

Comment on Proposed Title IX Rulemaking

Docket No. ED-2018-OCR-0064, RIN 1970-AA14

Nondiscrimination on the Basis of Sex in Education Programs or Activities

Receiving Federal Financial Assistance

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Respectfully,

Jeannie Suk Gersen

John H. Watson Professor of Law

Harvard Law School

The Honorable Nancy Gertner

Judge, United States District Court, District of Massachusetts (ret.)

Senior Lecturer, Harvard Law School

Janet Halley

Royall Professor of Law

Harvard Law School

Institutional affiliations are provided for identification purposes only.

Thank you for the opportunity to comment on the Department of Education’s Proposed Rule, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, designated “the Proposed Rule” in the following Comment.

We are professors at Harvard Law School who have researched, taught, and written on Title IX, sexual harassment, sexual assault, and feminist legal reform. We were three of the signatories to the statement of twenty-eight Harvard Law School professors, published in the Boston Globe on October 15, 2014, that criticized Harvard University’s newly adopted sexual harassment policy as “overwhelmingly stacked against the accused” and “in no way required by Title IX law or regulation.”

We strongly support vigorous enforcement of Title IX to ensure that students enjoy educational programs and activities unburdened by sexual harassment. We believe in sanctions for sexual harassment only under a clear definition of wrongful conduct and after a process that is fair to all parties. With these dual objectives in mind, we have reviewed the Proposed Rule and agree with some aspects and disagree with others. We agree (with some suggested amendments) with the Rule’s treatment of the burden of proof, the rejection of the single-investigator model, and the requirement of a live hearing process. We believe that the rules we endorse do not undermine the critical goal of enforcing Title IX. We have serious concerns about the provisions on cross examination and the definition of sexual harassment, and propose revisions that will be more protective of complainants. We strongly object to provisions encouraging schools to file complaints when they have multiple allegations against a single potential respondent but no formal complainant: the inquiry there should be refocused on the threat of harm and take into account the complainants’ as well as the respondents’ interests. We also strongly object to the deliberate indifference standard for schools’ ultimate responsibility to respond to sexual harassment.

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PART ONE:
DUE PROCESS

While we share the concerns that animated the Dear Colleague Letter of 2011, too often, schools went way beyond the few clear directives contained in it and in the 2014 Q&A, in their fear of attracting negative attention from the Office for Civil Rights. The result was a perfect storm of due process violations and a loss of legitimacy for important Title IX enforcement.

With the Proposed Rule, the Department commits itself to reforming unfair Title IX processes. We discuss the provisions related to due process in this Part.

Neutral and Independent Decision-makers

Provisions: Sections 106.8(a), 106.45(b)(1)(iii), and 106.45(b)(4)(i)

Summary of Provisions: Section 106.8 provides that schools must appoint at least one person to serve as a Title IX Coordinator. Section 106.45(b)(1)(iii) provides that anyone appointed as a Title IX Coordinator, investigator, or decision-maker must be without any “conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.” Section 106.45(b)(4)(i) provides that “decision-maker(s) ... cannot be the same person(s) as the Title IX Coordinator or investigator[.]”

Discussion: These provisions make it clear that the provision of neutral and independent decision-makers and a division of roles among them are fundamental aspects of due process. At many schools across the country, however, the Title IX Coordinator counsels complainants on how to make their cases, disavows any similar responsibility to counsel respondents, conducts investigations, makes all findings of fact, decides on responsibility, assigns sanctions, and even hears appeals from their own prior work! Many of these systems provide no hearing, so that the “single investigator” has plenary power on the question of responsibility, and either is or answers to a Title IX Coordinator. The Title IX Coordinator, meanwhile, is under political pressure to generate rising numbers of cases decided favorably to complainants.

There must be a division of roles between the Title IX Coordinator and the neutral and independent investigator and the decision-maker in a particular case. The separation is needed to provide accountability and checks, and to discourage bias and error at successive stages of the process. The role of advocate for either side must be divided completely from the roles of investigation and adjudication.

Section 106.8(a) provides that the Title IX Coordinator’s job is to coordinate the school’s compliance with Title IX. Section 106.45(b)(1)(iii) divides the roles of the Title IX Coordinator from those of the investigator and the decision-maker, and stipulates that all three of them must be without conflict of interest and bias. Finally, Section 106.45(b)(4)(i) partly delivers on the promise of Section 106.45(b)(1)(iii) by providing that the Title IX Coordinator cannot be the

same person as the decision-maker(s). Commentary (p. 80) clearly indicates that the Department is fashioning the Title IX Coordinator as the person who *coordinates*: he or she may not decide cases.

This is a good first step, and we applaud it.

We do not think, however, that it goes far enough to provide for the decision-maker's independence from the Title IX Coordinator. Making sure that they are two separate human beings does not address the possibility that one may be the job supervisor, job-performance evaluator, or employer of the other. Where any of these relationships pertain, a conflict of interest exists, and the no-conflict-of-interest requirement of Section 106.45(b)(1)(iii) *cannot* be satisfied.

We therefore recommend that the *Title IX Coordinator should not be an employment supervisor of the decision-maker in the school's administrative hierarchy*. If investigators or decision-makers are independent contractors, the Title IX Coordinator should not have a role in hiring or firing them. This division of roles has the additional benefit that it gives the decision-maker the power to check bias against complainants *or* respondents in the Title IX Coordinator's office.

