it Matters*, THE PRINCETON TORY (February 19, 2015).

[1408] Commenters cited: James M. Piccozi, *Note, University Disciplinary Process: What's Fair, What's Due, and What You Don't Get*, 96 YALE L. J. 2132, 2138 (1987) (impairment of accused's reputation severely limits the accused student's freedom and can make it virtually impossible to successfully transfer). Commenters also cited: *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974) for the proposition that State action results where a private party conducts activities exclusively and traditionally reserved to the State, such as adjudication of sexual misconduct.

Discussion: The Department acknowledges the suggestions offered by commenters to mandate a higher standard of evidence than the preponderance of the evidence standard, such as the clear and convincing evidence standard, or the beyond a reasonable doubt standard used in criminal proceedings. In recognition that sexual misconduct cases involve high stakes and potentially life-altering consequences for both parties, and such cases often involve competing, plausible narratives about the truth of allegations, the Department authorizes recipients, in § 106.45(b)(1)(vii) of the final regulations, to select either the preponderance of the evidence standard or the clear and convincing evidence standard to reach determinations regarding responsibility.[1409] Because Title IX proceedings differ in purpose and consequence from criminal proceedings, the Department does not believe the criminal law standard of "beyond a reasonable doubt" is appropriate in a noncriminal setting like a Title IX grievance process for various reasons.[1410] Recipients are not courts and do not have the power to impose a criminal punishment such as imprisoning a respondent. Recipients bear the burden of proof under §106.45(b)(5)(i), but they do not have subpoena power. These final regulations also provide privacy protections for complainants and respondents which prohibits the recipient from accessing, considering, disclosing, or otherwise using a party's treatment records without the party's voluntary, written consent under § 106.45(b)(5)(i), even if these treatment records are relevant to the allegations in

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[1409] A preponderance of the evidence standard of evidence is understood to mean concluding that a fact is more likely than not to be true. *E.g.*, *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993) (a preponderance of the evidence standard "requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence") (internal quotation marks and citation omitted). A clear and convincing evidence standard of evidence is understood to mean concluding that a fact is highly probable to be true. *E.g.*, *Sophanthavong v. Palmateer*, 378 F.3d 859, 866-67 (9th Cir. 2004) (a clear and convincing evidence standard requires "sufficient evidence to produce in the ultimate factfinder an abiding conviction that the truth of its factual contentions are [*sic*] highly probable.") (internal quotation marks and citation omitted).

[1410] *See, e.g.*, *Santosky v. Kramer*, 455 U.S. 745, 768 (1982) (noting that the Supreme Court hesitates to apply the "unique standard" of beyond a reasonable doubt "too broadly or casually in noncriminal cases") (internal quotation marks and citations omitted).

a formal complaint. The "beyond a reasonable doubt" standard also is rarely used in any civil proceeding.[1411] We therefore decline to permit a recipient to select that standard of evidence, and instead permit a recipient to select either of two standards of evidence, each of which is used in civil matters.[1412] The Department shares commenters' concerns for protecting academic freedom and free speech, and § 106.6(d)(1) emphasizes that nothing in the final regulations requires restriction of rights otherwise protected by the First Amendment. To further reinforce First Amendment rights, § 106.44(a) of the final regulations would explicitly prohibit the Department from deeming recipients' restriction of rights protected under the First Amendment to be evidence that the recipient was not deliberately indifferent, and the conduct constituting actionable harassment under § 106.30 must be either serious misconduct constituting *quid pro quo* harassment or Clery Act/VAWA sex offenses, or meet the *Davis* standard of being severe, pervasive, and objectively offensive denying a person equal educational access.[1413] When a formal complaint alleges conduct constituting "sexual harassment" as defined in § 106.30, the Department has concluded that the robust procedural protections granted to both parties in § 106.45 mean that the preponderance of the evidence standard, or the clear and convincing evidence standard, may be used to reach consistently fair, reliable outcomes. Contrary to the

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[1411] *Id*.

[1412] *E.g.*, *Addington v. Tex.*, 441 U.S. 418, 424 (1979) (holding that the clear and convincing evidence standard was required in civil commitment proceedings) (noting that clear and convincing evidence is an "intermediate standard" between preponderance of the evidence and the criminal beyond a reasonable doubt standard and that the clear and convincing evidence standard "usually employs some combination of the words 'clear,' 'cogent,' 'unequivocal,' and 'convincing'" and while less commonly used than the preponderance of the evidence standard, the clear and convincing evidence standard is "no stranger to the civil law" and is sometimes used in civil cases "involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant" where "the interests at stake are deemed to be more substantial than mere loss of money" justifying reduction of "the risk to the defendant of having his [or her] reputation tarnished erroneously.") (internal quotation marks and citations omitted).

[1413] For discussion of the intersection between the § 106.30 definition of sexual harassment, and the First Amendment, see the "Sexual Harassment" subsection of the "Section 106.30 Definitions" section of this preamble.

claims made by one commenter, the Supreme Court has never required application of the criminal "beyond a reasonable doubt" standard in Title IX proceedings, and the Department is not aware of a Federal appellate court decision requiring adoption of the criminal standard of evidence in Title IX proceedings. The Department believes that requiring such a "beyond a reasonable doubt" standard of evidence in a noncriminal Title IX proceeding is unnecessary to meet due process of law and fundamental fairness requirements, or increase accuracy of outcomes, in Title IX grievance processes.

Changes: The final regulations revise § 106.45(b)(7)(i) to refer to the revised requirement in § 106.45(b)(1)(vii), such that the a recipient must select between the preponderance of the evidence standard and clear and convincing evidence standard, and apply that selected standard consistently to all formal complaints alleging Title IX sexual harassment regardless of whether the respondent is a student or an employee. We also revise § 106.44(a) of the final regulations to explicitly prohibit the Department from deeming recipients' restriction of rights protected under the First Amendment to be evidence that the recipient was not deliberately indifferent.

*Supporting § 106.45(b)(7)(i)*

Comments: Some commenters expressed support for the NPRM's approach to the standard of evidence. Commenters asserted that many collective bargaining agreements (CBAs) applicable to school employees mandate the clear and convincing evidence standard and argued that students deserve the same rights and protections since students are the ones paying tuition. One commenter cited a poll about public perceptions of higher education that found 71 percent of people responding to the poll believed, "[s]tudents accused of sexual assault on college campuses

should be punished only if there is clear and convincing evidence that they are guilty of a crime."[1414]

Discussion: The Department appreciates the support from commenters regarding the proposed rules' approach to the standard of evidence. For reasons discussed above, the final regulations at § 106.45(b)(1)(vii) and § 106.45(b)(7)(i) continue to permit recipients to select between the preponderance of the evidence standard, or the clear and convincing evidence standard. We acknowledge the poll cited by one commenter finding that the majority of people responding to the poll supported application of the clear and convincing evidence standard to address allegations of sexual assault in the postsecondary context. While the Department does not reach legal or policy decisions on the basis of public polls, we believe that in light of the strong procedural rights granted to both parties under the § 106.45 grievance process, either the preponderance of the evidence standard or the clear and convincing evidence standard may be applied to reach fair, accurate determinations regarding responsibility in Title IX grievance processes, and recipients should be permitted to select either standard.

We acknowledge that many employee CBAs mandate the clear and convincing evidence standard. The Department believes that giving recipients the choice between the preponderance of the evidence standard and the clear and convincing evidence standard, along with the requirement contained in § 106.45(b)(1)(vii) that the same standard of evidence must apply for complaints against students as for complaints against employees and faculty, helps to ensure consistency in recipients' handling of Title IX proceedings. To better ensure that recipients have

[1414] Commenter cited: Bucknell Institute for Public Policy, *Perceptions of Higher Education Survey – Topline Results* (2017).

a true choice between the two standards of evidence, we have removed the NPRM's language from § 106.45(b)(7)(i) that would have allowed selection of the preponderance of the evidence standard only if the recipient also used that standard for non-sexual harassment misconduct that carried similar potential sanctions. The grievance process, including the standard of evidence the recipient will apply, should not vary based on the identity or status of the respondent (i.e., student or employee). However, each recipient is allowed to select one of the two standards of evidence (both of which are used in a variety of civil proceedings) to decide what degree of confidence the recipient's decision-makers must have in the factual correctness of determinations regarding responsibility in Title IX grievance processes.

Changes: The Department has revised § 106.45(b)(7)(i) of the final regulations such that recipients have the choice of either applying the preponderance of the evidence standard or the clear and convincing evidence standard, and § 106.45(b)(1)(vii) requires a recipient to make that choice applicable to all formal complaints of sexual harassment, including those against employees and faculty. We have removed the limitation contained in the NPRM that would have permitted recipients to use the preponderance of the evidence standard only if a recipient used that standard for non-sexual misconduct that has the same maximum disciplinary sanction.

*One-Sided Condition on Choice of Evidentiary Standard*

Comments: Commenters questioned the NPRM's requirement that if the preponderance of the evidence standard is used in Title IX cases then it must be used in non-Title IX cases with the same maximum punishment. Commenters suggested this would undermine recipient flexibility. Some commenters asserted that the NPRM presented a false choice of an evidentiary standard because the proposed rules imposed a one-way ratchet where schools may use the clear and convincing evidence standard in sexual assault cases and a lower standard in other cases, but not

vice versa, thereby disadvantaging complainants in sexual harassment situations but not in other situations. Some commenters asserted that the Department lacks authority under Title IX to impose requirements on non-Title IX related disciplinary proceedings.

One commenter argued that the Department should not interfere with recipient autonomy in determining the appropriate standard of evidence; this commenter suggested that the Department: (1) limit the preponderance of the evidence standard to recipients who used it before the Department advised them to; (2) limit the preponderance of the evidence standard for sexual misconduct cases to recipients who had the preponderance of the evidence standard for non-sexual cases before the NPRM; or (3) mandate all recipients use the clear and convincing evidence standard, but allow recipients to adopt the preponderance of the evidence standard if done by internal process initiated at least one year after the clear and convincing evidence standard takes effect.

One commenter asserted the NPRM's approach to standard of evidence is a heavy-handed Federal mandate to use the clear and convincing evidence standard, which is inconsistent with the current Administration's deregulatory agenda. This commenter asserted that the Department should not usurp the authority of school boards or micromanage recipients.

Discussion: The Department is persuaded by the concerns raised by commenters that the NPRM's prohibition on recipients using the preponderance of the evidence standard unless they also used that standard for non-sexual misconduct that carries the same maximum punishment constituted a one-way restriction that appeared to many commenters to leave a recipient without a genuine choice between the two standards of evidence. The Department is also persuaded by commenters' objections that the NPRM approach may have had the unintended consequence of pressuring recipients to choose a standard of evidence for non-Title IX misconduct situations,

potentially exceeding the Department's authority to effectuate the purpose of Title IX. For these reasons, the Department has simplified its approach to the standard of evidence contained in § 106.45(b)(1)(vii) and referenced in § 106.45(b)(7)(i), such that recipients may select the preponderance of the evidence standard or the clear and convincing evidence standard, without restricting that selection based on what standard of evidence a recipient uses in non-Title IX proceedings. The Department believes this revised approach better ensures that the Department is not inspecting how recipients handle non-Title IX misconduct proceedings.

We acknowledge the alternative approaches to the standard of evidence raised by one commenter that would limit the application of the preponderance of the evidence standard. However, the Department believes that recipients are in the best position to select the standard of evidence that suits their unique values and the needs of their educational community and the Department thus declines to impose restrictions or requirements upon recipients who select the preponderance of the evidence standard. Because the final regulations grant recipients the unrestricted right to choose between the preponderance of the evidence standard and the clear and convincing evidence standard, we disagree that the final regulations reflect a heavy-handed Federal mandate inconsistent with the current Administration's deregulatory agenda.

Changes: The Department has revised § 106.45(b)(7)(i) of the final regulations such that recipients have the choice of either applying the preponderance of the evidence standard or the clear and convincing evidence standard, and § 106.45(b)(1)(vii) requires a recipient to make that choice applicable to all formal complaints of sexual harassment, including those against employees and faculty. We have removed the limitation contained in the NPRM that would have permitted recipients to use the preponderance of the evidence standard only if they used that standard for non-sexual misconduct that has the same maximum disciplinary sanction.

*Same Evidentiary Standard in Student and Faculty Cases*

Comments: Several commenters expressed support for the NPRM's requirement that the same standard of evidence be used in student and faculty cases. Commenters stated that this is important for fairness; the Department should not permit recipients to disfavor certain groups. A few commenters raised the point that, unlike students, employees and faculty often have superior leverage as a group when negotiating terms with recipients. Commenters stated that the NPRM's approach would level this playing field. One commenter contended that setting the same standard for both students and employees will enhance predictability and consistency. Another commenter asserted that promoting a uniform set of evidentiary standards would reduce recipients' costs to administer their Title IX disciplinary programs and train personnel.

Some commenters believed that the Department was correctly encouraging schools to apply the clear and convincing evidence standard in Title IX cases. They stated that the clear and convincing evidence standard is appropriate given the long-lasting and serious consequences of being deemed responsible for sexual misconduct. Commenters argued that faculty may lose lifelong employment and suffer permanent reputational damage, and the preponderance of the evidence standard is insufficient to protect academic freedom and tenure. One commenter argued that just because the preponderance of the evidence standard is used in civil litigation does not mean it is appropriate for Title IX proceedings; the two systems are fundamentally distinct because the latter does not have procedural protections such as civil access to counsel, discovery, cross-examination, presumption of innocence, juries, or impartiality of decision-makers that may otherwise render the proceeding fair despite a lower evidentiary standard. The commenter asserted that the clear and convincing evidence standard may also mitigate the impact of racial bias that disproportionately affects male students and faculty in sexual harassment cases.

Other commenters opposed the NPRM's requirement that the same standard of evidence apply in student and faculty cases. Commenters emphasized the practical difficulty of recipients changing applicable standards for employee cases, given the reality that many faculty collective bargaining agreements (CBAs) mandate the clear and convincing evidence standard[1415] and that many postsecondary institutions choose to follow American Association of University Professors (AAUP) standards that include a clear and convincing evidence standard for faculty misconduct, even if the recipient's CBA does not mandate that standard.[1416] Commenters asserted that some State laws require recipients to use the clear and convincing evidence standard, especially for tenured faculty discipline cases, which may negate the flexibility that the Department was trying to provide recipients regarding a choice of standard of evidence. Commenters argued that recipients subject to such CBAs or State laws do not have a neutral choice because these recipients may be required to use a clear and convincing evidence standard for employees and the NPRM requires such recipients to also use that standard for students even if recipients would rather use different standards for students than employees. Other commenters stated that some State laws require postsecondary institution recipients to apply a preponderance of the evidence standard to student sexual misconduct disciplinary proceedings yet the proposed regulations may leave such recipients with a potential conflict between continuing to follow their State law by using the preponderance of the evidence standard (in student cases) but violating these final

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[1415] Commenters cited: *Vill. of Posen v. Ill. Fraternal Order of Police Labor Council*, 2014 Ill. App. 133329 (Ill. Ct. App. 2014) (in cases involving criminal conduct or stigmatizing behavior, many arbitrators apply higher burden of proof, typically the clear and convincing evidence standard) (quoting American Bar Association Section of Labor and Employment Law, *Elkouri & Elkouri: How Arbitration Works* 15-25 (Kenneth May *et al.* eds., 7th ed. 2012)); Nick Gier, *An Update on Unions in Higher Education*, IDAHO STATE JOURNAL (Sept. 2, 2018).

[1416] Commenters cited: Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEORGETOWN L. J. 946 (2009).

regulations (if the recipient is also bound under a CBA to apply a clear and convincing evidence standard to faculty misconduct and cannot raise the standard of evidence used in student cases without violating State law).

One commenter stated that at the commenter's university, clear and convincing evidence is required to dismiss a faculty member while a preponderance of the evidence is required to punish a student, even for similar misconduct, which "translates to the school being less inclined to fire a faculty member over an allegation than to punish a student over an allegation." This commenter argued that the proposed rules would force schools in that situation to make a choice: either lower the standard of evidence required to dismiss a faculty member, or raise the standard of evidence for all claims to the standard used for dismissing a faculty member, which would mean either making it easier to prove accusations against a faculty member or making it harder to prove any allegation (against any respondent). The commenter believed that the proposed rules should not force schools to make a choice between making it easier to fire faculty or making it harder to believe sexual assault victims.

One commenter cited studies of faculty sexual harassment cases that showed professors usually have multiple victims, mostly students, and that faculty harassers who experience sanctions are less likely to repeat serious harassment.[1417] This commenter argued that if the proposed rules' approach leads universities to comply by applying the clear and convincing evidence standard across the board for student and faculty sexual misconduct matters, then in effect universities would be forced by Federal regulatory requirements to "single out" for

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[1417] Commenters cited: Nancy Chi Cantalupo & William Kidder, *A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty*, 2018 UTAH L. REV. 671, 744 fig. 5B (2018); Margaret A. Lucero *et al.*, *Sexual Harassers: Behaviors, Motives, and Change Over Time*, 55 SEX ROLES 331 (2006).

unfavorable treatment their faculty and graduate students who are investigated for research misconduct because Federal regulations require research misconduct linked to federally funded research grants to be shown under a preponderance of the evidence standard, while sexual misconduct would be investigated under a clear and convincing evidence standard. The commenter asserted that because a finding of research misconduct carries significant public stigma (such as the respondent's name and case summary posted on government websites and scientific watchdog organization websites), concern for the heightened stigma faced by respondents accused of sexual misconduct is not an appropriate justification for the proposed rules' apparent encouragement of the clear and convincing evidence standard.

Some commenters argued that discipline of students, and discipline of employees, serve fundamentally different goals and applying a one-size-fits-all approach is inappropriate. Commenters asserted that student discipline has a mainly educational purpose, whereas employee discipline is about when to take adverse employment action. Commenters cited scholarly articles and cases to suggest that students and employees are different constituencies with different interests; for example, universities have obligations to protect student safety that differ from obligations to protect employee safety.[1418] Commenters asserted that the student/recipient relationship is different than the employee/recipient relationship, in part because the student pays tuition to gain educational and developmental services from the school

[1418] Commenters cited, *e.g.*, Kristen Peters, *Protecting the Millennial College Student*, 16 S. CAL. REV. OF L. & SOCIAL JUSTICE 431, 448 (2007) (schools have a qualitatively different relationship with their employees than their students. In the modern university context, courts "have increasingly recognized a college's duty to provide a safe learning environment both on and off campus."); *Duarte v. State*, 88 Cal. App. 3d 473 (Cal. 1979) (noting that students "in many substantial respects surrender[]the control of [their] person[s], control of [their] own security to the university"); *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 335-36 (Mass. 1983) (holding that "[p]arents, students, and the general community . . . have a reasonable expectation, fostered in part by colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm.").

and the school has an affirmative obligation to create an educational environment conducive to that goal. On the other hand, commenters argued, employees provide services to the school, mainly to benefit the students, and are paid by the school for their services, and while all employees have a right to a workplace free from discrimination, the school has no obligation to encourage an employee's social and personal development. Commenters argued that Title IX is about equal educational access, not about making sure that schools treat all classes of respondents the same way. One commenter contended that it is unfair to hold students to the same standard of evidence as employees because students are not parties to the employee union's CBAs and argued that the Department should not bind students to outcomes of negotiations in which the students could not participate. One commenter stated that, unlike students, university employees can lose lifetime employment, a much more serious outcome than being forced to leave one particular university, and this difference justifies using a higher burden of proof in faculty cases.

One commenter asserted that the proposed rules' requirement to use the same standard of evidence for cases with student-respondents as with employee-respondents stems from anti-union bias.

One commenter argued that the proposed choice given to recipients in the NPRM could potentially expose recipients to liability for sex discrimination under 34 CFR 106.51 ("A recipient shall not enter into a contractual or other relationship which directly *or indirectly* has the effect of subjecting employees or students to discrimination…") (emphasis added). This commenter argued that recipients who currently use the preponderance of the evidence standard in sexual harassment cases involving student-respondents, may be forced by the NPRM to raise the standard of evidence to the clear and convincing evidence standard in order to comply with

recipients' CBAs, yet that reason for raising the standard of evidence (and, in the commenter's view, disfavoring complainants by raising the standard of evidence) may constitute violation of 34 CFR 106.51 because raising the standard of evidence to match what the recipient uses in a CBA could be viewed as having entered into a CBA (i.e., a contractual or other relationship) that indirectly has the effect of subjecting students to discrimination (i.e., by "disfavoring" complainants alleging sexual harassment).

One commenter contended that the inherent power imbalance between faculty and students means that faculty may be viewed as more credible than students, and thus the applicable standard of evidence should not necessarily be identical.

Discussion: The Department appreciates commenters' support for the approach to recipients' selection of a standard of evidence, and agrees that offering a choice between two reasonable standards provides consistency across cases, within each recipient's educational community, regardless of whether the respondent is an employee or a student, while providing recipients flexibility to select the standard that best meets the recipient's unique needs and reflects the recipient's values. The Department disputes commenters' assertion that the Department is encouraging the selection of the clear and convincing evidence standard. As shown by the fact the final regulations respond to commenters' concerns by removing the NPRM's restriction on the use of the preponderance of the evidence standard, the Department's intention is to permit recipients to choose between two standards of evidence, either of which can be applied to Title IX grievance processes to produce fair and reliable outcomes.

The Department acknowledges the concerns raised by some commenters regarding the challenges that may arise from implementing the requirement contained in § 106.45(b)(1)(vii) and § 106.45(b)(7)(i) that the same standard of evidence be used for complaints against students

as for complaints against employees and faculty. We recognize the reality that some employee CBAs or State laws mandate application of the clear and convincing evidence standard for employee or faculty misconduct, that some recipients use a lower standard of evidence in cases involving student-respondents than in cases involving employee-respondents, and that it may be challenging for such recipients to decide whether to raise the standard of evidence (for student cases) or lower the standard of evidence (for employee cases) so that all formal complaints of sexual harassment use the same standard of evidence as required under the final regulations. The Department believes that recipients should carry the same burden of proof,[1419] weighing relevant evidence against the same standard of evidence, with respect to any complainant's allegations of Title IX sexual harassment. The Department believes that complainants in a recipient's educational community should face the same process, including the same standard of evidence, in a Title IX grievance process regardless of whether the respondent who allegedly sexually harassed the complainant is a student, employee, or faculty member. The Department believes that either the preponderance of the evidence standard, or the clear and convincing evidence standard, may be applied to allegations of sexual harassment to reach fair, reliable outcomes, and thus the Department permits recipients to select either of those standards of evidence. As shown by the fact that commenters confirmed that many recipients currently use the clear and convincing evidence standard of evidence in employee-respondent sexual misconduct cases while using the preponderance of the evidence standard of evidence standard in student-respondent cases, valid reasons exist as to why a recipient might believe that either one of those standards of evidence reflects the appropriate level of confidence that decision-makers should

[1419] Under the final regulations, § 106.45(b)(5)(i), the burden of proof rests on the recipient, not on the parties.

have in the factual correctness of determinations regarding responsibility in sexual misconduct cases. The final regulations require recipients to give complainants the predictability of knowing that the standard of evidence that applies to a formal complaint of sexual harassment in a particular recipient's grievance process will not vary depending on whether the complainant was sexually harassed by a fellow student, or by a school employee.

The Department acknowledges that employees and faculty members may have greater bargaining power and leverage than students in extracting guarantees of protection under a recipient's grievance procedures, and that some recipients apply a clear and convincing evidence standard for complaints of employee misconduct through CBAs or due to choosing to follow AAUP guidelines. However, the Department does not believe that is necessary or reasonable to draw distinctions among complainants alleging Title IX sexual harassment based on the status of the respondent as a "student" versus an "employee." Furthermore, a growing trend within postsecondary institutions is for graduate students to unionize, and such a trend blurs the lines between categories of students and employees, with respect to collective bargaining power.[1420]

Collective bargaining through a union may, as commenters asserted, give employees greater "bargaining power" than students have; on the other hand, student activism often succeeds in "bargaining" for university action on a variety of matters that affect students. Regardless of the relative strength of "bargaining power" of employees and students, the

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[1420] *E.g.*, Leslie Crudele, *Graduate Student Employees or Employee Graduate Students? The National Labor Relations Board and the Unionization of Graduate Student Workers in Postsecondary Education*, 10 WILLIAM & MARY BUS. L. REV. 739, 741-42 (2019) (noting that as college enrollment has increased, so has the number of teaching staff, and that as of 2013 the Bureau of Labor Statistics found there were approximately 1.13 million graduate teaching assistants employed at postsecondary institutions); *id.* at 780 (after detailing the history of unionization of graduate students at public and private colleges and universities, concluding that the National Labor Relations Board has most recently laid groundwork for a continuing trend toward graduate student unionization).

Department believes that a recipient must implement a fair grievance process for all complainants that does not use a different standard of evidence based on whether the complainant alleges sexual harassment against an employee, or against a student. Complainants (especially students) who allege sexual harassment against an employee already face the possibility that the respondent, as an employee, may be in a position of actual or perceived authority over the complainant, and the Department does not wish to encourage recipients to exacerbate that power differential by treating some complainants (i.e., those who allege sexual harassment against a recipient's employee) differently from other complainants (i.e., those who allege sexual harassment against a recipient's student) by requiring the former group of complainants to navigate a grievance process that will apply a higher standard of evidence than complainants in the latter group of complainants.[1421] Complainants should know that their school, college, or university has selected a standard of evidence (representing the "degree of confidence"[1422] that a recipient requires a decision-maker to have in the factual accuracy of the determination regarding responsibility) that will apply regardless of the identity, status, or position of authority of the respondent.

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[1421] The standard of evidence used for a class of claims reflects a societal judgment about the level of confidence a decision-maker should have before reaching a conclusion in the case. *E.g.*, *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring) (the purpose of a standard of proof is "to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."). The Department believes that a recipient's selection of a standard of evidence appropriate for resolving sexual harassment formal complaints should reflect the recipient's decision about the level of confidence the recipient believes a decision-maker should have in reaching a conclusion, that all complainants who file formal complaints of sexual harassment with a recipient should have the benefit of understanding the recipient's decision on that issue, and that different "degrees of confidence" should not be applied based on a respondent's status as a student or employee because whether the respondent is a student or employee does not necessarily alter the nature of the harm that the alleged conduct inflicted on the complainant or lessen the seriousness of potential consequences for the respondent.

[1422] *Id.*

The Department does not view the potential consequences of being found responsible for sexual harassment as less serious for students than employees; while employees face potential loss of employment, students face potential loss of educational opportunities which may also affect a student's career opportunities. While some employees found responsible for sexual harassment may lose all future career opportunities and some students found responsible may transfer to other institutions, the converse also occurs; some employees found responsible find work elsewhere and some students found responsible find it impossible to transfer to other institutions. The potential consequences of being found responsible, therefore, may be just as serious for a student as for an employee, and differences in the nature of potential consequences does not justify using a different standard of evidence for employee-respondent cases than for student-respondent cases. At the same time, a complainant alleging Title IX sexual harassment faces potential loss of equal educational access if sexual harassment allegations are not resolved accurately, regardless of whether the complainant has been allegedly sexually harassed by a student or by an employee. For respondents (whether students or employees) and for complainants (whether students or employees), it is important for a Title IX grievance process to reach a reliable outcome.[1423]

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[1423] For an example of divergent views about the appropriate standard of evidence within a university's faculty members, raising arguments for and against retaining the clear and convincing evidence standard for employees, *see, e.g.*, Matt Butler, *Standard of proof in sexual assault cases debated by professors*, THE REVIEW (Nov. 10, 2014) (University of Delaware student newspaper article reporting on a faculty debate about whether the university should lower the standard of evidence used in faculty sexual misconduct cases from the clear and convincing evidence standard to the preponderance of the evidence standard, in light of OCR's insistence that universities must use the preponderance of the evidence standard, reporting that "some faculty supported the lower burden of proof as a means of creating – in reality and perception – a safer place for students" but also quoting Kathy Turkel, a women and gender studies professor, as asserting that "the student environment should be the most important factor" but "the lower standards of proof violate due process rights of the professors" and a "higher standard of proof" would "outweigh the negatives, and it would actually help both the accuser and the accused in cases of sexual assault" because "it is due process that protects both complainants and perpetrators in these cases").

The Department agrees that recipients have a different relationship with the recipient's students than with the recipient's employees; the Department's approach to the standard of evidence ensures that a recipient does not adjudicate a student-complainant's formal complaint differently based on whether the student-complainant was allegedly sexually harassed by a student, or by an employee. Because the final regulations do not require particular disciplinary sanctions, the final regulations do not preclude a recipient from imposing student discipline as part of an "educational purpose" that may differ from the purpose for which a recipient imposes employee discipline. The Department's approach to the standard of evidence is not based on concern that a recipient must treat all classes of respondents the same way, but is based on the Department's concern that all complainants within a recipient's education program or activity are treated the same way, including facing the same standard of evidence when a complainant's sexual harassment allegations are resolved.

Permitting recipients to select between the two standards of evidence allows recipients who face conflicting requirements imposed by contracts or laws outside these final regulations the ability to resolve such conflict in whichever way a recipient deems appropriate.[1424] Not all

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[1424] The challenge with potential conflict between Federal Title IX expectations regarding a standard of evidence, and CBAs that require a different (usually higher) standard of evidence, is a challenge that has faced recipients since the Department first took a position with respect to an appropriate standard of evidence. In the withdrawn 2011 Dear Colleague Letter the Department insisted that *only* the preponderance of the evidence standard was appropriate in Title IX sexual harassment cases and made no exception for cases against faculty. The Department believes that the approach in these final regulations may help recipients address the challenge that some recipients face in reconciling CBAs with Title IX obligations, by allowing recipients to select one of two reasonable options regarding a standard of evidence for Title IX purposes. *See* Lance Toron Houston, *Title IX Sexual Assault Investigations in Public Institutions of Higher Education: Constitutional Due Process Implications of the Evidentiary Standard Set Forth in the Department of Education's 2011 Dear Colleague Letter*, 34 HOFSTRA LABOR & EMPLOYMENT L. J. 321, 322-23 (2017) ("This issue represents the evolution and eventual collision of years of legal jurisprudence involving collective bargaining rights from the origin of public employee law and the administratively relaxed evidentiary

recipients are subject to CBAs that require a different standard of evidence for employee discipline than the recipient uses for student discipline, and not all recipients are subject to State laws that mandate the standard of evidence to be used in student disciplinary cases; such recipients may select a standard of evidence in compliance with these final regulations without the external factors of CBA or State law requirements. For recipients who have CBAs requiring a clear and convincing evidence standard in employee cases but no State law directive requiring a different standard of evidence in student cases, recipients may comply with these final regulations by using the clear and convincing evidence standard in student cases, or by renegotiating their CBAs to use the preponderance of the evidence standard for employee cases.

For recipients who do have CBAs requiring a clear and convincing evidence standard (in employee cases) and State laws requiring a preponderance of the evidence standard (in student cases), such recipients may find it appropriate to comply with these final regulations by renegotiating their CBAs rather than violate State law. We acknowledge commenters' point that renegotiating a CBA is often a time-consuming process; however, a recipient's contractual and employment arrangements must comply with Federal laws,[1425] and recipients of Federal financial assistance understand that a condition placed upon receipt of Federal funds is operation of education programs or activities free from sex discrimination under Title IX, including

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standards at play in Title IX sexual assault investigations in public higher education. In a nutshell, when collectively bargained labor agreements on American public college campuses calls for the heightened 'clear and convincing' evidentiary standard in a sexual assault investigation of a unionized employee, but federally mandated Title IX investigations as required by the 2011 Dear Colleague Letter only require the much lower threshold 'preponderance of the evidence' standard to discipline the accused public employee, which prevails?").

[1425] *E.g.*, a typical clause included in a college's faculty CBA states: "This agreement and its component provisions are subordinate to any present or future Federal or New York laws and regulations." *Agreement (Faculty) Between Onondaga Community College And The Onondaga Community College Federation Of Teachers And Administrators AFT, Local 1845 September 1, 2014 - August 31, 2019*.

compliance with regulations implementing Title IX. Some recipients cooperatively worked with their employee unions and renegotiated their CBAs in response to the Department's withdrawn 2011 Dear Colleague Letter so that the recipient would use the preponderance of the evidence standard with respect to employee cases, and student cases.[1426] These final regulations do not require recipients who have already modified their policies and procedures in that manner to make further changes in that regard, because under these final regulations a recipient may select the preponderance of the evidence standard.

These final regulations are focused on the appropriate standard of evidence for use in resolving allegations of Title IX sexual harassment, and not on the appropriate standard of evidence for use in cases of other types of misconduct by students, or employees. This is emphasized by our revision to the final regulations removing the NPRM's approach that tied the preponderance of the evidence standard to the standard of evidence a recipient uses in non-sexual harassment misconduct cases. Whether or not a recipient is required to use a certain standard of evidence under Federal regulations governing non-sexual misconduct violations (for instance, research misconduct by faculty or graduate students), the Department's concern in these final regulations is ensuring that a recipient uses a single, selected standard of evidence for Title IX sexual harassment cases so that complainants alleging sexual harassment face a predictable grievance process regardless of whether the complainant has alleged sexual harassment by a student, employee, or faculty member.

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[1426] Lance Toron Houston, *Title IX Sexual Assault Investigations in Public Institutions of Higher Education: Constitutional Due Process Implications of the Evidentiary Standard Set Forth in the Department of Education's 2011 Dear Colleague Letter*, 34 HOFSTRA LABOR & EMPLOYMENT L. J. 321, 351 (2017) (stating that "some schools have taken the bold initiative to preemptively lower the standard of proof in cooperation with university labor unions in order to avoid litigation and potential DOE [Department of Education] Title IX investigations" and citing a University of Delaware CBA from 2015, and a California State University system CBA from 2014, as examples).

Contrary to commenters' assertions otherwise, the Department does not through these final regulations promote or encourage the clear and convincing evidence standard (or the preponderance of the evidence standard) and while we acknowledge that reputational stigma and potential life-altering consequences facing respondents accused of sexual misconduct may be reasons why a recipient might select a clear and convincing evidence standard, we do not contend that reputational stigma or life-altering consequences are absent in other types of misconduct allegations, such as research misconduct by graduate students or faculty.[1427]

The Department does not believe this approach to a recipient selecting the standard of evidence for use in all Title IX sexual harassment cases harms unions or reflects anti-union bias. If a recipient decides to renegotiate CBA terms in order to comply with Title IX obligations, that result is for the benefit of all students and employees (including complainants and respondents) whose Title IX rights will be more predictable and transparent, reflecting the recipient's judgment as to what level of confidence decision-makers should have in the accuracy of determinations regarding responsibility in sexual harassment cases. The Department does not believe that this approach subjects recipients to liability under 34 CFR 106.51, because the

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[1427] We disagree that using a clear and convincing evidence standard for formal complaints of sexual harassment, while using a preponderance of the evidence standard for allegations of research misconduct, necessarily places respondents accused of the latter misconduct in a disfavored position. The elements of research misconduct differ from the elements of sexual harassment (as defined in § 106.30) in ways that may justify using different standards of evidence (as explained above, a standard of evidence represents the degree of confidence the decision-maker must have in having reached a factually correct conclusion). For instance, "research misconduct" requires the misconduct to be committed intentionally, knowingly, or recklessly, while the § 106.30 definition of sexual harassment does not require an element of intentionality. *E.g.*, Gary S. Marx, *An Overview of The Research Misconduct Process and an Analysis of the Appropriate Burden of Proof*, 42 JOURNAL OF COLL. & UNIV. L. 311, 317 (2016) ("Under the regulations adopted by HHS and by NSF, the following evidence is required to establish research misconduct: (a) there must be a significant departure from accepted practices of the relevant research community, (b) the misconduct must be committed intentionally, knowingly, or recklessly; and (c) the allegation must be proven by a preponderance of the evidence.").

