

**Comment from 93 Law Professors Regarding Proposed Rulemaking
Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving
Federal Financial Assistance
Office of Civil Rights, Department of Education
ED-2018-OCR-0064**

This proposed rulemaking with regard to the treatment of sexual harassment under Title IX raises a wide range of substantive problems; many of its provisions obstruct, rather than effectuate Title IX, and rest on inaccurate descriptions of relevant Supreme Court decisions or exceed the regulatory authority of the Department. This comment raises a distinct type of objection to the proposed regulation: that in a large number of important respects the proposal is so unclear as to provide insufficient guidance to recipients about their new obligations, to victims and alleged harassers regarding their rights and responsibilities, and to the public as a whole as to what is being proposed.

Because Title IX, which is the basis of the Department's rulemaking authority, is spending clause legislation, it is essential that any regulation make clear to recipients what obligations they are assuming if they accept federal financial assistance. Rather than regulating schools or other educational institutions broadly, Title IX instead requires institutions which accept federal educational assistance to agree to comply with specific conditions that are attached to that funding. The requirement of clarity is not controversial; indeed, the NPRM itself notes that recipients are entitled to clear notice of their obligations under Title IX. The NPRM relies on this principle for its requirement that a recipient need not do anything at all about specific instances of sexual harassment until and unless the appropriate official gets certain specific information about that harassment. But in many respects the proposed regulation itself creates confusion instead of clarity. Its newly devised, inter-related provisions pose a large number of novel questions regarding what a recipient would have to do if the regulation were finalized. As proposed, these provisions make it impossible for even experienced attorneys to advise a recipient on its compliance with Title IX with any confidence regarding what the answers to those questions may be or what the recipient would be obligated to do if it accepts federal financial assistance. That uncertainty is particularly serious because the Department is proposing to issue regulations, rather than issue a less formal and less binding guidance.

Clarity is especially important because of the contentious nature of sexual harassment claims. Complainants and respondents usually have a substantial personal stake in any report of sexual harassment that a recipient addresses. Whatever a recipient does, either the complainant or the respondent is likely to object or challenge, and complainants and respondents alike have with significant frequency sued recipients because of the manner in which a sexual harassment complaint was handled. In this context, uncertainty about the meaning of a Title IX regulation is certain to provoke increased and more intractable litigation. When an ambiguous provision bears

on a recipient's action in a particular case, the party unhappy with the outcome has every reason to focus on that provision and to argue that the recipient's action was inconsistent with the correct interpretation. Uncertainty about the meaning of applicable regulations will significantly increase the grounds on which potential plaintiffs and their attorneys will see a basis for litigation, and will multiply the issues in those cases.

Clarity is also essential because the Department proposes to issue binding and highly specific regulations, rather than more generally phrased Guidelines. Past experience with earlier guidances demonstrates the great difficulty in framing standards whose meaning would be clear, and sensible, in the wide variety of circumstances in which sexual harassment, and sexual harassment complaints, can arise. Because of the binding and specific nature of the proposed regulation, uncertainty about the meaning of each word and phrase, and about the inter-relationship of provisions, can be highly problematic. This ill-considered approach denies recipients flexibility in applying broadly framed guidelines to unforeseen situations and replaces that freedom with vexing issues of construction. Because much of this regulatory scheme has been made up out of whole cloth, the Department has no body of experience illustrating the practical questions that have arisen out of similarly schemes.

Clarity is vital to sexual harassment victims and students accused of sexual harassment as well. In the past, although some institutions have made earnest efforts to prevent and correct sexual harassment, other schools turned a blind eye to sexual harassment, looking for ways to avoid taking serious action, or even any action, on a complaint, and in some instances ignoring pervasive ongoing sexual misconduct. Others have found it difficult to find the resources to learn about what Title IX requires and to adjust their policies, procedures, services, and prevention programs in a manner that both complies with their Title IX obligations and responds to their institution's and community's needs related to this harassment. This history, both recent and longstanding, has led some schools to fail to comply with Title IX in ways that harm both victims and accused students. Because the proposed regulations could be interpreted to forbid some steps to prevent and correct sexual harassment, those officials who would prefer to do as little as possible about sexual harassment will be able to find language throughout these proposals that could be construed as providing a federally-endorsed excuse for inaction. More importantly, the larger group of institutions that have relatively recently devoted significant resources to understanding and meeting their obligations under Title IX—in some cases making and correcting errors along the way that harmed both victims and accused students—will have to redo almost all of that work to adjust to a new legal landscape that not only is drastically changed but also lacks clarity. The lack of clarity, in particular, will virtually guarantee that such institutions will make even more costly errors, potentially harming accused students, student victims, or both, as they struggle to understand and adjust to these shifting regulatory sands.

Uncertainty about the meaning of the proposed regulations has also seriously undermined the notice and comment process. At recipient institutions, lawyers and non-lawyers alike are struggling to understand what their schools would be required, forbidden, and permitted to do under the proposal. They are finding it difficult to comment on the proposed regulations except in general terms because many specific details are unclear. Neither recipients nor any other interested parties should be asked to imagine all the possible meanings of dozens of inter-related provisions, and then offer comments on each hypothetical and combination of hypotheticals.