The Proposed Rule should consider adding the following measures to bolster neutrality and independence: remove the role of counseling potential complainants from the office that coordinates the process of investigation and adjudication; require that respondents be given support similar to that provided to complainants; provide that investigators must have some degree of institutional independence; require appeals to be provided; stipulate that appeals must be handled by neutral decision-makers who are independent of any prior investigators or decision-makers.

Recommendation: Require that the decision-makers must not be answerable in the institution's administrative hierarchy, or as an independent contractor to, the Title IX Coordinator. Consider ways of further providing independence and neutrality in the process.

General Rules Requiring Due Process, Equity, and Non-Discrimination

Provisions: Section 106.45(a) and (b)(1)

Summary of provisions: These subsections provide that:

- schools can be found to discriminate on the basis of sex by mistreating either the complainant or the respondent;
- schools must follow the provisions of this section whenever they receive a formal complaint of sexual harassment;
- the parties are to be treated equitably;
- all relevant evidence must be evaluated objectively;
- coordinators, investigators, and decision-makers must be without conflicts of interest; must receive nonbiased training; may not rely on sex stereotypes; and must be impartial;

- respondents are presumed not responsible;
- timeframes must be promoted and delays for good cause must be explained in written notice to all parties;
- the school must disclose the range of possible sanctions, the standard of evidence to be used; describe any appeal process; and indicate the availability of supportive measures.

Discussion: These provisions are highly welcome and should provide lodestar guidance throughout Title IX enforcement leading to a new culture of fairness.

We would only add that, with respect to training, commentary should clarify that “trauma-informed training” can lead to bias in the investigative and adjudicative processes. The following conclusions of the University of California Post SB 169 Working Group should guide the Department:

“Trauma-informed” approaches have different meanings in different contexts. Trauma-informed training should be provided to investigators so that 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.¹

Dismissal of Meritless Formal Complaints

Provision: 106.45(b)(3)

Summary of Provision: This section provides that, where the conduct alleged in a formal complaint does not fit within the definition of sexual harassment or did not take place within a program or activity of the recipient school,² the formal complaint must be dismissed.

Discussion: Schools have not known what to do when faced with a facially meritless complaint: one that, even if supported by ample evidence, would not constitute a valid sexual harassment complaint. They have sometimes let the machinery run in an excess of caution. As a result, respondents were subjected to disciplinary proceedings that could not possibly, properly, lead to their being held responsible. We support a clear rule that will require schools to dismiss non-meritorious complaints *ab initio*.

¹ Wendy Brown, Carlos R. Moreno and Lara Stemple, Report of the Post SB 169 Working Group, p. 3.

² On the limitation of these regulations to recipient schools’ programs and activities, see Part Three below.

Even with this rule, respondents named in non-meritorious complaints may be required to disclose in their job, licensing and professional school applications that they have been accused in a campus disciplinary proceeding regarding sexual harassment. To avoid this, the rule should be amended to state that the formal procedure commences only after a decision not to dismiss on the grounds stated in this subsection.

Recommendation: Add language stipulating that the formal process commences only after the school decides not to dismiss under this rule.

Emergency Removal of Accused Students and Administrative Leave of Faculty and Staff

Provision: Section 106.45(c) and (d)

Summary of Provisions: The first of these provisions provides for emergency removal from a school's programs and activities of a student respondent only after a determination that there is an immediate threat to the health or safety of others and only where the school provides the respondent with notice and an opportunity to contest this decision. The provision stipulates that it shall not be construed to modify the respondent's rights under federal disability law. For employees, the second provision simply allows schools to place employees on administrative leave.

Discussion: We applaud the Department's requirement of sound grounds for the severe remedy of barring a student respondent from all educational programs, the requirement of some due process protections in this decision, and the "savings clause" calling attention to the fact that the respondent may have rights under IDEA, Section 504 of the Rehabilitation Act, or title II of the ADA. We do not understand why parallel protections are withheld from employees.

Recommendation: To Section 106.45(d), add all of sentence one in Section 106.45(c), from "on an emergency basis" to the end of the sentence; add "This provision shall not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973, or Title I of the Americans with Disabilities Act."

Notice

Provision: Section 106.45(b)(2)

Summary of Provision: Section 106.45(b)(2) requires that the parties must be provided with notice of the grievance-procedure rules; of the allegations with required levels of particularity; of the right to inspect evidence; and with updated notice in case of newly added allegations.

Discussion: Notice and an opportunity to be heard are the bedrock of due process. But too often, schools launch investigations without providing the accused basic information about the accusations against them, requiring them to answer questions about they know not what. This rule is an important reform.

Burden of Production and Proof Placed on the School

Provision: Section 106.45(b)(3)(i)

Summary of Provision: This subsection provides that the school, not the complainant and not the respondent, bears the burden of proof and the burden of gathering evidence.

Discussion: It is entirely appropriate that complainants not be assigned the burden of production or the burden of proof. They are seeking equal access to education; it is the school that should provide it. Removing these burdens from the shoulders of the respondent is an important part of the accused's presumption of innocence.