Department does not assume that a recipient that changes the standard of evidence used in student cases to be the same standard as the recipient uses under employee CBAs makes that change for the purpose of disadvantaging complainants who allege sexual harassment; the Department believes that a recipient that makes that decision does so because the recipient has determined that the selected standard of evidence is the appropriate standard for resolving sexual harassment allegations. As discussed throughout this "Section 106.45(b)(7)(i) Standard of Evidence and Directed Question 6" subsection, commenters noted a variety of reasons to prefer the preponderance of the evidence standard over the clear and convincing evidence standard and vice versa. The Department believes that either standard of evidence (preponderance of the evidence, or clear and convincing evidence) may be applied fairly to reach reliable outcomes. The Department also does not believe that a recipient that selects the clear and convincing evidence standard subjects complainants to discrimination by "disfavoring" complainants of sexual harassment compared to complainants of other forms of misconduct just because the preponderance of the evidence is used as the standard in other forms of misconduct. As noted previously with respect to, for example, Federal regulations that require use of the preponderance of the evidence standard in cases of research misconduct, there may be differences in the elements needed to prove a type of misconduct that may justify using different standards of evidence. Further, the severity of potential consequences of a finding of responsibility for sexual misconduct may differ from the potential consequences of a finding of other kinds of misconduct. Additionally, recipients sometimes use a standard of evidence *lower* than the preponderance of the evidence standard for student misconduct. Thus, unless using *preponderance* also "disfavors" complainants of sexual harassment because some misconduct may continue to be decided under a *lower* standard of evidence, the Department does not believe

that a recipient's use of the clear and convincing evidence standard subjects complainants of sexual harassment to discrimination (by "disfavoring" them) just because other types of misconduct may be decided under the preponderance of the evidence standard.[1428]

Whether or not commenters are correct in noting that power differentials between employees (particularly faculty) and students may tempt recipients to treat faculty as more credible than students, the final regulations allow recipients to select one of two standards of evidence consistently to all formal complaints; under either standard selected, the recipient is obligated to assess credibility based on objective evaluation of the evidence and not due to the party's status as a complainant or respondent,[1429] and without bias for or against complainants or respondents generally or for or against an individual complainant or respondent.[1430]

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[1428] *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 COLL. L. REV. 1613, 1633, 1637 (2012) ("Substantial evidence is defined as enough relevant evidence that a reasonable person would support the fact-finder's conclusion" and substantial evidence is a lower standard than the preponderance of the evidence standard because the former requires only "some reasonable quantity of evidence" while the latter requires "facts to be true to the degree of more likely than not"); *id.* at 1642-43 (noting that OCR's interpretation of Title IX and implementing regulations was, as of 2011, that only the preponderance of the evidence standard could be used for sexual harassment cases and "As a practical matter, schools may be more likely to face constitutional challenges for moving from the higher clear and convincing evidence standard to the lower preponderance of the evidence standard than for moving from the lower substantial evidence standard to the higher preponderance of the evidence standard," analyzing "the benefits of preponderance of the evidence as compared to the lower substantial evidence standard" focusing on "whether the preponderance of the evidence standard is sufficient to protect accused students' due process rights or whether the higher standard of clear and convincing evidence is required," and asserting that "the use of the preponderance of the evidence standard, rather than the lower substantial evidence standard, will benefit schools, accused students, and perhaps all students, by lending greater legitimacy and uniformity to school disciplinary proceedings."); *see also, e.g.*, Miss. Code Ann. § 37-9-71 (in Mississippi, "The standard of proof in all disciplinary proceedings shall be substantial evidence" and students may be suspended or expelled for "unlawful activity" defined in Miss. Code Ann. § 37-11-29 to include rape, sexual battery, and fondling as well as non-sex crimes such as aggravated assault; thus, if Mississippi follows OCR's position since the withdrawn 2011 Dear Colleague Letter that only the preponderance of the evidence standard should be used for sexual violence cases, and follows Mississippi State law directing schools to apply the substantial evidence standard for unlawful activity, Mississippi would use preponderance of the evidence for sexual harassment complainants and a *lower* standard of evidence for complainants of other types of misconduct, and the Department does not view this as Mississippi subjecting complainants of sexual harassment to discrimination by "disfavoring" them as compared to complainants of non-sexual harassment misconduct).

[1429] Section 106.45(b)(1)(ii).

[1430] Section 106.45(b)(1)(iii).

Changes: The Department has revised § 106.45(b)(7)(i) of the final regulations such that recipients have the choice of either applying the preponderance of the evidence standard or the clear and convincing evidence standard, and § 106.45(b)(1)(vii) requires a recipient to make that choice applicable to all formal complaints of sexual harassment, including those against employees and faculty. We have removed the limitation contained in the NPRM that would have permitted recipients to use the preponderance of the evidence standard only if they used that standard for non-sexual misconduct that has the same maximum disciplinary sanction.

*Requiring the Preponderance of the Evidence Standard*

Comments: Many commenters urged the Department to mandate the preponderance of the evidence standard in Title IX proceedings. Commenters argued that the preponderance of the evidence standard is the only standard that treats both parties fairly, consistent with Title IX's requirement that grievance procedures be "equitable," and that a higher standard would unfairly tilt proceedings in favor of respondents and against complainants.[1431] Commenters argued that application of a heightened standard specifically in sexual misconduct cases reflects wrongful stereotypes that survivors, mainly girls and women, are more likely to lie than students who report other types of misconduct.[1432] Commenters argued that the preponderance of the evidence standard is most appropriate because both parties have an equal interest in continuing their education. Commenters cited Title IX experts who support the preponderance of the evidence

[1431] Commenters cited: Katharine Baker *et al.*, *Title IX & the Preponderance of the Evidence: A White Paper* (July 18, 2017) (signed by 90 law professors).

[1432] Commenters cited, e.g., Sarah McMahon & G. Lawrence Farmer, *An Updated Measure for Assessing Subtle Rape Myths*, 35 SOCIAL WORK RESEARCH 2 (2011); Linda A. Fairstein, *Sexual violence: Our war against rape* (William Morrow & Co. 1993); S. Zydervelt *et al.*, *Lawyers' Strategies for Cross-Examining Rape Complainants: Have We Moved Beyond the 1950s?*, 57 BRITISH JOURNAL OF CRIMINOLOGY 3 (2016); Martha R. Burt, *Cultural Myths and Supports for Rape*, 38 JOURNAL OF PERSONALITY & SOCIAL PSYCHOL. 2 (1980).

standard because, for example, it treats both parties equitably, levels the playing field between men and women, and because any higher standard than preponderance of the evidence would unfairly benefit respondents and discourage reporting of sexual assault by sending the message that a respondent's future at the institution is more important than the complainant's future at the institution.[1433] At least one commenter opined that using anything other than the preponderance standard demonstrates caring more about the accused than the complainant.[1434]

Commenters also asserted that the Department's longstanding practice has been to require the preponderance of the evidence standard, that many recipients currently use this standard,[1435] and that courts generally use the preponderance of the evidence standard in civil

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[1433] Commenters cited: Edward Stoner II & John Wesley Lowery, *Navigating Past the "Spirit of Subordination": A Twenty-First Century Model Student Conduct Code with a Model Hearing Script*, 31 JOURNAL OF COLL. & UNIV. L. 1, 49 (2004); Lavinia M. Weizel, *The Process that is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 BOSTON COLL. L. REV. 4, 1613, 1632 (2012); National Center for Higher Education Risk Management (The NCHERM Group), *Due Process and the Sex Police* (Apr. 2017) at 2, 17-18; Elizabeth Bartholet *et al.*, *Fairness For All Students Under Title IX* 5 (Aug. 21, 2017); Association of Title IX Administrators (ATIXA), *ATIXA Position Statement: Why Colleges Are in the Business of Addressing Sexual Violence* 4 (Feb. 17, 2017) ("The whole point of Title IX is to create a level playing field for men and women in education, and the preponderance standard does exactly that. No other evidentiary standard is equitable."); Student Affairs Administrators in Higher Education (NASPA), *NASPA Priorities for Title IX: Sexual Violence Prevention & Response* 1 ("Rather than leveling the field for survivors and respondents, setting a standard higher than preponderance of the evidence tilts proceedings to unfairly benefit respondents."); Association for Student Conduct Administration (ASCA), *ASCA 2014 White Paper: Student Conduct Administration & Title IX: Gold Standard Practices for Resolution of Allegations of Sexual Misconduct on College Campuses* 2 (2014); Association for Student Conduct Administration (ASCA), *The Preponderance of Evidence Standard: Use In Higher Education Campus Conduct Processes* ("Considering the serious potential consequences for all parties in these cases, it is clear that preponderance is the appropriate standard by which to reach a decision, since it is the only standard that treats all parties equitably. To use any other standard says to the victim/survivor, 'Your word is not worth as much to the institution as the word of accused' or, even worse, that the institution prefers that the accused student remain a member of the campus community over the complainant. Such messages do not contribute to a culture that encourages victims to report sexual assault.").

[1434] Commenters cited: Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L. J. 1940, 1986 (2016).

[1435] Commenters cited: Letter from Association of Title IX Administrators (ATIXA) *et al.* to Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, Dep't. of Education 2 (Feb. 7, 2012) (for the proposition that 80 percent of schools already used the preponderance of the evidence standard before OCR insisted on its use). Some commenters cited: Heather M. Karjane *et al.*, *Campus Sexual Assault: How America's Institutions of Higher*

rights litigation including for Title VI and Title VII.[1436] At least one commenter argued that VAWA created civil rights of action for claims of rape and sexual assault and requires the preponderance of the evidence standard, and thus Title IX should not permit a different evidentiary standard to be used for conduct that also constitutes rape and sexual assault.[1437] One commenter invoked the canon of *in pari materia*, in which similar statutes should be interpreted similarly, and argued that because lawsuits under Title VI and Title VII cases apply the preponderance of the evidence standard and these statutes serve the same basic civil rights purpose as Title IX, the preponderance of the evidence standard should also apply in Title IX proceedings.

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*Education Respond* 120, Final Report, NIJ Grant # 1999-WA-VX-0008 (Education Development Center, Inc. 2002); Angela Amar *et al.*, *Administrators' Perceptions of College Campus Protocols, Response, and Student Prevention Efforts for Campus Sexual Assault*, 29 VIOLENCE & VICTIMS 579, 584-85 (2014); Jake New, *Burden of Proof in the Balance*, INSIDE HIGHER EDUCATION (Dec. 16, 2016) (for the proposition that 60-70 percent of institutions already used the preponderance of the evidence standard prior to the withdrawn 2011 Dear Colleague Letter); Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 BOSTON UNIV. L. REV. 945, 1000 (2004) (for the proposition that most postsecondary institutions had voluntarily adopted the preponderance of the evidence standard for all student misconduct (not just sexual misconduct) by the early 2000s).

[1436] Commenters cited: *Bazemore v. Friday*, 478 U.S. 385, 400 (1986), citing cases under Title VII (e.g., *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003)), *Price Waterhouse v. Hopkins*, 490 U.S. 228, 253 (1989); *Tex. Dep't. of Cmty. Affairs v. Burdine*, superseded by statute, Civil Rights Act of 1991, as recognized in *Landgraf v. USI Film Prods.*, 511 U.S. 244, 251 (1994); *Elston v. Talladega Cnty. Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993); Ramya Sekaran, *The Preponderance of the Evidence Standard and Realizing Title IX's Promise: An Educational Environment Free from Sexual Violence*, 19 GEORGETOWN J. OF GENDER & THE L. 3 (2018); *Judicial Business 2014*, U.S. COURTS (Sept. 30, 2014) (for the proposition that the majority of cases in U.S. legal system use the preponderance of the evidence standard, shown by the fact that the number of filings for criminal defendants represented less than a third of all Federal case filings in 2014); *SEC v. Posner*, 16 F.3d 520, 521 (2d Cir. 1994); *EEOC v. Gaddis*, 733 F.2d 1373, 1378-79 (10th Cir. 1984); D. Allison Baker, *Gender-Based Discrimination*, 1 GEORGETOWN J. OF GENDER & THE L. 2 (2000) (for the proposition that preponderance of the evidence is the standard used in civil proceedings involving sexual harassment claims). Commenters also cited: *Steadman v. SEC*, 450 U.S. 91, 95-102 (1982); *Valmonte v. Bane*, 18 F.3d 992, 1003-05 (2d Cir. 1994) (for the proposition that preponderance is used in various administrative proceedings involving imposition of serious sanctions). Commenters also cited: William E. Thro, *No Clash of Constitutional Values: Respecting Freedom and Equality in Public University Sexual Assault Cases*, 28 REGENT UNIV. L. REV. 197, 209 (2016) (for the proposition that a higher standard should not be used for campus proceedings than what is used in traditional court litigation); Patricia H. Davis, *Higher Education Law: Title IX Cases*, 80 TEX. BUS. J. 512 (2017) (for the proposition that preponderance is essential to hold perpetrators accountable and promote healthy campus environments).

[1437] Commenters cited: Amy Chmielewski, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 BYU EDUC. & L. J. 143 (2013).

Commenters argued that Title IX proceedings do not involve potential denial of significant liberty interests or jail, but rather involve determinations about whether the accused has violated school policy. These commenters described Supreme Court cases requiring a higher standard of evidence (such as clear and convincing evidence) in only a narrow set of cases implicating particularly important interests,[1438] such as civil commitment, deportation, denaturalization, termination of parental rights, and similar cases, and commenters argued that school disciplinary proceedings do not implicate uniquely important interests that would warrant a heightened evidentiary standard.[1439] A few commenters argued that potential damage to future career prospects does not justify a higher standard because the preponderance of the evidence standard applies to Federal research misconduct cases, civil anti-fraud proceedings, and professional discipline cases.[1440]

One commenter asserted that the clear and convincing evidence standard is unfairly vague compared to the preponderance of the evidence standard, and can increase ambiguity in situations where there is already distrust of sexual assault survivors. This commenter asserted that schools often do not have capacity to thoroughly undertake investigations and uncover corroborative evidence, so the preponderance of the evidence standard is the most appropriate standard. Commenters expressed concern that economically disadvantaged students might not

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[1438] Commenters cited: Amy Chmielewski, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 BYU EDUC. & L. J. 143, 150 (2013).
[1439] Commenter cited: Chelsea Avent, *Karasek v. Regents of the University of California: The Victimization of Title IX*, 96 NEB. L. REV. 772, 776 (2018).
[1440] Commenters cited, e.g., *In re Barach*, 540 F.3d 82, 85 (1st Cir. 2008); *Granek v. Tex. State Bd. of Med. Examiners*, 172 S.W.3d 761, 777 (Tex. Ct. App. 2005) (for the proposition that many State and Federal courts apply the preponderance of the evidence standard to professional license revocation proceedings); Commenters cited an HHS study finding that two-thirds of States use the preponderance of the evidence standard in physician misconduct cases: Randall R. Bovbjerg *et al.*, *State Discipline of Physicians* 14-15 (2006). Commenters cited: Gary S. Marx, *An Overview of the Research Misconduct Process and an Analysis of the Appropriate Burden of Proof*, 42 JOURNAL OF COLL. & UNIV. L. 311, 364 (2016).

have the ability to access resources immediately after being raped or assaulted, and thus might not be able to obtain evidence that courts deem to meet a clear and convincing evidence standard. Another commenter expressed concern that applying a heightened standard for sexual misconduct could inadvertently set up young men to fail once they enter the corporate world, where a zero-tolerance approach applies.

Discussion: The Department acknowledges the arguments raised by many commenters that the Department should mandate a preponderance of the evidence standard in Title IX proceedings for reasons including fairness, consistency with civil litigation, and consistency with other civil rights laws including Title VI and Title VII. As to the sufficiency of evidence to meet a clear and convincing evidence standard, the Department appreciates the opportunity to clarify that neither the preponderance of the evidence standard, nor the clear and convincing evidence standard, requires corroborating evidence.[1441] We recognize, as have many commenters, that sexual harassment situations may arise under circumstances where the only available evidence is the statement of each party involved. A recipient is obligated to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence.[1442] The decision-maker can reach a determination regarding responsibility under a preponderance of the evidence standard, or a clear and convincing evidence standard, based on objective evaluation of party statements, with or

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[1441] Courts do not impose a requirement of corroborating evidence with respect to meeting either the preponderance of the evidence, or clear and convincing evidence, standard. *See, e.g.*, *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993) (quoting *In re Winship*, 397 U.S. 358, 371-372 (1970) (Harlan, J., concurring) ("The burden of showing something by a 'preponderance of the evidence,' the most common standard in the civil law, 'simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'")); *cf.*, *Sophanthavong v. Palmateer*, 378 F.3d 859, 866-67 (9th Cir. 2004) ("Clear and convincing evidence requires greater proof than preponderance of the evidence. To meet this higher standard, a party must present sufficient evidence to produce 'in the ultimate factfinder an abiding conviction that the truth of its factual contentions are [*sic*] highly probable.") (quoting *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984)).

[1442] Section 106.45(b)(1)(ii).

without evidence that corroborates either party's statements.[1443] As discussed previously, a standard of evidence represents the "degree of confidence" that a decision-maker must have in the conclusion reached;[1444] a standard of evidence does not dictate the nature of available evidence that might lead a decision-maker to reach the designated level of confidence.

The statutory text of Title IX does not dictate a standard of evidence to be used by recipients in investigations of sexual harassment. The Department's 2001 Guidance was silent on an appropriate standard of evidence during Title IX grievance procedures,[1445] although the withdrawn 2011 Dear Colleague Letter took the position that using a clear and convincing evidence standard violates Title IX because only a preponderance of the evidence standard is consistent with resolution of civil rights claims.[1446]

It is true that civil litigation generally uses the preponderance of the evidence standard (although a clear and convincing evidence standard is applied in some civil litigation issues),[1447] and that Title IX grievance processes are analogous to civil litigation in some ways. However, it is also true that Title IX grievance processes (as prescribed under these final regulations) do not

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[1443] Gary S. Marx, *An Overview of The Research Misconduct Process and an Analysis of the Appropriate Burden of Proof*, 42 JOURNAL OF COLL. & UNIV. L. 311, 347 (2016) (noting that with respect to a clear and convincing evidence standard, while "the proof must be of a heavier weight than merely the greater weight of the credible evidence, it does not require the evidence be unequivocal or undisputed").

[1444] *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring) (the purpose of a standard of proof is "to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.").

[1445] 2001 Guidance at 20.

[1446] 2011 Dear Colleague Letter at 11.

[1447] *Cal. ex rel. Cooper v. Mitchell Bros.' Santa Ana Theater*, 454 U.S. 90, 92-93 (1981) (noting that the "purpose of a standard of proof is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication" and "[t]hree standards of proof are generally recognized, ranging from the preponderance of the evidence standard employed in most civil cases, to the clear and convincing evidence standard reserved to protect particularly important interests in a limited number of civil cases, to the requirement that guilty be proved beyond a reasonable doubt in a criminal prosecution.") (internal quotation marks and citations omitted).

have the same set of procedures available in civil litigation. For example, many recipients choose not to allow active participation by counsel; there are no comprehensive rules of evidence or rules of civil procedure in Title IX grievance processes that allow and govern pretrial motion practice; and Title IX grievance processes do not afford parties the same discovery tools available under rules of civil procedure. The Department does not wish to force schools, colleges, and universities to become *de facto* civil courts by imposing all the features of civil litigation onto the Title IX grievance process; rather, the Department has included in the § 106.45 grievance process those procedural protections the Department has determined necessary to serve the critical interests of creating a consistent, fair process promoting reliable outcomes. While selecting a standard of evidence is important to ensuring a transparent, fair, reliable process, the Department has determined that a recipient may apply either the preponderance of the evidence standard, or the clear and convincing evidence standard, to fairly and accurately resolve formal complaints of sexual harassment. The Department believes that recipients reasonably may conclude that the preponderance of the evidence standard is more appropriate (perhaps for the reasons advocated by commenters) or that the clear and convincing evidence standard is more appropriate (perhaps for the reasons advocated by other commenters). The Department believes that either standard of evidence, in combination with the rights and protections required under § 106.45, creates a consistent, fair process under which recipients can reach accurate determinations regarding responsibility. Factually accurate outcomes are critical in sexual harassment cases, where both parties face potentially life-altering consequences from the outcome, and either standard of evidence allowed under these final regulations reduces the risk of a factually inaccurate outcome. "Being labeled a sex offender by a university has both an immediate and lasting impact on a student's life" may affect "educational and employment

opportunities down the road".[1448] When a finding of responsibility is erroneous, such consequences are unjust. At the same time, when a respondent is found *not* responsible for sexual harassment, the complainant receives no remedy restoring the complainant's equal access to education,[1449] with immediate and lasting impact on the complainant's life, which may affect educational and employment opportunities down the road. When the finding of non-responsibility is erroneous, such consequences are unjust. A complainant "deserves a reliable, accurate outcome as much as" a respondent.[1450]

The Department disagrees that the preponderance of the evidence standard means that complainants and respondents are treated "equally" or placed "on a level playing field." Where the evidence in a case is "equal" or "level" or "in equipoise," the preponderance of the evidence standard results in a finding that the respondent is not responsible.[1451]

The Department recognizes that consistency with respect to administrative enforcement of Title IX and other civil rights laws (such as Title VI and Title VII) is desirable. However, these final regulations focus on furthering Title IX's non-discrimination mandate and address challenges unique to recipients' responses to sexual harassment. In this regard the Department has determined that recipients should retain flexibility to select the standard of evidence that they

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[1448] *Doe v. Baum*, 903 F.3d 575, 582 (6th Cir. 2018).
[1449] Nothing in these final regulations prevents a recipient from providing supportive measures to a complainant even after a determination of non-responsibility.
[1450] *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 404 (6th Cir. 2017).
[1451] *See, 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").

believe is most appropriate, because either of the two standards of evidence permitted under these final regulations may be used to produce reliable outcomes. The Department does not believe this approach to a standard of evidence under Title IX is in conflict with statutory or regulatory requirements under Title VI or Title VII that may apply to recipients who also have obligations under Title IX. Similarly, while VAWA authorizes private rights of action that (similarly to judicially implied private rights of action under Title VI and Title IX) use a preponderance of the evidence standard in civil litigation exercising those rights of action, these final regulations do not impact the standard of evidence that applies in civil litigation under any statute. For the reasons explained above the Department believes that either the preponderance of the evidence standard, or the clear and convincing evidence standard, is an appropriate standard in Title IX grievance processes, which differs from civil litigation. Even as to ways in which a Title IX grievance process is similar to civil litigation, both standards of evidence (the preponderance of the evidence standard and the clear and convincing evidence standard) are used in various types of civil litigation.

As many commenters have noted, a Title IX grievance process differs in purpose and context from criminal, civil, and administrative agency proceedings. A Title IX grievance process serves a unique purpose (i.e., reaching accurate factual determinations about whether sexual harassment must be remedied by restoring a victim's equal access to education) in a unique context (i.e., decisions must be reached by schools, colleges, and universities whose primary function is to educate, not to serve as courts or administrative bodies). A Title IX grievance process is different from criminal, civil, and administrative proceedings, yet bears similarities to each. The preponderance of the evidence standard, and the clear and convincing

evidence standard, each are used in various civil and administrative proceedings.[1452] Additionally, recipients have historically used either the preponderance of the evidence standard or the clear and convincing evidence standard for a variety of student and employee misconduct proceedings, under a variety of rationales for choosing one or the other.[1453] The Department believes that a recipient could view either standard as appropriate in the context of Title IX proceedings, and the Department agrees that either standard may be fairly applied to reach accurate outcomes, and thus these final regulations allow recipients to select the preponderance of the evidence standard, or the clear and convincing evidence standard, for use in resolving formal complaints of sexual harassment under § 106.45.[1454] Selecting a standard of evidence represents a statement about the "degree of confidence" that a recipient believes its decision-makers should have in reaching determinations regarding responsibility in Title IX sexual harassment cases. We do not agree that the recipient's selection of one standard over the other implies a belief that any party is lying or untruthful, and regardless of the applicable standard of

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[1452] *See, e.g.*, *Nguyen v. Wash. Dep't. of Health*, 144 Wash.2d 516 (2001) (concluding that the Due Process Clause requires proof by at least the clear and convincing evidence standard in a sexual misconduct case in a medical disciplinary proceeding); *Disciplinary Counsel v. Bunstine*, 136 Ohio St. 3d 276 (2013) (applying the clear and convincing evidence standard in sexual harassment case involving a lawyer); *cf. In re Barach*, 540 F.3d 82, 85 (1st Cir. 2008); *Granek v. Tex. State Bd. of Med. Examiners*, 172 S.W.3d 761, 777 (Tex. Ct. App. 2005) (noting that many State and Federal courts apply the preponderance of the evidence standard to professional license revocation proceedings).

[1453] As many commenters noted, there exist valid reasons for supporting the preponderance of the evidence standard, and for supporting the clear and convincing evidence standard, with respect to sexual misconduct allegations. Commenters, for instance, cited this debate by citing to: Nancy Chi Cantalupo & John Villasenor, *Is a Higher Standard Needed for Campus Sexual Assault Cases?*, THE NEW YORK TIMES (Jan. 4, 2017). The final regulations permit recipients to select between these standards to best meet the legal, cultural, and pedagogical needs of the recipient's community with respect to the degree of certainty the recipient expects decision-makers to have when reaching determinations regarding responsibility for sexual harassment allegations.

[1454] For reasons explained in the "Mandating a Higher Standard of Evidence" subsection of this "Section 106.45(b)(7)(i) Standard of Evidence and Directed Question 6" subsection of this preamble, the Department does not permit recipients to select a standard of evidence higher than clear and convincing evidence (such as the criminally used "beyond a reasonable doubt" standard).

evidence, Title IX personnel must avoid prejudgment of the facts at issue[1455] and reach determinations regarding responsibility based on objective evaluation of the evidence without drawing credibility determinations based on a party's status as a complainant or respondent. [1456] We also reiterate that regardless of the applicable standard of evidence, the burden of proof rests on the recipient, not on either party.[1457]

We disagree that the clear and convincing evidence standard is unfairly vague. The clear and convincing evidence standard is a widely recognized standard of evidence used in a variety of civil and administrative proceedings,[1458] and many recipients have historically used clear and

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[1455] Section 106.45(b)(1)(iii).
[1456] Section 106.45(b)(1)(i).
[1457] Section 106.45(b)(5)(i).
[1458] *E.g.*, *Addington v. Texas*, 441 U.S. 418, 424 (1979) (holding that the clear and convincing evidence standard was required in civil commitment proceedings) (noting that clear and convincing evidence is an "intermediate standard" between preponderance of the evidence and the criminal beyond a reasonable doubt standard and that the clear and convincing evidence standard "usually employs some combination of the words 'clear,' 'cogent,' 'unequivocal,' and 'convincing'" and while less commonly used than the preponderance of the evidence standard the clear and convincing evidence standard is "no stranger to the civil law" and is sometimes used in civil cases "involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant" where "the interests at stake are deemed to be more substantial than mere loss of money" justifying reduction of "the risk to the defendant of having his reputation tarnished erroneously.") (internal quotation marks and citations omitted); *Sophanthavong v. Palmateer*, 378 F.3d 859, 866-67 (9th Cir. 2004) ("Clear and convincing evidence requires greater proof than preponderance of the evidence. To meet this higher standard, a party must present sufficient evidence to produce 'in the ultimate factfinder an abiding conviction that the truth of its factual contentions are [*sic*] highly probable.'") (quoting *Colorado. v. New Mexico*, 467 U.S. 310, 316 (1984)) (brackets in original); Jane B. Baron, *Irresolute Testators, Clear and Convincing Wills Law*, 73 WASH. & LEE L. REV. 3, 45 (2016) (discussing application of the "clear and convincing evidence" standard in the context of proving that a facially defective will represented the testator's intent, and noting that "It is common, however, for courts to vary in their formulation and expression of a legal standard. No evidentiary standard can define itself; all are indeterminate to some degree. Still, the idea behind requiring clear and convincing evidence seems intuitive enough; the factfinder need not be absolutely certain, but highly confident, about the fact in issue."); Haley Hawkins, *Clearly Unconvincing: How Heightened Evidentiary Standards in Judicial Bypass Hearings Create an Undue Burden Under Whole Woman's Health*, 67 AM. UNIV. L. REV. 1911, 1923 (2018) ("The clear and convincing evidence standard of proof is the highest evidentiary standard employed in civil proceedings, second only to the 'beyond a reasonable doubt' standard employed in criminal proceedings. In general, standards of proof function to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' Within the range of standards, clear and convincing evidence is situated to 'protect particularly important individual interests in various civil cases' that involve more than 'mere loss of money.' Though the meaning of 'clear and convincing' varies by state, one can generally articulate the standard as 'persuad[ing] the [factfinder] that the proposition is highly probable, or . . . produc[ing] in the mind of the factfinder a firm belief or conviction that the allegations in question are true.'") (internal citations omitted).

convincing evidence as an evidentiary standard for various types of student or employee misconduct.[1459]

We disagree that a recipient who selects the clear and convincing evidence standard for resolution of sexual harassment cases is failing to prepare students for future careers in the corporate world. While corporate employers may or may not choose to, or be required to, use the clear and convincing evidence standard for sexual misconduct proceedings involving employees, workplaces differ from educational environments and different laws and policies govern discrimination complaints and misconduct proceedings in each context. Whether or not the commenter correctly characterized corporate environments as having "zero tolerance policies," we note that nothing in these final regulations precludes a recipient from adopting a zero tolerance policy (with respect to harassment or any other misconduct); these final regulations apply only to a recipient's obligations to respond to sexual harassment (as defined in § 106.30) of which the recipient knows and which occurs in the recipient's education program or activity.[1460] As noted in § 106.45(b)(3)(i), even if a recipient must dismiss allegations of sexual harassment in a formal complaint under these final regulations, such dismissal is only for Title IX purposes and does not preclude action under another provision of the recipient's code of conduct.

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[1459] 2011 Dear Colleague Letter at 11 (noting that the clear and convincing evidence standard was, at that time, "currently used by some schools" and insisting that only the preponderance of the evidence standard is permissible under Title IX); Matthew R. Triplett, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L. J. 487, fn. 107 (2012) (noting that "the standard of proof in student disciplinary hearings has historically varied wildly across institutions" and listing examples of several prominent universities that lowered their standard of evidence from the clear and convincing evidence standard, to the preponderance of the evidence standard, after OCR issued the [now-withdrawn] 2011 Dear Colleague Letter).
[1460] Section 106.44(a) (requiring a recipient with actual knowledge of sexual harassment in the recipient's education program or activity against a person in the United States to respond promptly in a manner that is not deliberately indifferent).

Changes: The Department has revised § 106.45(b)(7)(i) of the final regulations such that recipients have the choice of either applying the preponderance of the evidence standard or the clear and convincing evidence standard, and § 106.45(b)(1)(vii) requires a recipient to make that choice applicable to all formal complaints of sexual harassment, including those against employees and faculty. We have removed the limitation contained in the NPRM that would have permitted recipients to use the preponderance of the evidence standard only if they used that standard for non-sexual misconduct that has the same maximum disciplinary sanction.

*Improving Accuracy of Outcomes*

Comments: A number of commenters asserted that the preponderance of the evidence standard increases the overall accuracy of the system because it is an error-minimizing standard and argued that the clear and convincing evidence standard would increase false negative errors to a greater extent than it reduces false positive errors, thus reducing the accuracy of Title IX outcomes.[1461] Other commenters pointed to a study explaining that use of the preponderance of the evidence standard increases false positive errors.[1462]

Discussion: The Department shares commenters' concerns that increasing the overall accuracy of determinations of responsibility in Title IX proceedings is critical and that minimizing either type of error (i.e., false positives and false negatives) is important and desirable. The Department does not believe that evidence is conclusive either way regarding whether using the preponderance of the evidence standard or the clear and convincing evidence standard as the

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[1461] Commenters cited: Nicholas E. Khan, *The Standard of Proof in the Substantiation of Child Abuse and Neglect*, 14 JOURNAL OF EMPIRICAL LEGAL STUDIES 333, 356-57 (2017).

[1462] Commenters cited: John Villasenor, *A Probabilistic Framework for Modelling False Title IX 'convictions' under the Preponderance of the Evidence Standard*, 15 LAW, PROBABILITY & RISK 4 (2016).

standard of evidence in Title IX proceedings best reduces risk of error, in part because studies that may shed light on that question assume features and processes in place that differ from those prescribed by the final regulations under § 106.45. The final regulations permit recipients to select either the preponderance of the evidence standard or the clear and convincing evidence standard for application to formal complaints of sexual harassment in the recipient's educational community, because in combination with the other procedural features of the § 106.45, either standard of evidence can be applied fairly to result in accurate outcomes.

Changes: The Department has revised § 106.45(b)(7)(i) of the final regulations such that recipients have the choice of either applying the preponderance of the evidence standard or the clear and convincing evidence standard, and § 106.45(b)(1)(vii) requires a recipient to make that choice applicable to all formal complaints of sexual harassment, including those against employees and faculty. We have removed the limitation contained in the NPRM that would have permitted recipients to use the preponderance of the evidence standard only if they used that standard for non-sexual misconduct that has the same maximum disciplinary sanction.

*Safety Concerns*

Comments: Many commenters contended that the clear and convincing evidence standard will make campuses less safe, chill reporting, and harm already vulnerable students.[1463] Commenters argued that the clear and convincing evidence standard will discourage survivors, particularly students of color, LGBTQ students, and students with disabilities, from reporting because this

[1463] Commenters cited: Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions,* 125 YALE L. J. OF FEMINISM 282, 290 (2016); Kathryn J. Holland & Lilia M. Cortina, *"It happens to girls all the time": Examining sexual assault survivors' reasons for not using campus supports*, 59 AM. J. OF COMMUNITY PSYCHOL. 1-2 (2017); Shamus Khan *et al.*, *"I Didn't Want to Be 'That Girl'": The Social Risks of Labeling, Telling, and Reporting Sexual Assault*, 5 SOCIOLOGICAL SCI. 432 (2018).

standard unjustly favors respondents. Commenters argued that the clear and convincing evidence standard may result in a lower number of respondents found responsible and removed from campus, thus increasing the risk of victim re-traumatization by encountering their perpetrator and possibly resulting in "constructive expulsion," where survivors leave school to avoid seeing their perpetrator. Commenters argued that the clear and convincing evidence standard may perversely incentivize perpetrators to attack again because of the perception they will not be held accountable.

Discussion: Under the final regulations, complainants (or third parties) may report sexual harassment triggering a recipient's mandatory obligation to offer the complainant supportive measures and inform the complainant about the option of filing a formal complaint; complainants are not required to file a formal complaint or participate in a grievance process in order to report sexual harassment and receive supportive measures.[1464] Thus, regardless of how a complainant perceives or anticipates the experience of a grievance process, a complainant has the right to report sexual harassment and receive supportive measures. If or when a complainant also decides to file a formal complaint initiating a grievance process against a respondent, § 106.45 ensures that the burden of gathering evidence, and the burden of proof, remain on the recipient and not on the complainant (or respondent). Complainants who participate in a grievance process receive the strong, clear procedural rights and protections in § 106.45 including, among other things, the right to gather, present, review, and respond to evidence, the right to review and respond to the recipient's investigative report summarizing relevant evidence, and the right to pose questions to be answered by a respondent to further the complainant's perspective about the

[1464] Section 106.44(a).

case and what the outcome should be, and the right to an advisor of choice to advise and assist the complainant throughout the process.[1465] Whether the recipient selects a preponderance of the evidence standard, or a clear and convincing evidence standard, complainants have the right and opportunity to participate in the process on an equal basis with the respondent. Regardless of which standard of evidence a recipient selects, we reiterate that neither standard requires corroborating evidence in order to reach a determination regarding responsibility; the standard of evidence reflects the "degree of confidence" that a decision-maker has in correctness of the factual conclusions reached.[1466]

The Department understands that whether a determination regarding responsibility is reached using the preponderance of the evidence standard or the clear and convincing evidence standard, the outcome reflects the weight and persuasiveness of the available, relevant evidence in the case. We have added § 106.71 in the final regulations to caution recipients not to draw conclusions about any party's truthfulness during a grievance process based solely on the outcome of the case. The final regulations do not preclude a recipient from keeping supportive measures in place even after a determination that a respondent is not responsible, so complainants do not necessarily need to be left in constant contact with the respondent, regardless of the result of a grievance process. The Department understands the potential for loss of educational access for complainants, and for respondents, in situations where sexual harassment allegations are not resolved accurately. The Department is not aware of a Federal

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[1465] Section 106.45(b)(5)(i); § 106.45(b)(5)(iii); § 106.45(b)(5)(iv); § 106.45(b)(5)(vi); § 106.45(b)(5)(vii); § 106.45(b)(6).

[1466] *Cal. ex rel. Cooper v. Mitchell Bros.' Santa Ana Theater*, 454 U.S. 90, 92-93 (1981) (noting that the "purpose of a standard of proof is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication").

appellate court holding that the clear and convincing evidence standard is required to satisfy constitutional due process or fundamental fairness in Title IX proceedings, and the Department is not aware of a Federal appellate court holding that the preponderance of the evidence standard is required under Title IX. Because recipients have historically used either the preponderance of the evidence standard or the clear and convincing evidence standard in sexual misconduct disciplinary proceedings, and because studies are inconclusive about which standard is more likely to reduce the risk of erroneous outcomes, the Department concludes that recipients must select and consistently apply a standard of evidence that is not lower than the preponderance of the evidence standard and not higher than the clear and convincing evidence standard, but that either the preponderance of the evidence standard or the clear and convincing evidence standard may be applied to reach accurate determinations in a Title IX grievance process, consistent with constitutional due process and fundamental fairness and with Title IX's non-discrimination mandate. The Department believes that the predictable, fair grievance process prescribed under § 106.45 will convey to complainants and respondents that the recipient treats formal complaints of sexual harassment seriously and aims to reach a factually accurate conclusion; the Department does not agree that using one standard of evidence rather than the other conveys to respondents that Title IX sexual harassment can be perpetrated without consequence.