We set out below 80 material questions that we have been able to identify about specific provisions in the proposed regulation. It may well be that the Department never thought about some of these issues when it issued the proposal; that would, in a sense, be understandable because it appears that this entire regulatory scheme was created out of whole cloth, with little evidence of experience regarding how a particular provision might work in practice, how provisions would inter-relate, or what particular terms would mean in the real world. Provisions with wording that seems straightforward in the abstract are often vexingly unclear when read in light of the wide variety of problems of sexual harassment that actually occur at educational institutions, and of the manner in which those institutions address other types of misconduct. The time for the Department to figure all this out is before the regulation is promulgated, indeed, it is before the public is asked to comment on the proposal.

Questions Regarding The Meaning of The Proposed Regulation

Program and Activity

- 1) If a victim is sexually assaulted by a fellow student outside of a recipient's education program or activity, but the accused rapist's subsequent presence in that program or activity (e.g., on campus) creates a hostile environment in the program or activity that effectively denies the victim equal access to the education program or activity, does that combination of circumstances constitute "sexual harassment in an education program or activity" under sections 106.44(a), 106.44(b)(4) and 106.45(b)(3)?

- 2) If a victim is sexually assaulted by a fellow student outside of a recipient's education program or activity, and the victim is thereafter, in the program or activity, taunted or otherwise harassed with regard to that assault, must the recipient take into account the earlier sexual assault in determining whether the harassment effectively denied the victim equal access to the program or activity and thus constituted sexual harassment, as defined in section 106.30, in that program or activity under sections 106.44(a) and 106.44(b)(4) and 106.45(b)(3)?

- 3) If a recipient ordinarily exercises disciplinary power over student misconduct outside a program or activity, may the recipient decline to do so if the misconduct is sexual harassment, or would making such a gender-based exception constitute discrimination on the basis of sex in violation of section 106.31 and/or Title IX itself? For example, if under its student code a recipient would punish a student for assaulting another student outside a program or activity, may the recipient ignore student-on-student sexual assault outside its education program or activity?
- 4) If a recipient chooses to address a complaint involving sexual harassment that did not occur in a program or activity, do the proposed regulations impose any standards or procedures to be followed in doing so? If so, what are those standards and/or procedures?
- 5) Title IX forbids discrimination “under” an education program or activity. Sections 106.44(a) and 106.44(b)(2) refer to sexual harassment “in” an education program or activity, and section 106.45(b)(3) refers to sexual harassment “within” a program or activity. Do “in” and “within” in those proposed sections mean something different than “under” in Title IX, and if so what is the difference in meaning?
- 6) Title IX forbids “discrimination” under an education program or activity. Sections 106.44(a) and 106.44(b)(2) refer to “sexual harassment” in an education program or activity. If sexual harassment occurred outside an education program or activity, but resulted in discrimination under the education program or activity, would a recipient be required to respond to that situation?
- 7) Under Title IX an individual may not be “excluded” from a federally assisted program or activity on the basis of gender. If a recipient knows that sexual harassment which did not occur “in” its education program or activity nonetheless effectively excludes the victim from equal access to that program or activity, is the recipient required to respond?

Sexual Harassment and Equal Access

- 8) If a recipient chooses to address a complaint involving unwelcome conduct on the basis of sex that did not effectively deny the complainant equal access to the recipient’s education program or activity, and that is not otherwise “sexual harassment” as defined in section 106.30, do the proposed regulations impose any standards or procedures to be followed in doing so? If so, what are those standards and/or procedures?
- 9) If a recipient exercises disciplinary power over student misconduct that does not affect the complainant’s access to its program or activity, may the recipient decline to do so for

sexual harassment, or would making such a gender-based exception constitute discrimination on the basis of sex in violation of section 106.31 or Title IX itself? For example, if under its student code a recipient would punish a student for harassing another student even if the harassment did not affect access, may the recipient refuse to respond to sexual harassment unless it affects equal access?

Quid Pro Quo Harassment

- 10) Under section 106.30 an employee “conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct” is sexual harassment per se, regardless of whether or not it effectively denied that individual equal access to the recipient’s education program or activity. Does “conditioning” in section 106.30 mean
- (a) only an express quid pro quo demand,
 - (b) a subjective intent on the part of the employee to deny the aid, etc., if the individual refuses to participate, even if not communicated at the time,
 - (c) action by the employee which the individual reasonably perceived to contain a threat of denial of an aid, etc., and/or
 - (d) withholding an aid, benefit or service because an individual declined to participate in unwelcome sexual conduct?