Full Provision of Evidence During the Investigative Process

Provision: Section 106.45(b)(3)(viii)

Summary of Provision: This subsection requires that schools disclose to parties in the formal process all evidence obtained during the investigation if it is directly related to the allegations, even if the school does not intend to rely on it in its investigative report or adjudicative process. It also requires that this evidence be conveyed through an electronic file sharing program that allows the parties to view documents on the computer screen for only 10 days, but not to download or copy them.

Discussion: We applaud the rule requiring full disclosure of evidence to both parties.

However, we believe that the non-downloading provision is unfair to both parties. In cases with even slightly complex evidentiary records, downloading is an absolute necessity. Parties cannot analyze their cases or assert their interests if they cannot collate, search, quote from, and compare documents. Downloading is essential to both parties' ability not only to make their case but also, if necessary later in time, to complain to the Department or to sue schools on meritorious claims that their rights have been violated.

The Department's justification for this provision makes loose reference to FERPA rights of *access* to documents. Nothing in FERPA demands or allows this arbitrary *limitation* on making crucial documents accessible to parties' analysis.

Recommendation: Delete the second sentence of this subsection.

Appropriate Limits to Inquiry into the Prior Sexual History of the Parties

Provision: Section 106.45(b)(3)(vi) and (vii)

Summary of Provision: These subsections – one applicable in primary and secondary education and the other in higher education – exclude evidence of the complainant's sexual history, except

for two categories of admissible sexual-history evidence: first, evidence intended to show that the wrong person is accused, and second, evidence of specific incidents intended to show consent. For institutions of higher education, which must provide a hearing with cross-examination, the Proposed Rule situates these restrictions and permissions within the rules about cross-examination. There is no provision protecting the respondent from improper inquiry into sexual history.

Discussion: It is not clear why these rules apply only at the adjudication stage, or why, within the rules about hearings at institutions of higher education, they apply only during cross-examination. The complainant’s and the respondent’s interests in the protections offered here are more general, and should apply in investigations, and, in hearings, not only during but also before and after cross-examination. These rules should be consolidated and moved to a generally applicable section of Section 106.45.

It is unclear to us why this provision protects only the complainant. The respondent also has a vital interest in privacy and in security from character assassination through the gathering of irrelevant evidence of sexual history. Omitting protection of the respondent here contradicts the effort to treat the parties equitably.

The second category of permitted evidence – specific incidents intended to show consent – omits the element of unwelcomeness, which is an essential element of any hostile environment claim. The category of evidence contemplated here would be just as relevant to showing welcomeness or unwelcomeness as to showing consent or non-consent. This omission seems to be a simple oversight. This part of this subsection should be amended include the unwelcomeness element of hostile-environment sexual harassment.

Recommendation: In Section 106.45(b)(3)(vii), delete the entire sentence beginning “All cross examination must exclude” and ending “to prove consent”; and remove the equivalent provision from Section 106.45(b)(3)(vi). Introduce a new rule about prior sexual history, modified to omit the limitation to cross-examination, in Section 106.45(a) or (b)(1). Further modify it to protect both the complainant and the respondent from improper inquiry into prior sexual history. After “... show consent,” add “or non-consent, or to show the welcomeness or unwelcomeness of the sexual conduct alleged to be unwelcome.”

Live Hearing and Elimination of the Single-Investigator Model **in Higher Education**

Provision: Section 106.45(b)(3)(vii)

Summary of Provision: This subsection requires a live hearing in the formal process in institutions of higher education. Commentary specifically indicates that the single-investigator model may not be used.

Discussion: We applaud this requirement. Many institutions follow the “investigator only” or “single investigator” model, wherein the investigator is also the adjudicator. In this model, there

is no hearing. One person conducts interviews with each party and witness, and then makes the determination whether the accused is responsible. No one knows what the investigator hears or sees in the interviews except the people in the room at the time. Neither accuser nor accused can guess what additional evidence to offer, or what different interpretations of the evidence to propose, because they are completely in the dark about what the investigator is learning and are helpless to fend off the investigator’s structural and personal biases in the evidence-gathering.

The single-investigator model also precludes the parties from probing the credibility of one another and of witnesses. As courts are increasingly concluding, only a live hearing allows parties to probe, and decision-makers to assess, the credibility of the parties and of witnesses.³

Finally, the single-investigator model collapses the evidence-gathering role with the role of deciding on the ultimate question of responsibility. Essentially, the single investigator is asked to review his or her own work for its fairness, completeness, lack of bias, and neutrality. This is a fundamental breach of the norms of due process that require neutral and independent decision-makers with a sufficient division of roles to provide a check on the fairness of each step in the process.

The hearing requirement will enhance the fairness and legitimacy of Title IX enforcement.

Cross-examination

Provision: Section 106.45(b)(3)(vii)

Summary of Provision: This subsection requires cross-examination of the parties and witnesses in hearings held by institutions of higher education. It specifies that the person who conducts cross-examination will be the advisor of the adverse party, not the party him- or herself, and that the statements of any party or witness who refuses to submit to cross-examination must be disregarded. Parties who don’t have advisors will be provided with one, who must be “aligned” with that party.⁴ Videoconferencing must be provided at the request of either party.