Changes: The Department has revised § 106.45(b)(7)(i) of the final regulations such that recipients have the choice of either applying the preponderance of the evidence standard or the clear and convincing evidence standard, and § 106.45(b)(1)(vii) requires a recipient to make that choice applicable to all formal complaints of sexual harassment, including those against employees and faculty. We have removed the limitation contained in the NPRM that would have permitted recipients to use the preponderance of the evidence standard only if they used that

standard for non-sexual misconduct that has the same maximum disciplinary sanction. We have added § 106.71 prohibiting retaliation for exercising rights under Title IX and specifying that while a recipient may punish a party for making bad-faith materially false statements during a grievance process, the outcome of the case alone cannot be the basis for concluding that a party made a bad-faith materially false statement.

*Consistency of Standards of Evidence Across Recipients*

Comments: A few commenters raised concerns that allowing recipients to choose between two standards of evidence will lead to inconsistent systems across the country, which may complicate campus crime reporting under the Clery Act and make it harder for prospective students to compare crime statistics across campuses. Commenters argued that the Department should not allow justice to apply unequally across the country.

Discussion: These final regulations do not alter requirements under the Clery Act or its implementing regulations. The Department disagrees that data gathering and reporting under the Clery Act will be affected by the standard of evidence selected by a recipient for resolving formal complaints of sexual harassment under Title IX. A recipient's obligations to report under the Clery Act depend on when a crime has been reported to the recipient and do not depend on the outcome of any disciplinary proceeding that results from a person's report of a crime.

The final regulations' approach to the standard of evidence for Title IX grievance processes (whereby a recipient may select either the preponderance of the evidence standard, or the clear and convincing evidence standard), may result in some recipients selecting one standard and other recipients selecting the other standard. The Department disagrees that this approach results in "unequal justice" across the country. The Department believes that this approach to the standard of evidence maintains consistency with respect to all Title IX grievance processes,

across recipients, because all grievance processes regardless of which standard of evidence a recipient applies, are fair processes likely to lead to accurate determinations regarding responsibility.

Changes: The Department has revised § 106.45(b)(7)(i) of the final regulations such that recipients have the choice of either applying the preponderance of the evidence standard or the clear and convincing evidence standard, and § 106.45(b)(1)(vii) requires a recipient to make that choice applicable to all formal complaints of sexual harassment, including those against employees and faculty. We have removed the limitation contained in the NPRM that would have permitted recipients to use the preponderance of the evidence standard only if they used that standard for non-sexual misconduct that has the same maximum disciplinary sanction.

*Standards of Evidence Below the Preponderance of the Evidence*

Comments: A few commenters proposed that the Department consider lower standards of evidence than the preponderance of the evidence standard. One commenter suggested "substantial evidence," or enough relevant evidence that a reasonable person would find supports the fact-finder's conclusion. Another commenter suggested "reasonable cause" and noted that child welfare agencies protecting children from abuse use the "reasonable cause" standard, which is lower than the preponderance of the evidence standard.

Discussion: As discussed above, the Department does not wish to be more prescriptive than necessary to ensure a consistent grievance process yielding accurate outcomes, so that recipients are held responsible for redressing sexual harassment as a form of sex discrimination under Title IX. As commenters pointed out, the two standards of evidence between which the final regulations permit recipients to choose are not the only possible standards of evidence that could be used in Title IX proceedings. For example, some commenters urged adoption of the higher,

criminal "beyond a reasonable doubt" standard, while other commenters noted that preponderance of the evidence standard is not "the lowest" possible standard that could be used, because lower standards such as "substantial evidence," "reasonable cause," or "probable cause" are used, or have been used, in student discipline and certain types of legal proceedings. The Department believes that students and employees deserve clarity as to the standard of evidence a recipient will apply during the grievance process and that recipients should be permitted as much flexibility as reasonably possible while ensuring reliable outcomes in these high-stakes cases. For reasons described above, the Department believes that either the preponderance of the evidence standard or the clear and convincing evidence standard can be applied within the § 106.45 grievance process and yield reliable outcomes, but does not believe that a standard lower than the preponderance of the evidence standard, or higher than the clear and convincing evidence standard, would result in a fair process or reliable outcomes.[1467]

As discussed above, the Department does not believe that the highest possible standard (beyond a reasonable doubt) should apply in a noncriminal proceeding such as a Title IX grievance process where, as commenters have accurately pointed out, a respondent's liberty interests are not at stake.[1468] The Supreme Court has cautioned against applying the "beyond a

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[1467] *See* Lavinia M. Weizel, *The Process That Is Due: Preponderance of The Evidence as The Standard of Proof For University Adjudications of Student-On-Student Sexual Assault Complaints*, 53 BOSTON COLL. L. REV. 1613, 1635 (2012) (analyzing court cases that have criticized colleges for using a standard of evidence lower than the preponderance of the evidence standard, such as what many schools have referred to as "substantial evidence" because using a standard lower than the preponderance of the evidence standard "leaves the fact-finder adrift to be persuaded by individual prejudices rather than by the weight of the evidence presented") (internal quotation marks and citations omitted).

[1468] The clear and convincing evidence standard is an "intermediate standard" that while less commonly used than the preponderance of the evidence standard, is sometimes used in civil cases "involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant" that justify reducing "the risk to the defendant of having his reputation tarnished erroneously." *Addington v. Texas*, 441 U.S. 418, 424 (1979) (internal quotation marks and citations omitted). As some commenters observed, the consequences for a respondent in a Title IX case often involve allegations of quasi-criminal wrongdoing with possible lifelong impact on a respondent's reputation.

reasonable doubt" standard to noncriminal proceedings.[1469] At the same time, the Department does not believe that a standard lower than preponderance (such as substantial evidence or probable cause) should apply to the Title IX grievance process either, because the stakes are high for both parties in a Title IX process; without a determination based on a probability of accuracy greater than 50 percent (i.e., more likely than not to be true), the Department does not believe that an outcome can be deemed reliable or perceived as legitimate. Without a reliable outcome, the parties, recipients, Department, and the public cannot confidently assess whether a recipient has responded to sex discrimination in the recipient's education program or activity by providing remedies to victims and taking disciplinary action against perpetrators with respect to sexual harassment allegations.

Changes: None.

*Questioning the Department's Legal Authority*

Comments: Several commenters contended that the NPRM's choice of evidence standard exceeds the Department's legal authority. One commenter argued that allowing the clear and convincing evidence standard for sexual harassment cases but a lower preponderance of the evidence standard for non-sexual harassment cases could violate the Fourteenth Amendment Equal Protection Clause. Other commenters suggested that allowing a clear and convincing evidence standard is inconsistent with Title IX's statutory objectives and would not effectuate the prohibition on sex discrimination. One commenter stated that the Supreme Court, not the Department, must ultimately determine the applicable Title IX standard of evidence. Another

[1469] *See, e.g.*, *Santosky v. Kramer*, 455 U.S. 745, 768 (1982) (noting that the Supreme Court hesitates to apply the "unique standard" of beyond a reasonable doubt "too broadly or casually in noncriminal cases") (internal quotation marks and citations omitted).

commenter suggested that the NPRM's approach to the standard of evidence violates the International Covenant on Civil and Political Rights, under which the U.S. is obligated to prohibit and eliminate sex discrimination. One commenter asserted that the Department lacks authority over evidence standards at all, and that the Department should instead defer to recipients' administrative discretion to set their own evidentiary standards. One commenter argued that the Department lacks authority over negotiated agreements between recipient management and employees, and the Department's attempt to supersede these agreements with mandated evidentiary standards is regulatory overreach. This commenter emphasized that recipients did not contemplate such a requirement when accepting Federal funding.

Discussion: Contrary to the claims made by some commenters, the Department believes the final regulations address the issue of what standard of evidence should apply in Title IX proceedings, in a reasonable manner that falls within the Department's regulatory authority. The Department acknowledges that the statutory text of Title IX does not reference, much less dictate, a standard of evidence to be used by recipients to resolve allegations of sexual harassment. The Department's authority to regulate on the subject of sexual harassment, including how a recipient responds when a complainant files a formal complaint raising allegations of sexual harassment against a respondent, flows from the Department's statutory directive to promulgate rules and regulations to effectuate the purposes of Title IX.[1470] Those purposes have been described by the Supreme Court as preventing Federal funds from supporting education programs or activities that

[1470] 20 U.S.C. 1681; 20 U.S.C. 1682; *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 638-39 (1999).

tolerate sex discriminatory practices and providing individuals with effective protections against such sex discriminatory practices.[1471]

Where sexual harassment allegations present contested narratives regarding a particular incident between a complainant and respondent, accurately determining the truth of the allegations in a non-sex biased manner is critical to ensuring that a recipient responds appropriately by providing the complainant with remedies that restore or preserve the complainant's equal access to education. As noted previously in this preamble, a complainant is a victim of sexual harassment where a fair process has reached an accurate determination that the respondent perpetrated sexual harassment against the complainant and the final regulations require recipients to provide such complainants with remedies. For the reasons discussed above, the Department has determined that a fair, reliable outcome requires that a recipient notify its students and employees in advance of the standard of evidence the recipient will apply in sexual harassment grievance processes, and the Department has further determined that either the preponderance of the evidence standard, or the clear and convincing evidence standard (but not a standard lower than preponderance of the evidence or higher than clear and convincing evidence) can produce an accurate determination. Both of the standards of evidence available for recipients to choose under these final regulations are standards common to civil proceedings, and not to

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[1471] *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979) (noting that the primary congressional purposes behind Title IX were "to avoid the use of Federal resources to support discriminatory practices" and to "provide individual citizens effective protection against those practices."). As noted previously, the Department is not aware of a Federal appellate court holding that the preponderance of the evidence standard is required in order to be consistent with Title IX's non-discrimination mandate, and is not aware of a Federal appellate court holding that the clear and convincing evidence standard is required to satisfy constitutional due process or fundamental fairness in Title IX proceedings. The Department believes that either of these two standards of evidence may be applied by a recipient in a Title IX grievance process because both are consistent with Title IX's non-discrimination and due process protections.

criminal proceedings. The difference between the two options is a difference in the degree of confidence that each recipient decides that a decision-maker must have in the factual correctness of the conclusions reached in Title IX sexual harassment cases; that is, the difference between having confidence that a conclusion is based on facts that are more likely true than not,[1472] or having confidence that a conclusion is based on facts that are highly probable to be true.[1473] Thus, the Department's provisions regarding selection and application of a standard of evidence effectuates the dual purposes of Title IX – preventing Federal dollars from flowing to schools that fail to protect victims of sexual harassment, and providing individuals with effective protections against discriminatory practices that occur by failure to accurately determine who has been victimized by sexual harassment. At the same time, these provisions regarding selection and application of a standard of evidence are consistent with constitutional due process and fundamental fairness. Fair adversarial procedures increase the probability that the truth of allegations will be accurately determined,[1474] and reduce the likelihood that impermissible sex bias will affect the outcome. Acknowledging the arguments from commenters urging the Department to mandate one or the other standard, the Department has determined that either the

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[1472] A preponderance of the evidence standard of evidence is understood to mean concluding that a fact is more likely than not to be true. *E.g.*, *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993) (a preponderance of the evidence standard "requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence") (internal quotation marks and citation omitted).

[1473] A clear and convincing evidence standard of evidence is understood to mean concluding that a fact is highly probable to be true. *E.g.*, *Sophanthavong v. Palmateer*, 378 F.3d 859, 866-67 (9th Cir. 2004) (a clear and convincing evidence standard requires "sufficient evidence to produce in the ultimate factfinder an abiding conviction that the truth of its factual contentions are [*sic*] highly probable.") (internal quotation marks and citation omitted; brackets in original).

[1474] The adversarial "system is premised on the well-tested principle that truth – as well as fairness – is 'best discovered by powerful statements on both sides of the question.'" *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (quoting Irving R. Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 AM. BAR ASS'N J. 569, 569 (1975)).

preponderance of the evidence standard or the clear and convincing evidence standard reasonably can be applied as part of the fair procedures prescribed under § 106.45.

The Department further notes that the Supreme Court has specifically approved of the Department's authority to regulate specific requirements under Title IX even when those requirements are not referenced under the statute and even when the administratively imposed requirements do not represent a definition of sex discrimination under the statute; the Department has wide latitude to issue requirements for the purpose of furthering Title IX's non-discrimination mandate, including measures designed to make it less likely that sex discrimination will occur, even if a Federal court would not hold the recipient accountable to the same requirements in a private lawsuit under Title IX.[1475] For example, the Department's existing regulations in 34 CFR 106 have, since 1975, required recipients to have in place grievance procedures for the "prompt and equitable" resolution of complaints that a recipient is committing sex discrimination,[1476] even though the Title IX statute does not require recipients to have in place any grievance procedures to handle sex discrimination complaints.

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[1475] *See, e.g.*, *Gebser*, 524 U.S. at 291-92 (refusing to allow plaintiff to pursue a claim under Title IX based on the school's failure to comply with the Department's regulatory requirement to adopt and publish prompt and equitable grievance procedures, stating "And in any event, the failure to promulgate a grievance procedure does not itself constitute 'discrimination' under Title IX. Of course, the Department of Education could enforce the requirement administratively: Agencies generally have authority to promulgate and enforce requirements that effectuate the statute's non-discrimination mandate, 20 U.S.C. 1682, even if those requirements do not purport to represent a definition of discrimination under the statute.").

[1476] The final regulations revise 34 CFR 106.8(b), in ways discussed in the "Section 106.8(b) Dissemination of Policy" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble. Under the final regulations, recipients still must have grievance procedures that provide for the prompt and equitable resolutions of complaints from students and employees alleging sex discrimination. The final regulations update § 106.8 to clarify that "prompt and equitable" grievance procedures must still exist for sex discrimination that is *not* sexual harassment, and that recipients must also notify students, employees, and others that the recipient has a grievance process that complies with § 106.45 for the purpose of resolving formal complaints of sexual harassment.

The Department rejects the contention made by one commenter that the approach to the standard of evidence contained in § 106.45(b)(7)(i) of the final regulations may violate the Fourteenth Amendment Equal Protection Clause. Nothing in the final regulations dictates what standard of evidence recipients use in non-sexual harassment cases, so a recipient does not necessarily treat different types of cases differently because of the final regulations. Further, the Department notes that the appropriate standard of review under an Equal Protection challenge would be the rational basis test, which upholds a State action that makes distinctions that are not based on suspect classifications, if there is any reasonable set of facts that could provide a rational basis for the action.[1477] The Department has determined that allowing recipients to select one of two standards of evidence,[1478] either of which can be applied within a fair grievance process to reach accurate determinations, is rationally related to the legitimate interest of ensuring reliable outcomes in Title IX sexual harassment cases.

With respect to obligations under international law such as the International Covenant on Civil and Political Rights, nothing in the final regulations impairs any U.S. obligation to prohibit and eliminate sex discrimination, nor does the Department see any conflict between recipients' compliance with the final regulations, and U.S. compliance with applicable international laws or treaties.[1479]

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[1477] *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).

[1478] As noted above, the final regulations removed the NPRM condition that a recipient only use the preponderance of the evidence standard if the recipient also uses that standard in non-sexual harassment code of conduct proceedings.

[1479] For further discussion, see the "Conflicts with First Amendment, Constitutional Confirmation, International Law" subsection of the "Miscellaneous" section of this preamble.

We discuss the implications of the final regulations' approach to the standard of evidence with respect to a recipient's employees and CBAs in the "Same Evidentiary Standard in Student and Faculty Cases" subsection of this section, above. For further discussion of the Department's application of these final regulations to employees, 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. For reasons discussed in the "Spending Clause" subsection of the "Miscellaneous" section of this preamble, the Department disagrees that these final regulations exceed the Department's regulatory authority to promulgate rules that effectuate the purposes of Title IX with respect to education programs or activities that receive Federal financial assistance.

Changes: None.

*Alternative Approaches and Clarification Requests*

Comments: Several commenters proposed alternative regulatory language for § 106.45(b)(7)(i). One commenter urged the Department to explicitly address both sexual harassment and "sexual misconduct" in the standard of evidence provisions. This commenter agreed that it was appropriate to require the same standard of evidence in student and faculty cases but also believed that the Department should apply the same due process rights for students and faculty alike. This commenter also requested that the Department include "staff" and not just "faculty" in this provision.

One commenter requested that the Department explicitly define the preponderance of the evidence standard as satisfied where the conclusion is supported by persuasive, relevant, and substantial evidence and the procedures are both transparent and fair. This commenter rejected the notion that the preponderance of the evidence standard is 50 percent "plus a feather." One

commenter suggested that if in a particular case the preponderance of the evidence standard is satisfied, but not the clear and convincing evidence standard, then the Department should allow recipients to suspend or expel the respondent but not put a permanent notation on the respondent's transcript that would prevent transfer to another school. The commenter argued that this strikes a balance between protecting wrongly convicted students and protecting victims seeking to continue their education. One commenter requested that the Department adopt the provision as written, but also require recipients to provide a written explanation as to why it is necessary to use one evidentiary standard instead of another. Another commenter argued that the clear and convincing evidence standard is unclear, and the Department should explicitly define it in the final regulations. And one commenter suggested that the Department include statistics in the final regulations to justify changing its approach to evidentiary standards.

Commenters also raised several questions regarding evidentiary standards. One commenter inquired as to whether the requirement that if the preponderance of the evidence standard is used in Title IX cases then it must be used in non-Title IX cases with the same maximum punishment is satisfied where the preponderance of the evidence standard is used for: (a) all conduct code violations with same maximum punishment; (b) most of such conduct code violations; (c) more than one but less than a majority of such violations; (d) even a single such violation; (e) a penalty phase only (such as to impose expulsion); (f) student infractions governed by a separate policy than the student conduct code; or (g) student conduct code violations, but not for other forms of discrimination or harassment by students. The same commenter asked whether the requirement that the same standard of evidence be used for Title IX complaints against students and faculty means recipients must use the clear and convincing evidence standard for student cases if the clear and convincing evidence standard is applied to: (a) all Title

IX complaints against employees; (b) Title IX complaints against a majority of employees; (c) Title IX complaints against even a single employee: (d) Title IX complaints against some but not all types of misconduct by employees; (e) Title IX complaints about even a single type of misconduct; (f) complaints about employee misconduct not involving alleged discrimination and/or harassment by employees towards students; (g) complaints about employee misconduct not involving alleged discrimination and/or harassment by employees towards other employees, (h) some, but not all, aspects of complaints against employees (for example, where the preponderance of the evidence standard is used to determine whether misconduct occurred, but the clear and convincing evidence standard is required for some forms of discipline against a class of employees, such as revoking tenure for tenured faculty).

Discussion: The Department notes that "sexual harassment" is defined in § 106.30 of the final regulations, and this definition encompasses a wide range of sexual misconduct. The Department does not believe that the term "sexual misconduct" would be more appropriate than "sexual harassment" in these regulations, because the Supreme Court interpretations of Title IX refer to sexual harassment. Furthermore, § 106.45(b)(1)(vii) and § 106.45(b)(7)(i) mandate that recipients use the same standard of evidence to reach determinations regarding responsibility in response to formal complaints against students as they do for formal complaints against employees, including all staff and faculty, and the final regulations also require the other provisions in § 106.45 to apply to all formal complaints of sexual harassment whether against students and employees, including faculty.

The Department declines to provide definitions of the "preponderance of the evidence" standard and the "clear and convincing evidence" standard. The Department believes that each standard of evidence referenced in the final regulations has a commonly understood meaning in

other legal contexts and intends the "preponderance of the evidence" standard to have its traditional meaning in the civil litigation context and the "clear and convincing evidence" standard to have its traditional meaning in the subset of civil litigation and administrative proceedings where that standard is used.[1480]

For discussion of transcript notations, see the "Transcript Notations" subsection of the "Determinations Regarding Responsibility" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

The Department expects that recipients will select a standard of evidence based on the recipient's belief about which standard best serves the interests of the recipient's educational community, or because State law requires the recipient to apply one or the other standard, or because the recipient has already bargained with unionized employees for a particular standard of evidence in misconduct proceedings. The Department declines to require recipients to explain why a recipient has selected one or the other standard of evidence, though nothing in the final regulations precludes a recipient from communicating its rationale to its educational community.

The Department has examined statistics, data, and information regarding standards of evidence submitted by commenters through public comment on the NPRM, and has considered

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[1480] *See, e.g.*, *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993) (quoting *In re Winship*, 397 U.S. 358, 371-372 (1970) (Harlan, J., concurring) ("The burden of showing something by a 'preponderance of the evidence,' the most common standard in the civil law, 'simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'") (brackets in original; citation omitted)); *Sophanthavong v. Palmateer*, 378 F.3d 859, 866-67 (9th Cir. 2004) ("Clear and convincing evidence requires greater proof than preponderance of the evidence. To meet this higher standard, a party must present sufficient evidence to produce 'in the ultimate factfinder an abiding conviction that the truth of its factual contentions are [*sic*] highly probable.'") (quoting *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984)) (brackets in original); Justia.com, "Evidentiary Standards and Burdens of Proof," https://www.justia.com/trials-litigation/lawsuits-and-the-court-process/evidentiary-standards-and-burdens-of-proof/ (describing preponderance of the evidence as proof "that a particular fact or event was more likely than not to have occurred" and clear and convincing evidence as proof "that a particular fact is substantially more likely than not to be true.").

commenters' arguments in favor of the preponderance of the evidence standard, in favor of the clear and convincing evidence standard, and in favor of other standards of evidence. For reasons described above, the Department has determined that the approach to the standard of evidence contained in § 106.45(b)(1)(vii) and § 106.45(b)(7)(i) of the final regulations represents the most effective way of legally obligating recipients to select a standard of evidence for use in resolving formal complaints of sexual harassment under Title IX to ensure a fair, reliable grievance process without unnecessarily mandating that a recipient select one standard over the other.

As discussed above, and after careful consideration of many comments we found to be persuasive, the Department removed the NPRM's requirement that recipients may only apply the preponderance of the evidence standard to reach determinations regarding responsibility in Title IX proceedings if they use that same standard to address non-sexual misconduct cases that carry the same maximum punishment. However, the final regulations retain the NPRM's requirement that recipients use the same standard of evidence to reach determinations of responsibility in Title IX proceedings against students as they do for Title IX proceedings against employees including faculty, for reasons discussed above. With respect to the questions raised by one commenter as to the scope of this requirement, the Department wishes to clarify that the same standard of evidence must apply to each formal complaint alleging sexual harassment against employees as it does for each formal complaint alleging sexual harassment against students. In short, under the final regulations the same standard of evidence will apply to all formal complaints of sexual harassment under Title IX responded to by a particular recipient, whether the respondent is a student or employee.

Changes: The Department has revised § 106.45(b)(7)(i) of the final regulations such that recipients have the choice of either applying the preponderance of the evidence standard or the

clear and convincing evidence standard, and § 106.45(b)(1)(vii) requires a recipient to make that choice applicable to all formal complaints of sexual harassment, including those against employees and faculty. We have removed the limitation contained in the NPRM that would have permitted recipients to use the preponderance of the evidence standard only if they used that standard for non-sexual misconduct that has the same maximum disciplinary sanction.

Section 106.45(b)(7)(ii) Written Determination Regarding Responsibility Must Include Certain Details

Comments: A number of commenters expressed support for § 106.45(b)(7) because it requires the decision-maker to provide a written determination regarding responsibility. Commenters stated that putting decisions in writing will prevent confusion as to what was decided and provide a written record for appeals or other administrative needs, or judicial review. Commenters asserted that a written determination will protect due process and prevent schools from inserting bias into proceedings. Commenters expressed support for § 106.45(b)(7) due to concern that institutions were "railroading" respondents.

One commenter argued that § 106.45(b)(7) is a reasonable means of reducing sex discrimination because requiring decision-makers to give reasons for their decisions has been shown to enhance the thoroughness of decision making and to improve the willingness of decision-makers to engage in self-critical thinking,[1481] a concept well known to the legal

[1481] Commenters cited: Itamar Simonson & Peter Nye, *The Effect of Accountability on Susceptibility to Decision Errors*, 51 ORGANIZATIONAL BEHAVIOR & HUM. DECISION PROCESSES 416, 430-32, 437 (1992); Itamar Simonson & Barry M. Staw, *Deescalation Strategies: A Comparison of Techniques for Reducing Commitment to Losing Courses of Action*, 77 J. APPLIED PSYCHOL. 419, 422-25 (1992); Diederik A. Stapel *et al.*, *The Impact of Accuracy Motivation on Interpretation, Comparison, and Correction Processes: Accuracy x Knowledge Accessibility Effects*, 74 JOURNAL OF PERSONALITY & SOCIAL PSYCHOL. 878, 891 (1998); Erik P. Thompson *et al.*, *Accuracy Motivation Attenuates Covert Priming: The Systematic Reprocessing of Social Information*, 66 JOURNAL OF PERSONALITY & SOCIAL PSYCHOL. 474, 484 (1994).

system.[1482] The commenter further argued that requiring reason-giving tends to foster independent decision making and reduce overconfidence in decision making,[1483] so that individual decision-makers become less susceptible to group pressure,[1484] all of which contribute to rendering more accurate decisions.

A few commenters urged the Department to also require that the written determination must include or describe contradictory facts, exculpatory evidence, all evidence presented at the hearing, and/or credibility assessments. One commenter argued that § 106.45(b)(7)(ii)(C) should be revised to require findings of fact *sufficient to allow the parties and any appellate reviewer to understand the facts tending to support or refute the determination*.

Some commenters argued that requiring a written determination is too burdensome, especially for smaller institutions and for elementary and secondary schools.

Discussion: The Department believes § 106.45(b)(7) serves the important function of ensuring that both parties know the reasons for the outcome of a Title IX grievance process, and agrees that requiring decision-makers to give written reasoning helps ensure independent judgment and decision making free from bias. Section 106.45(b)(7)(i) requires recipients to issue a written determination regarding responsibility to foster reliability and thoroughness, and to ensure that a recipient's findings are adequately explained.

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[1482] Commenters cited: Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 657-58 (1995) ("[W]hen institutional designers have grounds for believing that decisions will systematically be the product of bias, self-interest, insufficient reflection, or simply excess haste, requiring decision-makers to give reasons may counteract some of these tendencies.").

[1483] Commenters cited: Karen Siegel-Jacobs & J. Frank Yates, *Effects of Procedural and Outcome Accountability on Judgment Quality*, 65 ORGANIZATIONAL BEHAVIOR & HUM. DECISION PROCESSES 1, 15 (1996); Philip E. Tetlock & Jae Il Kim, *Accountability and Judgment Processes in a Personality Prediction Task*, 52 JOURNAL OF PERSONALITY & SOCIAL PSYCHOL. 700, 706-07 (1987).

[1484] Commenters cited: Marceline B.R. Kroon *et al.*, *Managing Group Decision Making Processes: Individual Versus Collective Accountability and Groupthink*, 2 INT'L J. OF CONFLICT MGMT. 91, 99 (1991).

Section 106.45(b)(7)(ii) mandates that the written determination must include certain key elements so that the parties have a thorough understanding of the investigative process and information considered by the recipient in reaching conclusions. Section 106.45(b)(7)(iii) requires that this written determination be provided to the parties simultaneously. The substance of these provisions generally tracks language in the Clery Act regulations at 34 CFR 668.46(k)(2)(v) and (k)(3)(iv) and reflect concepts familiar to institutions of higher education that receive Federal student aid under Title IV of the Higher Education Act of 1965, as amended. The Department believes that the benefits of these provisions, including promoting transparency and equal treatment of the parties, are also important in the elementary and secondary school context, even though elementary and secondary schools are not subject to the Clery Act. Furthermore, the provisions in § 106.45(b)(7) are consistent with Department guidance, which has always been applicable to both postsecondary institutions and elementary and secondary schools. For example, the 2001 Guidance stated that an equitable grievance procedure should include providing notice to the parties of the outcome of a sexual harassment complaint,[1485] and the withdrawn 2011 Dear Colleague Letter stated that notice of the outcome should be in writing and sent to both parties concurrently.[1486]

Requiring recipients to describe, in writing, conclusions (and reasons for those conclusions) will help prevent confusion about how and why a recipient reaches determinations regarding responsibility for Title IX sexual harassment. We agree that requiring a written

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[1485] 2001 Guidance at 20 (prompt and equitable grievance procedures should provide for "Notice to the parties of the outcome of the complaint").

[1486] 2011 Dear Colleague Letter at 13 ("Both parties must be notified, in writing, about the outcome of both the complaint and any appeal, i.e., whether harassment was found to have occurred. OCR recommends that schools provide the written determination of the final outcome to the complainant and the alleged perpetrator concurrently.").

determination (sent simultaneously to both parties) is an important due process protection for complainants and respondents, ensuring that both parties have relevant information about the resolution of allegations of Title IX sexual harassment. Section 106.45(b)(7) also helps prevent injection of bias into Title IX sexual harassment grievance processes, by requiring transparent descriptions of the steps taken in an investigation and explanations of the reasons why objective evaluation of the evidence supports findings of facts and conclusions based on those facts. Because the Department believes that § 106.45(b)(7) is important to ensure that recipients consistently, transparently, fairly, and accurately respond to Title IX sexual harassment, the Department declines to exempt smaller institutions, or elementary and secondary schools, from the requirements of this provision. The Department believes that the requirements of this provision are reasonable, and that the burden of complying with this provision is outweighed by the benefit of a consistent, transparent Title IX grievance process for students in elementary and secondary schools, as well as students at postsecondary institutions, irrespective of the size of the institution's student body.

In order to ensure that the written determination resolves allegations that a respondent committed sexual harassment as defined in § 106.30, and to avoid confusion caused by the NPRM's reference in § 106.45(b)(7)(ii)(A) to a recipient's code of conduct, we have revised that provision to reference identification of "allegations potentially constituting sexual harassment as defined in § 106.30" instead of "identification of sections of the recipient's code of conduct alleged to have been violated." Recipients retain discretion to also refer in the written determination to any provision of the recipient's own code of conduct that prohibits conduct meeting the § 106.30 definition of sexual harassment; however, this revision to § 106.45(b)(7)(ii)(A) helps ensure that these final regulations are understood to apply to a

recipient's response to Title IX sexual harassment, and not to apply to a recipient's response to non-Title IX types of misconduct.

We decline to expressly require the written determination to address evaluation of contradictory facts, exculpatory evidence, "all evidence" presented at a hearing, or how credibility assessments were reached, because the decision-maker is obligated to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence (and to avoid credibility inferences based on a person's status as a complainant, respondent, or witness), under § 106.45(b)(1)(ii). It is precisely this objective evaluation that provides the basis for the decision-maker's "rationale" for "the result" of each allegation, which must be described in the written determination under § 106.45(b)(7)(ii)(E). The Department believes that § 106.45(b)(7), as revised in these final regulations, provides for a written determination adequate for the purposes of an appeal or judicial proceeding reviewing the determination regarding responsibility. We therefore decline to revise the language of this provision to specify that findings of fact must be described sufficiently to allow the parties and any appellate reviewer to understand the facts supporting or refuting the determination.

Changes: We have revised § 106.45(b)(7)(ii)(A) to reference identification of allegations potentially constituting sexual harassment as defined in § 106.30, instead of referencing identification of sections of the recipient's code of conduct alleged to have been violated.

Comments: One commenter argued that requiring a written determination that describes the procedural steps of the investigation (i.e., § 106.45(b)(7)(ii)(B) requiring inclusion of notifications to parties, interviews of parties and witnesses, site visits, methods used to gather evidence) has no equivalent within criminal or civil procedure. Commenters argued that this provision would be unreasonably burdensome for recipients, especially for smaller institutions

and for elementary and secondary schools. Some commenters asserted that the only procedural detail that should be included in the written determination is the investigation timeline. Other commenters asserted that information about the investigation should be included in the investigative report, but not in the written determination.

One commenter argued that proposed § 106.45(b)(7)(ii)(C)-(D), which required that the written determination include findings of fact supporting the determination and "conclusions regarding the application of the recipient's code of conduct to the facts," would be contrary to the Administrative Procedure Act ("APA"), 5 U.S.C. 701 *et seq.*, because the Department is not authorized to impose requirements on a recipient based whether the recipient's own code of conduct has been violated. The commenter argued that the Department's authority is strictly restricted to the application of Title IX to the facts and does not extend to application of the recipient's code of conduct to the facts.

One commenter expressed concern that the requirements related to the written determination are an example of how the proposed rules would conflate a sexual harassment investigation with disciplinary proceedings for behavioral violations. The commenter asserted that in the elementary and secondary school context, a sexual harassment investigation is designed to determine whether or not a student experienced sexual harassment and what remedies are necessary to stop the harassment, eliminate a hostile environment, prevent the harassment from reoccurring, and address any effects of the hostile environment. The commenter furthered argued that determinations of an individual student's culpability for sexual harassment should be handled under a school district's code of conduct and State student discipline due process laws.

A number of commenters expressed concerns about including "remedies" in the written determination, under proposed § 106.45(b)(7)(ii)(E). One commenter requested a definition of the term "remedies." One commenter argued that this proposed provision's reference to including "any sanctions the recipient imposes on the respondent, and any remedies provided by the recipient to the complainant" is consistent with FERPA. Other commenters asserted that disclosing a complainant's remedies to the respondent may violate FERPA, and would violate the complainant's right to privacy regardless of whether FERPA would allow the disclosure. Commenters asserted that including remedies in the written determination would endanger safety on campus, deter students from seeking help, deter faculty and staff from participating in the process, and subject victims to further harassment from respondents. With respect to describing sanctions and remedies, some commenters suggested adding a FERPA compliance clause to this provision, and other commenters suggested modifying this provision to mirror the Clery Act.

Commenters asserted that the Department should require the written determination to contain assurances that the school will take steps to prevent recurrence of harassment, correct the discriminatory effects of harassment, and prevent any retaliation against the complainant. Commenters argued that the effects of harassment can impact not only the complainant and respondent but also other members of the recipient's community; because of this, commenters asserted, the final regulations should specify that a school's obligation to respond following a determination of responsibility is not time-limited, and should require the school to take steps to ensure that remedial efforts are successful and to take further remedial steps if initial remedial efforts are not successful.

One commenter suggested that the Department should require recipients to make a transcript or recording of all proceedings, and that the Department should require recipients to

provide the transcript or recording to the parties along with the determination regarding responsibility, at least ten days prior to any appeal deadline.

Commenters suggested that the written determination should not be prepared by the recipient but, rather, should be prepared by the Department, the U.S. Department of Justice, or a local or State human rights commission under work-sharing agreements. Commenters suggested that the same arrangement should be used to conduct the entire investigation.

Discussion: The Department believes that the written determination must include certain key elements so that the parties have a complete understanding of the process and information considered by the recipient to reach its decision and that as revised, § 106.45(b)(7)(ii) appropriately and reasonably prescribes what a determination regarding responsibility must include. Such key information includes: identification of the allegations alleged to constitute sexual harassment as defined in § 106.30; the procedural steps taken from receipt of the formal complaint through the determination regarding responsibility; findings of fact supporting the determination; conclusions regarding the application of the recipient's code of conduct to the facts of the conduct allegedly constituting Title IX sexual harassment; a determination regarding responsibility for each allegation and the decision-maker's rationale for the result; any disciplinary sanctions the recipient imposes on the respondent and whether the recipient will provide remedies to the complainant; and information regarding the appeals process and the recipient's procedures and permissible bases for the complainant and respondent to appeal. These requirements promote transparency and consistency so that both parties have a thorough understanding of how a complainant's allegations of Title IX sexual harassment have been resolved. We believe these requirements are reasonable, and that the cost or burden associated with compliance with this provision is outweighed by the benefit of promoting a consistent,

transparent Title IX grievance process, including in elementary and secondary schools, and in institutions of a smaller size.

The Department acknowledges a commenter's point that a requirement to prepare a written determination that details steps of the investigation has no equivalent within criminal or civil procedure. However, in a criminal or civil proceeding, the criminal defendant or the civil litigation parties would likely have access to the same information through a combination of discovery rules and the ability to compel witnesses to appear at trial. To avoid attempting to make educational institutions mimic courts of law, the final regulations refrain from imposing discovery rules or purporting to create subpoena powers to compel parties or witnesses to be interviewed or to testify, in a Title IX grievance process. However, the written determination detailing the steps of the recipient's investigation ensures that both parties in a Title IX grievance process understand the investigative process. This gives the parties equal opportunity to raise any procedural irregularities on appeal.[1487]

The Department disagrees with the suggestion by commenters that the Department should require the investigator's timeline to be included in the investigative report, and not in the written determination. The investigative report must fairly summarize relevant evidence, but § 106.45(b)(5)(vii) does not require that investigative report to describe the investigator's timeline. The procedural steps in the investigation will instead appear in the written determination regarding responsibility, so that both parties have a thorough understanding of the investigative process that led to the decision-maker's determination regarding responsibility.