Retaliation

- 11) Does the act of retaliating against an individual because he or she declined to participate in or objected to unwelcome conduct on the basis of sex constitute misconduct to which a recipient must respond because that retaliation itself would constitute unwelcome conduct on the basis of sex under section 106.30, e.g. in light of *Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167 (2005)?
- 12) If a recipient has a policy forbidding false statements in connection with an investigation, section 106.45(b)(2)(i)(B) requires that the policy to be disclosed to the complainant and respondent. If a recipient has a policy forbidding retaliation against an individual for reporting or filing a formal complaint about sexual harassment, or for providing information in connection with an investigation of sexual harassment, what, if any, is the recipient’s duty to disclose this policy? Would it be inconsistent with the requirement of “equitable” treatment in section 106.8(c) and 106.45(b)(1)(i) for the recipient to fail to disclose that policy?
- 13) How does the limitations under section 106.45(b)(3)(iii), that prohibits a recipient from restricting “the ability of either party to discuss the allegations under investigation or to

gather and present relevant evidence” interrelate to the obligation to prevent and address retaliation? For example, may a respondent have a private investigator speak to large numbers of campus community members to obtain information about his or her sexual history ?

Knowledge by A Person With Authority To Institute Corrective Measures

- 14) If a recipient has actual knowledge that a student or employee has been subjected to unwelcome conduct on the basis of sex, or of an allegation of such misconduct, but does not know whether or not the misconduct effectively denied the victim equal access to the recipient’s education program or activity, must the recipient respond under sections 106.44(a) and 106.44(b)(4), at least to seek the missing information? If the recipient need not and chooses not to respond to that unwelcome conduct or an allegation thereof, does the respondent have an obligation to inform the complainant of the nature of the missing and needed additional information regarding denial of equal access?
- 15) If a recipient has actual knowledge that a student or employee has been subjected to sexual harassment as defined in section 106.30, but does not know whether or not the sexual harassment occurred in the recipient’s education program or activity, must the recipient respond under sections 106.44(a) and 106.44(b)(2), at least to seek the missing information? If the recipient need not and chooses not to respond to that sexual harassment or an allegation thereof, does the recipient have an obligation to inform the complainant of the nature of the missing and needed additional information regarding whether the sexual harassment occurred in its educational program or activity?
- 16) Is a recipient required to notify employees and students, in light of the definition of recipient in section 106.30, that it is not obligated to address sexual harassment in its education program or activity if the harassment is only reported to a person who lacks authority to institute corrective measures?
- 17) Must a recipient notify employees and students as to the identity of the persons who have authority to institute corrective measures within the meaning of section 106.30?
- 18) Is a recipient required to notify employees and students when a person to whom they could ordinarily take complaints, such as a dormitory resident adviser, a coach or a counselor, is *not* a person with authority to institute corrective measures under section 106.30?
- 19) Must a recipient direct any of its employees who have knowledge of what could be sexual harassment (or an allegation thereof), but who are not themselves persons with the

authority to institute corrective measures, to notify (in the absence of a request for confidentiality) a person who does have authority to institute corrective measures? If so, which employees must be so directed?

- 20) Under section 106.8(c), which requires that a recipient notify students and employees regarding how to report sex discrimination and how to file a complaint of sex discrimination, must the person to whom reports or complaints are to be made be a person with authority to institute corrective measures within the meaning of section 106.30?

Informal Resolution

- 21) If a recipient is required only to provide the “parties” with written notice regarding the informal process, would parties mean the complainant and respondent as defined by section 106.44(e)(2) & (3) only? If so, what if one or both of the complainant and respondent is a minor or person who is legally incompetent? Would parents and/or guardians get such notice as required under § 106.45(6)?

Formal Complaint

- 22) If an individual makes a complaint that is not a formal complaint as defined in section 106.30, because it is an oral complaint or an unsigned written complaint, and the recipient declines to treat it as a formal complaint, would it be clearly unreasonable under section 106.44(a) and 106.44(b)(4) for a recipient to fail to notify the complainant that it is declining to do so, or to fail to notify the complainant as to what additional action the complainant must take to file a formal complaint?
- 23) Does the duty in section 106.44(a) and 106.44(b)(4) to not respond with deliberate indifference require a recipient to advise a complainant that the handling of a complaint will be subject to different requirements, procedures or standards depending on whether or not the complaint is written and signed, and thus a formal complaint governed by section 106.45, or a non-formal complaint subject only to the general requirement in section 106.44(a) and 106.44(b)(4) that the recipient not act with deliberate indifference? If so, to what extent must the recipient explain the differences in procedures? If such notification is not required, is it permissible?
- 24) If a written and signed complaint alleges sexual harassment in the recipient’s education program or activity, but does not specifically request initiation of the recipient’s grievance procedures as required by the definition of formal complaint in section 106.30, and the recipient declines to treat it as a formal complaint, do sections 106.44(a) and

106.44(b)(4) require the recipient to notify the complainant that it is doing so, and to notify the complainant as to what additional language is needed to turn the complaint into a formal complaint?