Discussion: We have some serious concerns about this provision. We think it is implausible that the overall legal mandate of Title IX includes an actual *requirement* of cross-examination in Title

³ *Doe v. Baum*, 903 F.3d 575, 578 (6th Cir. 2018), reh’g en banc denied, Oct. 11, 2018; *Doe v. University of Cincinnati*, 872 F. 3d 393, 299-402 (6th Cir. 2017); *Doe v. University of Southern California (USC)*, 29 Cap. App. 5th 1212 (2018), reh’g denied Dec. 27, 2018; *Doe v. Claremont McKenna College*, 25 Cal. App. 5th 1055, 1070 (2018); *Doe v. University of Michigan*, 325 F.Supp.3d 821, 830 (E.D. Mich. 2018); *Doe v. Alger*, 228 F.Supp.3d 713, 730 (W.D. Va. 2016); *Lee v. The University of New Mexico*, Case 1:17-cv-01230-JB-LF, pp. 2-3 (D. NM. Sept. 20,2018); *Doe v. University of So. Miss.*, No. 2:18-cv—00153 (S.D. Miss. Sept. 26, 2018); *Doe v. Penn. State University*, No. 4:18-CV-00164, (M.D. Pa. Aug. 21, 2018); *Doe v. Regents of University of California*, 28 Cal. App. 5th 44 (2018); *Doe v. Allee*, __ Cal. Rptr.3d __ (2019) (2nd Appl District, Div. 4). See also Brown, Moreno and Stemple, Report of the UC Post SB 169 Working Group, p. 2.

⁴ Note that the Proposed Rule contains a typo in this sentence. It currently reads: “... the recipient must provide that party an advisor aligned with that party *for to* conduct cross-examination.” (Emphasis added.)

IX school-based proceedings. The truth-seeking benefits of cross-examination in courtroom trials are well accepted, and we support proper cross-examination of parties and witnesses in sexual misconduct cases in court. But school-based hearings are not courtroom trials, and lack the formal rules and trained professionals that make cross-examination appropriate and essential in court proceedings. The Department’s Executive Summary indicates that the motive for assigning cross-examination to the parties’ advisor is to “balance[] the importance of cross-examination with any potential harm from personal confrontation between the complainant and the respondent by requiring questions[.]” But of course similar harm – to the complainant *and* to the respondent – can result from harsh questioning by the opposing party’s advisor. Whether or not they are attorneys, parties’ advisors, unchecked by the myriad rules and the legally trained judges that keep cross-examination controlled in courtroom trials, may unleash unfair and hurtful techniques that would harm parties’ educational access. Unlike in a court, the risk of harm to educational opportunity in the overall context of school-based hearings likely outweighs the benefits that traditional cross-examination offers. We believe that the Proposed Rule has not yet found the balance sought.

There is a suitable alternative that aims at the desired truth-seeking objective, yet achieves a better balance of the competing interests here. That alternative is used in the Harvard Law School Procedures for Student/Student Sexual Harassment Cases and is endorsed by the American Bar Association Criminal Justice Section and by the University of California Post SB 169 Working Group.⁵ According to this procedure, both parties are invited to submit questions to the presiding decision-maker, who proceeds to ask them. The rule must stipulate that all questions submitted must be asked unless they are irrelevant, excluded by a rule of evidence clearly adopted in advance, harassing, or duplicative. This procedure should be called “submitted questions” not “cross examination.”

We think that the risks of cross-examination within school-based hearings are so acute, and the mandate of Title IX in this respect is so uncertain, that schools should not be required to undertake it in the context of school-based hearings. The submitted-questions procedure that we propose provides ample opportunity for the parties to probe each other’s and witnesses’ credibility and consistency.

We disagree with the provision requiring the decision-maker to disregard the statements of a party who refuses to submit to cross-examination (or to answer submitted questions). This provision may have extremely harsh consequences for respondents, who may be instructed by

⁵ Harvard Law School Sexual Harassment Resources and Procedures for Students, available at <https://hls.harvard.edu/content/uploads/2015/07/HLSTitleIXProcedures150629.pdf>; American Bar Association Criminal Justice Section, 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 6 (June 2017) (“The complainant and respondent may not question one another or other witnesses directly, but should be given an ongoing opportunity during the proceeding to offer questions to be asked through the decision-maker, who will determine whether to ask them. The investigator should be available for questioning by the decision-maker(s) and the parties.”); Brown, Moreno and Stemple, Report of the U.C. Post SB 169 Working Group, p. 8 n. 20.

counsel not to answer questions in order to preserve criminal trial rights. Disregarding this person's other statements may severely distort the accuracy of the final decision. And in a proceeding in which the credibility of the complainant is crucial to the outcome, the refusal of that party to comply with required questioning can quite appropriately throw the entire case against the respondent into doubt. This is a complex terrain and we see no need for a one-size-fits-all rule. Decision-makers should be permitted to draw a negative inference from refusals to provide answers to questions when that appears to be equitable under the circumstances.

We applaud the commitment to ensure that parties without advisors will be provided one who is "on their side" for any questioning, and, like the several courts that have considered the issue,⁶ we think videoconferencing is a suitable way to reduce the level of personal distress inherent in the hearing.

Recommendations: Require schools to implement the submitted-questions procedure rather than requiring or encouraging cross-examination. In the submitted-questions procedure, require that the decision-maker ask all questions submitted unless they are irrelevant, excluded by a pre-existing rule of evidence, harassing, or duplicative. Delete the sanction for not submitting to cross-examination and substitute for it decision-maker authority to draw a negative inference from non-cooperation where the decision-maker deems that to be equitable under the circumstances.