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[1487] Section 106.45(b)(8) (requiring recipients to offer both parties equal opportunity to appeal, on any of three bases, including that procedural irregularity affected the outcome of the matter).

The Department disagrees that requiring the written determination to include findings of fact supporting the determination and conclusions regarding application of the recipient's code of conduct to the facts runs contrary to the APA or otherwise exceeds the Department's regulatory authority. The Department recognizes that the Department's regulatory authority to enforce Title IX does not extend to purporting to enforce a recipient's own code of conduct. Nothing in these final regulations, including with respect to a recipient's issuance of a written determination regarding responsibility, purports to regulate a recipient's application of the recipient's own code of conduct. Instead, these final regulations, including the provisions in § 106.45(b)(7)(ii), govern how a recipient describes and explains its conclusions regarding Title IX sexual harassment in the recipient's education program or activity. The facts supporting the determination required to be included in the written determination under § 106.45(b)(7)(ii) are relevant to evaluating a recipient's response to Title IX sexual harassment regardless of the recipient's code of conduct. However, requiring the recipient to "match up" how the conduct that allegedly constituted Title IX sexual harassment also violates the recipient's code of conduct serves to notify the parties of any rules the recipient applies in its own code of conduct that, while not required by the § 106.45 grievance process, are permissible exercises of a recipient's discretion with respect to a Title IX grievance process. In response to commenters' concerns, we have revised § 106.45(b)(7)(ii)(A) to remove reference to identification of sections of the recipient's code of conduct alleged to have been violated, and replaced that language with a requirement to identify the allegations potentially constituting sexual harassment as defined in § 106.30. Similarly, as discussed in the "Written Notice of Allegations" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, we have revised § 106.45(b)(2) to remove unnecessary references to the recipient's "code of conduct" that could have mistakenly implied

that alleged conduct under investigation in a § 106.45 grievance process is conduct that violates the recipient's code of conduct without also constituting sexual harassment as defined in § 106.30. With these revisions, we do not believe that the final regulations, including 106.45(b)(7)(ii), unduly or impermissibly reference a recipient's code of conduct. Rather, this provision gives the parties information about how the conduct under investigation and adjudication (i.e., Title IX sexual harassment) fits within a recipient's own unique code of conduct so that the parties are apprised of rules unique to the recipient's own code of conduct that affect the determination or consequences of a determination regarding responsibility. For example, the final regulations include an entry for "Consent" under § 106.30 that assures recipients that the Department will not require recipients to adopt any particular definition of consent. Parties will benefit from a written determination that, for example, explains how the recipient's own definition of "consent" has been applied in a particular case to an allegation of sexual assault. Thus, the written determination requirement to include how the conduct being adjudicated fits into the recipient's code of conduct does not imply that the Department is regulating conduct outside Title IX sexual harassment.

The Department disagrees that the final regulations, or the written determination provision in particular, conflate sexual harassment with student code of conduct violations. As explained above, the written determination requirements in § 106.45(b)(7)(ii) are intended to transparently disclose to the parties how the conduct under investigation and subject to adjudication (which conduct, by virtue of § 106.45(b)(2) must consist of allegations that meet the § 106.30 definition of sexual harassment) "matches up" against particular portions of a recipient's code of conduct, so that the parties understand how rules unique to a recipient's code of conduct affect the determination. As to conduct that does not meet the § 106.30 definition of

sexual harassment (or does not otherwise meet the jurisdictional conditions specified in § 106.44(a)), a formal complaint regarding such conduct must be dismissed for purposes of Title IX, though such conduct may be addressed by the recipient under its own code of conduct.[1488] Thus, the written determination provision in § 106.45(b)(7) only applies to Title IX sexual harassment, and does not govern a recipient's investigation or adjudication (or other response) to other misconduct under the recipient's own student conduct codes.

The Department does not believe a definition of the term "remedies" is necessary, but the final regulations add a statement in § 106.45(b)(1)(i) to lend clarity as to the nature of remedies. That provision now explains that remedies may include the same individualized services described in § 106.30 as "supportive measures" but that remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent. Beyond this, the Department believes recipients should have the flexibility to offer such remedies as they deem appropriate to the individual facts and circumstances of each case, bearing in mind that the purpose of remedies is to restore or preserve the complainant's equal access to education.

The Department acknowledges the privacy concerns expressed by commenters regarding the inclusion of remedies in the written determination of responsibility. In response to commenters' concerns about the privacy aspects of disclosing what remedies a victim receives and the resulting possible effects of deterring reporting or making complainants feel unsafe, and in an effort to align these Title IX regulations with what recipients are required to do under the Clery Act, the final regulations revise § 106.45(b)(7)(ii)(E) to state (emphasis added) that the written determination must include any disciplinary sanctions the recipient imposes on the

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[1488] Section 106.45(b)(3)(i).

respondent,[1489] "and *whether remedies will be provided* by the recipient to the complainant" to assure complainants that the nature of remedies provided does not appear in the written determination, while preserving the overall fairness of giving both parties identical copies of the written determination simultaneously. The final regulations also add § 106.45(b)(7)(iv) stating that the Title IX Coordinator is responsible for the effective implementation of remedies. These revisions to § 106.45(b)(7) help ensure that complainants know that where the final determination has indicated that remedies will be provided, the complainant can then communicate separately with the Title IX Coordinator to discuss what remedies are appropriately designed to preserve or restore the complainant's equal access to education. The Department believes that these changes address commenters' concerns about the privacy implications, safety concerns, and discouragement of students and employees from participating in the process, that were raised by the proposed rules' requirement that remedies granted to a victim must be stated and described in the written determination. For discussion of these final regulations' reference to remedies and disciplinary sanctions, and FERPA, see the "§106.6(e) FERPA" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

Commenters suggested requiring assurances that the school will take steps to prevent recurrence of harassment, correct its discriminatory effects, and prevent any retaliation against the complainant because the effects of harassment can go beyond the complainant and the respondent. The Department does not believe such assurances are necessary given the recipient's ongoing and continuous duty to not be deliberatively indifferent. The Department believes the

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[1489] We have also revised this provision to use the phrase "disciplinary sanctions" instead of "sanctions" as part of consistent use throughout the final regulations of "disciplinary sanctions" to avoid confusion over whether "sanctions" means something other than "disciplinary sanctions."

existing requirements under the final regulations are sufficient to promote prevention of recurrence of harassment and restore equal access to education. The Department believes the standard it has articulated, that a recipient's response to sexual harassment must not be clearly unreasonable in light of the known circumstances, sufficiently addresses further Title IX concerns for all students following a determination of responsibility. In response to concerns about retaliation, the Department has added a new section addressing the topic, § 106.71.

The Department is persuaded by the suggestion from commenters that the Department require recipients to make a transcript or recording of the live hearing. The Department believes that such a transcript is necessary to preserve the record for appeal and judicial review. This requirement is now contained in § 106.45(b)(6)(i), requiring a recipient to make an audiovisual recording, or a transcript, of any live hearing, but the Department notes that this recording or transcript is not required to be part of the written determination sent to the parties. Rather, under § 106.45(b)(6)(i) the parties have equal opportunity to inspect and review the recording or transcript of a live hearing, but that inspection and review right does not obligate the recipient to send the parties a copy of the recording or transcript.

The Department acknowledges the suggestions by commenters that the written determination should be prepared by the Department, the Department of Justice, or a local or State human rights commissions through work-sharing agreements. While the final regulations do not preclude a recipient from delegating the recipient's obligation to investigate and adjudicate formal complaints of sexual harassment to persons or entities not affiliated with the recipient (for example, under a regional center model), Title IX governs each recipient's obligation to appropriately respond to sexual harassment in the recipient's education program or activity, and the recipient remains responsible for ensuring that it responds to a formal complaint

by conducting a grievance process that complies with § 106.45, including issuing a written determination.

Changes: The Department revised this provision to harmonize the language with other provisions of the final regulations. Section 106.45(b)(7) has been revised to reflect changes in § 106.45(b)(8), which now makes appeals mandatory. The proposed version of § 106.45(b)(7)(i) included language reflecting that providing for appeals was optional. Section 106.45(b)(7)(ii) uses the phrase "disciplinary sanctions" instead of "sanctions." We have added § 106.45(b)(7)(iv) to clarify that the Title IX Coordinator is responsible for effective implementation of any remedies. This clarification reflects the mirror provision in the § 106.30 definition of "supportive measures" that made the Title IX Coordinator responsible for the effective implementation of supportive measures. We have also revised § 106.45(b)(7)(ii)(E) to require the written determination to state *whether* remedies will provided to the complainant.

Section 106.45(b)(7)(iii) Timing of When the Decision Becomes Final

Comments: One commenter expressed general support for § 106.45(b)(7)(iii). A few commenters expressed concerns regarding when the determination regarding responsibility becomes final and argued that the Department should permit recipients flexibility to impose sanctions on respondents upon the initial determination of responsibility and before the appeal process is complete. One commenter asserted that this approach is a best practice; appeals are meant to be limited to correcting rare error, and recipients can offer remote learning opportunities to respondents during the appeal period to preserve educational access.

One commenter argued that the proposed requirement that an appeal by either party "stays" the determination is also problematic because practice is not accepted in other elementary and secondary school proceedings. The commenter reasoned that a school for

example, would almost never stay a school's suspension or expulsion order pending an appeal and that if a school district determines after a thorough investigation that sexual harassment occurred, school officials need to implement remedies as soon as possible in addition to continuing any interim measures already in place.

One commenter expressed concern about the possibility that nearly all respondents found in violation of a school's code of conduct will automatically appeal to OCR to have their findings overturned since such an appeal is free and can only help their position. This will significantly increase the effort and expenditures of recipients when compared with the far less expensive task of responding to an OCR data request and addressing any issues through the administrative process.

One commenter suggested that the Department clarify the meaning of "final," because if "final" means the determination can be the basis for disciplinary measures then it could conflict with existing State timelines and appeal procedures for disciplinary decisions. One commenter expressed concern that making a "final determination" at the hearing could have the effect of limiting essential time to render informed decisions, thus unfairly altering the hearing process for all parties.

One commenter suggested that institutions should not be required to disclose the final outcome where doing so might upset the complainant.

Discussion: The Department appreciates the support for § 106.45(b)(7)(iii) regarding the timing of when determinations regarding responsibility become final. We acknowledge the concerns raised by some commenters regarding the effect that the timing of when a decision becomes final may have on recipients' ability to impose sanctions on respondents and remedies for complainants. The intent of this provision is to promote transparency for, and equal treatment of,

the parties, and to ensure that the recipient takes action on a determination that represents a reliable, accurate outcome. Importantly, the final regulations require recipients to offer both parties an appeals process to help mitigate risks such as procedural irregularity and investigator, decision-maker, or informal resolution facilitator bias. In order to ensure that both parties have the opportunity to benefit from their right to file an appeal, the written determination becomes "final" only after the time period to file an appeal has expired, or if a party does file an appeal, after the appeal decision has been sent to the parties. If the written determination became final prior to the outcome of an appeal, the right to have the case heard on appeal might be undermined. We also note that the § 106.44(c) emergency removal provision gives recipients some flexibility to remove respondents to protect the physical health or safety of students or employees. The Department notes that the final regulations also require recipients to designate reasonably prompt time frames for concluding appeals and leave recipients discretion over appeal procedures; thus, the appeals process would not necessarily have to be lengthy.

The Department disagrees with commenters who argued that the proposed requirement that an appeal by either party "stays" the determination is problematic. The Department acknowledges that the "judgment" in a recipient's determination regarding responsibility is more analogous to injunctive relief than monetary damages, and that civil court rules (e.g., the Federal Rules of Civil Procedure) do not provide for automatic stay of injunctions. However, the process for concluding a recipient's appeal (thereby finalizing the determination) differs from the process for an appeal in civil court. The recipient's appeal process is likely to conclude during a much shorter time period than an appeal from a court judgment, and furthermore, the final regulations obligate the recipient to offer supportive measures throughout the grievance process (unless failing to do so would not be clearly unreasonable) thus maintaining a status quo through the

grievance process that may continue a short time longer while an appeal is being resolved. The Department believes that in order for an appeal, by either party, to be fully effective, the recipient must wait to act on the determination regarding responsibility while maintaining the status quo between the parties through supportive measures designed to ensure equal access to education. Because a recipient's determination regarding responsibility in the nature of injunctive relief, if the recipient acts on a determination prior to resolving any appeal against that determination, the recipient likely will have taken steps requiring the parties to change their positions, in ways that cannot be easily reversed if the determination is changed due to the appeal. On the other hand, maintaining the status quo a short time while an appeal is resolved gives the parties, and the recipient, confidence that the determination regarding responsibility acted upon represents a factually accurate, reliable outcome.

The Department disagrees that all respondents will file an "appeal" with OCR, or that the rate at which respondents file complaints with OCR challenging the recipient's response to a formal complaint of sexual harassment will interfere with victims' abilities to receive remedies under a promptly-resolved grievance process. Any person, including any complainant or respondent, may file a complaint with OCR claiming that a recipient has not complied with the recipient's obligations under Title IX. However, filing a complaint with OCR does not "stay" or reverse the recipient's determination regarding responsibility. Moreover, the final regulations include § 106.44(b)(2) which gives deference to the recipient's determination regarding responsibility by assuring recipients that the Department will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under Title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent

weighing of the evidence. Thus, after a party (whether respondent or complainant) has taken advantage of the recipient's own appeal process, the Department believes it is unlikely that parties will rush to file with OCR, first because the recipient's appeal process will address procedural, new evidence, and bias or conflict of interest problems that affected the outcome, and second because the final regulations clarify for all parties that the Department will not reverse an outcome based solely on re-weighing the evidence.

We appreciate the opportunity to address commenters' questions regarding the meaning of a "final" determination. A "final" determination means the written determination containing the information required in § 106.45(b)(7), as modified by any appeal by the parties. With respect to potential conflict with State procedures, under the final regulations recipients have substantial discretion to designate time frames for concluding the grievance process, including appeals, thus lessening the likelihood that a recipient must violate a State law with respect to timely conclusion of a grievance process. In the event of actual conflict, our position is that the final regulations would have preemptive effect.[1490] Further, the Department appreciates the opportunity to clarify here that nothing in the final regulations requires final determinations to be made at the hearing; the commenter who expressed concern over this possibility appears to have misinterpreted the NPRM, as the proposed regulations did not provide for that outcome. Rather, the final regulations provide that a determination regarding responsibility cannot be reached without conducting a live hearing (for postsecondary institutions), or without first giving the parties an opportunity to submit written questions to parties and witnesses (for elementary and

[1490] *See* discussion under the "Section 106.6(h) Preemptive Effect" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

secondary schools, and other recipients who are not postsecondary institutions), and § 106.45(b)(7)(ii) states that the decision-maker "must issue a written determination regarding responsibility" but does not require that written determination to be issued *at the hearing*. The Department notes that the time frame for when the decision-maker should issue the written determination will be governed by the recipient's designated, reasonably prompt time frames under § 106.45(b)(1)(v).

The Department wishes to make clear that it is certainly not our intent to upset or traumatize complainants by requiring recipients to provide a written determination regarding responsibility to both complainants and respondents. To promote transparency, equal treatment of the parties, and to ensure that both parties' right to appeal may be meaningfully exercised, the final regulations require the decision-maker to simultaneously send a copy of the written determination to both parties. In response to commenters' concerns that including details about remedies for complainants in the written determination could pose unnecessary privacy, confidentiality, or safety problems that could negatively impact complainants, the final regulations revise this provision to require that the written determination state *whether* remedies will be provided to a complainant; the nature of such remedies can then be discussed separately between the complainant and the Title IX Coordinator. The final regulations also add § 106.45(b)(7)(iv) to state that the Title IX Coordinator is responsible for the effective implementation of remedies.

Changes: We have revised § 106.45(b)(7)(iii) such that responsibility determinations will become final either on the date the recipient simultaneously provides the written determination of the appeal result to the parties, or the date on which an appeal is no longer timely if neither party appeals. We have revised § 106.45(b)(7)(ii)(E) to state that while the written determination

must include "any sanctions the recipient imposes on the respondent," the written determination must only state "*whether* remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant." (Emphasis added.) We also add § 106.45(b)(7)(iv) to state that the Title IX Coordinator is responsible for the effective implementation of remedies.

[§ 106.45(b)(7)(iv) Title IX Coordinator responsible for effective implementation of remedies: addressed under § 106.45(b)(7)(iii)]

Transcript Notations

Comments: Some commenters expressed concern about harms to the education, career, well-being, and lives of students whose transcripts are marked as responsible for sexual misconduct. Several commenters referenced the notation as a "black mark" on a student's record and asserted that it is overly stigmatizing or punitive, and imposes permanent barriers to success in one's education and career. One commenter, for example, noted the damage of respondents having to disclose such records to apply to graduate school, to receive a professional license, or to potential employers, which risks being denied admission, disciplined, or suspended from one's professional practice, as well as a stain on one's personal relationships and reputation. Several commenters emphasized their concerns about such transcript notations being imposed without due process protections or using a low standard of evidence. Another commenter asserted that the records have no predictive value, would not prevent crimes even if shared, are often inaccurate or misleading (such as recording both an unwanted touch and rape as sexual misconduct), and create a high financial burden to clearing one's name through litigation that only well-off families can afford. Similarly, another commenter asserted that expunging

disciplinary records would significantly improve the lives of respondents while imposing minimal costs or administrative burdens on schools.

A number of commenters suggested mechanisms be added to the final regulations for removing sexual misconduct notations or for expunging such records so that the students involved could clear their names and reputations. Several commenters suggested expunging records after a certain time period, such as after a sanction has been served or after a certain number of years. Other commenters suggested limiting expungement to less egregious cases, such as in cases: not involving rape; with no criminal charges or findings; or for lower-level, noncriminal, or non-violent cases not involving weapons, evidence of force, incapacitation, multiple parties, or multiple witnesses. Several commenters suggested allowing schools to expunge records of students found responsible under withdrawn or disapproved OCR policies, which commenters stated could be accomplished if the Department would express to recipients that the Department will not penalize a recipient that chooses to re-open and reconsider closed cases.

One commenter suggested deeming a school in violation of Title IX for not removing a notation based on flawed prior proceedings or for refusing to provide continuing enrollment at an institution if a student does not proceed with a Title IX investigation and hearing that lacks fundamental safeguards; this commenter asserted that schools have used flawed procedures as a result of the Department's withdrawn 2011 Dear Colleague Letter. Another commenter proposed allowing transcript notations only in the most egregious cases and that used a clear and convincing evidence standard, allowed cross-examination, and gave the accused a chance to help select the trier of fact.

Some commenters provided other points of view. A few expressed concerns that individuals found responsible for sexual misconduct could transfer to other educational institutions that have no awareness of such misconduct. One such commenter proposed mandating that Title IX findings be shared between universities to help them avoid hiring sexual harassers. Another commenter, a State's attorney general, urged the Department not to restrict schools from being more aggressive in addressing sexual harassment, citing their State law requiring transcript notations for respondents who are suspended, dismissed, or who withdraw while under investigation for sexual assault.

Discussion: The Department understands the concerns that commenters raise about transcript notations, the value of these transcript notations, and the impact that these transcript notations may have on a respondent's future educational and career opportunities. The Department also appreciates the concerns of other commenters that individuals found responsible for sexual misconduct could transfer to other educational institutions that have no awareness of such misconduct. The Department intentionally did not take a position in the NPRM on transcript notations or the range of possible sanctions for a respondent who is found responsible for sexual harassment. The Department does not wish to dictate to recipients the sanctions that should be imposed when a respondent is found responsible for sexual harassment as each formal complaint of sexual harassment presents unique facts and circumstances. As previously stated, 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. If a respondent determines that a school is discriminating against the respondent based on sex with respect to a sanction such as a transcript notation, then a respondent may be able to challenge such a

discriminatory practice through a recipient's procedures under § 106.8(c) or through filing a complaint with OCR.

We do not wish to deem a school in violation for a school's conduct prior to the effective date of these final regulations, including conduct such as not removing a notation based on a prior proceeding that lacked due process or a school's past refusal to provide continuing enrollment at a postsecondary institution if a student does not proceed with a Title IX investigation and hearing that lacks fundamental safeguards. These final regulations will apply prospectively to give recipients adequate notice of the standards that apply to them. The Department shares some of the concerns that the commenter has about the 2011 Dear Colleague Letter, and the Department has withdrawn the 2011 Dear Colleague Letter.[1491]

The Department understands the commenter's concerns that respondents who have been found responsible for sexual harassment may transfer to another institution or be hired by another institution and declines to require that institutions share the result of a Title IX investigation or proceeding with other institutions. Requiring such disclosure of personally identifiable information from a student's education record outside the elementary or secondary school or postsecondary institution may require institutions to violate FERPA, and its implementing regulations. These final regulations are consistent with FERPA, and the Department does not wish to impose any requirements that violate FERPA.

As at least one commenter stated, some States have adopted laws concerning transcript notations in the context of sexual harassment, and the Department's approach does not present

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[1491] U.S. Dep't. of Education, Office for Civil Rights, *Dear Colleague Letter* (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.

any conflict with these State laws. The Department's policy aligns with the holding of the Supreme Court in *Davis* that courts must not second guess recipients' disciplinary decisions.[1492] Where a respondent has been found responsible for sexual harassment, any disciplinary sanction decision rests within the discretion of the recipient, although the recipient must also provide remedies, as appropriate, to the complainant designed to restore or preserve the complainant's equal educational access.[1493]

The Department also appreciates the concern that transcript notations may be imposed without adequate due process protections or a low standard of evidence. In response to these concerns, the Department revised § 106.44(a) to provide that an equitable response for a respondent means 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. Although the Department will not interfere with the recipient's discretion in imposing an appropriate sanction, the Department requires that a respondent receive a grievance process with the fulsome due process protections in § 106.45 before any sanctions are imposed. Accordingly, a recipient will be held in violation of these regulations for failing to proceed with a Title IX investigation and hearing that lacks fundamental safeguards. These final regulations provide that a recipient may use either a preponderance of the evidence standard or a clear and convincing evidence standard and must apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.[1494] If a recipient chooses to use a

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[1492] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 646 (1999) (recognizing school officials' "comprehensive authority" to control student conduct subject to constitutional limitations) (internal citation omitted).
[1493] Section 106.45(b)(1)(i).
[1494] Section 106.45(b)(1)(vii); § 106.45(b)(7)(i).

preponderance of the evidence standard, then the recipient must carefully consider whether the sanction of a transcript notation is appropriate under Federal case law. As noted in § 106.6(d)(2), nothing in these final regulations deprives 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 Department also appreciates the comments regarding the expungement of records. The Department did not address expungement in its proposed regulations and declines to do so here. The concept of expungement in the context of an education program or activity appears novel. A recipient may choose to have an expungement process that removes a sanction or result of a hearing or appeal from a respondent's official academic or disciplinary record at the school or institution if a respondent is found not responsible after a hearing or an appeal. A recipient, however, must retain certain records of a sexual harassment investigation for at least seven years under § 106.45(b)(10), even if the recipient has a process for expungement. As explained earlier in this preamble, this seven-year period aligns with the record retention period in the Department's regulations,[1495] which is important as the definitions for sexual assault, dating violence, domestic violence, and stalking from the regulations implementing the Clery Act are part of the definition of sexual harassment in § 106.30. The Department will not dictate how recipients must treat these records after seven years because recipients may have other obligations that require them to preserve the records for a longer period of time such as the obligation to preserve records for litigation. Recipients, however, may choose to destroy records

[1495] 34 CFR 668.24(e)(2)(ii); *see* Dep't. of Education, Office of Postsecondary Education, *The Handbook for Campus Safety and Security Reporting* 9-11 (2016), https://www2.ed.gov/admins/lead/safety/handbook.pdf.

after this seven-year retention period. The Department notes that these final regulations, including the seven-year retention period, apply prospectively only.

Just as the Department is not dictating when and whether a recipient may destroy records after the seven-year retention period, the Department will not dictate when and whether recipients may destroy records of respondents found responsible for sexual harassment before these final regulations become effective. As long as recipients adhere to all other Federal retention requirements that the Department imposes, the Department will not interfere with a recipient's decision to expunge records of responsibility determinations made under prior OCR policies, irrespective of whether these policies were rescinded. Recipients, however, should be mindful of adhering to any retention requirements in State law and in their own policies. Recipients also must not treat or categorize records in a manner that results in discrimination based on sex under the Department's regulations. In other words, a recipient cannot treat people differently on the basis of their sex with respect to records pertaining to sexual harassment.

Changes: The Department revised § 106.44(a) to provide that an equitable response for a respondent means 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.

*Appeals*

Section 106.45(b)(8) Appeals

Comments: A number of commenters supported equal appeal rights for both complainants and respondents because they believe it will bring campus procedures in line with the requirements of due process, First Amendment free speech rights, established case law, and existing legislation. Commenters also argued that equal appeal rights will reduce litigation by reducing the abuses of Title IX procedures and helping to ensure accuracy. Some commenters argued that

the proposed regulations promote fairness and push back on misguided efforts to micromanage the lives of students. Commenters stated that many institutions may not be equipped to decide whether to offer an appeal, or that institutions may have a conflict of interest, and that the proposed regulations balance the complexities of the modern education environment. Some commenters shared personal stories about how they have benefitted from attending institutions that offered appeal rights or, conversely, about how costly it was to overturn a denial of due process at institutions that did not offer appeal rights. Some commenters supported the NPRM because denying appeal rights to complainants would cause further trauma, while offering them the option to appeal will provide needed support. Other commenters argued that the NPRM promotes fair and impartial procedures that will protect justice and civil rights. Commenters supported giving both parties the opportunity to submit a written statement supporting or challenging the outcome.

Discussion: The Department appreciates the general support received from commenters regarding our approach to offering appeal rights to both parties in Title IX proceedings, and the urging of many commenters to require recipients to offer appeals. The Department is persuaded by commenters that recipient-level appeals should be mandatory and offered equally to both parties because this will make it more likely that recipients reach sound determinations, giving the parties greater confidence in the ultimate outcome. 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," while 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[.]"[1496] Although these interests may differ, each represents high-stakes, potentially life-altering consequences deserving of an accurate outcome.[1497] Accordingly, the Department has revised § 106.45(b)(8) to require recipients to offer both parties equal appeal rights on three bases: procedural irregularity, newly discovered evidence, and bias or conflict of interest. This provision further states that recipients may offer appeals on additional grounds but must do so equally for both parties. The revised provision also expressly permits both parties to appeal a recipient's dismissal of a formal complaint (or allegations therein), whether the dismissal was mandatory or discretionary under § 106.45(b)(3). We have also removed the limitation that precluded a complainant from appealing the severity of sanctions; the final regulations leave to a recipient's discretion whether severity or proportionality of sanctions is an appropriate basis for appeal, but any such appeal offered by a recipient must be offered equally to both parties.

Changes: We have revised § 106.45(b)(8) such that recipients must offer both parties an appeal from determinations regarding responsibility, or from a recipient's dismissal of a formal complaint or any allegations contained in a formal complaint. Recipients must offer appeals 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 general or specific conflict of interest or bias against the complainant or respondent that affected the outcome. Recipients may offer appeals equally to both parties on additional bases.

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[1496] *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 400, 403 (6th Cir. 2017).
[1497] *Id.* at 404 (recognizing that the complainant "deserves a reliable, accurate outcome as much as" the respondent).

Complainants and respondents have equal appeal rights under the final regulations; we have removed the NPRM's limitation on complainants' right to appeal sanctions.

Comments: Some commenters argued that the proposed regulations do not reflect the high ideals we should have for education. Other commenters expressed concern about the application of § 106.45(b)(8), arguing that appeals procedures will not be applied equally across the country and that appeals should be made mandatory instead. Other commenters suggested that appeals should only be granted when parties can demonstrate specific rights that were violated by the proceedings. Other commenters suggested adding greater due process protections, such as barring appeals of any not guilty finding, in accordance with the double-jeopardy principle enshrined in the Constitution and applied in criminal proceedings. Commenters opposed § 106.45(b)(8) because many institutions already offer equal appeals to both parties.

Discussion: The Department is persuaded by commenters who asserted that appeal rights should be mandatory for Title IX proceedings. We have revised § 106.45(b)(8) to require recipients to offer both parties the opportunity to appeal a determination regarding responsibility on any of three bases, and equal opportunity to appeal a recipient's decision to dismiss a formal complaint or an allegation contained in a formal complaint.[1498] This will help to ensure that appeal rights are applied equally by recipients across the country, increasing the legitimacy of recipients' determinations regarding responsibility and ensuring that recipients have an opportunity to self-correct erroneous outcomes. The final regulations clearly specify which rights or interests could justify an opportunity to appeal; namely, where the outcome was affected by procedural

[1498] Section 106.45(b)(3)(i) (addressing mandatory dismissals); § 106.45(b)(3)(ii) (addressing discretionary dismissals).

irregularity, newly discovered evidence, or conflict of interest or bias in key personnel involved with the investigation and adjudication of the case. The Department also believes that giving recipients flexibility and discretion in crafting their Title IX processes is important, and we believe that recipients are in best position to know the unique values and interests of their educational communities. For this reason, § 106.45(b)(8) grants recipients discretion to offer appeals on additional grounds, so long as such additional bases for appeal are offered equally to both parties.

We respectfully disagree with the commenters who argued that the final regulations should prohibit appeals of not responsible determinations because of double jeopardy concerns. As discussed above, we believe that both respondents and complainants face potentially life-altering consequences from the outcomes of Title IX proceedings. As such, it is important to protect complainants' right to appeal as well as respondents' right to appeal. We believe the final regulations adequately protect both parties' interests in a fair, accurate outcome by requiring recipients to offer both parties the opportunity to appeal on at least three specific bases; requiring that appeal decision-makers be different than the Title IX Coordinator, investigator(s), or decision-maker(s) that reached the initial determination; requiring appeal decision-makers to satisfy the robust anti-bias and training requirements of § 106.45(b)(1)(iii); giving both parties a meaningful and equal opportunity to submit written statements supporting or challenging the outcome; and requiring written determinations explaining the appeal result and rationales to be given to both parties.

Changes: None.

Comments: Some commenters expressed concern that § 106.45(b)(8) was not drafted with the victim in mind. Commenters opposed restricting the complainant's right to appeal because equal

appeal rights are supported by experts, or because the complainant may have new evidence and restricting their appeal rights will put the integrity of the proceeding at risk. Commenters argued that appeals for only the respondent are not needed because false accusations are rare. These commenters also believed that approach proposed in the NPRM offers unequal appeal rights, which reinforces sex stereotypes, can be a form of sex bias, and can signal that sexual harassment is not treated seriously.

Some commenters opposed restricting the complainant's right to appeal because the Secretary spoke in favor of equal appeals. Other commenters argued that appeals are a guaranteed right for any individual who is participating in a federally-funded program and that complainants should not be restricted at all in their grounds for appeals. Commenters argued that a school's grievance procedure should be compared to an administrative process rather than a criminal process, and that appeals ensure an additional layer of review that is needed when fact-finders may not be sympathetic to claims that access to educational opportunities has been impaired. Some commenters expressed concern that the proposed appeal procedures would disrupt the balance of rights in campus procedures and, by treating sexual harassment uniquely, will cause sexual harassment claims to be received with skepticism.

Discussion: The Department has revised many provisions of the final regulations with the well-being of victims in mind, including revisions to § 106.45(b)(8) that require recipients to offer appeals equally to both parties and remove the restriction in the NPRM on complainants' ability to appeal a determination based on the severity of the sanctions imposed on the respondent. The Department is persuaded by many commenters' concerns that the right to appeals should be mandatory and equally available to both parties. We have revised § 106.45(b)(8) to provide equal appeal rights to both parties and include robust protections such as anti-bias and training

requirements for appeal decision-makers, strict separation of the appeal decision-makers from the individuals who investigated and adjudicated the underlying case to reinforce independence and neutrality, and retain the proposed provision's requirements allowing both parties equal opportunity to participate in the appeals process through submitting written statements, and requiring reasoned written decisions describing the appeal results to be provided to both parties. Under the final regulations, the appeal rights of complainants and respondents are identical. Appeals may be an important mechanism to reduce the possibility of unfairness or to correct potential errors made in the initial responsibility determination.

As a general principle, we agree with commenters that one of the goals of these regulations should be to preserve recipients' autonomy to craft procedures by which they address issues of sexual misconduct. However, the Department also believes that the requirements contained in the final regulations, including § 106.45(b)(8) on appeals, further the twin purposes of the Title IX statute. As the Supreme Court has stated, 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"[1499] The Department is persuaded by commenters who urged that recipient-level appeals are not only a best practice, but should be required equally for both parties, to provide additional, effective protections against a recipient reaching an unjust or inaccurate outcome in Title IX sexual harassment proceedings.

Changes: None.

Comments: Some commenters argued that granting the complainant a right to appeal will adversely affect the proceedings by empowering institutions to be advocates for complainants.

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[1499] *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979).

Commenters asserted that institutions can offer supportive measures to complainants such that the benefits to the complainant of being able to appeal a finding of non-responsibility are not sufficient to outweigh the respondent's interest in not having to face the same accusation more than once. Commenters also argued that the Department has not offered enough guidance on how institutions can offer complainants appeals while preserving the presumption of innocence.

Discussion: We believe that granting appeal rights to complainants will not have the effect of turning recipients into advocates for complainants, and granting those same appeal rights to respondents does not turn recipients into advocates for respondents, either. The Department wishes to emphasize that supportive measures, such as mutual no-contact orders or academic course adjustments, remain available to help restore or preserve either party's equal access to education and that such measures may continue in place throughout an appeal process.[1500] We believe that maintaining a level of equal educational access while the recipient takes an additional step (assuming one or both parties decide to appeal) contributes to the benefit of requiring equal appeal rights, so that recipients may self-correct erroneous outcomes, better ensuring that the § 106.45 grievance process as a whole leads to reliable determinations regarding responsibility. As a result, we have revised § 106.45(b)(8) to require recipients to offer both parties equal appeal rights on bases of procedural irregularity, newly discovered evidence, or bias or conflict of interest; if such grounds exist, a party should be able to appeal and ask the recipient to revisit the outcome so that the recipient has the opportunity to correct the outcome, whether such an improvement in the accuracy of the outcome is for the complainant's benefit or

[1500] We reiterate that as to complainants, revised § 106.44(a) requires recipients to offer supportive measures to complainants, and the definition of supportive measures in § 106.30 states that supportive measures may be available for either party.

the respondent's benefit. The Department notes that under the final regulations, whether the parties can appeal based solely on the severity of sanctions is left to the recipient's discretion, though if the recipient allows appeals on that basis, both parties must have equal opportunity to appeal on that basis.

The Department does not believe that this approach to appeals constitutes double jeopardy unfair to respondents; the Department reiterates that the Title IX grievance process differs in purpose and procedure from a criminal proceeding, and the Department is not persuaded that a fair process under Title IX requires protection against "double jeopardy" the way that the U.S. Constitution grants such protection to criminal defendants. The Department acknowledges that respondents face a burden if a complainant appeals a determination of non-responsibility, but the Department believes it is important for recipients to revisit determinations that were reached via alleged procedural irregularity or bias or conflict of interest affecting the outcome, or where newly discovered evidence may affect the outcome. The Department notes that § 106.45(b)(1)(v) requires recipients to conclude the appeal process under designated, reasonably prompt time frames, and thus the end result is that the recipient's final determination in a Title IX grievance process is both accurate and reasonably prompt.

With respect to commenters' request that the Department offer additional guidance on how recipients may offer appeals to complainants while also respecting the presumption of non-responsibility contained in § 106.45(b)(1)(iv), we believe that nothing about § 106.45(b)(1)(iv), or the underlying principles justifying the presumption of non-responsibility, conflicts with the equal appeal rights that § 106.45(b)(8) of the final regulations offers to both complainants and respondents. As discussed in the "Section 106.45(b)(1)(iv) Presumption of Non-Responsibility" subsection of the "General Requirements for § Grievance Process" subsection of the "Section

106.45 Recipient's Response to Formal Complaints" section of this preamble, the presumption of non-responsibility is intended to ensure that recipients do not *treat* respondents as responsible prior to ultimate resolution of the grievance process. For the reasons discussed above, asking recipients to offer appeals where the outcome may have been affected by procedural irregularity, bias or conflict of interest, or where newly discovered evidence becomes available helps ensure that the final determination in each particular case is factually accurate, because a proceeding infected by such defects may have resulted in an erroneous outcome to the prejudice of the complainant or the respondent.