- 25) If a recipient understands that individuals complaining about sexual harassment are deterred from or uncomfortable making signed written statements, must the recipient treat oral complaints, or non-signed written complaints, as formal complaints so long as they are made to the official to whom formal complaints would be made?
- 26) If an institution of higher education notifies a person asserting sexual harassment that he or she can file a formal complaint, and offers supportive measures as defined in section 106.30, must the institution notify that person that if he or she *accepts* any supportive measure, the institution will under section 106.44(b)(3) be absolved of any further responsibility to address the asserted sexual harassment?
- 27) Do sections 106.44(a) and 106.44(b)(4) forbid an employee of a recipient from discouraging or delaying an individual from filing a formal complaint or from otherwise reporting what could be sexual harassment?
- 28) If a person authorized to institute corrective measures knows of sexual harassment (as defined in section 106.30), or allegations or a report of such sexual harassment, in a recipient's education program or activity, but no formal complaint as defined in section 106.30 is filed, do the regulations establish any standard regarding how the recipient must respond other than the general requirement in sections 106.44(a) and 106.44(b)(4) that the response must not be "deliberately indifferent"?
- 29) If a student gives to a person authorized to institute corrective measures a document alleging that he or she was subjected to sexual harassment (as defined in section 106.30) by a respondent about conduct within the recipient's education program or activity and requesting initiation of the recipient's grievance procedure consistent with section 106.45, is the recipient required by section 106.44(a) or 106.44(b)(4) to conduct an investigation?
- 30) If a student makes a verbal report to a person authorized to institute corrective measures alleging that he or she was subjected to sexual harassment (as defined in section 106.30) by a respondent about conduct within the recipient's education program or activity and requesting initiation of the recipient's grievance procedure consistent with section 106.45, is the recipient required by section 106.44(a) or 106.44(b)(4) to conduct an investigation?

Training

- 31) Section 106.45(b)(1)(iii) requires that coordinators, investigators, and decision-makers receive training on “the definition of sexual harassment.” As used in this section, does “sexual harassment” refer to
- (a) sexual harassment as defined in section 106.30,
 - b) sexual harassment as defined in “the recipient’s sexual misconduct policy,” which under section 106.45(b)(2)(i)(B) is the standard about which the parties are notified, and which under sections 106.45(b)(4)(ii)(A) and 106.45(b)(4)(ii)(D) is the standard that the decision-maker applies, or
 - (c) both.
- 32) If the scope of the sexual harassment forbidden by the recipient’s sexual misconduct policy is broader than the definition of sexual harassment in section 106.30, must coordinators, investigators and decision-makers be trained on the narrower section 106.30 definition? If the scope of the sexual harassment forbidden by the recipient’s sexual misconduct policy is broader than the definition of sexual harassment in section 106.30, under what circumstances would a coordinator, investigator or decision-maker apply the narrower section 106.30 standard?

Mandatory Dismissal

- 33) If, following the filing of a formal complaint, a recipient concludes that a complainant is the victim of ongoing unwelcome conduct on the basis of sex (for example, his or her teacher on made several lewd remarks to the complainant) but the conduct has not yet continued long enough to effectively deny the victim equal access to the recipient’s education program or activity and thus constitute sexual harassment as defined in section 106.30, is the recipient required, or permitted, to dismiss the complaint under section 106.45(b)(3), and to compel the victim to endure the continuing unwelcome conduct on the basis of sex until it has reached the point at which that misconduct effectively denies the victim equal access to the recipient’s program or activity, at which time a new formal complaint could be filed and would be acted on?
- 34) Prior to dismissing a formal complaint under section 106.45(b)(3), does the requirement in sections 106.b(c) and 106.45(b)(1)(i) that a recipient handle a complaint in an “equitable” manner, the requirement in sections 106.44(a) or 106.44(b)(4) that a recipient not act with deliberate indifference, or the requirement in section 106.45(b)(1)(iii) that officials be trained to “ensure due process for all parties,” require that the recipient first
- (a) notify the complainant that it is considering such a dismissal,

(b) notify the complainant of the relevant standard regarding the meaning of “sexual harassment” or “in an education program or activity,” and/ or

(c) provide the complainant an opportunity to adduce argument or evidence to show that dismissal would not be warranted under those standards?

- 35) If a recipient dismisses a complaint under section 106.45(b)(3), must the recipient provide the complainant with a written explanation of that decision, including a statement of any findings of fact supporting the decision?
- 36) If a recipient permits a respondent to appeal a determination of responsibility, must the respondent permit a complainant to appeal a dismissal under section 106.45(b)(3), and if so must the recipient notify the complainant of that right?
- 37) If whether a formal complaint is subject to dismissal under section 106.45(b)(3) turns on a dispute of material fact, must that dispute be resolved under the general standards and procedures in section 106.45, or should or may the recipient use some other standard and procedure?
- 38) If a recipient, as required by section 106.45(b)(3), dismisses a formal complaint because the conduct did not constitute sexual harassment as defined in section 106.30, may the recipient then entertain under its own code a new complaint regarding the misconduct alleged, so long as that new complaint is not a formal complaint as defined in section 106.30?
- 39) If a recipient, as required by section 106.45(b)(3), dismisses a formal complaint because the conduct did not occur in an education program or activity, may the recipient then entertain under its own code a new complaint regarding the misconduct alleged?
- 40) Sections 106.44(a) and (b)(1) refer to “sexual harassment” in an education program or activity. Section 106.45(b)(3) refers to “conduct” in an education program or activity. Title IX refers to “discrimination” in an education program or activity. Do “sexual harassment” and “conduct” mean the same thing? Do they mean the same thing as “discrimination”? For example, if a sexual assault outside the education program or activity combined with the subsequent presence of the perpetrator in the program or activity to discriminate against the victim, would that be within the scope of section 106.45(b)(3)?