Standard of Evidence

Provision: Section 106.45(b)(4)(i)

Summary of Provision: This subsection allows schools discretion to use a preponderance-of-the-evidence standard or a clear-and-convincing-evidence standard in determining whether a respondent is responsible. But it makes the preponderance standard permissible *only if* the recipient school uses it for student conduct code violations other than sexual harassment but that carry the same maximum sanction. Furthermore, the school can use either standard only if it *also* uses that standard in cases involving complaints against employees, including faculty.

Discussion: The Department explains its reasoning for allowing schools the option of preponderance of the evidence or clear and convincing evidence as follows. First, given the other procedural protections required in the Proposed Regulations, Title IX proceedings will be similar enough to civil litigation to justify using its evidentiary standard, the preponderance standard; but the Department is unwilling to require the use of preponderance, because the clear-and-convincing standard comports with the gravity of the accusations and their possible consequences for the respondent. Accordingly, the Department is leaving the choice of standard to recipient schools. We think this reasoning is sound.

We share the concern that using a lower evidentiary standard for Title IX cases than for other types of discipline that can lead to the same severity of sanction would, effectively, tolerate sex

⁶ See, e.g., *Doe v. Claremont McKenna College*, 25 Cal. App. 5th at 1070.

discrimination. We also believe that using a higher evidentiary standard for Title IX than a school uses, for instance, for racial harassment, could be, in effect, racially discriminatory. And we agree that an institution can check its commitment to the standard it selects by ensuring that it is willing to use that standard widely, including in the discipline of powerful constituencies.

We believe, however, that the proviso on employees should be limited, like the one on students, to discipline that can lead to the same or similar severity of sanction, so that the comparison across complex institutions is both cogent and administrable.

Availability of Informal Resolution

Provision: Section 106.45(b)(6):

Summary of Provision: This provision allows recipient schools to use informal dispute resolution methods provided that both parties consent after being fully informed of any rules precluding them from opting into formal proceedings or other important consequences attached to informal resolution.

Discussion: 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.

Informal resolution presents dangers as well as opportunities, however, inasmuch as the fairness protections offered by formality are missing. We urge the Department to monitor the evolution of informal resolution methods once they are permitted, to ensure that they do not evolve to produce unfairness for either complainants or respondents.

Acknowledgement of Other Rights

Provision: Section 106.6.

Summary of Provision: This section provides that nothing in the Proposed Rule will require a recipient school to violate the First Amendment or the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution, or to restrict other federal constitutional rights. It also provides that it should not be read to derogate from rights under Title VII.

Discussion: We believe these savings clauses are important additions to the Proposed Rules.

In addition, we have long been concerned that Title IX is having a disproportionate negative impact on men of color, which makes the protections of due process and other legal rights all the more important. There may be other demographic groups that are being subjected to a disproportionate level of allegations, disproportionate sanctions, or other unfairness. We recommend the approach recently adopted by the UC Post SB 169 Task Force: “an optional, confidential exit survey about the parties’ demographic characteristics” including “race, sex, sexual orientation, gender identity, disability, nationality, or other status.”⁷

PART TWO:

DEFINITION OF PROHIBITED CONDUCT

Many schools have unclear and overbroad definitions of sexual harassment. We welcome definitions that are clear, not under-inclusive or over-inclusive, and justifiable as preserving equal access to education on the basis of sex.

We do not comment on the proposed definition of quid pro quo sexual harassment, which is entirely conventional. We do have concerns about the definitions of hostile environment sexual harassment and about the way in which sexual assault is included.

Hostile-Environment Sexual Harassment

Provision: Section 106.44(e)

Summary of Provision: The definition of hostile environment sexual harassment reads as follows: “[u]nwelcome conduct on the basis of sex that is so severe, pervasive, *and* objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity” (emphasis added).

Discussion: The Department should provide a uniform, clear definition of hostile-environment sexual harassment. The Proposed Rule’s definition, however, is both too narrow and too broad.

The Rule should require conduct that is severe *or* pervasive, not conduct that is severe *and* pervasive. To be sure, the language in the Proposed Rule is taken directly from the Supreme Court’s Title IX case *Davis v. Monroe County Board of Education*. But there, the Court was crafting a distinctly narrowing definition of sexual harassment for a very specific purpose: to limit private parties’ access to civil lawsuits against school boards for money damages.⁸ As the

⁷ Brown, Moreno and Stemple, Report of the U.C. Post SB 169 Working Group, p. 5.

⁸ *Davis v. Monroe County Board of Education*, 526 U.S. 629, 650-2 (1999) (“...funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”; “Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect” – that is, “to have the systematic effect of denying the victim equal access to an

Davis Court acknowledged by citing *Meritor Savings Bank v. Vinson*, a Title VII case, the standard legal definition of sexual harassment is broader than the one used in *Davis*. The *Meritor* definition requires unwelcome sexual conduct that is sufficiently severe *or* pervasive so as to impair a person’s access to the protected activity.⁹

Meritor’s broader definition of hostile environment sexual harassment is thus the baseline legal definition, as the *Davis* Court recognized.¹⁰ The Court, moreover, has repeatedly affirmed the broader definition.¹¹ The Department has announced that it wants to adhere to Supreme Court law here. The Proposed Rule has simply drawn its definition from the wrong Supreme Court case: it should properly look to *Meritor*’s definition, not *Davis*’s.