Changes: None.

Comments: Some commenters argued that unequal appeal rights will have an adverse effect on campus safety. Commenters cited the high rates of sexual assault and harassment and expressed fear about attending campus if these regulations take effect. Commenters expressed concern that victims will experience further trauma and not be able to receive an education if recipients cannot punish their attacker.

Discussion: In response to commenters' concerns that any inequality in the appeals provision could undermine the safety and security of recipients' educational communities, the Department has revised § 106.45(b)(8) to require recipients to offer appeals to both complainants and respondents on three specified bases, and if a recipient chooses to offer appeals on additional bases such appeals also must be offered equally to both parties. As discussed above, the Department believes that by offering the opportunity to appeal to both parties, recipients will be more likely to reach sound determinations, giving the parties greater confidence in the ultimate outcome and better ensuring that recipients appropriately respond to sexual harassment for the benefit of all students and employees in recipients' education programs and activities.

Changes: None.

Comments: Some commenters argued that the NPRM's appeal provisions conflicted with Federal law, including the Campus SAVE Act, because as proposed, § 106.45(b)(8) gave unequal appeal rights to the parties. Commenters also asserted that the Department mischaracterized case law in the NPRM's preamble to purportedly justify imposing unequal appeal rights on the parties. Some commenters contended the NPRM's appeal provisions conflicted with OCR's past enforcement practices.

Discussion: In response to well-taken arguments made by commenters, the Department is persuaded that the final regulations, unlike the NPRM, should require recipients to give equal appeal rights to the parties. That is why, as discussed above, the limitation contained in the NPRM that complainants could not appeal sanction decisions has been removed from the final regulations. We are leaving recipients with the discretion to permit both parties to appeal sanctions, provided that such an appeal must be offered equally to both parties. We therefore decline to address the contention raised by some commenters that the approach to appeal rights contained in the NPRM may have conflicted with Federal law such as the Campus SAVE Act, or with past Department enforcement practices.

The Department believes that by offering appeals to both complainants and respondents on an equal basis, recipients will be more likely to reach sound determinations, giving the parties greater confidence in the ultimate outcome. Both complainants and respondents have significant interests in the outcomes of these proceedings; the consequences of a particular determination of responsibility or sanction can be life-altering for both parties and thus each determination must be factually accurate. The stakes are simply too high in the context of sexual misconduct for appeals not to be part of the grievance process; as many commenters pointed out, a recipient-

level appeal gives the recipient an opportunity to ensure factual accuracy in determinations by permitting either party to bring to the recipient's attention improper factors that affected the initial determination. The Department is persuaded by commenters who urged the Department to recognize that an error or bias affecting the initial determination regarding responsibility is as likely to negatively affect a complainant as a respondent, and thus the equality of both parties' right to appeal is critical to the parties' sense of justice and confidence in the outcome. Furthermore, a procedural irregularity that affected the outcome, newly discovered evidence that may have affected the outcome, or bias or conflict of interest that affected the outcome, each represents an error that, if left uncorrected by the recipient, indicates that the determination was inaccurate, and thus that sexual harassment in the recipient's education program or activity has not been identified and appropriately addressed. Appeals enable recipients to correct errors in the adjudicative process, and may also reduce parties' reliance on OCR or private litigation to challenge the outcomes thereby yielding just outcomes more quickly than when a party must seek justice in a process outside the recipient's own Title IX grievance process. The Department has therefore revised § 106.45(b)(8) to ensure that both parties have equal right to appeal by asking recipients to reconsider determinations (using a different decision-maker from any person who served as the Title IX Coordinator, investigator, or decision-maker reaching the initial determination) where procedural irregularity, newly discovered evidence, or bias or conflict of interest affected the outcome.

The same reasoning applies to a recipient's dismissal of a formal complaint, or allegations therein; where a recipient's dismissal is in error (for example, the recipient incorrectly decided that the underlying alleged incident did not occur in the recipient's education program or activity leading to mandatory dismissal for Title IX purposes, or the recipient's

discretionary dismissal was based on incorrect facts), the parties should have the opportunity to challenge the recipient's dismissal decision so that the recipient may correct the error and avoid inaccurately dismissing a formal complaint that needs to be resolved in order to identify and remedy Title IX sexual harassment. Thus, we have also revised this provision to expressly allow both parties the equal right to appeal a recipient's mandatory or discretionary dismissals under § 106.45(b)(3)(i)-(ii).

Changes: None.

Comments: Some commenters opposed restricting complainants' rights to appeal because of the effect this provision would have on sanctions issued during the grievance process. Commenters argued that respondents are often given light sanctions and are permitted to remain at the institution, adversely impacting complainants' access to education. They contended that it is unfair to allow one party to appeal sanctions, but not the other party. Commenters asserted that complainants should have a say in the sanctions delivered to the respondents. Other commenters argued that complainants should be allowed to appeal sanctions because they will have a strong interest in doing so, while respondents should not be allowed to appeal sanctions because they would only do so out of self-interest.

Discussion: As discussed above, and in response to well-taken concerns raised by commenters, the Department has decided to remove the limitation contained in the NPRM that would have prevented complainants from appealing recipients' sanction decisions. Under § 106.45(b)(8) of the final regulations, recipients have the discretion to permit parties to appeal sanctions. The Department wishes to clarify that if recipients decide to offer appeal rights regarding sanctions, then both complainants and respondents must have the same rights to appeal. We agree with commenters that it would be unfair and run counter to the spirit of Title IX to permit

complainants to appeal sanction decisions but not permit respondents to appeal sanction decisions, and vice versa, and as such if a recipient allows appeals on the basis of severity of sanctions that appeal must be offered equally to both parties.

Changes: None.

Comments: Some commenters argued that the Department should require institutions to offer appeals. They argued that mandated appeals will ensure uniformity, reduce litigation, and will be necessary due to the decreased standard of liability. Other commenters expressed concern that offering complainants the right to appeal would violate due process. They argued that a false finding of responsibility will result in life-altering stigma and harm to respondents and that their interest in avoiding double jeopardy is significant. Some commenters suggested that if respondents are allowed to appeal, they should only be allowed to appeal for blatant errors. Some commenters argued that § 106.45(b)(8) was not clear that an appeals panel must be different from the original panel. Commenters suggested that the Department ensure a third-party appeals process to protect the fairness and independence of the decisions on appeal.

Discussion: The Department is persuaded by the concerns raised by commenters, and we note that § 106.45(b)(8) of the final regulations requires recipients to offer appeals equally to both parties. Further, we acknowledge that being found responsible for sexual misconduct under Title IX may carry a significant social stigma and life-altering consequences that could impact the respondent's future educational and economic opportunities. However, we also believe that complainants have significant, life-altering interests at stake, and that they "have a right, and are entitled to expect, that they may attend [school] without fear of sexual assault or harassment."[1501]

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[1501] *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 403 (6th Cir. 2017).

For these reasons, along with the centrality of appeals as a mechanism for addressing potential unfairness or error in an adjudication, the Department believes that appeal rights should be offered equally to both complainants and respondents in recipients' Title IX proceedings. Further, we believe that appeal rights for respondents should not be limited to "blatant errors," as suggested by one commenter. Instead, the final regulations specify the bases upon which either party can appeal, including procedural irregularity or bias or conflict of interest in key personnel involved in the adjudicative process that affected the outcome, or newly discovered evidence that would affect the outcome. Moreover, we recognize the importance of granting recipients flexibility and discretion in designing and implementing their Title IX systems; the Department believes recipients are in best position to know the unique needs and values of their educational communities. For this reason, § 106.45(b)(8) permits recipients to offer appeals to both parties on additional bases in their discretion.

With respect to ensuring that appeal decision-makers are different individuals than investigators, Title IX Coordinators, or decision-makers who rendered the initial determination regarding responsibility, the Department agrees with commenters and therefore, § 106.45(b)(8)(iii) makes it clear that the appeal decision-maker cannot be the same person as the decision-maker below, or as the Title IX Coordinator or investigator in the case. This ensures that the recipient's appeal decision reviews the underlying case independently. The Department also notes that appeal decision-makers must be free from bias and conflicts of interest, and be trained to serve impartially, as required under § 106.45(b)(1)(iii).

We respectfully disagree with the commenters who argued that the final regulations should prohibit appeals of not responsible determinations because of double jeopardy concerns. As discussed above, we believe that both respondents and complainants face potentially life-

altering consequences from the outcomes of Title IX proceedings. As such, it is important to protect complainants' right to appeal as well as respondents' right to appeal.

The Department does not believe that a third party independent from the recipient would need to handle appeals to ensure impartiality and fairness. Rather, the robust anti-bias and training requirements of § 106.45(b)(1)(iii) that apply to appeal decision-makers, along with the requirement contained in § 106.45(b)(8)(iii) that the appeal decision-maker must be a different person than the Title IX Coordinator or any investigators or decision-makers that reached the initial determination of responsibility, will help to ensure that recipients' appeal processes are adequately independent and effective in curing possible unfairness or error.

Changes: None.

*Informal Resolution*

Section 106.45(b)(9) Informal Resolution

*Supporting and Expanding Informal Resolution*

Comments: Some commenters appreciated the option of informal resolution in the proposed rules for reasons that echoed one commenter's assertions as follows: "Restrictions on informal resolution have had several problematic consequences. Would-be complainants often declined to come forward with complaints because they were offered only two roads forward: the full formal process leading to possibly severe punishment for the respondent, or counseling for themselves. These students often said: 'I don't want the respondent to be punished; I just want them to realize how bad this event was for me.' Students fully prepared to confess, apologize, and take their sanction were sometimes ground through the formal process for no good reason. Additionally, often both parties would have preferred informal resolution; a rule that pushed them to adopt an

adversarial posture vis a vis each other meant that the conflict persisted, and even escalated, when it could have been settled."

A number of commenters urged the Department to make informal resolution the default option for addressing sexual misconduct. One commenter emphasized that sometimes alleged victims just want to be heard, that confidential settlement conferences should be required before any formal hearing process, and the final regulations should prohibit any settlement mediator from being called as a witness in subsequent proceedings. Another commenter argued that where the default option of mediation fails, the parties should then turn to the court system. One commenter suggested the Department place informal resolution near the start of the final regulations to encourage its use. Several commenters noted that informal resolution can empower victims and increase flexibility to address unique situations; they argued that informal resolution increases choice by allowing both parties to choose the option that is right for them and that the Department should not arbitrarily force them into a formal process. Commenters asserted that confidential conversations between the parties can be ideal where there is insufficient evidence to warrant investigation, or where there may be confusion or misunderstanding as to what exactly happened between the parties. One commenter asserted that it is inaccurate to call mediation "forced" or "unregulated" because the NPRM imposes important requirements on recipients' use of informal resolution and recipients remain free to prohibit it. A few commenters contended that informal resolution is more efficient than formal proceedings because it is faster and less costly and parties do not need to hire expensive attorneys.

Discussion: The Department appreciates the support from commenters regarding informal resolution and agrees that, subject to limitations, informal resolution may represent a beneficial

outcome for both parties superior to forcing the parties to complete a formal investigation and adjudication process as the only option once a formal complaint has raised allegations of sexual harassment. As discussed below, the Department has made several changes to the informal resolution provision in the final regulations to better address potential risks while retaining the benefits that such an option may hold for parties in particular cases.

As a general matter, informal or alternative dispute resolution processes have become increasingly available throughout the American legal system, in recognition of a variety of potential benefits (such as shortening the time frames governing litigation, greater party control over outcomes which may improve parties' sense of justice and increase compliance with outcomes, and yielding remedies more customized to the needs of unique situations) of alternative dispute resolution as a substitute for the adversarial process.[1502] Alternative dispute resolution presents the same potential benefits for sexual harassment cases as for other disputes.[1503]

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[1502] *E.g.*, Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEORGE WASH. L. REV. 482, 493 (1987) (noting that the legal system has "witnessed a massive movement towards the use of ADR procedures" to achieve fairness and justice while relieving overburdened court systems and providing access to resolutions for parties who find litigation cost-prohibitive, and noting that ADR gives greater autonomy to parties "by placing control over the dispute in their hands" ); Developments, *The Paths of Civil Litigation: ADR*, 113 HARV. L. REV. 1851, 1851 (2000) (referring to ADR as a "virtual revolution" in the legal system); *id.* at 1852-53 ("In the 1970s, jurists began to voice concerns about the rising costs and increasing delays associated with litigation, and some envisioned cheaper, faster, less formal, and more effective dispute resolution in such alternatives as arbitration and mediation. As the use of ADR mechanisms grew, proponents viewed them as promising vehicles for an array of agendas. . . . In the 1980s, social scientists, game theorists, and other scholars showed how ADR mechanisms could facilitate settlement by dealing proactively with heuristic biases through the strategic imposition of a neutral third party. Meanwhile, process-oriented ADR advocates emphasized that problem-solving approaches would yield remedies better tailored to parties' unique needs and that the more direct involvement of disputants would encourage greater compliance with outcomes and help rebuild ruptured relationships.") (internal citations omitted).

[1503] *E.g.*, Barbara J. Gazeley, *Venus, Mars, and the Law: On Mediation of Sexual Harassment Cases*, 33 WILLAMETTE L. REV. 605 (1997) (notwithstanding "a perception" that sexual harassment, rape, and domestic

We acknowledge the suggestions made by some commenters that the Department go further to promote informal resolution as a means of addressing sexual misconduct under Title IX, such as by making informal resolution a default option or placing the informal resolution provisions near the start of the final regulations. As recognized by many commenters, the Department believes that informal resolution may empower complainants and respondents to address alleged sexual misconduct incidents through a process that is most appropriate for them, and that it is inaccurate to call informal resolution mechanisms such as mediation "forced" or "unregulated." Informal resolution also enhances recipient and party autonomy and flexibility to address unique situations. However, the Department also believes that the more formal grievance process under § 106.45 may be an appropriate mechanism to address sexual misconduct under Title IX in many circumstances because these provisions establish procedural safeguards providing a fair process for all parties, where disputed factual allegations must be resolved. Furthermore, the existence of a formal grievance process provides parties (where a recipient has chosen to offer informal resolution processes) with expanded choice in the form of alternatives that will best meet the needs of parties involved in a particular situation; the Department does not believe that requiring informal resolution to be attempted prior to engaging the formal grievance process results in the parties having genuine choice and control over the process. Because informal resolution, as opposed to formal investigation and adjudication, relies on the voluntary participation of both parties, the Department declines to require or allow informal resolution

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violence cases "uniformly involve a severe imbalance of power, rendering the woman incapable of participating effectively in mediation" many sexual harassment situations benefit from mediation where an "educative approach, which restores both parties' dignity, can be much more satisfying to all concerned"); Carrie A. Bond, *Note, Shattering the Myth: Mediating Sexual Harassment Disputes in the Workplace*, 65 FORDHAM L. REV. 2489 (1997) (advocating for greater use of mediation in the context of sexual harassment).

processes to be a "default." The "default" is that a formal complaint must be investigated and adjudicated by the recipient; within the parameters of § 106.45(b)(9) a recipient *may* choose to offer the parties an informal process that resolves the formal complaint without completing the investigation and adjudication, but such a result depends on whether the recipient determines that informal resolution may be appropriate and whether both parties voluntarily agree to attempt informal resolution. To clarify the intent of this provision, we have revised § 106.45(b)(9) to state that recipients may not offer informal resolution unless a formal complaint has been filed.

At the same time, the Department is persuaded by some commenters who expressed concern that it may be too difficult to ensure that mediation or other informal resolution is truly voluntary on the part of students who report being sexually harassed by a recipient's employee, due to the power differential and potential for undue influence or pressure exerted by an employee over a student. For this reason, the Department has revised § 106.45(b)(9)(iii) to state that recipients cannot offer an informal resolution process to resolve formal complaints alleging that an employee sexually harassed a student.

With respect to informal resolution facilitators potentially serving as witnesses in subsequent formal grievance processes, we leave this possibility open to recipients. If recipients were to accept such witnesses, then the Department would expect this possibility to be clearly disclosed to the parties as part of the § 106.45(b)(9)(i) requirement in the final regulations to provide a written notice disclosing any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

Changes: The Department has made several changes to the informal resolution provision that we proposed in the NPRM. Individuals facilitating informal resolution must be free from conflicts of

interest, bias, and trained to serve impartially.[1504] Informal resolution processes must have reasonably prompt time frames.[1505] The initial written notice of allegations sent to both parties must include information about any informal resolution processes the recipient has chosen to make available.[1506] In the informal resolution provision itself, § 106.45(b)(9), the final regulations now provide that recipients are explicitly prohibited from requiring students or employees to waive their right to a formal § 106.45 grievance process as a condition of enrollment or employment or enjoyment of any other right; recipients are explicitly prohibited from requiring the parties to participate in an informal resolution process; a recipient may not offer informal resolution unless a formal complaint is filed; either party has the right to withdraw from informal resolution and resume a § 106.45 grievance process at any time before agreeing to a resolution; and recipients are categorically prohibited from offering or facilitating an informal resolution process to resolve allegations that an employee sexually harassed a student.

*Terminology Clarifications*

Comments: A number of commenters expressed concerns regarding the terminology surrounding informal resolution in the NPRM. Commenters stated that calling this process "informal" can cause recipients to underestimate the training, skill, and preparation necessary to successfully execute this resolution method, and it might also lead recipients to treat sexual misconduct claims with greater skepticism than other misconduct. Several commenters argued that mediation is inappropriate in sexual misconduct cases because it suggests both parties are at fault. Many commenters contended that mediation is categorically inappropriate in sexual assault cases, even

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[1504] Section 106.45(b)(1)(iii).
[1505] Section 106.45(b)(1)(v).
[1506] Section 106.45(b)(2)(i).

on a voluntary basis, because of the power differential between assailants and victims, the potential for re-traumatization by having to face the attacker again, the implication that survivors share partial responsibility for their own assault, the seriousness of the offense, and the inadequate punishment imposed on offenders. Other commenters, however, argued that informal resolution of disputed sexual harassment allegations often provides both parties with a preferable outcome to formal adjudication procedures. Some commenters suggested that the Department clearly define what "informal resolution" is in the final regulations and also explain the relationship and possible overlap between informal resolution and the "supportive measures" contemplated in the NPRM. One commenter asked whether the provisions requiring written notice be provided to "parties" refers only to complainants and respondents, or whether parents and/or legal guardians would receive notice instead where the complainant and/or respondent is a minor or legally incompetent person.

Discussion: It is not the intent of the Department in referring to resolution processes under § 106.45(b)(9) as "informal" to suggest that personnel who facilitate such processes need not have robust training and independence, or that recipients should take allegations of sexual harassment less seriously when reaching a resolution through such processes. Indeed, the Department acknowledges the concerns raised by some commenters regarding the training and independence of individuals who facilitate informal resolutions. In response to these well-taken comments, we have extended the anti-conflict of interest, anti-bias, and training requirements of § 106.45(b)(1)(iii) to these personnel in the final regulations. The same requirements that apply to Title IX Coordinators, investigators, and decision-makers now also apply to any individuals who facilitate informal resolution processes. Contrary to the claims made by some commenters that mediation is categorically inappropriate, the Department believes that recipients' good judgment

and common sense should be important elements of a response to sex discrimination under Title IX.

The Department believes an explicit definition of "informal resolution" in the final regulations is unnecessary. Informal resolution may encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation, or restorative justice. Defining this concept may have the unintended effect of limiting parties' freedom to choose the resolution option that is best for them, and recipient flexibility to craft resolution processes that serve the unique educational needs of their communities.

With respect to the relationship between supportive measures and informal resolution, the Department wishes to clarify that supportive measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party and without constituting punitive or disciplinary actions including by protecting the safety of all parties and the recipient's educational environment or deterring sexual harassment. Unlike informal resolutions, which may result in disciplinary measures designed to punish the respondent, supportive measures must be non-disciplinary and non-punitive. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. Informal resolutions may reach agreements between the parties, facilitated by the recipient, that include similar measures but that also could include disciplinary measures, while providing finality for both parties in terms of resolving allegations raised in a formal complaint of sexual harassment. Because an informal resolution *may* result in disciplinary or punitive measures agreed to by a

respondent, we have revised § 106.45(b)(9) to expressly state that a recipient may not offer informal resolution unless a formal complaint is filed. This ensures that the parties understand the allegations at issue and the right to have the allegations resolved through the formal grievance process, and the right to voluntarily consent to participate in informal resolution.

Furthermore, the Department wishes to clarify that where the complainant or respondent is a minor or legally incompetent person, then the party's parent or legal guardian will receive the required written notice under § 106.45(b)(9) of the final regulations. The final regulations address the rights of parents and guardians in § 106.6(g), which states that nothing in the final regulations may be read in derogation of the legal rights of a parent or guardian to act on behalf of an individual.

Changes: The Department has added § 106.6(g) to acknowledge the importance of the legal rights of parents or guardians to act on behalf of individuals exercising Title IX rights or involved in Title IX proceedings. We have also revised § 106.45(b)(9) to state that no recipient may require parties to participate in informal resolution, and a recipient may not offer informal resolution unless a formal complaint has been filed.

*Written Notice Implications*

Comments: One commenter expressed concern that the NPRM requires written notice of the allegations provided to both parties before informal resolution. At public institutions, written notice constitutes a public record; this would frustrate the utility of informal resolution as a confidential forum. The commenter argued that the Department should either withdraw this requirement or instead extend a privilege to records created in informal resolution.

Discussion: The Department acknowledges the confidentiality concerns raised by some commenters regarding informal resolution. Section 106.45(b)(9)(i) provides that the written

notice given to both parties before entering an informal resolution process must indicate what records would be maintained or could be shared in that process. Importantly, records that could potentially be kept confidential could include the written notice itself, which would not become a public record. The Department leaves it to the discretion of recipients to make these determinations. The Department believes this requirement effectively puts both parties on notice as to the confidentiality and privacy implications of participating in informal resolution. Recipients remain free to exercise their judgment in determining the confidentiality parameters of the informal resolution process they offer to parties.

Changes: None.

*Voluntary Consent*

Comments: Many commenters argued that the NPRM fails to ensure that the parties' consent to informal resolution is truly voluntary. Commenters argued that recipients may have perverse reputational and monetary incentives to downplay sexual misconduct claims and push parties to undergo informal resolution instead of lengthy, costly, complex, and public formal proceedings. Commenters noted these perverse incentives may be particularly strong where the respondent is a star athlete or child of a major donor. Some commenters suggested that the Department failed to consider social pressure and power disparities between parties, such as between children and teachers,[1507] and victims and domestic abusers,[1508] and their effect on the "choice" of informal

[1507] Commenters cited: Samantha Craven *et al.*, *Sexual grooming of children: Review of literature and theoretical considerations*, 12 JOURNAL OF SEXUAL AGGRESSION 3 (2006); Anne-Marie Mcalinden, *Setting 'Em Up': Personal, Familial and Institutional Grooming in the Sexual Abuse of Children*, 15 SOCIAL & LEGAL STUDIES 3 (2006).
[1508] Commenters cited: Karla Fischer *et al.*, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 S. METHODIST UNIV. L. REV. 2117 (1993); Jacquelyn C. Campbell *et al.*, *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. OF PUB. HEALTH 1089 (2003).

resolution. Commenters argued that all sexual violence situations reflect power dynamics that make mediation or informal resolution not truly voluntary and pose a risk of further harm to victims.[1509] A few commenters noted that the prospect of retraumatizing cross-examination under the NPRM's grievance procedures means many parties have no real choice at all. One commenter asserted that the final regulations should require recipients to ensure the parties first confer with an advisor or counsel of their choice, and if none is available, then one provided by the recipient, so that consent to informal resolution is truly voluntary. Another commenter asserted that, to avoid recipient biases to promote their own interests, the final regulations should specify the circumstances in which recipients can recommend informal resolution. Commenters believed that mediation improperly shifts the burden of resolution to the parties, instead of school professionals. One commenter claimed that informal resolution could also violate a respondent's due process rights because recipients could impose sanctions without formally investigating the case.

Discussion: The Department appreciates the concerns expressed by many commenters regarding whether parties' consent to informal resolution is truly voluntary. To ensure that the parties do not feel forced into an informal resolution by a recipient, and to ensure that the parties have the ability to make an informed decision, § 106.45(b)(9) requires recipients to inform the parties in writing of the allegations, the requirements of the informal resolution process, any consequences

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[1509] Commenters cited: Lois Presser & Cynthia A. Hamilton, *The Micropolitics of Victim-Offender Mediation*, 76 SOCIAL INQUIRY 316 (2006); Helen C. Whittle *et al.*, *A Comparison of Victim and Offender Perspectives of Grooming and Sexual Abuse*, 36 DEVIANT BEHAVIOR 7, 539 (2015); Mary P. Koss & Elise C. Lopez, *VAWA After the Party: Implementing Proposed Guidelines on Campus Sexual Assault Resolution*, 18 CUNY L. REV. 1 (2014); Rajib Chanda, *Mediating University Sexual Assault Cases*, 6 HARV. NEGOTIATION L. REV. 312 (2001); Mori Irvine, *Mediation: Is it Appropriate for Sexual Harassment Grievances*, 9 OHIO STATE J. ON DISPUTE RESOLUTION 1 (1993).

resulting from participating in the informal process, and to obtain both parties' voluntary and written consent to the informal resolution process. The Department acknowledges the concerns expressed by these commenters, and the final regulations go a step further than the NPRM by explicitly prohibiting recipients from requiring the parties to participate in an informal resolution process, and expressly forbidding recipients from making participation in informal resolution a condition of admission or employment, or enjoyment of any other right. We wish to emphasize that consent to informal resolution cannot be the product of coercion or undue influence because coercion or undue influence would contradict the final regulations' prohibitions against a recipient "requiring" parties to participate in informal resolution, obtaining the parties' "voluntary" consent, and/or conditioning "enjoyment of any other right" on participation in informal resolution. In addition, and as discussed above, the Department believes that by extending the robust training and impartiality requirements of § 106.45(b)(1)(iii) to individuals who facilitate informal resolutions, the perverse incentives and biases that may otherwise taint an informal resolution process will be effectively countered. The Department believes these requirements have the cumulative effect of ensuring that the parties' consent to informal resolution is truly voluntary, and that no party is involuntarily denied the right to have sexual harassment allegations resolved through the investigation and adjudication process provided for by the final regulations. Indeed, we believe the cumulative effect of these requirements will help to ensure that parties' consent to informal resolution is truly voluntary, and therefore we decline to mandate that the parties confer with an advisor before entering an informal resolution process, or to mandate that recipients provide the parties with advisors before entering an informal resolution process.

The Department shares commenters' concerns regarding grooming behaviors common in situations where an employee sexually harasses a student, which may result in any ostensibly "voluntary" choice of the student to engage in informal resolution actually being the product of undue influence of the employee. Because the option of informal resolution rests on the premise that no party is ever required to participate, and where each party voluntarily engages in informal resolution only because the party believes such a process may further the party's own wishes and desires, we have removed from the final regulations the option of informal resolution for any allegations that an employee sexually harassed a student. The final regulations leave recipients discretion to make informal resolution available as an option, or not, with respect to sexual harassment allegations other than when the formal complaint alleges that an employee sexually harassed a student.

Subject to the modifications made in these final regulations, described above, the Department believes that informal resolution empowers the parties by offering alternative conflict resolution systems that may serve their unique needs and provides greater flexibility to recipients in serving their educational communities. Thus, the Department concludes that permitting informal resolution is an appropriate policy development subject to the limitations and restrictions in the final regulations, notwithstanding the 2001 Guidance's position on mediation. The 2001 Guidance approved of informal resolution for sexual harassment (as opposed to sexual assault) "if the parties agree to do so," cautioned that it is inappropriate for a school to simply instruct parties to work out the problem between themselves, stated that "mediation will not be appropriate even on a voluntary basis" in cases of alleged sexual assault, and stated that the complainant must be notified of the right to end the informal process at any time and begin the

formal complaint process.[1510] Within the conditions, restrictions, and parameters the final regulations place on a recipient's facilitation of informal resolution, we believe that the concerns underlying the Department's prior position regarding mediation are ameliorated, while providing the benefits of informal resolution as an option where that option is deemed potentially effective by the recipient and all parties to the formal complaint. The Department notes that nothing in § 106.45(b)(9) requires an informal resolution process to involve the parties confronting each other or even being present in the same room; mediations are often conducted with the parties in separate rooms and the mediator conversing with each party separately. The final regulations ensure that only a person free from bias or conflict of interest, trained on how to serve impartially, will facilitate an informal resolution process. Further, we have revised § 106.45(b)(9) to expressly allow either party to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint. These provisions address the concerns about mediation addressed in the 2001 Guidance, without removing informal resolution as an option for cases where informal resolution may present the parties with a more desirable process and outcome than a formal investigation and adjudication.

We believe concerns about perverse institutional incentives to promote informal resolutions will be adequately addressed by the robust requirements contained in the final regulations. Many commenters have asserted that a recipient's student disciplinary process

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[1510] 2001 Guidance at 21 ("Grievance procedures may include informal mechanisms for resolving sexual harassment complaints to be used if the parties agree to do so. OCR has frequently advised schools, however, that it is not appropriate for a student who is complaining of harassment to be required to work out the problem directly with the individual alleged to be harassing him or her, and certainly not without appropriate involvement by the school (e.g., participation by a counselor, trained mediator, or, if appropriate, a teacher or administrator). In addition, the complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process. In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis.").

traditionally has an educational rather than punitive purpose and thus object to the formal procedures prescribed under the § 106.45 grievance process. The Department believes that the option of informal resolution gives recipients an avenue for using the disciplinary process to educate and change behavior in a way that the adversarial formal grievance process might not, in situations where both parties voluntarily agree to participate. At the same time, the final regulations ensure that recipients cannot require the parties to use informal resolution, the parties must give voluntary consent to informal resolution, and the recipient cannot condition enrollment, employment, or enjoyment of any other right, on participation in informal resolution. Recipients also must not intimidate, threaten, or coerce any person for the purpose of interfering with a person's rights under Title IX,[1511] including the right to voluntarily decide whether or not to participate in informal resolution. These requirements counteract incentives a recipient may have to pressure parties to engage in informal resolution.

We disagree that mediation improperly shifts the burden of resolution to the parties instead of school professionals, and that informal resolution could violate a respondent's due process rights. Informal resolution under the final regulations is not possible without the informed, voluntary consent of all parties, and persons who facilitate informal resolution must be well-trained pursuant to § 106.45(b)(1)(iii). Recipients must explain the parameters and processes, consequences, and confidentiality implications of informal resolution to the parties. Furthermore, the final regulations respond to commenters' concerns by expressly providing that either party can withdraw from the informal resolution process at any time prior to reaching a

[1511] Section 106.71 prohibits retaliation: "No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part[.]"

final resolution and resume the formal grievance process. A benefit of informal resolution may be that parties have a greater sense of personal autonomy and control over how particular allegations are resolved; however, where that avenue is not desirable to either party, for any reason, the party is never required to participate in informal resolution.

Changes: None.

*Safety Concerns Based on Confidentiality*

Comments: A few commenters expressed concerns that the confidential nature of informal resolution could present safety risks to the survivor and broader campus community because informal resolutions such as mediation often happen behind closed doors and the broader school community and other students may not become aware of the risks posed by the perpetrator and so cannot take precautions.[1512] Further, some commenters believed that confidentiality requirements in resolution agreements could silence survivors who would otherwise raise awareness of the allegations and criticize the recipient's handling of the case.

Discussion: The Department appreciates the concerns raised by some commenters that the confidential nature of informal resolutions may mean that the broader educational community is unaware of the risks posed by a perpetrator; however, the final regulations impose robust disclosure requirements on recipients to ensure that parties are fully aware of the consequences of choosing informal resolution, including the records that will be maintained or that could or could not be shared, and the possibility of confidentiality requirements as a condition of entering

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[1512] Commenters cited: Jennie Kihnley, *Unraveling the Ivory Fabric: Institutional Obstacles to the Handling of Sexual Harassment Complaints*, 25 LAW & SOCIAL INQUIRY 69, 84 (2000); Laurie Rudman *et al.*, *Suffering in Silence: Procedural Justice versus Gender Socialization in University Sexual Harassment Grievance Procedures*, 17 BASIC & APPLIED SOCIAL PSYCHOL. 4 (1995); Stephanie Riger, *Gender Dilemmas in Sexual Harassment Policies and Procedures*, 46 AM. PSYCHOL. 5 (1991); Margaret B Drew, *It's Not Complicated: Containing Criminal Law's Influence on the Title IX Process*, 6 TENN. J. OF RACE, GENDER & SOCIAL JUSTICE 2 (2017).

a final agreement. We believe as a fundamental principle that parties and individual recipients are in the best position to determine the conflict resolution process that works for them; for example, a recipient may determine that confidentiality restrictions promote mutually beneficial resolutions between parties and encourage complainants to report,[1513] or may determine that the benefits of keeping informal resolution outcomes confidential are outweighed by the need for the educational community to have information about the number or type of sexual harassment incidents being resolved.[1514] The recipient's determination about the confidentiality of informal resolutions may be influenced by the model(s) of informal resolution a recipient chooses to offer; for example, a mediation model may result in a mutually agreed upon resolution to the situation without the respondent admitting responsibility, while a restorative justice model may reach a mutual resolution that involves the respondent admitting responsibility. The final regulations permit recipients to consider such aspects of informal resolution processes and decide to offer, or not offer, such processes, but require the recipient to inform the parties of the nature and consequences of any such informal resolution processes.

Changes: None.

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[1513] Rajib Chanda, *Mediating University Sexual Assault Cases*, 6 HARV. NEGOTIATION L. REV. 265, 280 (2001) (acknowledging the argument that the confidentiality of mediation is a negative feature but asserting that mediation is still advantageous over litigation or arbitration of sexual harassment cases because empirical evidence suggests that parties not part of a dispute do not learn from the public resolution of the case, and suggesting that the "vast underreporting" of sexual harassment could be "possibly due to the public and adversarial nature of litigation and arbitration" such that the confidentiality of mediation could encourage more reporting).

[1514] *Id.* (acknowledging the argument that the confidentiality of mediation means that people other than the parties "may not even know about the existence of the dispute" and thus "may discount the incidence of sexual harassment, and thus underestimate the seriousness of the problem").

*Consistency with Other Law and Practice*

Comments: A number of commenters asserted that informal resolution under the NPRM would trigger conflict with other Federal and State law and is inconsistent with best practices. For example, some commenters stated that the Department failed to provide a reasoned explanation for allowing mediation, given that such a position was rejected by both the Bush and Obama Administrations for serious sexual misconduct cases. Several commenters suggested that informal resolutions such as mediation will chill reporting. Commenters urged the Department to preserve the approach to mediation contained in the 2001 Guidance. Commenters asserted that the Department of Justice has traditionally discouraged use of mediation in sexual and intimate partner violence cases and that some Federal programs prohibit grant recipients serving victims from engaging clients in mediation related to their abuse; commenters argued that all sexual violence cases but especially those involving children and domestic abusers, involve power differential dynamics that make mediation high-risk for the complainants.[1515] A few commenters argued that the NPRM's conflicts with State law regarding mediation could trigger enforcement problems, cause confusion for recipients and students, impose additional cost burdens, and prompt lengthy litigation. Commenters argued that since 2000, the American Bar Association (ABA) has recommended that mediation generally not be used in domestic violence cases. And one commenter asserted that the Department should not hold schools to lower standards than U.S. companies, many of which are withdrawing mandatory mediation, arbitration, and other alternative dispute resolution in their employee contracts. Some commenters asserted that

[1515] Commenters cited: Mary P. Koss *et al.*, *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance*, 15 TRAUMA, VIOLENCE & ABUSE 3 (2014).

smaller recipients may not have adequate resources and staff to handle mediations and other informal resolutions.

Discussion: The Department acknowledges there may be differences between the approach to informal resolution contained in the final regulations and other Federal practices relating to informal resolution. As discussed above, the Department believes that the concerns underlying the position on mediation in the 2001 Guidance are adequately addressed by these final regulations, including modifications in response to commenters' concerns that allegations involving sexual harassment of a student by an employee pose a significant risk of ostensibly "voluntary" consent to mediation (or other informal resolution) being the product of undue pressure by the respondent on the complainant, and thus the final regulations preclude informal resolution as an option with respect to allegations that an employee sexually harassed a student. Because informal resolution is only an option, and is never required, under the final regulations, the Department does not believe that § 106.45(b)(9) presents conflict with other Federal or State laws or practices concerning resolution of sexual harassment allegations through mediation or other alternative dispute resolution processes.[1516]

The Department believes that an *option* of mediation may encourage reporting of sexual harassment incidents,[1517] but reiterates that the final regulations do not require any recipient to

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[1516] *See* discussion under the "Section 106.6(h) Preemptive Effect" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

[1517] Rajib Chanda, *Mediating University Sexual Assault Cases*, 6 HARV. NEGOTIATION L. REV. 265, 305 (2001) (a "mediation option for sexual assault victims addresses" each of the three main reasons why sexual assault is underreported – "that victims anticipate social stigmatization, perceive a difficulty in prosecution, and consider the effect on the offender" because mediation is not adversarial, avoids the need to "prove" charges, and gives the victim control over the range of penalties on the offender, all of which likely "encourage [victims] to report the incident").

offer informal resolution and preclude a party from being required to participate in informal resolution.