Interim Protective Measures

- 41) Do the proposed regulations in any way restrict what interim measures a recipient may take with regard to sexual harassment in an education program or activity prior to a determination of responsibility at the conclusion of the grievance process?
- 42) Is a recipient barred (e.g. by section 106.44(d)) from putting a student employee on administrative leave prior to a determination of responsibility? If so,
- (a) Does “student” include a regular employee who is taking any class?
 - (b) Does “student” include a graduate student employee who has completed all coursework and oral examinations, but still has to complete his or her thesis or dissertation?
 - (c) Does this rule preclude consideration of a pending complaint of sexual harassment, or a prior report of sexual harassment that was not resolved on the merits, in determining whether to hire a student as an employee or to renew his or her appointment?
 - (d) Does this bar apply even though the school under its own procedures might put a student employee on administrative leave for misconduct other than sexual harassment?
 - (e) Does the bar apply to misconduct that is otherwise outside the scope of the proposed regulations because the unwelcome conduct on the basis of sex did not effectively deny a person equal access to the recipient’s education program or activity and/or was not otherwise within the section 106.30 definition of sexual harassment?
 - (f) Does the bar apply to misconduct that is otherwise outside the scope of the proposed regulations because the sexual harassment did not occur in a program or activity?
- 43) Is a recipient barred (e.g., by the definition of supportive measures in section 106.30) from taking any disciplinary action against a respondent for sexual harassment in its education program or activity prior to a determination of responsibility? If so:
- (a) Does the bar apply to misconduct that is otherwise outside the scope of the proposed regulations because the unwelcome conduct on the basis of sex did not effectively deny a person equal access to the recipient’s education program or activity and/or was not otherwise within the section 106.30 definition of sexual harassment?
 - (b) Does the bar apply to misconduct that is otherwise outside the scope of the proposed regulations because the sexual harassment did not occur in a program or activity?
 - (c) Does the bar apply to interim disciplinary action for sexual harassment even though the recipient takes interim disciplinary action for other conduct code violations?
 - (d) May a respondent challenge an interim facially non-disciplinary action on the ground that the recipient’s covert motive for taking that action was to discipline the respondent?

- 44) Do the proposed regulations in any way restrict what interim measures a recipient may take with regard to sexual harassment in an education program or activity prior to a determination of responsibility at the conclusion of the grievance process?
- 45) Is a recipient barred (e.g., by section 106.44(c)) from removing a respondent from its education program or activity on an emergency basis for sexual harassment in that program or activity unless that recipient determines that the respondent poses an “immediate threat” to the health or safety of students or employees? If so:
- (a) What does “safety” mean, e.g., is it any crime? Could it encompass non-criminal activity?
 - (b) What does “health” mean, e.g., would it include the mental health of the complainant?
 - (c) What does “immediate” mean, e.g. must a recipient afford a hearing to a removed respondent in a shorter period of time (“immediate”) than the period of time within which the recipient must afford a complainant a hearing (“reasonably prompt” under section 106.45(b)(1)(v))?
 - (d) Does the bar apply to misconduct that is otherwise outside the scope of the proposed regulations because the unwelcome conduct on the basis of sex did not effectively deny a person equal access to the recipient’s education program or activity and/or was not otherwise within the section 106.30 definition of sexual harassment?
 - (e) Does the bar apply to misconduct that is otherwise outside the scope of the proposed regulations because the sexual harassment did not occur in a program or activity?
 - (f) Does the additional requirement that a post-removal opportunity to challenge the removal be provided “immediately” mean that a removed alleged sexual harasser is entitled to an opportunity to be heard in a shorter period of time than the “prompt” time frame for acting on a complaint by an alleged sexual harassment victim?
- 46) Are recipients barred (e.g., by the definition of supportive measure in section 106.30) from imposing interim *non*-mutual no-contact orders (e.g., permitting a student to contact a faculty member respondent, but not vice versa). If so, does the bar apply to misconduct that is otherwise outside the scope of the proposed regulations, because the unwelcome conduct on the basis of sex did not effectively deny a person equal access to the recipient’s education program or activity and/or was not otherwise within the section 106.30 definition of sexual harassment, or because the sexual harassment was not in the recipient’s education program or activity?
- 47) Is the presumption of non-responsibility in section 106.45(b)(1)(iv) and section 106.45(b)(2)(i)(B) *conclusive* until there has been a determination regarding responsibility at the conclusion of the grievance process, i.e. does it preclude a recipient in deciding whether to provide some interim protective measure from making a preliminary determination of responsibility? If so, does that bar apply to unwelcome

conduct on the basis of sex that is not otherwise within the scope of the proposed regulations because the respondent's unwelcome conduct on the basis of sex that did not effectively deny a person equal access to the recipient's education program or activity and was not otherwise within the section 106.30 definition of sexual harassment, or to sexual harassment did not occur in a program or activity?