The stakes are high. It is easy to imagine sexual misconduct that is severe but not pervasive: a single rape, for instance. And it is equally easy to imagine sexual conduct that is pervasive but not independently severe: sending someone hundreds of text messages asking them to go out on a date, for instance. To require the unwelcome conduct to be both severe and pervasive is under-inclusive in important ways.

At the same time, the Proposed Rule’s definition of hostile environment sexual harassment is over-inclusive. As the Supreme Court and the Department have repeatedly affirmed,¹² a hostile

educational program or activity” – “we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment.”).

⁹ *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (“For sexual harassment to be actionable, it must be sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”), cited in *Davis*, 526 U.S. at 651.

¹⁰ *Davis*, 526 U.S. at 651-53.

¹¹ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22 (1993) (“Conduct that is not severe or abusive enough to create an objectively hostile or abusive work environment ... is beyond Title VII’s purview.”); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (“Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment ... is beyond Title VII’s purview”).

¹² *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22 (1993) (“Conduct that is not severe or abusive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII’s purview.”); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (“Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII’s purview”; “And there is another requirement that prevents Title VII from expanding into a general civility code [That requirement] ... forbids only behavior so objectively offensive as to alter the ‘conditions’ of the victim’s employment”; “We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering all the circumstances.”; “We have always regarded that requirement as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace – such as male-on-male horseplay or intersexual flirtation – for discriminatory ‘conditions of employment.’”). See also Department of Education Office for Civil Rights Q&A, April 2014, p. 1 (“... OCR considers a variety of related factors to determine if a hostile environment has been created; and also considers the conduct in question *from both a subjective and an objective perspective*. Specifically, OCR’s standards require that the conduct be evaluated from the perspective of a reasonable person in the

environment claim, to be valid, must be objectively reasonable. The Proposed Rule’s definition includes no reference to this requirement. “Objective offensiveness,” adopted from the *Davis* Court’s definition, is no substitute for the general requirement that the claims regarding the elements of the hostile environment be not only subjectively valid but also objectively reasonable. Again, the stakes are high: many complaints come to Title IX officers from students who sincerely believe that they have experienced sexual harassment, thus meeting any subjective test, but which cannot survive reasonableness scrutiny.¹³ Objective reasonableness under all the circumstances is a necessary guard against arbitrary enforcement.

Recommendations: Define hostile environment sexual harassment as “unwelcome sexual conduct that is sufficiently severe *or* pervasive that it effectively denies a person equal access to the recipient’s education program or activity”; require that hostile environment claims be objectively reasonable.

Sexual Assault, as Defined in 34 CFR 667.46(a)

Provision: The Proposed Rule includes new, third form of sexual harassment: “[s]exual assault, as defined in 34 CFR 667.46(a).”

Summary of Provision: In addition to quid-pro-quo sexual harassment and hostile-environment sexual harassment, the Proposed Rule appends to its sexual-harassment definition the category of “sexual assault,” which it defines here the same way as in the Department’s regulations promulgated under the Clery Act.

Discussion: The relationship between sexual harassment and sexual assault has been confusing to commentators, school administrators, and the public for quite some time. It seems clear that the *Meritor* definition of sexual harassment includes any conduct worthy of the name sexual assault, but there is some risk that the narrower *Davis* definition would not include even highly repugnant and severe sexual assaults, if they occurred only once. (We think this is an important reason to use the *Meritor* definition, as we explain in the prior sub-part.) But even with the *Meritor* definition of hostile-environment sexual harassment, possible non-inclusion of sexual assault is a real concern. We therefore agree that it is prudent to include sexual assault explicitly in the definition of sexual harassment.

However, because the term sexual assault refers obliquely to hundreds of highly inconsistent state criminal statutes and is often used in an entirely colloquial, non-legal sense, there is no consensus on what it is. Debates about sexual assault presume that the conduct being described is normatively intolerable, but the conduct that many people think the term includes is conduct that many others find to be unobjectionable, even desirable -- even when they imagine

alleged victim’s position, considering all the circumstances. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment “; emphasis added).

¹³ Shera V. Avi-Yonah and Jamie D. Halper, “Students Filed Title IX Complaints Against Kavanaugh to Prevent Him from Teaching at Harvard Law,” *The Harvard Crimson*, October 2, 2019, available at <https://www.thecrimson.com/article/2018/10/2/students-file-title-ix-against-kavanaugh/>

themselves to be the recipients of that conduct. Specifying *what it is* is of the highest importance for fair, focused enforcement going forward.

We do not believe that the Proposed Rule's approach to this problem achieves this goal. 34 CFR 667.46(a) is part of regulations promulgated under the Clery Act to require that schools make disclosures of institutional information to students, including data about crimes of sexual assault. It defines sexual assault for this reporting purpose as "[a]n offense that meets the definition of rape, fondling, incest, or statutory rape in the FBI's UCR [Uniform Crime Reporting] Program and included in Appendix A of this subpart." The FBI's Uniform Crime Reporting Program is *another* reporting system, designed to aggregate crime data across the nation for periodic national reports. These definitions are designed to aggregate statistics on categories of crimes on a nationwide basis, to make them comparable from year to year, from state to state, from school to school, and from one large class of misconduct to other large classes of misconduct, not to provide lucid guidance about acceptable and unacceptable behavior for purposes of discipline or punishment.