The Department agrees that informal resolution should not be mandatory, and the final regulations explicitly prohibit recipients from requiring students or employees to waive their right to a § 106.45 investigation and adjudication of formal complaints as a condition of enrollment or continuing enrollment, or employment or continuing employment with the recipient. Recipients cannot force individuals to undergo informal resolution under the final regulations. Furthermore, the Department reiterates that nothing in the final regulations requires recipients to offer an informal resolution process. Recipients remain free to craft or not craft an informal resolution process that serves their unique educational needs; therefore, smaller recipients that may not have adequate resources or staff to handle informal resolution need not offer such processes.

Changes: None.

*Training Requirements*

Comments: Many commenters contended that the final regulations should impose training and qualification requirements on mediators, facilitators, arbitrators, and other staff involved in informal resolution. For example, these commenters wanted the Department to impose the same training requirements on personnel involved in formal grievance procedures as on personnel handling informal resolution; ensure no conflicts of interest; and minimize the risk of inappropriate questioning during informal process and possible re-traumatization. One commenter suggested that the Department encourage recipients to enter into memoranda of understanding (MOUs) with third-party informal resolution providers.

Discussion: The Department appreciates the well-taken concerns raised by many commenters that the NPRM did not explicitly require informal resolution personnel to be appropriately trained and qualified. As a result, as discussed above, we have revised § 106.45(b)(1)(iii) of the final regulations to require recipients to ensure any individuals who facilitate an informal resolution process must receive training on the definition of sexual harassment contained in § 106.30 and the scope of the recipient's education program or activity; how to conduct informal resolution processes; and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, or bias. As such, the Department believes that it is unnecessary to encourage recipients to enter MOUs with third party informal resolution providers, though the Department notes that the final regulations permit recipients to outsource informal resolutions to third party providers.

Changes: The Department has revised § 106.45(b)(1)(iii) to include persons who facilitate an informal resolution process as persons who must be free from conflicts of interest and bias and receive the same training as that provision requires for Title IX Coordinators, investigators, and decision-makers.

*Non-Binding Informal Resolution*

Comments: Several commenters asserted that the Department should allow mediation but require recipients to allow parties to return to formal proceedings if they want to; otherwise respondents might have less incentive to mediate in good faith and reach a reasonable outcome. If mediation is binding, respondents may have no incentive to mediate in good faith and reach a reasonable outcome. A few commenters argued that schools must not offer a one-time choice of informal mediation versus formal investigation. Survivors need to be able to change their minds; their access to education can change over time. One commenter asserted that informal resolution

should only be binding where all parties voluntarily agree on a resolution and the agreement's terms are not breached. This commenter suggested that the final regulations should include a provision stating that any agreement reached in informal resolution or mediation must be signed by all parties, clearly specify the terms by which the case is resolved, establish consequences for breaching the agreement, detail how the parties can report breach of agreement, and define how the breach would be addressed.

Discussion: The Department acknowledges that the NPRM proposed to allow recipients to prohibit parties from leaving the informal resolution process and returning to a formal grievance process. As noted above, we have amended our approach to this issue such that § 106.45(b)(9) of the final regulations explicitly permits either party to withdraw from an informal resolution at any time before agreeing to a resolution and resume the grievance process under § 106.45. The Department expects informal resolution agreements to be treated as contracts; the parties remain free to negotiate the terms of the agreement and, once entered into, it may become binding according to its terms. The Department believes the cumulative effect of these provisions will help to ensure that informal resolutions such as mediation are conducted in good faith and that these processes may reach reasonable outcomes satisfactory to both parties. As such, the Department believes the alternative approaches offered by some commenters, such as requiring a new subsection provision that would cover breaches of informal resolution agreements, are unnecessary to address such concerns.

Changes: The Department has revised § 106.45(b)(9) to provide that any party may withdraw from informal resolution at any time prior to agreeing to a resolution, and resume the formal grievance process.

*Survivor-Oriented Protections*

Comments: A few commenters asserted the final regulations should include explicit protections for survivors in the informal resolution process. For example, the final regulations should prohibit in-person questioning during informal process but allow written submissions by the parties to avoid re-traumatization. Commenters suggested that the final regulations should categorically prohibit schools from requiring complainants to resolve the problem alone with the respondent. Some commenters stated that if mediation is an option, survivors should determine the format, such as having someone sit in on their behalf or requiring the parties to be in separate rooms. Otherwise, the process could become irresponsible and cause more harm than good. A few commenters asserted that the final regulations should require recipients to evaluate all potential risks before proposing informal resolution. One commenter suggested that § 106.44(c) regarding safety and risk analysis for emergency removals could be a model for informal resolutions, such that recipients should thoroughly investigate the situation and parties' relationship to ensure informal resolution is appropriate.

Discussion: The Department appreciates the suggestions offered by some commenters to include explicit survivor-oriented protections in the informal resolution provisions in § 106.45(b)(9) of the final regulations. The Department declines to make these changes because the changes would restrict recipients' flexibility and discretion in satisfying their Title IX obligations and meeting the needs of the members of their educational community. The Department believes that the parties are in the best position to make the right decision for themselves when choosing informal resolution, and that choice will be limited in scope based on what informal processes a recipient has deemed appropriate and has chosen to make available. As such, we believe that to require a safety and risk analysis before recipients may offer informal resolutions would be unnecessary,

though nothing in the final regulations precludes a recipient from following such a practice. Similarly, nothing in § 106.45(b)(9) precludes a recipient from categorically refusing to offer and facilitate an informal process that involves the parties directly interacting, from prohibiting a facilitator from directly questioning parties, or from requiring the parties to be in separate rooms.

Changes: None.

*Restorative Justice*

Comments: Many commenters opposed mediation but supported expanding access to, and Department funding of, restorative justice. These commenters raised the point that restorative justice requires the perpetrator to admit wrongdoing from the beginning and work to redress the harm caused, whereas mediation requires no admission of guilt, implicitly rests on the premise both parties are partially at fault for the situation and must meet in the middle, and often entails debate over the facts. Commenters cited studies suggesting restorative justice has resulted in reduced recidivism for offenders and better outcomes for survivors.[1518] One commenter stated that many recipients currently implement restorative justice, but only where the respondent is willing to accept responsibility, and stated that the process does not require face-to-face meeting between the parties, and the most severe misconduct is not eligible. One commenter was concerned that because § 106.45(b)(9) suggests informal processes can only be facilitated prior to reaching a determination regarding responsibility this can complicate or end up precluding

[1518] Commenters cited: Clare McGlynn *et al.*, *"I just wanted him to hear me": Sexual violence and the possibilities of restorative justice,* 39 JOURNAL OF L. & SOCIETY 2 (2012); Katherine Mangan, *Why More Colleges Are Trying Restorative Justice in Sex-Assault Cases*, CHRONICLE OF HIGHER EDUCATION (Sept. 17, 2018); Kerry Cardoza, *Students Push for Restorative Approaches to Campus Sexual Assault*, TRUTHOUT (Jun. 30, 2018); Howard Zehr, *The Little Book of Restorative Justice* (Good Books 2002); David R. Karp *et al.*, *Campus Prism: A Report On Promoting Restorative Initiatives For Sexual Misconduct On College Campuses*, SKIDMORE COLLEGE PROJECT ON RESTORATIVE JUSTICE (2016); Margo Kaplan, *Restorative Justice and Campus Sexual Misconduct*, 89 TEMP. L. REV. 701, 715 (2017).

restorative justice, because restorative justice requires admission of responsibility before participation.

Discussion: The Department appreciates commenters' support for restorative justice as a viable method of informal resolution, commenters' concerns regarding mediation, and the common differences between the two resolution processes.[1519] One of the underlying purposes of § 106.45(b)(9) is to recognize the importance of recipient autonomy and the freedom of parties to choose a resolution mechanism that best suits their needs. As such, nothing in § 106.45(b)(9) prohibits recipients from using restorative justice as an informal resolution process to address sexual misconduct incidents.

With respect to the implications of restorative justice and the recipient reaching a determination regarding responsibility, the Department acknowledges that generally a critical feature of restorative justice is that the respondent admits responsibility at the start of the process. However, this admission of responsibility does not necessarily mean the recipient has also reached that determination, and participation in restorative justice as a type of informal resolution must be a voluntary decision on the part of the respondent. Therefore, the language limiting the availability of an informal resolution process only to a time period before there is a determination of responsibility does not prevent a recipient from using the process of restorative justice under §106.45(b)(9), and a recipient has discretion under this provision to specify the

[1519] Mediation does not bar imposition of disciplinary sanctions. *E.g.,* Rajib Chanda, *Mediating University Sexual Assault Cases*, 6 HARV. NEGOTIATION L. REV. 265, 301 (2001) (defining mediation as "a process through which two or more disputing parties negotiate a voluntary settlement with the help of a 'third party' (the mediator) who typically has no stake in the outcome" and stressing that this "does not impose a 'win-win' requirement, nor does it bar penalties. A party can 'lose' or be penalized; mediation only requires that the loss or penalty is agreed to by both parties – in a sexual assault case, 'agreements . . . may include reconciliation, restitution for the victim, rehabilitation for whoever needs it, and the acceptance of responsibility by the offender.'") (internal citations omitted).

circumstances under which a respondent's admission of responsibility while participating in a restorative justice model would, or would not, be used in an adjudication if either party withdraws from the informal process and resumes the formal grievance process. Similarly, a recipient could use a restorative justice model *after* a determination of responsibility finds a respondent responsible; nothing in the final regulations dictates the form of disciplinary sanction a recipient may or must impose on a respondent.

Changes: None.

*Avoiding Formal Process*

Comments: One commenter expressed concern that recipients could simply offer informal resolution and only informal resolution to get around the NPRM's formal process requirements. To address this, the commenter argued the final regulations should clearly state that recipients must implement a formal resolution process regardless of their choice to facilitate an informal resolution process.

Discussion: The Department acknowledges the concern that under the NPRM it may have appeared that recipients could avoid formal grievance procedures altogether by solely offering informal resolution. To address this concern, we have revised § 106.45(b)(9) to preclude recipients from requiring students or employees to waive their rights to a § 106.45 grievance process as a condition of enrollment or employment, or enjoyment of any other right, include a statement that a recipient may never require participation in informal resolution, and clarify that a recipient may not offer informal resolution unless a formal complaint is filed. As such, recipients must establish a grievance process that complies with § 106.45 to ensure that parties' Title IX rights are realized, and the parties may participate in informal resolution only *after* a formal complaint has been filed, ensuring that the parties are therefore aware of the allegations at

issue and the formal procedures for investigation and adjudication that will apply absent an informal resolution process.

Changes: The Department has revised § 106.45(b)(9) to preclude a recipient from requiring any party to waive the right to a formal grievance process as a condition of enrollment, employment, or enjoyment of any other right, that a recipient may never require participation in informal resolution, and that a recipient may not offer informal resolution unless a formal complaint is filed.

*Electronic Disclosures*

Comments: One commenter asserted that the Department should allow electronic disclosures and signatures to obtain parties' consent to informal resolution to enhance privacy and security of sensitive documents, and because written notice requirements are costly and unnecessary in 2019.

Discussion: The final regulations do not specify the method of delivery for written notices and disclosures required under the final regulations, including the method by which the recipient must obtain parties' voluntary written consent to informal resolution. The Department acknowledges the potential convenience, privacy, and security benefits of shifting from physical disclosures and signatures to electronic disclosures and signatures but leaves recipients with discretion as to the method of delivery of written notices under § 106.45(b)(9).

Changes: None.

*Expulsion Through Informal Resolution*

Comments: One commenter argued that expulsion is an inappropriate sanction for informal resolution, and the Department should prohibit schools from expelling students through informal resolution to ensure a fair process for all.

Discussion: The Department believes that the robust disclosure requirements of § 106.45(b)(9), the requirement that both parties provide voluntary written consent to informal resolution, and the explicit right of either party to withdraw from the informal resolution process at any time prior to agreeing to the resolution (which may or may not include expulsion of the respondent), will adequately protect the respondent's interest in a fair process before the sanction of expulsion is imposed. Accordingly, the Department believes that prohibiting recipients from using informal resolution where it results in expulsion is unnecessary; if expulsion is the sanction proposed as part of an informal resolution process, that result can only occur if both parties agree to the resolution. If a respondent, for example, does not believe that expulsion is appropriate then the respondent can withdraw from the informal resolution process and resume the formal grievance process under which the recipient must complete a fair investigation and adjudication, render a determination regarding responsibility, and only then decide on any disciplinary sanction.

Changes: None.

*Clarification Requests*

Comments: Several commenters raised questions regarding the informal resolution provisions of the NPRM. One commenter inquired as to whether a time frame could apply after which neither party could ask for an ongoing informal resolution process to be set aside and proceed with formal investigation and adjudication. One commenter raised concerns regarding recipients' legal liability if the informal resolution process included a respondent's acknowledgement of a policy violation, but the respondent was allowed to remain on campus and violated that same policy again. One commenter sought clarification as to whether informal resolution could include a respondent taking responsibility and accepting disciplinary action without any meeting or process at all. One commenter raised questions as to what happens to ongoing informal

resolution process where more complaints are brought against the same respondent. One commenter asked whether parties can proceed with informal resolution even where the recipient believes it is inappropriate to resolve the case. One commenter inquired whether the NPRM's informal resolution provisions only apply where a formal complaint was filed against the respondent. And one commenter sought clarification as to whether schools remain free to prohibit informal resolutions under the NPRM.

Discussion: The Department appreciates the questions raised by commenters regarding § 106.45(b)(9). The final regulations clarify that either party can withdraw from the informal resolution process and resume the formal grievance process at any time prior to agreeing to a resolution. The Department appreciates the opportunity to clarify here that informal resolution compliant with § 106.45(b)(9) is a method of resolving allegations in a formal complaint of sexual harassment. Because a recipient *must* investigate and adjudicate allegations in a formal complaint, informal resolution stands as a potential alternative to completing the investigation and adjudication that the final regulations otherwise require. Under the final regulations, a recipient may not offer informal resolution unless a formal complaint has been filed.

With respect to recipients' potential legal liability where the respondent acknowledges commission of Title IX sexual harassment (or other violation of recipient's policy) during an informal resolution process, yet the agreement reached allows the respondent to remain on campus and the respondent commits Title IX sexual harassment (or violates the recipient's policy) again, the Department believes that recipients should have the flexibility and discretion to determine under what circumstances respondents should be suspended or expelled from campus as a disciplinary sanction, whether that follows from an informal resolution or after a determination of responsibility under the formal grievance process. Recipients may take into

account legal obligations unrelated to Title IX, and relevant Title IX case law under which Federal courts have considered a recipient's duty not to be deliberately indifferent by exposing potential victims to repeat misconduct of a respondent, when considering what sanctions to impose against a particular respondent. The Department declines to adopt a rule that would mandate suspension or expulsion as the only appropriate sanction following a determination of responsibility against a respondent; recipients deserve flexibility to design sanctions that best reflect the needs and values of the recipient's educational mission and community, and that most appropriately address the unique circumstances of each case. While Federal courts have found recipients to be deliberately indifferent where the recipient failed to take measures to avoid subjecting students to discrimination in light of known circumstances that included a respondent's prior sexual misconduct,[1520] courts have also emphasized that the deliberate indifference standard is not intended to imply that a school must suspend or expel every respondent found responsible for sexual harassment.[1521]

The Department reiterates that the final regulations do not require recipients to establish an informal resolution process. As such, if recipients believe it is inappropriate, undesirable, or

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[1520] *E.g.*, *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1296-97 (11th Cir. 2007).

[1521] *E.g.*, *id.* at 1297 (suspending or expelling offenders would have been one measure the university could have taken to avoid subjecting the plaintiff to discrimination in the form of further sexual misconduct perpetrated by the offenders, but other measures could also have been pursued by the university, such as removal of the offenders from their housing, or implementing a more protective sexual harassment policy to address future incidents); *Davis v. Monroe Cnty. Bd. of Educ.*, 546 U.S. 629, 648 (1999) ("We thus disagree with respondents' contention that, if Title IX provides a cause of action for student-on-student harassment, 'nothing short of expulsion of every student accused of misconduct involving sexual overtones would protect school systems from liability or damages.' See Brief for Respondents 16; see also [*Davis v. Monroe Cnty. Bd. of Educ.*,] 120 F.3d [1390 (11th Cir. 1997)] at 1402 (Tjoflat, J.) ('[A] school must immediately suspend or expel a student accused of sexual harassment'). Likewise, the dissent erroneously imagines that victims of peer harassment now have a Title IX right to make particular remedial demands. See post, at 34 (contemplating that victim could demand new desk assignment). In fact, as we have previously noted, courts should refrain from second guessing the disciplinary decisions made by school administrators.").

infeasible to use informal resolution to address sexual harassment under Title IX, then recipients may instead offer only the § 106.45 grievance process involving investigation and adjudication of formal complaints.

Changes: We have revised § 106.45(b)(9) to state that recipients may not offer informal resolution unless a formal complaint has been filed.

*Recordkeeping*

Section 106.45(b)(10) Recordkeeping and Directed Question 8

Comments: Many commenters expressed general support for the recordkeeping requirements in § 106.45(b)(10). Some commenters expressed that this provision would improve the overall transparency and integrity of the Title IX grievance process, discourage colleges and universities from utilizing training materials that employ sex stereotypes, and encourage recipients to adopt a high standard of training that provides investigators with proper trauma training. Many commenters, however, opposed any recordkeeping requirement, arguing that these requirements are not victim-centered or trauma-informed, that it is burdensome, time consuming, and will greatly slow the investigation process.

Some commenters stated that several institutions of higher educations' retention policies dictate keeping records for even longer periods of time than the three years suggested in the NPRM, and that lengthening the retention period in this provision would facilitate the parties' abilities to prepare cases and appeals.

Many commenters opposed the recordkeeping requirement. The commenters stated that a three-year time period fails to take into account that State law may require a longer period of retention, or that three years often does not cover a student's educational tenure at an institution. They also argued that this closely resembles requirements in the criminal justice system, which

will reduce the likelihood of an erroneous finding of guilt. Many of the commenters opposed the three-year period of retention of records as being too short. Because most students take more than three years to graduate from an institution of higher education, a student's record could be erased prior to their graduation. This could limit a recipient's ability to fully address sporadic but repeated sex discrimination that fails to garner the notice of recipients and is lost forever in records discarded from three years prior. Also, such circumstances could trigger the Title IX Coordinator's duty to file a formal complaint under proposed §106.44(b)(2). As the average graduation rate at an institution of higher education is six years, there may be times in which a respondent had a prior allegation in year one, and another allegation in year five. Commenters also asked whether the Title IX Coordinator is required to bring forward a complaint, and if so, what records would be used if this three-year period had passed?

Commenters asserted that freshmen college students are more likely to be involved in a sexual harassment proceeding than upperclassmen and thus by allowing schools to destroy these records before such a freshman student graduates, the recipient and the larger community might be prevented from learning from the earlier incident if the respondent reoffends.

Commenters argued that for students attending schools where they could be present for more than three years, such as a K-8 school, students could outlast the record of their harassment or assault, even within a single institution. Commenters argued that it makes little sense for a student sexually harassed in the third grade to enter the seventh grade, at the same institution, without a record of those past experiences; for example, the perpetrator might be placed in a survivor's class and the relevant teachers might not understand how to implement appropriate supportive measures. Commenters asserted that for elementary and secondary school students, these records are important when students transfer between schools or school districts, and that a

funding recipient must know when a new student at their school has been sexually assaulted or harassed in the past in order to provide appropriate services.

Other commenters opposed the three-year retention period on the grounds that it would impair the legal rights of minor children, and is inconsistent with State statutes of limitations, if evidence surrounding the student's harassment and their schools' response was unavailable because it was older than three years. Commenters stated that many States allow for minors to file civil suits only once they reach the age of majority, and that Federal and State laws consistently toll relevant statute of limitations periods until minors reach the age of majority and have the ability to vindicate their own rights, recognizing that they should not be punished for the failure of a guardian to file a claim on their behalf.

Several commenters stated that, in the case of employee-on-student harassment and "sexually predatory educators," this would allow employee records to be periodically cleansed of evidence of wrongdoing relatively quickly (three years), thereby putting future students at risk.

Other commenters stated that the three-year retention period is so short that it would limit complainants' ability to succeed in a Title IX lawsuit or OCR complaint because it would allow recipients to destroy relevant records before a party has had the opportunity to file a complaint or complete discovery, and therefore escape liability. Commenters recommended the provision be modified to state: "If litigation is pursued before the expiration of the three-year period, records should be kept until the final action is completed." Commenters argued that the Title IX statute does not contain a statute of limitations, so courts generally apply the statute of limitation of the most analogous State laws regarding retention periods or statutes, e.g., a State's civil rights statute or personal injury statute which varies from one to six years.

Many commenters found the three-year retention period confusing and argued that the Department provided no rationale for it. Commenters stated the retention period would conflict with State requirements, or other disciplinary actions (e.g., long-term suspension) that require longer document retention (e.g., in Washington State, districts must retain records related to discrimination complaints for six years.)

Several commenters, in asserting that the three-year retention period is too short, proposed alternate retention periods. One commenter stated, in order to avoid conflict with State requirements, the Department should modify § 106.45(b)(10) to read: "maintain for a minimum of three years or as required by State statute…" or "seven years, or 3 years after all parties graduate, whichever is sooner," or keeping records until one year after a student graduates. Some commenters stated the retention period should not be tied to the Clery Act's limitation period for reporting specific campus crimes in an annual security report. (Clery Act, 20 U.S.C. 1092(f); 34 CFR 668.46(c)(1) (requiring schools to annually report all crimes which occurred in the prior three calendar years by the end of the following year). Other commenters suggested the period be six years, or modified to state "files should be retained for the time the student is involved on campus and extended for a reasonable time period that considers the student may enroll for a graduate degree."

Many commenters proposed that records be kept for a minimum of seven years, instead of three, in keeping with best practices for student record-keeping as well as general accounting practices. Some commenters stated medical and tax records are required to be kept for seven years, so records of sexual abuse should be kept for the same amount of time, if not more. Furthermore, the commenters stated a three-year period would hinder the Department's efforts to ensure compliance, especially if a continuing violation is alleged or class-wide discrimination is

occurring over multiple years, and conflict with the Clery records retention requirement of seven years. Rather, commenters asserted, this section should mirror the Clery Act retention effective time period requirement of seven years to avoid confusion and the potential for documents to be misfiled and destroyed. Commenters recommended this provision be modified to state: "All records must be kept for at least three years following the generation of the last record associated with the report or complaint." Or: "…and maintain for a period of three years from the date the disciplinary proceedings, including any appeals, is completed." Commenters also requested to extend the time period by stating: "…or in the presence of an active investigation by OCR or other court system, until the investigation and determination is completed." Commenters noted that in the past, OCR complaints involving campus sexual assault have taken an average of more than four years to resolve.

Many commenters recommended that the retention period be linked to the parties' attendance in the recipient's program or activity. For example, commenters referenced the FERPA statute in recommending that the standard time period for retention be five to seven years after graduation or separation from an institution. Other commenters recommended the retention period be changed to three years or the point at which any parties are no longer in attendance at the institution, whichever comes later. Commenters stated that three-year retention period should be limited to student-complainants or student-respondents because if one or both parties are staff or faculty, their association with the recipient may extend for many years. Commenters recommended that § 106.45(b)(10) require the recipient to create, gather, and maintain the records for the duration of the students' time in school and then five years after the last student involved has graduated, and to define all important terms in a way that prevents loopholes and misconduct.

Other commenters recommended that recipients be allowed to determine the appropriate amount of time to retain records, in keeping with their own policies. Commenters requested that this requirement be made permissive for elementary and secondary school recipients – that such recipients "may" create records – and may only retain them for one year, stating that some primary or secondary schools are not required to maintain these kinds of records, and may not retain them in excess of one year.

Some commenters recommended that records be maintained for a minimum of ten years, arguing that, if not, the proposed rules would decrease the volume of relevant records, and in turn burden the Federal government because Federal background clearance investigations would become unreliable; agencies would inevitably make a favorable national security clearance or employment suitability determination without being aware of a candidate's past proven sexual assault if it occurred more than three years prior.

Some commenters stated that records should be kept based on the criminal justice systems' statutes of limitations, if not longer, to ensure consistency between institutional standards and State standards and ensuring parties can appropriately represent themselves. The three-year requirement could undermine criminal prosecutions related to the incidents at issue because it would permit recipients to discard vital records that could help the criminal prosecution of sexual assault or rape before the statute of limitations for such crimes has run, thereby potentially letting the perpetrators go free. For example, commenters contended, an elementary and secondary school could have ceased maintaining records of a sexual assault investigation before the student reaches the age of 18 and has the ability to vindicate their own rights. Other commenters argued that, if the underlying offense can still be prosecuted ten years after it occurred, then the recipient has a duty to retain those records for an equal length of time,

especially if any aspect of the school's investigation had to be put on hold for "good cause," e.g., until police and the court system have wrapped up their investigations.

Some commenters asserted that records should be kept at least as long as the educational program at which the events took place exists, if not indefinitely. Otherwise, they argue, it would allow the records of employees, who may have a longer tenure at an institution, to be periodically cleansed of any evidence of wrongdoing. Most students attend the same institution for four or more years during their elementary school, middle school, high school, college, and graduate school experiences. Commenters argued that an indefinite timeline is critical to ensure that complainants have ongoing access to their files and evidence to allow them flexibility to pursue the Title IX or criminal law process when it is safe and appropriate for them. Some commenters argued that if a complainant chooses to access the legal system simultaneously or independently from the institution, their evidence should be accessible to them at any point in time. If someone were to make a report within their first year of enrollment, and waited longer than the proposed three years to go through with a formal investigation or hearing, the complainant would not have access to the information shared when they had a fresher memory of the incident. Commenters stated that complainants may not come forward immediately for various reasons, including trauma, youth, coping mechanisms, lapses in memory, fear of re-assault, escalation, or retaliation.

Commenters asserted that three years is too short a time period to allow OCR to conduct a thorough investigation of the prevalence of sexual harassment in a recipient's programs or activities and that it would also not allow recipients to monitor campus climate, identify trends in sexual misconduct that need to be addressed on a community level, or flag sexual predators. Commenters argued that problematic sexual behavior tends to develop and escalate over time,

and that if school systems keep track of developing behavior patterns, they can both prevent future violations and ensure that the individual with the problematic behavior pattern receive educational intervention to prevent the individual from forfeiting the individual's education by committing, for example, criminal offenses. Recipients, commenters stated, could maintain records indefinitely in a digital cloud account.

Several commenters requested further clarification as to what types of records a recipient should keep. Commenters asked whether the recipient should keep transcripts of hearings or merely a list of steps taken. Other commenters asked when the clock begins to calculate the time at which recipients may destroy records: does the time toll from the date of the incident or the date the incident is reported? Or does the clock begin at the conclusion of the complaint?

Several commenters stated that the requirement about access to records seemed to contradict the provision that requires supportive measures to be kept confidential. Commenters argued that this provision will erode any confidentiality in the Title IX office and create institutional liability. Commenters also queried whether the recordkeeping provision encompasses an investigation of unwelcome conduct on the basis of sex that did not effectively deny the victim equal access to the recipient's program or activity and was not otherwise sexual harassment within the meaning of § 106.30.

Several commenters requested that access to records be limited, that they not be made available through the Freedom of Information Act (FOIA), that access be in accordance with FERPA, and that § 106.45(b)(7)(i)(A) be modified to include "their sexual harassment investigation…" to avoid the burdensome interpretation that complainants and respondents may have access to "each sexual harassment investigation" maintained by the recipient. Similarly, commenters requested that this provision require that any records collected be protected in a

manner that will not permit access to the personal identification of students to individuals or entities other than the authorized representatives of the Secretary; and that any personally identifiable data be destroyed at the end of the retention period.

Some commenters argued that the required access to records is ambiguous and vague. Several commenters requested further clarification on the parameters of this requirement, including whether the access requirement affords the complainant and respondent access to each other's files, or just their own. Another commenter asked whether a recipient who chose to take no action at all in response to a report of sexual harassment must maintain a record of the report. A commenter also asked whether the provision applies only to reports or complaints that were known at the time to an individual with authority to institute corrective measures.

Several commenters who were in overall support of the provision stated that a recipient's Title IX training materials should be made publicly available because this allows the training materials to be assessed for fairness, absence of bias, and respect for the parties. Many commenters stated that training should be available to all students, teachers, parents, and the public because and it may help students decide which college to attend, and that the training needs to incorporate due process protections, be evidence-based, and focused on determining the truth. Commenters stated that public dissemination of the training materials would keep a check on quality of training and promote accountability and confidence in the Title IX grievance system.

Commenters requested that the requirement concerning the retention of training materials only pertain to changes that are of material significance; updates that are proofreading or aesthetic in nature should not require notation. Commenters also recommended that the provision

narrow the required window for archiving of training materials to three years prior to the date of the hearing.

Some commenters found this requirement confusing, unnecessary, and burdensome. Commenters queried about the type of documentation that must be maintained regarding training, and that data and storage requirements to maintain records for three years could become burdensome for smaller recipients. Some commenters suggested that a list of annual training, including topics and who attended, be maintained instead.

Some commenters opposed the provision and requested that recipients keep an internal database of all sexual harassment reports, so that after a second or third independent report from a different complainant, a school can escalate its response to the alleged harassment to prevent further harm. Other commenters requested the entire deletion of subsection (D), asserting that: the provision does not explain what OCR's expectations will be regarding the training, so it is impossible to know what training records to maintain; training is an ongoing process that involves information from informal and formal sources; and at most, recipients should be required to summarize the qualifications of the investigators, Title IX Coordinators, and adjudicators.

Commenters who opposed § 106.45(b)(10) also requested that this provision clarify that recipients should not release information about remedies provided to the complainant as this should be kept as private as possible because remedies are often personal, and may include changes to a complainant's schedule, medical information, counseling, and academic support. Commenters argued that a respondent has little legitimate interest in knowing the complainant's remedies and could exploit such information in a retaliatory manner. Some commenters

requested that if a student then sues, or goes to OCR, the college should hand over all materials without the need for legal action.

Some commenters wanted recipients to collect additional data regarding when the complaint was filed, whether there were any cross complaints, when, how, and to what extent the respondent was notified, demographic information about the parties, the number of complaints that found respondent responsible, and the sanctions.

Other commenters suggested the creation of a new section requiring recipients to send all records once a year to the Department. Some commenters requested that the Department require the collection of additional data: number and names of Title IX staff, consultants and advisors, budget and person hours, the number of Title IX complaints reported, how each complaint was resolved, remedies provided, number of complaints deemed false accusations or where evidence did not support accusation, number of Title IX law suits by both complainants and respondents, ongoing court cases, number and type of settlements, legal costs to an institution of Title IX litigation, settlement costs to the institution and/or the institution's insurance companies. Commenters argued that demographic data on complainants and respondents would help the public evaluate whether discipline has a disparate impact on the basis of race, sex, disability, and other protected statuses, and the fact that recipients already perform such data collection for the CRDC demonstrates that postsecondary institutions could do the same without undue burden; these commenters asserted that the Department has the authority to require such data collection. Other commenters requested that discipline records prior to college must be sealed to avoid excessively harmful or unfair use of juvenile records.

Some commenters requested that the Department remove the requirement that recipients keep records for the bases of their conclusion about deliberate indifference, as this is a determination made by the Department if and when a civil rights complaint is filed.

Other commenters requested that the recordkeeping requirement exempt ombudspersons. These commenters argued that ombudspersons are objective, neutral, and confidential resources who provide information regarding the grievance process, and advocates for equitably administered processes.

Commenters suggested the deletion of the last sentence of 106.45(b)(7)(ii), "The documentation of certain bases or measures . . . ." The commenters argued that the sentence would allow recipients to add *post hoc* alterations and justifications to the record of a formal complaint, which is inconsistent with principles of basic fairness.

Discussion: The Department, having considered the commenters' concerns about the three-year retention period proposed in the NPRM, is persuaded that the three-year retention period should be extended to seven years for consistency with the Clery Act's recordkeeping requirements.[1522] Although elementary and secondary schools are not subject to the Clery Act, the Department desires to harmonize these final regulations with the obligations of institutions of higher education under the Clery Act to facilitate compliance with both the Clery Act and Title IX. At the same time, we do not believe that a seven year period rather than the proposed three-year period will be more difficult for elementary and secondary schools (who are not subject to the Clery Act), because elementary and secondary schools are often under recordkeeping requirements under other laws with retention periods of similar length. The seven-year

[1522] Clery Act, 20 U.S.C. 1092(f); 34 CFR 668.46(c)(1).

requirement also addresses many commenters' concerns about three years being an inadequate amount of time for reasons such as a college freshman's Title IX case file being destroyed before that student has even graduated from a four-year program, or that a young student in elementary school who becomes a party to a Title IX proceeding cannot count on the student's case file being available by the time the student is in junior high, or that three years is too short a time for recipients to benefit from records of sexual harassment where a respondent re-offends years later.

The Department notes that while the final regulations require records to be kept for seven years, nothing in the final regulations prevents recipients from keeping their records for a longer period of time if the recipient wishes or due to other legal obligations. Any recipient that needs or desires to keep records for ten years to facilitate more complete Federal background checks as one commenter requested, or indefinitely as another commenter proposed, may do so. The Department declines to base this record retention provision around the potential need for use in litigation; the Department does not regulate private litigation, and in any event the Department believes that the extension of the retention period in these final regulations to seven years adequately covers the period of most statutes of limitations that apply to causes of action that may derive from the same facts and circumstances as the recipient's handling of a Title IX sexual harassment report or formal complaint. The Department declines to base the retention period around the length of time each student is enrolled by a recipient because a standardized expectation of the minimum time that these Title IX records will be kept by a recipient more easily allows a recipient to meet this requirement than if the time frames were customized to the duration of each student's enrollment.

The Department understands commenters' concerns that records of sexual harassment cases involving employees pose particular reasons supporting a longer retention period, and the

modification to a seven year requirement addresses those concerns while allowing recipients to adopt a policy keeping sexual harassment records concerning employees for longer than the seven year retention period required under these final regulations.

In response to commenters' concerns that this provision giving the parties access to records might contradict the requirement to keep supportive measures confidential, the Department has revised § 106.45(b)(10)(i) to remove the language making records available to parties. Because the parties to a formal complaint receive written notice of the allegations, the evidence directly related to the allegations, the investigative report, and the written determination (as well as having the right to inspect and review the recording or transcript of a live hearing), the Department is persuaded that the parties' ability to access records relevant to their own case is sufficiently ensured without the risk that making records available to parties under proposed § 106.45(b)(10) would have resulted in disclosure to one party of the supportive measures (or remedies) provided to the other party.

Section 106.45(b)(10)(i)(A) requires recipients to maintain records of "each sexual harassment investigation." Any record that the recipient creates to investigate an allegation, regardless of later dismissal or other resolution of the allegation, must be maintained for seven years. Therefore, recipients must preserve all records, even those records from truncated investigations that led to no adjudication because the acts alleged did not constitute sex discrimination under Title IX and the formal complaint (or allegation therein) was dismissed. The Department also wishes to clarify that the date of the record's creation begins the seven year retention period. We reiterate that recipients may choose to keep each record for longer than seven years, for example to ensure that all records that form part of a "file" representing a

particular Title IX sexual harassment case are retained for at least seven years from the date of creation of the last record pertaining to that case.

Regarding the Freedom of Information Act (FOIA),[1523] and similar State laws that require public disclosure of certain records, the Department cannot opine on whether disclosure of records required to be retained under the final regulations would, or would not, be required under FOIA or similar laws because such determinations require fact-specific analysis.