Clear and Convincing Evidence Standard

- 48) In resolving a complaint of sexual harassment, does section 106.45(b)(4)(i) permit a recipient to apply a clear and convincing evidence standard even though the recipient instead uses a less-demanding preponderance of the evidence standard for
- (a) all other student conduct code violations,
 - (b) all or some other complaints of harassment by students,
 - (c) all or some other complaints of discrimination by students,
 - (d) all or some other conduct code violations by students that carry the same maximum disciplinary sanction,
 - (e) a complaint that the individual who alleged sexual harassment had made an inaccurate statement?
- 49) Under section 106.45(b)(4)(i), a recipient may not use a preponderance of the evidence standard unless it uses that standard for "conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction." Does this bar to the use of the preponderance standard apply when a clear and convincing standard is used for
- (a) all conduct code violations that carry the same maximum disciplinary sanction,
 - (b) a majority of conduct code violations that carry the same maximum disciplinary sanction,
 - (c) more than one but less than a majority of conduct code violations that carry the same maximum disciplinary sanction, or
 - (d) even a single other conduct code violation that does not involve sexual harassment but carries the same maximum disciplinary sanction?
 - (e) a penalty phase only (such as to impose expulsion), but not for lesser penalties or to make findings of whether misconduct occurred,
 - (f) student infractions that are governed under a separate policy from the student conduct code (such as an honor code), but not for misconduct governed by the student conduct code,
 - (g) student conduct code violations, but not for other forms of discrimination and harassment by students?

- 50) Does this bar apply to complaints about unwelcome sexual conduct that are not otherwise within the scope of the proposed regulation because the conduct was not sexual harassment as defined in section 105.30, or because the sexual harassment did not occur in the recipient's education program or activity?
- 51) Under section 106.45(b)(4)(i), a recipient must "apply the same standard of evidence for complaints against students as it does for complaints against employees." Is a recipient required to use a clear and convincing standard for complaints of sexual harassment by students if a clear and convincing standard is applied to
- (a) all complaints against employees,
 - (b) complaints against a majority of employees,
 - (c) complaints against even a single employee
 - (d) complaints about some but not all types of misconduct by employees,
 - (e) a complaint about even a single type of misconduct,
 - (f) complaints about some forms of employee misconduct, but not complaints alleging discrimination and/or harassment by employees towards students,
 - (g) complaints about some forms of employee misconduct, but not complaints alleging discrimination and/or harassment by employees towards other employees,
 - (h) some, but not all, aspects of complaints against employees (e.g., where the preponderance standard is used to determine whether misconduct occurred, but a clear and convincing standard is required for some forms of discipline against a class of employees, such as revoking tenure for tenured faculty)?
- 52) Does the bar to applying a preponderance standard to student sexual harassment unless the recipient uses that standard for "conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction" apply to complaints about unwelcome sexual conduct that is not otherwise within the scope of the proposed regulation because the conduct was not sexual harassment as defined in section 105.30, or because the sexual harassment did not occur in the recipient's education program or activity?

Cross Examination and Questions Under Section 106.45(b)(3)(vi)

- 53) Under section 106.45(b)(3)(vii), must a recipient permit *all* cross-examination questions that are relevant and outside the rape shield exclusion?
- 54) Under section 106.45(b)(3)(vi), must a recipient ask *all* questions proposed by a party that are relevant and outside the rape shield exclusion?

- 55) May a recipient bar a cross-examination question, or refuse to ask a question posed by a party, on the ground that it is misleading, e.g. that it assumes a fact not in evidence?
- 56) May a recipient bar a cross-examination question, or refuse to ask a question posed by a party, on the ground that it is repetitive, e.g. the question has already been asked and answered?
- 57) May a recipient bar a cross-examination question, or refuse to ask a question posed by a party, on the ground that it seeks privileged information, e.g. that it asks a witness what he or she told his or her attorney or his or her section 106.45(b)(3)(iv) advisor?
- 58) May a recipient bar a cross-examination question, or refuse to ask a question posed by a party, on the ground that it is abusive?
- 59) Under section 106.45(b)(3)(vii), a decision-maker may not rely on any statement of a party or witness if the party or witness “does not submit to cross-examination” at the hearing. Does “does not submit to cross-examination” refer to
- (a) a refusal to answer even a single question on cross examination, a refusal to answer a significant number of cross-examination questions, or only a refusal to answer all cross-examination questions,
 - (b) all refusals to answer, or only to refusals based on certain objections (e.g. self-incrimination) but not others (e.g., privacy, attorney-client privilege)?
- 60) If a recipient poses questions to a party or witness under section 106.45(b)(3)(vi), and the party refuses to answer (e.g., on grounds of self-incrimination), may the decision-maker nonetheless rely on the statements of that party or witness?