It is no wonder, then, that the definitions of sexual assault found in 34 CFR 667.46(a) fail to provide meaningful guidance on what conduct schools must include in their Title IX enforcement efforts. Rape, for instance, is defined by the FBI to involve sexual penetration without consent, and does not include non-penetrative sexual assaults. Non-penetrative acts are presumably covered by "fondling," which is defined as nonconsensual touching of private body parts, but it leaves undefined what parts of the body are "private." There is no definition of consent. In short, the present text will lead to serious confusion, and the need for clarity on sexual assault is too important to leave schools to muddle through in this way.

Furthermore, the new sexual assault category introduces a large new over-inclusiveness problem. The FBI's definition of sexual assault includes statutory rape, defined as "Sexual intercourse with a person who is under the statutory age of consent." Including this category of crimes in the definition of sexual harassment under Title IX thus sweeps in *all* sexual intercourse engaged in by students who are underage in their jurisdictions, no matter how much it is wanted, consented to, and reciprocated; no matter how harmless it is to their educational opportunity; and no matter how socially equal the parties to the sexual encounter are. Many states' age of consent is 18, and many young people under this age are sexually active, most often with other young people. Under the Proposed Rule, if a school acquires actual knowledge that a student has had intercourse while underage with another underage student, this provision could lead it to sanction them both for sexual harassment – without regard to severity or pervasiveness, and without regard to detriment to educational access, much less denial of educational opportunity because of sex. The rule threatens to turn Title IX enforcement in high schools and among first-year college students into a repressive monitor of youth sexuality.

We respectfully propose the following definition of sexual assault, which we believe includes the most important elements of the states' many criminal provisions on this subject:

Sexual assault is the penetration or touching of another's genitalia, buttocks, anus, breasts, or mouth without consent.

A person acts without consent when, in the context of all the circumstances, he or she should reasonably be aware of a substantial risk that the other person is not voluntarily and willingly engaging in the conduct at the time of the conduct.

Note that this definition includes both penetration and touching; that it specifies the body parts involved quite clearly; and that it frames the violation as penetration or touching without consent. The consent requirement is clearly defined: the factfinder must conclude that, under all the circumstances, the accused should reasonably have been aware of a substantial risk that the other person was not voluntarily and willingly engaging in the sexual conduct in question. This is the modal understanding of non-consent today. And, as one of us has extensively shown, the embrace of “affirmative consent” as a growing aspirational concept on college campuses is dangerously over-inclusive for the focused purposes of discipline or punishment.¹⁴ Though debates in this area will never be entirely settled, our proposed definition of sexual assault, we believe, represents a faithful rendering of the state of the law today. It is sufficiently clear to give notice to the public of what conduct they must not commit; it is administrable; it is sufficiently inclusive to capture wrongful conduct, and it is sufficiently limited to prevent its use to punish non-wrongful conduct. Including it in the definition of sexual harassment under Title IX will usefully enhance the clarity of the entire regime.

Finally, the new element of sexual assault should be firmly tethered to the central mission of Title IX: the preservation of students’ equal access to education. We propose a simple solution, to specify “sexual assault that effectively denies a person equal access to the recipient’s education program or activity.”

Recommendation: We urge that the Rule replace the definition of sexual assault with the following:

Sexual assault is the penetration or touching of another’s genitalia, buttocks, anus, breasts, or mouth without consent.

A person acts without consent when, in the context of all the circumstances, he or she should reasonably be aware of a substantial risk that the other person is not voluntarily and willingly engaging in the conduct at the time of the conduct.

Include language specifying that the third form of sexual harassment is “sexual assault that effectively denies a person equal access to the recipient’s education program or activity.”

¹⁴ Janet Halley, “The Move to Affirmative Consent,” 42 *Signs* 257 (2016), available at <http://signsjournal.org/currents-affirmative-consent/halley/>.

PART THREE:
SCHOOL'S LEGALLY REQUIRED RESPONSE TO ALLEGATIONS OF
PROHIBITED CONDUCT

The Proposed Rule limits a school's responsibility to respond to allegations of sexual harassment to conduct in its programs and activities. It provides that schools will be held to be in violation of Title IX only if they respond with deliberate indifference to allegations of sexual misconduct of which they have actual knowledge. It also provides that schools will not be held to have responded with deliberate indifference if they bring themselves within one of three safe harbors.

Conduct in a Program or Activity of the School

Provision: Section 106.44(a)

Summary of Provision: This provision, and the related commentary, provide that the school's Title IX responsibilities extend to conduct committed anywhere within its educational programs and activities but not beyond them. The commentary explains that it extends to activities at off-campus private entities like fraternities if the school actively "devotes significant resources to the promotion and oversight of" those entities or otherwise explicitly includes those entities in its programs and activities.