Additionally, as explained in the "Section 106.6(e) FERPA" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble, these final regulations, including § 106.45(b)(10)(i), do not run afoul of FERPA and to the extent possible, should be interpreted consistently with a recipient's obligations under FERPA. To address any concerns, the Department has removed the phrase "make available to the complainant and respondent" in § 106.45(b)(10) out of an abundance of caution and in case this phrase may have created confusion. Accordingly, the requirement to maintain records is separate and apart from the right to inspect and review these records under FERPA, and these final regulations specifically address when the parties must have an opportunity to inspect and review records relating to the party's particular case. For example, § 106.45(b)(5)(vi) requires that the recipient provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint. The Department acknowledges that a parent of a student or an eligible student may have the right to inspect and review their education records pursuant to 34 CFR 99.10 through 34 CFR 99.12, and these final regulations do not diminish these rights. As previously explained, FERPA allows a

[1523] 5 U.S.C. 552 *et seq.*

recipient to share information with the parties that is directly related to both parties.[1524] Further, § 106.71 authorizes any party who has suffered retaliation to alert the recipient by filing a complaint according to the prompt and equitable grievance procedures for sex discrimination required to be adopted under § 106.8(c).[1525]

In response to numerous commenters who requested the requirement to publish training materials, the Department agrees with commenters that such publication will improve the overall transparency and integrity of the Title IX grievance process, and thus revises § 106.45(b)(10) to require recipients to publish on their websites training materials referenced in § 106.45(b)(1)(iii). The Department believes the seven-year requirement will not significantly burden recipients, for whom keeping and publishing materials relevant to training its employees is good practice in light of the numerous lawsuits recipients have faced over handling of Title IX allegations. Regarding the request to clarify that recipients need only update published training materials when the recipient makes material changes to the materials, this provision requires the recipient to publish training materials which are up to date and reflect the latest training provided to Title IX personnel.

Although we acknowledge that creating and storing records uses some resources, publishing training materials on a website and retaining the notes, reports, and audio or audiovisual recordings or transcripts from an investigation and any hearing are not cost prohibitive. The Department believes the recordkeeping requirements are practical and

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[1524] 73 FR 74806, 74832-33 (Dec. 9, 2008).

[1525] The Department notes that other laws and regulations may require disclosure of recipient records to the Department, for instance when the Department investigates allegations that a recipient has failed to comply with Title IX. *E.g.*, 34 CFR 100.6 (addressing a recipient's obligation to permit the Department access to a recipient's records and other information to determine compliance with this part).

reasonable. To the extent that commenters' concerns that a recipient may be unable to publicize its training materials because some recipients hire outside consultants to provide training, the materials for which may be owned by the outside consultant and not by the recipient itself, the Department acknowledges that a recipient in that situation would need to secure permission from the consultant to publish the training materials, or alternatively, the recipient could create its own training materials over which the recipient has ownership and control.

The Department disagrees that it is "impossible" to know what training records recipients should maintain. Section 106.45(b)(1)(iii) specifies that recipients must train Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions on specific topics for specific purposes, providing sufficient basis for a recipient to understand its obligations regarding retention and publication of materials used to conduct such training.

The Department does not wish to burden recipients with a requirement to send the records it maintains under this provision to the parties. However, parties preparing for a lawsuit or for an OCR complaint are entitled to receive copies of the evidence directly related to the allegations raised in a formal complaint,[1526] the investigative report,[1527] and the written determination regarding responsibility,[1528] and thus parties to a Title IX grievance process have relevant information that they may desire to review or submit as part of a school-level appeal, a lawsuit, or an OCR complaint.

The Department declines to require the data collections requested by commenters concerning Title IX reports and formal complaints. The Department wishes to correct a lack of

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[1526] § 106.45(b)(5)(vi).
[1527] § 106.45(b)(5)(vii).
[1528] § 106.45(b)(7)(iii).

due process and neutrality in the grievance process, among numerous other problems that occurred under previous Title IX guidance, and believes that prescribing a consistent framework for recipient responses to sexual harassment will benefit all individuals involved in reports and formal complaints of sexual harassment without regard to demographics. The Department notes that nothing in the final regulations precludes a recipient from collecting demographic data relating to the recipient's Title IX reports and formal complaints. Additionally, the Department does not believe that the concept of "sealing" records applies in the context of most educational institutions, nor does the Department believe that furthering the purposes of Title IX requires the Department to micromanage the manner in which recipients keep records. Recipients will maintain records of their Title IX investigations aimed at determining a respondent either responsible or not responsible; the Department does not believe that a recipient's retention of such records is the equivalent of keeping records of criminal juvenile delinquency.

The Department disagrees that the provision in § 106.45(b)(10)(ii) requiring a recipient to document the recipient's conclusion that its response to sexual harassment was not deliberately indifferent is useless. Although commenters may correctly assert that recipients "of course" believe their responses have been sufficient, requiring a recipient to document reasons for that conclusion requires the recipient to evaluate how it has handled any report or formal complaint of sexual harassment, documenting reasons why the recipient's response has not been clearly unreasonable in light of the known circumstances. For example, if a Title IX Coordinator decides to sign a formal complaint against the wishes of a complainant, the recipient should document the reasons why such a decision was not clearly unreasonable and how the recipient believes that it met its responsibility to provide that complainant with a non-deliberately indifferent response. To reinforce the obligation imposed on recipients to offer supportive measures (and engage in an

interactive discussion with the complainant about appropriate, available supportive measures) in revised § 106.44(a), we have revised § 106.45(b)(10)(ii) to add 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; for example, where a complainant refuses supportive measures or refuses to communicate with the Title IX Coordinator in order to know of supportive measures the recipient is offering. The Department declines to remove the final sentence of § 106.45(b)(10)(ii) because assuring a recipient that the recipient may provide additional documentation or explanations about the recipient's responses to sexual harassment after creating its initial records does not foreclose the ability of a court or administrative agency investigating a recipient's Title IX compliance to question the accuracy of a recipient's later-added documentation or explanations, and where such a court or agency is satisfied that later-added information was not, for example, fabricated to protect the recipient from exposure to liability, the later-added information helps such a court or agency accurately assess the recipient's response to sexual harassment.

The Department wishes to clarify that, unless ombudspersons have created records that the Department requires the recipient to maintain or publish, ombudspersons do not fall under § 106.45(b)(10). The provision identifies the type of record that must be kept, not the category of persons whose records do or do not fall under this provision.

Changes: The Department has removed from § 106.45(b)(10)(i) the word "create" and the phrase "make available to the complainant and respondent." The Department has also revised the requirement to maintain records from three years to seven years. In § 106.45(b)(10)(i)(A), the Department has added "Title IX" to "Coordinator" and added any audio or audiovisual recording or transcript of a live hearing to the list of records required to be kept. We have revised §

106.45(b)(10)(i)(D) to add persons who facilitate informal resolutions to the list of Title IX personnel, and direct recipients to make materials used to train Title IX personnel available on the recipient's website or if the recipient does not have a website then such training materials must be available for public inspection. We have revised § 106.45(b)(10)(ii) to add the introductory clause "For each response required under § 106.44(a) …" and by increasing the retention period from three years to seven years. We have further revised § 106.45(b)(10)(ii) by replacing "was not clearly unreasonable" with "was not deliberately indifferent" and by adding 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.

**Clarifying Amendments to Existing Regulations**

*Section 106.3(a) Remedial Action*

Comments: One commenter stated favorably that § 106.3(a) expands the remedial power of the Assistant Secretary in some cases, such as where a regulatory requirement has been violated, but where no sex discrimination has occurred. The commenter asserted that this is important for students who are deprived of due process in a Title IX proceeding.

Some commenters expressed concern that § 106.3(a) allows the Assistant Secretary to require a school to remedy any violation of the Title IX regulations, as opposed to only violations that constitute sex discrimination. Commenters argued that this will inappropriately shift the Department toward focusing on procedural requirements which will result in more complaints being filed with OCR that do not involve actual sex discrimination but only involve regulatory violations, and that this will unjustifiably expand the Department's jurisdiction over

complaints brought by parties who were the respondents in underlying Title IX sexual harassment proceedings.

Discussion: The Department believes that the final regulations appropriately state that the Assistant Secretary may require recipients to remedy violations of Title IX regulations, even where the violation does not itself constitute sex discrimination. The Department, recipients, and the Supreme Court have long recognized the Department's statutory authority under 20 U.S.C. 1682 to promulgate rules to effectuate the purposes of Title IX even when regulatory requirements do not, themselves, purport to represent a definition of discrimination.[1529] In these final regulations, we revise § 106.3(a) to reflect the Department's statutory authority and longstanding Department practice with respect to requiring recipients to remedy violations both in the form of sex discrimination and other violations of our Title IX implementing regulations, including where the violation does not, itself, constitute sex discrimination. We emphasize that the Department's remedial powers are not intended to benefit only respondents; rather, any party can request that the Department take action against a recipient that has not complied with Title IX implementing regulations, including these final regulations. For example, if a recipient fails to offer supportive measures to a complaint pursuant to § 106.44(a), or fails to send written notice after dismissing a complainant's allegations under § 106.45(b)(3), the recipient is in violation of these final regulations and the Department may require the recipient to take remedial action.

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[1529] *E.g.*, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291-92 (1998) (refusing to allow plaintiff to pursue a claim under Title IX based on the school's failure to comply with the Department's regulatory requirement to adopt and publish prompt and equitable grievance procedures, stating "And in any event, the failure to promulgate a grievance procedure does not itself constitute 'discrimination' under Title IX. Of course, the Department of Education could enforce the requirement administratively: Agencies generally have authority to promulgate and enforce requirements that effectuate the statute's non-discrimination mandate, 20 U.S.C. 1682, even if those requirements do not purport to represent a definition of discrimination under the statute.").

Changes: We have revised § 106.3(a) to clarify that the Department may require a recipient to take remedial action for discriminating in violation of Title IX or for violating Title IX implementing regulations. We have removed the reference in the proposed regulations to assessment of damages and instead state that remedial action must be consistent with the Title IX statute, 20 U.S.C. 1682.

Comments: Commenters argued that proposed § 106.3(a) was unclear because the line between equitable remedies and monetary damages is sometimes unclear. Commenters asserted that proposed § 106.3(a) left open too many questions and would lead to confusion for students who file Title IX complaints with OCR. Another commenter suggested that the final regulations should unambiguously clarify that a complainant may always bring a Title IX claim in a private right of action.

Discussion: The Department agrees that the line between equitable and monetary relief may be difficult to discern, and is persuaded that attempting to distinguish between damages and equitable relief may cause confusion for students and for recipients. The current regulatory provision at 34 CFR 106.3(a) does not distinguish among various types of remedial action the Department might require of recipients, and the Supreme Court has noted that the current regulations "do not appear to contemplate a condition ordering payment of monetary damages," but the Supreme Court did not indicate what types of remedial action might be contemplated under 20 U.S.C. 1682.[1530] In response to commenters' concerns that proposed § 106.3(a) would

[1530] *Gebser*, 524 U.S. at 288-89 ("While agencies have conditioned continued funding on providing equitable relief to the victim, the regulations do not appear to contemplate a condition ordering payment of monetary damages, and there is no indication that payment of damages has been demanded as a condition of finding a recipient to be in compliance with the statute.") (internal citation omitted).

cause confusion, we have revised § 106.3(a) in these final regulations to remove the proposed reference to "assessment of damages" and instead indicate that the Department's remedial authority is consistent with 20 U.S.C. 1682.

While the Supreme Court has recognized a judicially implied right of private action under Title IX,[1531] these final regulations pertain to how the Department administratively enforces Title IX, and we therefore decline to reference private Title IX rights of action in these regulations implementing Title IX.

Changes: We have revised § 106.3(a) to clarify that the Department may require a recipient to take remedial action for discriminating in violation of Title IX or for violating Title IX implementing regulations. We have removed the reference to assessment of damages and instead state that remedial action must be consistent with the Title IX statute at 20 U.S.C. 1682.

Comments: Some commenters suggested that monetary damages ought to be available to complainants through the administrative enforcement process, particularly where there is no other means of remedying the sexual harassment that occurred. Commenters argued that damages ought to include damages for pain and suffering caused by a school's deliberate indifference. According to these commenters, depriving a complainant of a damages remedy will leave the complainant – even one who has established a bona fide Title IX violation – less than completely whole. Victims of sexual harassment, stated commenters, might miss work, might incur legal fees, might pay out-of-pocket for treatment expenses, or incur other monetary losses. Some commenters asserted that OCR ought to be able to award damages in cases where monetary relief is necessary to restore a complainant's position.

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[1531] *Cannon v. Univ. of Chicago*, 441 U.S. 677, 717 (1979).

Discussion: The Department believes that remedial action should be carefully crafted to restore a victim's equal access to education and ensure that a recipient comes into compliance with Title IX and its implementing regulations. This approach has been cited approvingly by the Supreme Court.[1532] The Department's revisions to § 106.3(a) ensure that the Department may exercise its administrative enforcement authority to fulfill these goals by requiring remedies consistent with 20 U.S.C. 1682, regardless of whether the remedies are deemed necessary due to a recipient's discrimination under Title IX or a recipient's violation of Department regulations implementing Title IX.[1533]

Changes: We have revised § 106.3(a) to clarify that the Department may require a recipient to take remedial action for discriminating in violation of Title IX or for violating Title IX implementing regulations. We have removed the reference to assessment of damages and instead state that remedial action must be consistent with the Title IX statute at 20 U.S.C. 1682.

Comments: Some commenters stated that proposed § 106.3(a) inappropriately narrowed the remedies available for sexual harassment, and that any effort to take rights away from victims was troubling. These commenters asserted that the Department ought to be using its power to

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[1532] *Gebser*, 524 U.S. at 289 ("In *Franklin* [*v. Gwinnett Co. Pub. Sch.*, 503 U.S. 64, fn. 3 (1992)], for instance, the Department of Education found a violation of Title IX but determined that the school district came into compliance by virtue of the offending teacher's resignation and the district's institution of a grievance procedure for sexual harassment complaints.").

[1533] The Title IX statute at 20 U.S.C. 1682 provides in relevant part that any agency that disburses Federal financial assistance to a recipient is "authorized and directed to effectuate the provisions of section 1681 of this title [i.e., Title IX's non-discrimination mandate] with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. . . . Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, . . . or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means."

expand protections for victims, not narrow them. Some commenters stated that preventing OCR from awarding monetary damages would reduce the incentive to report sex discrimination, meaning that it was more likely to continue unabated. Other commenters argued that monetary damages serve as an effective deterrent to a school not taking sex discrimination allegations seriously. One commenter asserted that this was part of a nefarious motive on the part of Secretary Betsy DeVos to hurt victims of discrimination, and not an effort to help the American people.

Discussion: The Department's purpose and motive in these final regulations is to implement legally binding obligations governing recipients' responses to sexual harassment so that recipients respond supportively to complainants and fairly to both complainants and respondents and operate education programs and activities free from sex discrimination, including in the form of sexual harassment. The Department intends to continue vigorously enforcing recipients' Title IX obligations. We are persuaded by commenters that specifying the type of remedies that OCR may require of recipients in administrative enforcement risks confusion for students, employees, and recipients, including as to whether the Department intends to continue vigorously enforcing recipients' Title IX obligations. We have therefore revised § 106.3(a) to clarify that the Department may require a recipient to take remedial action, consistent with the Department's regulatory authority under 20 U.S.C. 1682, whenever a recipient has discriminated in violation of Title IX or whenever a recipient has violated the Department's regulations implementing Title IX.

Changes: We have revised § 106.3(a) to clarify that the Department may require a recipient to take remedial action for discriminating in violation of Title IX or for violating Title IX

implementing regulations. We have removed the reference to assessment of damages and instead state that remedial action must be consistent with the Title IX statute at 20 U.S.C. 1682.

Comments: Some commenters asserted that the withdrawal of all Federal funds happens so rarely that the payment of monetary damages is the only true way to get at a school's pocketbook for ignoring sex discrimination. Commenters argued that some schools will read § 106.3(a) too broadly, and deny even equitable relief to complainants, who then may never file with OCR and will simply be denied relief to which they are entitled. One commenter suggested that the Equal Employment Opportunity Commission has made public statements adopting the viewpoint that the best way to ensure compliance with non-discrimination law is to make employers pay damages for violating those laws. Commenters stated that if monetary damages cannot be a part of a resolution agreement, this would have the effect of increasing and encouraging sexual assault. It would also mean, commenters argued, that complainants could not obtain necessary treatment to respond to their trauma from the very misconduct that the recipient caused or exacerbated.

Discussion: The Department acknowledges that the termination of Federal financial assistance is rare, but this is because the statutory enforcement scheme that Congress set forth in 20 U.S.C. 1682 recognized termination of Federal funds as a "severe" remedy that should serve as a "last resort" when other, less severe measures have failed.[1534] Loss of Federal funding to a school

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[1534] *Cannon*, 441 U.S. at 705, fn. 38 ("Congress itself has noted the severity of the fund-cutoff remedy and has described it as a last resort, all else – including 'lawsuits' – failing."); *id.* at 704-05 (describing termination of Federal financial assistance as "severe" and stating that it is not always the appropriate means of furthering Title IX's non-discrimination mandate where "an isolated violation has occurred."); *see also* Nancy Chi Cantalupo, *Burying Our Heads in The Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. UNIV. CHI. L. J. 205, 241 (2011) (referring to the ability of OCR to terminate Federal funding as the "nuclear option").

district, college, or university is a serious consequence that may have devastating results for a recipient and the educational community the recipient exists to serve.[1535] Termination of Federal funds as a remedy is statutorily intended to serve as a "last resort" in order to "avoid diverting education funding from beneficial uses" unless that severe remedy is necessary.[1536] The fact that the severe remedy of terminating Federal funds is appropriately intended and utilized as a last resort does not preclude the Department from effectively enforcing Title IX by securing voluntary resolution agreements with recipients who have violated Title IX or its implementing regulations.[1537] The Department will continue to effectively enforce Title IX, including these final regulations, in furtherance of Title IX's non-discrimination mandate.

The Equal Employment Opportunity Commission enforces non-discrimination laws, including Title VII, that provide specific limits on the amount of compensatory and punitive damages that a person can recover. For example, Title VII expressly limits the amount of compensatory and punitive damages that a person may recover against an employer with more than 500 employees to $300,000, in 20 U.S.C. 1981a(b)(3)(D). Title IX, unlike Title VII, does not expressly include any reference to such compensatory and punitive damages, nor does any

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[1535] "Federal financial assistance" includes, for example, "scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity." 34 CFR 106.4(g)(1)(ii); *see also* Pamela W. Kernie, *Protecting Individuals from Sex Discrimination: Compensatory Relief Under Title IX of the Education Amendments of 1972*, 67 WASH. L. REV. 155, 166 (1992) ("Indeed, the fund-termination remedy, if applied, might actually prove detrimental to the very people Title IX is designed to protect: if an educational program's funds are terminated, future participants in the program will be denied the benefits of much-needed federal financial assistance.").

[1536] *Gebser*, 524 U.S. at 289 ("Presumably, a central purpose of requiring notice of the violation to the appropriate person and an opportunity for voluntary compliance before administrative enforcement proceedings [to terminate Federal funding] 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.").

[1537] Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L. J. 2038, fn. 102 (2016) (noting that the fact that OCR has not actually terminated a school's Federal funds "only means schools, knowing OCR means business, have complied, not that OCR is unwilling to use this tool.").

statute address the amount of compensatory and punitive damages that may be awarded under Title IX. Instead, Congress expressly references an agency's suspension or termination of Federal financial assistance, which is a severe consequence, and also allows a recipient to secure compliance with its regulations through any "other means authorized by law". The Department will therefore continue to enforce Title IX consistent with 20 U.S.C. 1682, and not by reference to the enforcement schemes set forth in other laws. Remedial action required of a recipient for violating Title IX or these final regulations may therefore include any action consistent with 20 U.S.C. 1682, and may include equitable and injunctive actions as well as financial compensation to victims of discrimination or regulatory violations, as necessary under the specific facts of a case.[1538]

Changes: We have revised § 106.3(a) to clarify that the Department may require a recipient to take remedial action for discriminating in violation of Title IX or for violating Title IX implementing regulations. We have removed the reference to assessment of damages and instead state that remedial action must be consistent with the Title IX statute at 20 U.S.C. 1682.

Comments: Some commenters asserted that proposed § 106.3(a) was inconsistent with the statutory provisions of Title IX, since Title IX does not limit the types of relief that OCR may provide to complainants. Other commenters stated that the proposed rules would shift existing

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[1538] *See* Dana Bolger, *Gender Violence Costs: Schools' Financial Obligations Under Title IX*, 125 YALE L. J. 2106, 2120-21 (2016) (noting that "OCR has required financial reimbursement in a surprisingly small number of its enforcement decisions" and arguing that the Department should more often order schools to financially reimburse survivors for costs incurred due to the school's Title IX violations rather than permitting "the same schools that violated the survivors' rights to determine what remedies are appropriate"); *see also Gebser*, 524 U.S. at 288-89 (noting that while 34 CFR 106.3(a) does not appear to authorize an agency to order monetary damages as a remedy, and agencies generally seem to order equitable relief (for instance, termination of a teacher who committed sexual harassment), the absence of express reference to monetary damages in 20 U.S.C. 20 and in 34 CFR 106.3 did not imply that monetary damages could not be an appropriate remedy in a private lawsuit under Title IX).

policy away from how Congress and the agency have interpreted the current regulatory provisions for the past 50 years, arguing that Title VI contains an express limit on relief, allowing only "preventive relief" under 42 U.S.C. 2000a-3 while Title IX does not contain such limiting language in its remedial provisions, at 20 U.S.C. 1682, which allows for relief by "any other means authorized by law". Commenters referred to resolution agreements where OCR has seemingly awarded monetary damages remedies.

Discussion: As discussed above, the Department is persuaded by commenters' concerns that because Title IX, 20 U.S.C. 1682, does not expressly approve or disapprove of monetary damages as one of the "other means authorized by law" which the Department may use to secure compliance under the Department's administrative enforcement authority, the Department should not differentiate in § 106.3(a) among potential remedies that may be deemed necessary to ensure that a recipient complies with Title IX and its implementing regulations. We have revised § 106.3(a) to expressly provide that discrimination under Title IX, or violations of the Department's Title IX regulations, may require a recipient to take remedial action, and that such remedial action ordered by the Department in an enforcement action must be consistent with 20 U.S.C. 1682. The Department notes that actions that some commenters characterize as OCR requiring a recipient to pay "monetary damages" may be viewed as financial compensation that OCR requires a recipient to pay to a victim of sex discrimination as a form of equitable relief, which does not necessarily constitute "monetary damages." However, the revisions to § 106.3(a) affirm that the Department will continue to enforce Title IX and its implementing regulations vigorously by using all tools at the Department's disposal under 20 U.S.C. 1682.

Changes: We have revised § 106.3(a) to clarify that the Department may require a recipient to take remedial action for discriminating in violation of Title IX or for violating Title IX

implementing regulations. We have removed the reference to assessment of damages and instead state that remedial action must be consistent with the Title IX statute at 20 U.S.C. 1682.

Comments: Some commenters stated that the proposed rules' reliance on Supreme Court case law is faulty, because those cases arose in the context of private rights of action in civil suits, and not the administrative context. Another commenter stated that OCR already does not award monetary damages, and so § 106.3 is unnecessary, but could engender confusion, particularly where equitable remedies involving monetary payments are necessary to make a complainant whole. Another commenter asserted that there is a discord between changing the legal standards in other parts of the proposed rules to more closely mirror the legal standards in civil suits, while expressly barring complainants from obtaining the relief that they would otherwise be entitled to in civil suits.

Discussion: The Department is persuaded by commenters' concerns that proposed § 106.3(a) may have had the unintended effect, or perceived effect, of restricting the Department's ability to vigorously enforce Title IX through all "means authorized by law,"[1539] may have caused unnecessary confusion on topics such as whether the Department's administrative enforcement of Title IX pursues the same goals as private lawsuits under Title IX (i.e., enforcement of Title IX's non-discrimination mandate), whether financial compensation when necessary to remedy a recipient's discrimination against individual victims would no longer be part of the Department's enforcement efforts, and may have indicated tension with the Department's approach to adopting and adapting the three-part *Gebser/Davis* framework[1540] (which the Supreme Court developed in

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[1539] 20 U.S.C. 1682.

[1540] "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble.

the context of private litigation subjecting schools to monetary damages). To address commenters' concerns and clarify the Department's intent to vigorously enforce Title IX, we have revised § 106.3(a) to state that the Department may order remedial action as necessary to correct discrimination under Title IX or violations of the Department's Title IX regulations, consistent with 20 U.S.C. 1682.

Changes: We have revised § 106.3(a) to clarify that the Department may require a recipient to take remedial action for discriminating in violation of Title IX or for violating Title IX implementing regulations. We have removed the reference to assessment of damages and instead state that remedial action must be consistent with the Title IX statute at 20 U.S.C. 1682.

Comments: Commenters stated that because the current regulations need clarity and modification, it is good that the proposed rules addressed the remedies issue. Some commenters stated that the proposed rules set forth a fair and reliable procedure with respect to damages and remedies. Commenters who worked for postsecondary institutions expressed support for proposed § 106.3(a) as a significant improvement upon the current Title IX landscape. Some commenters on behalf of institutions expressed appreciation for the focus on remedial action that does not include the assessment of damages against a recipient because some recipients are small, rural schools with limited resources, and would prefer to use those resources to remedy violations rather than pay damages. Commenters asserted that proposed § 106.3(a) helps recipient institutions avoid unnecessary burdens. Commenters stated that they supported the limitation of remedial action to exclude assessment of damages against the recipient because parties seeking monetary damages may always avail themselves of the courts, which are better equipped than OCR to assess damages to compensate a victim for harms like emotional distress. One commenter asserted that proposed § 106.3(a) would appropriately focus Title IX

enforcement on securing equitable relief and bringing schools into compliance with Title IX. Commenters offered that it is appropriate for OCR to focus exclusively on equitable relief and bringing schools into compliance, as opposed to compensating victims.

Discussion: The Department appreciates some commenters' support for the intention of proposed § 106.3(a), to distinguish between monetary damages and equitable relief in determining remedial action the Department should pursue in its administrative enforcement actions. However, for the reasons discussed above, the Department is persuaded by the concerns of other commenters and we have revised § 106.3(a) to remove reference to assessment of damages.

Changes: We have revised § 106.3(a) to clarify that the Department may require a recipient to take remedial action for discriminating in violation of Title IX or for violating Title IX implementing regulations. We have removed the reference to assessment of damages and instead state that remedial action must be consistent with the Title IX statute at 20 U.S.C. 1682.

Comments: Some commenters argued that proposed § 106.3(a) conveyed that the Department will not be enforcing Title IX at all and will look the other way at a recipient's failure to respond to allegations of sexual harassment. Another commenter suggested that the proposed rules ought to state that all remedial action should be dedicated to minimizing, to the extent possible, harm done to the complainant. One commenter argued that proposed § 106.3 would create an inconsistency with other laws and regulations that OCR enforces, such as Title VI or Section 504.

One commenter argued that § 106.3(a) is a change in position from prior Department guidance that contemplates monetary relief, is in tension with a Department of Justice manual

about Title IX,[1541] and could potentially put the Department's Title IX enforcement practices in tension with other executive branch agencies that enforce Title IX. The commenter asserted that it is strange for a complainant's scope of relief to change depending on the agency with which the complaint is filed. The commenter asserted that such a significant shift ought to be more fulsomely explained by the Department. Additionally, the commenter stated that the commenter had filed a Freedom of Information Act (FOIA) request but had not yet received a response, and that the proposed rules ought to be withdrawn until the commenter had opportunity to review the FOIA response and comment further. The same commenter argued that the proposed rules would pose anomalous situations that would strain OCR's ability to separate equitable relief involving payments of money, from non-equitable relief in the form of monetary damages. The commenter raised the scenario of a complainant that suffers damages caused by a third party; in the hypothetical, a student is sexually harassed at their school and reports the incident, and later the student obtains a scholarship at another school, and if the first school retaliates against the reporting student by interfering with the scholarship so the student loses the scholarship, the first school may or may not be liable for the loss of the scholarship under revised § 106.3(a), depending on whether OCR construes that relief as monetary damages or equitable relief.

Discussion: For reasons discussed above, the Department is persuaded by commenters' concerns that proposed § 106.3(a) could cause unnecessary confusion, such as about how the Department intends to enforce Title IX and whether the Department intends to continue vigorously enforcing Title IX administratively. We have revised § 106.3(a) to clarify that the Department will require

[1541] Commenters cited: U.S. Dep't. of Justice, *Title IX Legal Manual* "VIII Private Right of Action and Individual Relief through Agency Action, C. Recommendations for Agency Action."

remedial action for a recipient's discrimination under Title IX or a recipient's violations of Title IX regulations, in a manner consistent with 20 U.S.C. 1682. In light of these revisions, the Department does not believe it is necessary to analyze prior Department guidance as to whether the Department's past practice has, or has not, been to impose monetary damages for Title IX violations, and for similar reasons there is no conflict between § 106.3(a) in the final regulations, and the Department of Justice Title IX Manual referenced by commenters, or among the Department's approach to remedial action and the approach of other Federal agencies, each of which is subject to the same provision in the Title IX statute (20 U.S.C. 1682) regarding administrative enforcement of Title IX, to which § 106.3(a) now refers. We note that the sufficiency of the Department's response to any individual FOIA request is beyond the scope of this rulemaking, and decline to comment on the content of such a request or its relationship to these final regulations. The revisions to § 106.3(a) additionally ameliorate the commenter's concern raised in a hypothetical, that a dividing line between equitable relief and monetary damages could lead to the Department being constrained from requiring a recipient to, for example, reimburse a student for the value of a lost scholarship under circumstances where such remedial action is necessary to remediate the effects of a recipient's discrimination against an individual student.

Changes: We have revised § 106.3(a) to clarify that the Department may require a recipient to take remedial action for discriminating in violation of Title IX or for violating Title IX implementing regulations. We have removed the reference to assessment of damages and instead state that remedial action must be consistent with the Title IX statute at 20 U.S.C. 1682.

Comments: Some commenters suggested that if changes to § 106.3 are made at all, the changes ought to strengthen the penalties that can be adjudicated against actual perpetrators of sexual

harassment, including students. One commenter suggested that students who engage in sexual harassment ought to themselves be liable for monetary damages as part of OCR's enforcement practices. Additionally, this commenter argued that OCR ought to make students who engage in sexual harassment repay grants given to them by the Federal government, and permanently bar such students from applying for any financial assistance in the future. Another commenter suggested that the Department ought to bar students who commit sexual harassment from attending any other postsecondary institution in the future.

Discussion: Title IX applies to recipients of Federal financial assistance operating education programs or activities.[1542] Title IX does not apply as a direct bar against perpetration of sexual harassment by individual respondents; rather, Title IX requires recipients to operate education programs and activities free from sex discrimination. When a recipient knowingly, deliberately refuses to respond to sexual harassment, such response is a violation of Title IX's non-discrimination mandate, and a recipient's failure to respond appropriately in other ways mandated by these final regulations constitutes a violation of the Department's regulations implementing Title IX.[1543] The Department will vigorously enforce Title IX's non-discrimination mandate and the obligations contained in these final regulations to ensure recipients' compliance.

These final regulations clarify the conditions that trigger a recipient's legal obligations with respect to sexual harassment and enforcement of Title IX, and these final regulations are focused on remedial actions the recipient must take, rather than on punitive actions against

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[1542] 20 U.S.C. 1681(a).

[1543] *See* discussion in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble.

individuals who perpetrate sexual harassment.[1544] These final regulations explain the circumstances under which a recipient must provide remedies to victims of sexual harassment, and leave decisions about appropriate disciplinary sanctions imposed on respondents found responsible for sexual harassment within the sound discretion of the recipient.[1545] These final regulations do not impact eligibility of a student for Federal student aid or the eligibility of an individual to apply for Federal grants. The Title IX statute authorizes the Department to enforce Title IX by terminating Federal financial assistance provided to a recipient operating education programs or activities – not by terminating Federal financial aid to individual students. As discussed previously, these final regulations leave sanctions and punitive consequences that a recipient chooses to take against a respondent found responsible for sexual harassment in the sound discretion of the recipient. Nothing in these final regulations precludes a recipient from barring such a respondent found responsible for sexual harassment from continuing enrollment or from re-enrolling with the recipient, or from including a notation on the student's transcript with the intent or effect of prohibiting the respondent from future enrollment with a different recipient.[1546]

Changes: We have revised § 106.3(a) to clarify that the Department may require a recipient to take remedial action for discriminating in violation of Title IX or for violating Title IX implementing regulations. We have removed the reference to assessment of damages and instead state that remedial action must be consistent with the Title IX statute at 20 U.S.C. 1682.

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[1544] *Id.*
[1545] *Id.*
[1546] For further discussion of transcript notations, see the "Transcript Notations" subsection of the "Determinations Regarding Responsibility" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

Comments: Some commenters asserted that the proposed rules ought to eliminate the ability of a recipient to engage in affirmative action absent any finding of a violation; commenters referenced a provision under 34 CFR 106.3(b) that the proposed rules did not propose to alter. Additionally, some commenters stated that the proposed rules ought to more clearly define what monetary damages are, since monetary payments may nevertheless be equitable in nature, in some circumstances. Commenters suggested that the Assistant Secretary for Civil Rights ought to be more constrained in assessment of remedies than proposed § 106.3(a) set forth and should not require that schools engage in disciplinary or exclusionary processes in order to remedy sexual harassment. Commenters argued that the Assistant Secretary should only have jurisdiction to require supportive measures for victims of sexual harassment in order to restore access to education and bring a recipient into compliance with Title IX.

Discussion: In the NPRM, the Department proposed revisions to § 106.3(a), which concerns remedial action, and did not propose changing the provisions of 34 CFR 106.3(b), which concerns affirmative action, and the Department declines to revise 34 CFR 106.3(b) in these final regulations.

The Department disagrees that the Department lacks authority to require recipients to investigate and adjudicate sexual harassment allegations in order to determine whether remedies are necessary to restore or preserve the equal educational access of a victim of sexual harassment, including deciding whether disciplinary sanctions are warranted against a respondent found responsible for sexual harassment. Since 1975, Department regulations have required recipients to adopt and publish grievance procedures to address student and employee

complaints of sex discrimination,[1547] and through guidance since 1997 the Department has interpreted this regulatory requirement to apply to complaints of sexual harassment. Adopting and publishing a grievance process to address sexual harassment as a form of sex discrimination prevents instances in which a recipient violates Title IX by failing to provide remedies to victims of sexual harassment, falling squarely within the Department's authority to promulgate rules that further Title IX's non-discrimination mandate.[1548] As previously discussed, with respect to disciplinary sanctions, the Department, like the courts, will "refrain from second guessing the disciplinary decisions made by school administrators"[1549] because school administrators are best positioned to determine the appropriate discipline to be imposed. The final regulations remove reference to "assessment of damages" in § 106.3(a), and thus the Department declines to provide a definition of "monetary damages" in order to clarify when payments of money are part of equitable relief, versus damages.

Changes: We have revised § 106.3(a) to clarify that the Department may require a recipient to take remedial action for discriminating in violation of Title IX or for violating Title IX implementing regulations. We have removed the reference to assessment of damages and instead state that remedial action must be consistent with the Title IX statute at 20 U.S.C. 1682.

*Section 106.6(d)(1) First Amendment*

Comments: A number of commenters expressed support for § 106.6(d) generally, including § 106.6(d)(1) regarding the First Amendment. Other commenters argued the provision is necessary

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[1547] *Compare* 34 CFR 106.9 *with* § 106.8(c).
[1548] "Role of Due Process in the Grievance Process" section of this preamble.
[1549] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648 (1999). Disciplinary sanctions, however, cannot be retaliatory or discriminatory on the basis of sex. § 106.71(a); § 106.45(a).

to prevent a chilling effect on free speech. Other commenters supported this provision because they believed that Title IX should conform with Supreme Court rulings on free speech. Commenters argued that the protection of free speech on campuses is important and that this provision helps prevent Title IX enforcement from chilling free speech. Commenters argued that § 106.6(d) is necessary in light of the growing number of instances in which institutions have violated students' rights in campus Title IX adjudications. Commenters expressed support for the saving clause nature of this provision because of concerns that Title IX has a disproportionate impact on men of color and other disadvantaged demographic groups.

Some commenters requested more clarity on the application of the saving clause to specific situations. Commenters requested that OCR "provide additional guidance or clarity on what responsibilities school districts have with respect to the First Amendment and other constitutional protections." One commenter requested guidance on the parameters of free speech protections. Other commenters supported the saving clause but requested that the Department modify the language to provide greater protection for free speech, such as providing explicit protection of academic freedom, or such as changing the provision to not just state that the regulations do not require a recipient to restrict constitutional rights, but that the regulations do not permit deprivations of constitutional rights. Some commenters expressed confusion as to whether the saving clauses in 106.6(d) cover recipients that are not government actors.

A number of commenters opposed the saving clause because they believed it is unnecessary.