Duty of Recipient

- 61) Under sections 106.44(a) and 106.44(b)(4), may a recipient instruct its officials that, in responding to allegations of sexual harassment in an education program or activity, they are not required to make a diligent, good faith effort to identify and correct any sexual harassment, but need only to act in a manner that is not clearly unreasonable?
- 62) Under sections 106.44(a) and 106.44(b)(4), may a recipient instruct its officials that, in responding to a formal complaint of sexual harassment, they may act in a manner that *is* clearly unreasonable (e.g., in assessing the evidence), so long as they comply with the procedural requirements of section 106.45 and thus fall into the safe harbor in section 106.44(b)(1) or section 106.44(b)(2)?

63) Is sexual harassment (as defined in section 106.30) in an education program or activity of the recipient by a student or employee of the recipient against a person in the United States a violation of either

- (a) Title IX,
- (b) any existing regulation, or
- (c) the proposed regulation?

For example, if a college president told an applicant that she would not be admitted unless she participated in unwelcome sexual conduct, would that quid pro quo demand violate Title IX itself or an existing or proposed regulation? Would the answer depend on whether the victim acquiesced and was admitted, or refused and was rejected?

64) Does intentional discrimination on the basis of sex by a recipient in the manner in which it responds to a report or complaint of sexual harassment violate the proposed regulation (e.g. section 106.45(a)), an existing regulation, or Title IX itself? If so, would the “safe harbor” in section 106.44(b)(1), section 106.44(b)(2), or section 106.44(b)(3) bar such a claim?

65) Does the duty of a recipient under sections 106.44(a) and 106.44(b)(4) to respond to sexual harassment in a manner that is not clearly unreasonable apply to the decision-maker’s factual determination as to whether the respondent was responsible for the alleged sexual harassment? If so, is that duty inapplicable

- (a) if the recipient follows the procedures in section 106.45 and thus falls within the safe harbor in section 106.44(b)(1) or section 106.44(b)(2), or
- (b) because of section 106.44(b)(5)?

66) Does the duty of a recipient under sections 106.44(a) and 106.44(b)(4) to respond in a manner that is not clearly unreasonable apply to the decision maker’s determination regarding whether, and in what manner, to discipline a respondent whom the decision maker concludes is responsible for sexual harassment. If so, is that duty inapplicable if the recipient follows the procedures in section 106.45 and thus falls within the safe harbor in section 106.44(b)(1) or section 106.44(b)(2)?

67) Does the duty of a recipient under section 106.44(a) and 106.44(b)(4) to respond to sexual harassment in a manner that is not clearly unreasonable include consideration of whether the recipient’s response may fail to protect individuals other than the complainant from future sexual harassment? If so, would the safe harbor in sections 106.44(b)(1), 106.44(b)(2) or 106.44(b)(3) apply even if the recipient, by failing to do more than required by those sections, created a clearly unreasonable risk of sexual harassment of others? For example, if a student reported that she had been forcibly raped by a faculty member, and then accepted a supportive measure and did not file a formal

complaint, could the institution be liable if it took no further action and the faculty member then forcibly raped another student?

Delays Regarding Formal Complaints

- 68) Section 106.45(b)(1)(v) provides that the existence of concurrent law enforcement activity may constitute good cause to extend the timeframe for responding to a formal complaint, e.g. suggesting that if law enforcement officials indicate that they are about to make public material information regarding an alleged sexual assault. May a recipient
- (a) defer action on a formal complaint until the police close a pending investigation,
 - (b) defer action on a formal complaint until the final resolution of a pending criminal proceeding, or
 - (c) defer action because of concurrent law enforcement activity even when there is no substantial reason to believe that law enforcement will soon make public significant information relevant to the formal complaint?
- 69) Section 106.45(b)(1)(v) requires “reasonably prompt time frames for the *conclusion* of the grievance process.” (Emphasis added). Does this provision, or any other provision in the proposed regulations, establish any standard regarding how long a recipient may delay before *initiating* its grievance process after it has received a formal complaint that “request[s] initiation of the recipient’s grievance procedures” (see the definition of “formal complaint” in section 106.30)?

Harassment on Multiple Grounds

- 70) If a formal complaint alleges that the complainant was harassed both because of gender and because of some other characteristic (e.g., repeatedly subject to an epithet that was both misogynistic and racist, or abusive action with multiple motives), does the mandatory dismissal provision in section 106.45(b)(3) require the recipient to dismiss that aspect of the complaint asserting the non-gender aspect of the harassment, and deal with the two aspects of the harassment in separate proceedings?
- 71) If not, in the investigation and resolution of that formal complaint,
- (a) would any requirement of clear and convincing evidence, under section 106.45(b)(4), apply to the non-gender aspect of the complaint,
 - (b) would any limitations on interim remedies apply to the non-gender aspect of the complaint, or
 - (c) would the right of cross-examination, under section section 106.45(b)(3)(vii), apply to the non-gender aspect of the complaint?

Remedial Action by Recipient

- 72) Section 106.45(b)(1)(i) requires that remedies “must be designed to restore or preserve access to the recipient’s program or activity.” Is a recipient required to take any remedial or other action if, when the determination of responsibility is finally made, no action to restore or preserve access is relevant because
- (a) the student complainant has graduated,
 - (b) the student complainant has withdrawn from the school and does not wish to return,
 - (c) the student complainant is no longer in a class with the respondent teacher, or
 - (d) the employee-complainant has resigned and does not wish to return?
- 73) Does the word “designed” in section 106.45(b)(1)(i) and section 106.45(b)(5), which provide that a remedy must be “designed” to restore or preserve the complainant’s access to the recipient’s education program or activity, mean:
- (a) that the remedy must objectively be reasonably likely to restore or preserve such access, or
 - (b) that the decision-maker must have had a subjective intent to restore or preserve such access, or
 - (c) both?
- 74) Under section 106.45(b)(1)(i), so long as a remedy is designed to restore or preserve access, or if no such restorative or preservative action is warranted, are there any circumstances in which a recipient is required to discipline the respondent found responsible for the sexual harassment at issue? If so, in what circumstances would that obligation exist?

Appeals

- 75) Section 106.45(b)(5) provides, regarding appeals:

In cases where there has been a finding of responsibility, although a complainant may appeal on the ground that the remedies are not designed to restore or preserve the complainant’s access to the recipient’s education program or activity, a complainant is not entitled to a particular sanction against the respondent.

May a complainant appeal the sanction imposed on the respondent, other than on the ground that the sanction was not designed to restore or preserve the complainant’s access to the recipient’s education program or activity?

Remedial Action by OCR

- 76) In response to a complaint from an individual asserting that he or she was subject to sexual harassment in an educational program or activity receiving federal financial assistance, will the Assistant Secretary under section 106.3(a) determine whether such sexual harassment occurred, or instead determine only:
- (a) whether the sexual harassment was known to a person with the authority to institute corrective measures on behalf of the recipient, or there was a formal complaint, and if so
 - (b) whether the recipient was within the safe harbor in sections 106.44(b)(1), 106.44(b)(2), or 106.44(b)(3), and if not
 - (c) whether
 - (i) the recipient's response to that knowledge was deliberately indifferent, and
 - (ii) the recipient violated a procedural requirement in section 106.45?

Required Reports

- 77) Section 106.45(b)(7)(i)(A) requires that a recipient maintain records of every "sexual harassment investigation."
- (a) Does this include 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 section 106.30?
 - (b) Does this include an investigation of sexual harassment that did not occur in the recipient's education program or activity?
- 78) Section 106.45(b)(7)(i)(A) requires that a recipient maintain records of any actions taken "in response" to any report or formal complaint of sexual harassment.
- (a) Is a recipient required to maintain a record of a report or formal complaint of sexual harassment if the recipient failed to take any such action at all in response to that report or formal complaint?
 - (b) Does this requirement apply only to reports or formal complaints that were known at the time to an individual with authority to institute corrective measures?
 - (c) Does this requirement include reports of responses to allegations of unwelcome conduct on the basis of sex that were not within the section 106.30 definition of sexual harassment, or to reports of sexual harassment that was not within a recipient's education program or activity?

Relationship to Title VII

- 79) Is a recipient required to comply with a provision of the regulation where doing so would, with regard to a pending or potential Title VII claim by an employee of the recipient, (a)

impair its affirmative defense under *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Ellerth v. Burlington Industries, Inc*, 524 U.S. 742 (1998), or (b) constitute or be evidence of negligence in responding to sexual harassment?

Notification of Policy by Educational Institutions Controlled by Religious Organizations

80) Section 106.8(b)(1) requires all recipients to notify applicants, students, employees and others “that it does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by Title IX and this part not to discriminate in such a manner.” Section 106.12(a) states that “[t]his part” (presumably including section 106.8(b)(1)) “does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would be consistent with the religious tenets of such organization.” Is an educational institution within the scope of section 106.12(a) required to

(a) notify applicants, students, employees and others that it does not discriminate on the basis of sex, even though that is not true, or

(b) notify applicants, students, employees and others that it does not discriminate on the basis of sex, except in circumstances identified in that notification that are permissible because of section 106.12(a)?

Concluding Remarks

We are convinced that this list, despite including 80 questions, is incomplete. If these regulations are finalized in even close to their proposed form, many more questions will arise the moment any institution attempts to comply with them. The recent history of OCR enforcement of Title IX regarding sexual harassment has been characterized by educational institutions, especially at the post-secondary level, asking so many compliance questions of OCR that in only three years after issuing the 2011 Dear Colleague Letter on Sexual Violence, OCR issued a 46-page “Questions & Answers” guidance document addressing 52 of the most frequently asked questions. This number of frequently asked questions was in response to a guidance document that OCR itself made clear would not and could not be enforced in the way that it could enforce regulations subject to notice and comment. These proposed regulations would have the force of law in a manner that neither the 2011 or 2014 guidance documents did, therefore they need to be more clear, not less.

Signed on February 15, 2019, by:

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