One commenter opposed the saving clause due to the concern that it could be seen as calling for the courts to give greater weight to the listed constitutional protections than a court may have given otherwise. As an example, the commenter posed a hypothetical case where First

Amendment rights are implicated; without the addition of § 106.6(d)(1), a court could give different weight to factors in its factored-analysis as to whether a constitutional violation occurred but with the saving clause in the proposed rules, the court may conclude that the Department has determined that greater weight should be given to First Amendment protections than the other factors used in its making of a determination of a constitutional violation.

One commenter argued that the saving clause is an unwarranted and harmful restriction on Title IX. The commenter reasoned that under Title IX's non-discrimination mandate the Department could, for example, reasonably determine that Title IX requires that a trigger warning be given to students before the start of any academic class discussing topics involving sexual violations, so that students could avoid being subjected to the traumatizing class discussion; the commenter argued that such a requirement is constitutional and could be necessary under Title IX, yet because of § 106.6(d) such a reasonable, constitutional requirement (because even First Amendment speech rights are not unlimited, inasmuch as yelling "fire" in a crowded theater has long been deemed unprotected speech) to promote Title IX's purposes might be forgone by the Department. On the other hand, another commenter argued that classroom discussions about sensitive topics involving sex and sexuality are protected by academic freedom – in the teacher or professor's judgment – even if such topics are offensive and uncomfortable to some students.

Discussion: The Department added § 106.6(d)(1) to act as a saving clause.[1550] Its purpose is to ensure the Department is promoting non-discrimination enforcement consistent with

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[1550] "Saving Clause," *Black's Law Dictionary* (11th ed. 2019) ("A statutory provision exempting from coverage something that would otherwise be included. A saving clause is generally used in a repealing act to preserve rights and claims that would otherwise be lost.").

constitutional protections, and with First Amendment protections of free speech and academic freedom in particular. Due to significant confusion regarding the intersection of individuals' rights under the U.S. Constitution with a recipient's obligations under Title IX, the proposed regulations clarify that these regulations do not require a recipient to infringe upon any individual's rights protected under the First Amendment.

The Department disagrees with the commenter who argued that § 106.6(d)(1) will chill Title IX enforcement without more precise language. Rather, stating that nothing in regulations implementing Title IX requires restriction of constitutional rights protects robust Title IX enforcement by clarifying that furthering Title IX's non-discrimination mandate does not conflict with constitutional protections. Failure to recognize and respect principles of free speech and academic freedom has led to overly broad anti-harassment policies that have resulted in chilling and infringement of constitutional protections.[1551]

The Department disagrees with commenters who argued that additional language or guidance is necessary in § 106.6(d)(1). We believe that § 106.6(d)(1) is clear without further explanation. The Department also includes an explanation of First Amendment law and the interaction of First Amendment law with these final regulations throughout the preamble; for example, in the "*Davis* standard generally" subsection of the "Prong (2) *Davis* standard" subsection of the "Sexual Harassment" subsection in the "Section 106.30 Definitions" section, the Department includes discussion about how the second prong of the definition of sexual harassment in § 106.30, with language from *Davis*, interacts with the First Amendment. The Department will abide by courts' rulings as to the scope of the First Amendment.

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[1551] "Sexual Harassment" subsection of the "Section 106.30 Definitions" section of this preamble.

In response to requests from commenters for stronger First Amendment protections in these final regulations, the Department has added additional language in the final regulations, addressing circumstances under which First Amendment concerns often intersect with Title IX policies and procedures. For example, the Department has added § 106.71 (prohibiting retaliation) to state that the exercise of rights protected under the First Amendment does not constitute retaliation. The final regulations also add language in § 106.44(a) to state 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. The Department reinforces § 106.6(d) in the context of a recipient's non-deliberately indifferent response in § 106.44(a) and evaluation of retaliation under new § 106.71 to caution recipients that the Department will not require a recipient to restrict constitutional rights as a method of Title IX compliance. Because academic freedom is well understood to be protected under the First Amendment, the Department declines to expressly reference "academic freedom" in § 106.6(d)(1), but that provision applies to all rights protected under the First Amendment.

Title IX, including § 106.6(d), applies to all recipients of Federal financial assistance, including private actors. The language is intended to clarify that, under Title IX regulations, recipients – including private recipients – are not obligated by Federal law under Title IX to restrict free speech or other rights that the Federal government could not restrict directly. Accordingly, the government may not compel private actors to restrict conduct that the government itself could not constitutionally restrict.[1552]

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[1552] *Peterson v. City of Greenville*, 373 U.S. 244, 248 (1963); *Truax v. Raich*, 239 U.S. 33, 38 (1915).

The Department agrees with commenters who stated that § 106.6(d)(1) will ensure that nothing in these final regulations is interpreted to violate the First Amendment to the U.S. Constitution, and we agree that this provision is important to prevent a chilling effect on free speech. As discussed in more detail in the "Sexual Harassment" subsection of the "Section 106.30 Definitions" section of this preamble, overly broad definitions applied in anti-harassment codes of conduct have led to confusion about how to enforce non-sex discrimination laws like Title IX consistent with First Amendment protections, and we therefore disagree that § 106.6(d)(1) is unnecessary.

The Department disagrees that § 106.6(d)(1) will change the way courts interpret the Constitution or Title IX. These types of clauses are routinely included in regulations to note similar issues, and we have no reason to believe including a saving clause such as § 106.6(d) would encourage courts to apply the Constitution differently or more broadly than they otherwise would. The Department believes that § 106.6(d)(1) acts as a saving clause to ensure that institutions do not violate the First Amendment's requirements, but the scope and meaning of First Amendment rights and protections are not affected by these final regulations.

The Department disagrees that these final regulations including § 106.6(d)(1), unnecessarily and harmfully prohibit the Department from promulgating regulations under Title IX that are constitutionally permissible. Contrary to the commenter's assertions, these final regulations clarify that part 106 of title 34 of the Code of Federal Regulations in no way requires the restriction of rights that would otherwise be protected from government action by the First Amendment. The U.S. Constitution applies to the Department as a Federal government agency, and the Department cannot enforce Title IX (e.g., interpret Title IX and promulgate rules enforcing the purposes of Title IX) in a manner that requires restricting constitutional rights

protected from government action by the First Amendment. These final regulations neither require nor prohibit a recipient from providing a trigger warning prior to a classroom discussion about sexual harassment including sexual assault; § 106.6(d)(1) does assure students, employees (including teachers and professors), and recipients that ensuring non-discrimination on the basis of sex under Title IX does not require restricting rights of speech, expression, and academic freedom guaranteed by the First Amendment. Whether the recipient would like to provide such a trigger warning and offer alternate opportunities for those students fearing renewed trauma from participating in such a classroom discussion is within the recipient's discretion. However, nothing in § 106.6(d) restricts *the Department* from issuing any rule effectuating the purpose of Title IX that the Department would otherwise be permitted to issue; in other words, with or without § 106.6(d), the Department as a Federal government agency is required to abide by the First Amendment, and would not be permitted to issue a rule that restricts constitutional rights, whether or not a saving clause such as § 106.6(d) exists to remind recipients that Title IX enforcement never requires any recipient to restrict constitutional rights.

Changes: None.

*Section 106.6(d)(2) Due Process*

Comments: A number of commenters expressed general support for § 106.6(d)(2) and the protection of due process of law. Commenters supported the provision because they asserted that there is confusion now as to how Title IX affects individual rights, and that this provision provides clarity. Commenters supported this provision in light of actions of educational institutions that commenters believed have violated the constitutional rights of students in Title IX proceedings; some commenters asserted that due process deprivations were caused by policies implemented under the withdrawn 2011 Dear Colleague Letter.

Some commenters expressed confusion as to whether the saving clauses in §106.6(d) cover recipients that are not government actors.

Commenters requested clarification of § 106.6(d)(2), asserting that the Department must comply with Executive Order 13563, which calls for regulations to reduce uncertainty and be written in plain language.

A number of commenters opposed § 106.6(d)(2). Commenters opposed the saving clause, arguing that it is unnecessary. Other commenters opposed this provision because they argued that it inappropriately pits Title IX's civil rights mandate against the Constitution, when no such conflict exists. Other commenters opposed this provision, asserting that schools are not courts of law.

Other commenters argued that § 106.6(d)(2) could be seen by the courts as calling for the courts to give greater weight to the listed constitutional protections than courts may give without this provision.

Other commenters opposed this provision stating that it would be burdensome on institutions.

Discussion: The Department added § 106.6(d)(2) to act as a saving clause. The Department included this provision to promote enforcement of Title IX's non-discrimination mandate consistent with constitutional protections.[1553] Due to significant confusion regarding the intersection of individuals' rights under the U.S. Constitution with a recipient's obligations under Title IX, the Department believes that this provision will help clarify that nothing in regulations

[1553] 83 FR 61480.

implementing Title IX requires a recipient to infringe upon any individual's rights protected under the Due Process Clauses of the U.S. Constitution.

As noted previously, some commenters expressed confusion as to whether the saving clauses in § 106.6(d) cover recipients that are not government actors. The Department reiterates that Title IX, including § 106.6(d), applies to all recipients of Federal funding, including private actors. The language is intended to make clear that, under Title IX regulations, recipients – including private recipients – are not obligated to choose between complying with Title IX and respecting constitutional rights. Section 106.6(d)(2) clarifies that no recipient, including a private recipient, is required to take actions constituting deprivation of rights secured by the Constitution that the Federal government could not take directly. The government may not compel private actors to restrict conduct that the government itself could not constitutionally restrict.[1554]

The Department believes it has complied with Executive Order 13563 with respect to § 106.6(d)(2).[1555] We believe that this provision is clear, uses plain language, and is tailored to the objective of clarifying that nothing in these regulations requires a recipient to infringe upon any individual's rights protected under the Due Process Clauses of the Fifth or Fourteenth Amendments. We intend for § 106.6(d)(2) to reduce uncertainty about the interaction between these final regulations and recipients' due process obligations. The Department agrees with commenters who supported § 106.6(d)(2) as necessary to protect the constitutional rights of complainants and respondents in Title IX proceedings. The Department also disagrees that § 106.6(d)(2) pits Title IX's civil rights mandate against the Constitution; to the contrary, this

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[1554] *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Truax v. Raich*, 239 U.S. 33, 38 (1915).
[1555] 83 FR 61462, 61483-84.

provision helps clarify that there is no conflict between enforcement of Title IX and respect for constitutional rights.

The Department disagrees that § 106.6(d)(2) could be seen by the courts as calling for giving greater weight to the listed constitutional protections than courts may have otherwise given. These types of saving clauses are routinely included in regulations to note similar issues, and we have no reason to believe including one here would encourage courts to apply the Constitution differently or more broadly than they otherwise would. Nothing in these final regulations alters the meaning or scope of constitutional rights or protections, but rather acknowledges that whatever the meaning and scope of a constitutional right, that right never needs to be restricted to comply with Title IX regulations.

We agree that schools are not courts of law; however, the Due Process Clauses of the Fifth and Fourteenth Amendments do not just apply in judicial proceedings. Constitutional protections such as the right to due process of law apply to the actions of governmental actors, including governmental decisions in administrative hearings which deprive individuals of liberty or property interests.[1556] For example, when a State university imposes a serious disciplinary sanction, it must comply with the terms of the Due Process Clause of the Fourteenth Amendment.[1557] For private institutions receiving Federal financial assistance, the Department cannot require such institutions to deprive persons of rights protected under the U.S. Constitution in order to comply with these final regulations implementing Title IX.[1558]

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[1556] *E.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).
[1557] *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 192 (1988).
[1558] *Adickes v. S.H. Kress & Co*., 398 U.S. 144, 170 (1970) (government is responsible for discriminatory act of private party when government, by its law, has compelled the act).

Changes: None.

*Section 106.6(d)(3) Other Constitutional Rights*

Comments: A number of commenters expressed support for § 106.6(d)(3). One commenter who opposed the NPRM in general agreed with § 106.6(d)(3). Commenters supported § 106.6(d)(3) due to their own experiences with Title IX procedures and adjudications, stating that such processes lacked basic due process protections. Several commenters supported § 106.6(d)(3), asserting that constitutionally-guaranteed due process rights trump any guidance or requirements established under Title IX. Other commenters argued that the Department should add additional specific constitutional saving clauses, similar to § 106.6(d)(1)-(3), to protect individual liberty from government overreach, such as Sixth Amendment and Seventh Amendment protections.

Several commenters opposed § 106.6(d)(3). Commenters opposed § 106.6(d)(3) because they believed the provision is unnecessary. Some commenters opposed § 106.6(d)(3) asserting it was inapplicable to private institutions. Commenters opposed this provision asserting it would be burdensome for recipients. Commenters opposed this provision arguing that the provision implies that there has been past fault by institutions depriving constitutional rights. Commenters opposed this provision arguing that it could be seen by courts as calling for the courts to give greater weight to constitutional protections than a court may otherwise give.

Discussion: The purpose of § 106.6(d)(3) is to ensure that regulations implementing Title IX promote the non-discrimination mandate of Title IX consistent with all constitutional rights and protections. To avoid confusion regarding the intersection of individuals' rights under the U.S. Constitution, and a recipient's obligations under Title IX, § 106.6(d)(3) clarifies that nothing in regulations implementing Title IX requires a recipient to infringe upon any rights guaranteed by the U.S. Constitution. This provision also makes it clear that, under Title IX regulations,

recipients – including private recipients – are not obligated by Title IX to restrict rights that the Federal government could not restrict directly. Consistent with Supreme Court case law, the government may not compel private actors to restrict conduct that the government itself could not constitutionally restrict.[1559]

The Department agrees that constitutionally-guaranteed due process rights trump any guidance or requirements established by Title IX, and disagrees that § 106.6(d)(3) may be interpreted by courts to give greater weight to constitutional protections than a court may otherwise give. Congress authorized and directed the Department to promulgate regulations to effectuate Title IX.[1560] The Department, thus, has the authority to promulgate regulations that further Title IX's non-discrimination mandate, though such regulations must not require restriction of constitutional rights. Section 106.6(d)(3) states that position. Nothing in the final regulations alters the meaning or scope of constitutional rights or protections. Section 106.6(d)(3) is in the nature of a saving clause, and such clauses are routinely included in regulations to note similar issues; we have no reason to believe including one here would encourage courts to apply the Constitution differently or more broadly than courts otherwise would.

With respect to the suggestion to list additional constitutional rights specifically in § 106.6(d), the Department believes the concerns raised by the commenters are already sufficiently addressed by this provision, which covers "any other rights guaranteed against government action by the U.S. Constitution" and by § 106.6(d)(1)-(2) which specifically refer to

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[1559] *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Truax v. Raich*, 239 U.S. 33, 38 (1915).
[1560] 20 U.S.C. 1682.

constitutional rights that most often intersect with Title IX enforcement – First Amendment rights, and the right to due process of law.

The Department disagrees that this provision is unnecessary or burdensome. The Department's goal is to ensure that non-discrimination provisions are enforced in a manner that is consistent with the entire U.S. Constitution. Although the First Amendment and Due Process Clauses tend to be the most directly relevant provisions to these final regulations concerning responses to sexual harassment, the Department believes a catch-all saving clause regarding constitutional rights is necessary and appropriate. In addition, emphasizing and clarifying that these final regulations do not require a recipient to restrict rights, should not pose a burden.

We do not believe that inclusion of § 106.6(d)(3) in these final regulations implies "fault" on the part of particular recipients or indicates a belief regarding the extent to which recipients may, or may not, have regarded Title IX obligations as necessitating restriction of constitutional rights, but we believe that including this provision will help ensure that constitutional rights are properly respected in all efforts to enforce Title IX.

Changes: None.

*Section 106.6(e) FERPA*

Background

These final regulations, including § 106.45(b)(5)(vi) (giving the parties access to all evidence directly related to the allegations in the formal complaint) and § 106.45(b)(5)(iv) (allowing the parties to bring an advisor of choice to all meetings in the Title IX proceeding), help protect a party's, including an employee-respondent's, procedural due process rights under the Fifth and Fourteenth Amendments to the U.S. Constitution. Procedural due process requires

notice and a meaningful opportunity to respond.[1561] The Department is precluded from administering, enforcing, and interpreting statutes, including Title IX and FERPA, in a manner that would require a recipient to deny the parties, including employee-respondents, their constitutional right to due process because the Department, as an agency of the Federal government, is subject to the U.S. Constitution. The Department's position is consistent with the principle articulated in the Department's 2001 Guidance that the "rights established under Title IX must be interpreted consistent with any federally guaranteed due process rights involved in a complaint proceeding."[1562]

The Department expressly stated in the 2001 Guidance that "[FERPA] does not override federally protected due process rights of persons accused of sexual harassment" in the context of public school employees or other recipients that are public entities, and the 2001 Guidance will continue to constitute the Department's interpretation of the intersection of Title IX and FERPA even after these final regulations become effective.[1563] The Department's NPRM addresses private schools and expressly states:

> We are proposing to add paragraph (d) to clarify that nothing in these regulations requires a recipient to infringe upon any individual's rights protected under the First Amendment or the Due Process Clauses, or [] any other rights guaranteed by the U.S. Constitution. The language also makes it clear that, under the Title IX regulations, recipients – *including private recipients* – are not obligated by Title IX to restrict speech or other behavior that the Federal government could not restrict directly. Consistent with Supreme Court case law, the government may not compel private actors to restrict conduct that the government itself could not constitutionally restrict. *See e.g.*, *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Truax v. Raich*, 239 U.S. 33, 38 (1915). *Thus, recipients that are private entities are*

[1561] *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (stating that the "essence of due process is the requirement that 'a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it'") (internal citations omitted).
[1562] 2001 Guidance at 22.
[1563] *Id*.

> *not required by Title IX or its regulations to restrict speech or other behavior that would be protected against restriction by governmental entities*.[1564]

The Department acknowledged in the NPRM that it cannot interpret Title IX to compel a private school to deprive employee-respondents of their due process rights, specifically the opportunity to review the evidence that directly relates to the allegations against that employee and to bring an advisor to help defend against the allegations. Similarly, the Department cannot interpret FERPA to compel a private school to apply the Department's Title IX regulations in a manner that deprives parties, including any respondent-employees, of due process. In *Peterson v. City of Greenville*, the U.S. Supreme Court held that the City of Greenville through an ordinance could not compel a private restaurant to operate in a manner that treated patrons differently on the basis of race in violation of the Equal Protection Clause of the Fourteenth Amendment.[1565] Similarly, in *Truax v. Raich*, the Supreme Court held that Arizona cannot use a State statute to compel private entities to employ a specific percentage of native-born Americans as employees in violation of the Equal Protection Clause of the Fourteenth Amendment.[1566] Like the City of Greenville and the State of Arizona, the Department cannot compel private schools that apply FERPA and Title IX, as interpreted by the Department, to violate a party's due process rights, including an employee's due process rights.

(The Department sometimes uses the terms "alleged victim" and "alleged perpetrator" in responding to comments about the intersection between Title IX and FERPA because FERPA,

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[1564] 83 FR 61480-81 (emphasis added).
[1565] 373 U.S. 244, 247-48 (1963).
[1566] 239 U.S. 33, 38 (1915).

e.g., 20 U.S.C. 1232g(b)(6), and its implementing regulations, e.g., 34 CFR 99.31(a)(13)-(a)(14) and 34 CFR 99.39, use these specific terms.)

Comments, Discussion, and Changes

Comments: Some commenters commended the proposed rules for appropriately balancing Title IX protections with FERPA, suggesting that both are important laws but that in most cases, the proposed rules and FERPA can co-exist without conflict.

Some commenters argued that nothing in FERPA prevents parties from accessing information or evidence that directly relates to their case, particularly if the evidence could potentially be used against them to establish responsibility for sexual harassment. Commenters suggested that one way to protect privacy might be to provide only a hard copy of relevant documents, or a hard copy and ongoing electronic access that was limited. Some commenters also stated that all parties should have a hard copy of the evidence and ongoing electronic access. Commenters asserted that the proposed rules protect the rights of students who attend school and will calm the fears of parents who are concerned about their children being falsely accused of sexual harassment. One commenter, anticipating criticism, argued that "victim-centered" approaches do not work in a context where both parties have a right to present their case, and where schools have a duty to fairly determine whether a party is responsible. Another commenter suggested that FERPA's provision allowing the production of student records in connection with a law enforcement action might also reduce tension between the proposed rules and FERPA.

Commenters also noted that the proposed rules are good for providing predictability and certainty when a conflict between Title IX and FERPA does arise, which is what recipients need in order to comply with both. One student expressed appreciation that the proposed rules expressly recognized and considered FERPA in its provisions. Some commenters noted that it

was appropriate to favor due process in cases where that principle conflicts with FERPA, since due process is a constitutional right, while FERPA is a Federal statute. Several commenters suggested that the proposed rules would ensure justice for victims and protections for those falsely accused.

Discussion: The Department appreciates the comments in support of its proposed regulations and agrees that a recipient may comply with both these final regulations and FERPA. The Department does not believe that the proposed or final regulations offer a "complainant-centered" (or "victim-centered") or "respondent-centered" approach. The Department's final regulations provide a fair, impartial process for both complainants and respondents.

The Department acknowledges that a recipient may use, but is not required to use, a file sharing platform that restricts the parties and advisors from downloading or copying evidence. In the final regulations, the Department has removed the specific reference to such a file sharing platform to emphasize that using such a platform is discretionary and not mandatory.

A recipient must provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, as described in § 106.45(b)(5)(vi). The Department also specifies in § 106.45(b)(5)(vi) that the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format. The Department neither requires nor prohibits a recipient from providing parties with a hard copy of the investigative report in § 106.45(b)(5)(vii) or any evidence obtained as part of an investigation that is directly related to the allegations raised in a formal complaint as described in § 106.45(b)(5)(vi). To clarify the Department's position in this regard, the Department revised § 106.45(b)(5)(vi)-(vii) to allow a recipient to provide a hard copy of the evidence and investigative report to the party

and the party's advisor of choice, or to provide the evidence and investigative report in an electronic format. The Department discusses this revision in the "Section 106.45(b)(5)(vi) Inspection and Review of Evidence Directly Related to the Allegations, and Directed Question 7" subsection and the "Section 106.45(b)(5)(vii) An Investigative Report that Fairly Summarizes Relevant Evidence" subsection of the "Investigation" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble.

The Department does not fully understand how the provision in FERPA allowing the production of student records in connection with a law enforcement action might also reduce tension between the proposed rules and FERPA. These final regulations do not directly implicate law enforcement, and it is not clear how these final regulations directly implicate or address any exemptions under FERPA that allow for the disclosure of personally identifiable information from an education record without consent in relation to a law enforcement action.

The Department is not "favoring" due process over FERPA. As explained earlier in this section, the Department is bound by the U.S. Constitution, including the Due Process Clause in the Fifth and Fourteenth Amendment. The Department, thus, cannot administer Title IX or FERPA in a manner that deprives persons of due process of law.

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

Comments: Many commenters thought that the proposed rules appropriately balanced student privacy with the need for students to obtain evidence during the Title IX grievance process. One commenter stated that the provisions of the proposed rules are necessary to ensure that respondents have the evidence that they need to defend themselves from false accusations, and

that schools occasionally deprive respondents of relevant evidence under the guise of student privacy. Some commenters argued that because schools have had a negative track record in providing relevant evidence to respondents, it was important for the proposed rules to avoid giving schools too much flexibility in applying Title IX, which ensures that schools cannot abuse the process in order to disadvantage respondents. One commenter asserted that without the proposed rules, most parents could not in good conscience send their sons to college, given the possibility of being denied due process when defending against an accusation of sexual harassment.

Discussion: The Department appreciates the commenters' support of its proposed regulations and agrees that the grievance process in § 106.45 for formal complaints of sexual harassment provides sufficient due process protections for both complainants and respondents.

Changes: None.

Comments: Many commenters suggested that there was no true conflict between FERPA and Title IX in terms of the requirements surrounding evidence production. According to the commenters, this is because there is nothing in FERPA that prevents the parties from gaining access to the evidence that directly relates to their case, and which may be used against them in the Title IX process. One commenter stated that FERPA includes provisions that relate to the disclosure of information related to a sexual assault allegation, and the commenter cited a provision that specifically allows schools to disclose to the alleged victim of any crime of violence or rape and other sexual assaults, the final results of any disciplinary proceedings conducted by the institution against the alleged perpetrator of the offense.[1567] This commenter

[1567] 20 U.S.C. 1232g(b)(6).

stated that FERPA's limits on redisclosure of information do not apply to information that institutions are required to disclose under the Clery Act.[1568] The commenter also stated that institutions may not require a complainant to abide by a nondisclosure agreement in writing or otherwise in a way that would prevent the re-disclosure of this information.

Discussion: The Department agrees that there is no inherent conflict between these final regulations implementing Title IX, and FERPA and its implementing regulations with respect to the Title IX requirements concerning evidence production. The Department acknowledges that provisions in FERPA, e.g. 20 U.S.C. 1232g(b)(6), address the conditions permitting the disclosure, without prior written consent, to an alleged victim of a crime of violence or a nonforcible sex offense, among others, of the final results of any disciplinary proceeding conducted by an institution against the alleged perpetrator of such crime or offense with respect to such crime or offense.[1569] The Department also acknowledges § 99.33(c), concerning the inapplicability of the general limitations in FERPA on the redisclosure of personally identifiable information contained in education records that the Clery Act and its implementing regulations require to be disclosed.

The Department does not interpret Title IX as either requiring recipients to, or prohibiting recipients from, using a non-disclosure agreement, as long as such non-disclosure agreement does not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence under § 106.45(b)(5)(iii). Any non-disclosure agreement, however, must comply with all applicable laws.

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[1568] 34 CFR 99.33(c).

[1569] The Department uses the terms "alleged victim" and "alleged perpetrator" in this section because these terms are in FERPA, 20 U.S.C. 1232g(b)(6).

Changes: None.

Comments: Some commenters suggested that concerns regarding the private information of complainants were either overstated or outweighed by the need to reach a fair conclusion in the Title IX process. One commenter stated that there is no way to provide adequate due process while still avoiding the discomfort complainants may feel having to review the investigative report that contains summaries of traumatic incidents which include private details about the complainant. This commenter suggested that while recipients may be allowed to redact highly sensitive information, or threaten parties with punitive action for publicly disclosing private information in the investigative report or evidence collected by the investigator, both parties need to be able to review the evidence and the investigative report. The commenter believed that exchange of evidence, and reviewing the investigative report, is necessary to provide due process for both parties.

Discussion: The Department appreciates the comments in support of its proposed regulations. The Department acknowledges that sharing information may be uncomfortable and that sharing such information in a grievance process under § 106.45 is necessary to provide adequate due process to both parties. Each party should be able inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, as this evidence may be used to support or challenge the allegations in a formal complaint.

Changes: None.

Comments: Some commenters opposed most of the proposed rules but stated their appreciation that the proposed rules acknowledged FERPA and that schools had a duty to comply with FERPA to the extent compliance was consistent with Title IX. One commenter stated the proposed rules were workable so long as a recipient itself has sole discretion to determine what

evidence is directly related to sexual harassment allegations. The commenter suggested that any process where OCR second guesses a recipient's determination as to whether documents are directly related to the allegations raised in a formal complaint will significantly impair a recipient's ability to provide a prompt and equitable resolution and will effectively turn disputes among the recipient and the parties about evidence into Federal matters. Other commenters supported the proposed rule, noting that even in cases of private medical or behavioral information, if that information is relevant to an allegation of sexual harassment, then the party needing access to the records should have it.

Discussion: The Department appreciates the comments in support of these final regulations. A recipient has some discretion to determine whether evidence obtained as part of an investigation is directly related to allegations raised in a formal complaint as described in § 106.45(b)(5)(vi), and the Department is required to enforce both FERPA and Title IX. The Department previously noted that the "directly related to" requirement in § 106.45(b)(vi) aligns with FERPA. For example, the regulations implementing FERPA define education records as records that are "directly related to a student" pursuant to § 99.3. Accordingly, the Department in enforcing both FERPA and Title IX is well positioned to determine whether records constitute education records and also whether records are directly related to the allegations in a formal complaint. The Department has a responsibility to administer both FERPA and Title IX and cannot shirk its responsibility. If a party files a complaint that the recipient did not provide the party with an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, then the Department will investigate and must determine whether the recipient complied with § 106.45(b)(5)(vi).

In the final regulations, the Department has clarified in § 106.45(b)(5)(i) that a recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained, in connection with provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for the grievance process under § 106.45(b).[1570] This provision prevents the recipient from accessing, considering, disclosing, or otherwise using such records without the party's knowledge for a grievance process under § 106.45(b). If the party would like the recipient to access, consider, disclose, or otherwise use such records in a grievance process under § 106.45(b), then the party must give the recipient voluntary, written consent to do so. 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

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[1570] While the Department based this regulatory provision on the exemption for treatment records in the definition of the term "education records," as set forth in FERPA at 20 U.S.C. 1232g(a)(4)(B)(iv), we made two minor modifications to the FERPA exemption to better align the provision in these final regulations with the purpose of protecting the privacy of such treatment records in a grievance process under § 106.45, rather than the purpose of the exemption for treatment records in FERPA, which is to disallow college students from being able "directly to inspect" such treatment records, although allowing college students to have "a doctor or other professional of their choice inspect their records." "Joint Statement in Explanation of the Buckley / Pell Amendment [to FERPA]," 120 CONG. REC. 39858, 39862 (Dec. 13, 1974). For this reason, we removed the limitation in the FERPA definition of treatment records narrowing the applicability of the exemption to students who are 18 years of age or older or in attendance at an institution of postsecondary education because this provision should apply to any party in a grievance process under § 106.45, regardless of that party's age. We also revised the phrase used in the FERPA exemption, "made, maintained, or used only in connection with the provision of treatment to the student," to "made and maintained in connection with the provision of treatment to the party" so that this provision will apply where a recipient has the discretion under FERPA to use treatment records for other than treatment purposes, such as billing or litigation purposes. Thus, under these final regulations a recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under § 106.45. Also, if the party is not an "eligible student," as defined in 34 CFR 99.3 (FERPA regulations), then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3.

defined in 34 CFR 99.3. Absent such voluntary, written consent, a recipient may not access, consider, disclose, or otherwise use such records in a grievance process under § 106.45(b). If a party provides such voluntary, written consent and if such records are directly related to the allegations raised in a formal complaint, then the recipient must provide both parties an equal opportunity to inspect and review the records pursuant to § 106.45(b)(5)(vi).

Changes: The Department clarified in § 106.45(b)(5)(i) that a recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent. If the party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3.

Comments: One commenter cautioned the Department that the proposed rules would not garner as many supportive comments as critical comments, but that the Department should pay more attention to reason and logic, as opposed to sheer numbers. The commenter argued that opponents of the proposed rules are better funded, and that there is less of a stigma to openly criticizing the Department than there is in saying that one was accused of sexual harassment, even if wrongly accused, and openly supporting the Department's proposed rules. Another commenter argued that depriving respondents of relevant evidence only created more victims, not fewer.

Discussion: The Department appreciates the commenters' perspectives.

Changes: None.

Comments: Several commenters opposed the requirement in § 106.45(b)(5)(v) (written notice of investigative interviews, meetings, and hearings) because they stated it generally conflicts with FERPA. One commenter suggested adding a FERPA compliance clause to § 106.45(b)(5)(v) due to concerns about student privacy.

One commenter argued specifically that the requirement in § 106.45(b)(5)(v) that recipients disclose the identities of all the parties' conflicts with FERPA. One commenter specifically argued that requiring a recipient to disclose all sanctions imposed on the respondent conflicts with the school's responsibilities under FERPA. Several commenters specifically suggested that the Department remove from the documentation of the recipient's response to a Title IX complaint any requirement to include information regarding remedies and supportive measures accessed by a complainant who is a student.

Several commenters stated that the parties should not be informed of the remedies given to the complainant, or to the disciplinary sanctions imposed on the respondent, in cases where the allegation involves assault, stalking, dating violence, or other violent crimes. Not only does disclosure of these items violate FERPA, but it would be troubling, for instance, to inform a respondent that after they were found responsible, the complainant was given remedies like moving to other classes, counseling, and so on. Commenters also asserted that the respondent who is found responsible should not have any knowledge about what safety measures the school is taking to protect the complainant, since those very measures will be undermined if the respondent learns of them. In support of these arguments, some commenters cited the Clery Act, arguing that it requires less than the proposed rule, and that the final regulations should map Clery specifically. These commenters asserted that when such results become final, §

668.46(k)(2)(v) of the Clery Act regulations further clarify that the "result" must include any sanctions and rationale for results and sanction, notwithstanding FERPA.

Discussion: The Department disagrees that § 106.45(b)(5)(v) inherently or directly conflicts with FERPA. A recipient should interpret Title IX and FERPA in a manner to avoid any conflicts. To the extent that there may be rare and unusual circumstances, where a true conflict between Title IX and FERPA exists, the Department includes a provision in § 106.6(e) to expressly state that the obligation to comply with these final regulations under Title IX is not obviated or alleviated by the FERPA statute or regulations. Section 106.45(b)(5)(v) requires recipients to provide to the party whose participation is invited or expected written notice of all hearings, investigative interviews, or other meetings with a party, with sufficient time for the party to prepare to participate in the proceeding. The Department notes that this provision is similar to the provision in the Department's regulations, implementing the Clery Act, which requires timely notice of meetings at which the accuser or accused, or both, may be present and provides timely and equal access to the accuser, the accused, and appropriate officials to any information that will be used during informal and formal disciplinary meetings and hearings under § 668.46(k)(3)(1)(B). The Department has not interpreted its regulations, implementing the Clery Act, to violate FERPA and will not interpret similar regulations in these final regulations to violate FERPA.

There is no need to add a FERPA compliance clause in this particular section, as a recipient is always required to comply with all applicable laws. Adding a FERPA compliance clause would contradict the General Education Provisions Act (GEPA), 20 U.S.C. 1221(d), which is reflected in § 106.6(e). GEPA provides in relevant part: "Nothing in this chapter shall be construed to affect the applicability of title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, title V of the Rehabilitation Act of 1973, the Age

Discrimination Act, or other statutes prohibiting discrimination, to any applicable program."[1571] Since at least 2001, the Department has interpreted "this provision to mean that FERPA continues to apply in the context of Title IX enforcement, but if there is a direct conflict between the requirements of FERPA and the requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions."[1572] Section 106.6(e) reflects the Department's longstanding interpretation of GEPA and provides that the "obligation to comply with this part is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99."

A party such as a complainant or respondent must know who the other parties in a formal complaint are in order to support or challenge the allegations in the formal complaint. With respect to recipients that are State actors, constitutional due process would require as much. As previously stated, the Department interprets these final regulations in a manner that will not require a recipient to violate a person's constitutional due process rights, whether the recipient is private or public.

Additionally, FERPA and its implementing regulations define the term "education records" as meaning, with certain exceptions, records that are directly related to a student and maintained by an educational agency or institution, or by a party acting for the agency or institution.[1573] The Department previously stated: "Under this definition, a parent (or eligible student) has a right to inspect and review any witness statement that is directly related to the

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[1571] 20 U.S.C. 1221(d).
[1572] 2001 Guidance at vii.
[1573] 20 U.S.C. 1232g(a)(4); 34 CFR 99.3.

student, even if that statement contains information that is also directly related to another student, if the information cannot be segregated and redacted without destroying its meaning."[1574] The Department made this statement in response to comments regarding impairing due process in student discipline cases in its notice-and-comment rulemaking to promulgate regulations to implement FERPA.[1575] Written notices under § 106.45(b)(5)(v) may pertain to students who are complainants or respondents, in which case they would need to know who is being interviewed as a witness in an investigation of the formal complaint of harassment.

FERPA, 20 U.S.C. 1232g(b)(6), and its implementing regulations, 34 CFR 99.31(a)(13)-(a)(14) and 34 CFR 99.39, address the conditions permitting the disclosure, without prior written consent, to an alleged victim of a crime of violence or a nonforcible sex offense, among others, of the final results of any disciplinary proceeding conducted by an institution against the alleged perpetrator of such crime or offense with respect to such crime or offense. Similarly, the Clery Act, 20 U.S.C. 1092(g)(8)(B)(ii), and its implementing regulations, 34 CFR 668.46(k)(3)(iv), require an institution to provide the result of a proceeding, including any sanctions imposed by the institution, to both parties. The Department believes that both parties should receive the same information about the result as to each allegation, including a determination regarding responsibility, the reasons for the determination, any sanctions the recipient imposes on the respondent, and whether remedies will be provided by the recipient to the complainant, under §

[1574] U.S. Dep't. of Education, Office of Planning, Evaluation, and Policy Development, Final Regulations, Family Educational Rights and Privacy, 73 FR 74806, 74832-33 (Dec. 9, 2008).
[1575] *Id*.