Discussion: We believe that this inappropriately narrows Title IX enforcement. Where one student is sexually harassed by another student in an off-campus setting that is not connected to any official program or activity of the school, the *effects* of that violation may arise on campus and produce a highly discriminatory impact on the victim's access to education. This will be the case when both the victim and the perpetrator share the common environment of the school's programs and activities. Consider a simple hypo: a student is raped by another student in a fraternity that is entirely without any support or oversight from the school. They arrive the next day in the same chemistry class, and have assigned seats right next to each other. To enable equal access to education, Title IX requires the school to supply supportive measures to this hypothetical victim, and to sanction the hypothetical assailant. (Of course, a fair procedure is needed to determine whether the facts presumed in this hypo pertain.)

The Department's commentary depends on an argument that schools should not be held responsible for settings over which they have no control. But schools do not enjoy complete control over many settings even *within* their programs and activities. They can engage in prevention activities but they cannot completely prevent wrongful conduct; they can deter but not preclude misconduct. Furthermore, the devotion of resources has no necessary relationship to effective oversight. The Department's focus on resource provision and control are legal fictions. The focus should be on access to education, and that turns on education-constricting effects on the educational experience of an individual due to the alleged offender's discriminatory conduct.

Recommendation: This provision should be revised to provide that schools must provide Title IX remedies when a complainant's educational opportunity is concretely impaired by conduct in the school's educational programs and activities, or by the conduct of the school's students, staff, or faculty.

The Safe Harbors

Provision: Section 106.44(b)

Summary of Provision: The Proposed Rule provides three safe harbors from a finding of deliberate indifference: when, in response to a formal complaint, a school follows the procedures spelled out in section 106.45 (discussed in our Part One and Part Two above); when, upon gaining actual knowledge of multiple reports of sexual harassment by the same respondent, it files a formal complaint; and when, faced with a potential complainant who declines to file a formal complaint, it nevertheless offers that person supportive measures.

Discussion: We strongly object to the drafting of the second safe harbor. This provision assures schools that they will not be held to have acted with deliberate indifference if, when they have actual knowledge of multiple allegations against a single respondent but no formal complaint against that person, the school files a complaint. There are severe costs to doing this. Overriding the decision of alleged victims in this way exposes them to a very serious change in their educational experience and violates their autonomy. It also imposes a heavy detriment upon the respondent – who now has been accused in a campus sexual wrongdoing procedure and will have to disclose this fact on many academic, licensing, and employment applications – without any consideration of whether the accusations against him or her have any likelihood of being supported by adequate evidence. Note that students occasionally mount political campaigns against particular individuals involving multiple, non-meritorious Title IX complaints: schools should not be pressured by the government to convert these into formal complaints in order to avail themselves of a safe harbor. Finally, it is not the multiplicity of accusations – which, in an age of social media, may proliferate even without substantive merit – but the gravity of the threat to *any* alleged victim who is unwilling to come forward and/or to public wellbeing that justifies overriding the autonomy of alleged victims and changing so substantially the social position of the respondent.

The array of such situations is so varied that the Department should not push schools to uniformly file formal complaints.

This provision should be revised to provide a safe harbor for schools that respond promptly, effectively, and equitably when they reasonably conclude, after an appropriate preliminary investigation, that a substantial and ongoing threat of significant harm to a single alleged victim, to multiple alleged victims, or to public safety is indicated by allegations of which they have actual knowledge but where there is no one willing to file a formal complaint.

Recommendation: Revise Section 106.44(a)(2) to provide a safe harbor for schools that respond promptly and effectively when they reasonably conclude, after an appropriate preliminary

investigation, that a substantial and ongoing threat of severe or pervasive harm is posed to a single alleged victim, to multiple alleged victims, or to public safety but where there is no one willing to make a formal complaint.

The Deliberate Indifference Standard

Provision: Section 106.44(a).

Summary of Provision: Where the safe harbors do not apply, schools will be held to have violated Title IX only when they have actual knowledge of sexual harassment allegations and respond in a manner that is not deliberately indifferent. Deliberate indifference is equated to acting clearly unreasonably under the known circumstances.

Discussion: We strongly object to this standard.

Here again the Department imports into general sexual harassment law another element of the special narrowing language that the Supreme Court adopted in *Davis v. Monroe County* in order to limit schools' exposure to lawsuits for money damages.¹⁵ See the discussion of *Davis* in Part Two above. The Proposed Rule now promises that schools' entire enforcement obligation corresponds with its *Davis* liability exposure.

This is far too permissive. It substantially undercuts recipient schools' responsibility to adhere to the requirement of Title IX itself:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]¹⁶

Anti-discrimination law imposes an obligation on those it regulates not to discriminate. It is not enough to hold them responsible only when they engage in egregious institutional misconduct.

Much of the public outcry about the Proposed Rule arises from the needless complexity of the deliberate indifference/safe harbors structure of this provision, and the perception of many that *all* a school would need to do to comply is to refrain from being deliberately indifferent to sexual wrongdoing in its programs and activities. We urge that the "deliberate indifference" or "clear unreasonableness" standard be abandoned and replaced with a simple unreasonableness standard, that the safe harbors be presented as requirements, and that the Department affirm its commitment to robust nondiscrimination in federally funded educational institutions.

Recommendations: Delete Section 106.44(a)'s deliberate indifference standard and replace it with a statement that schools will be held to have violated Title IX when they have responded

¹⁵ *Davis*, 119 S.Ct. at 650 ("We thus conclude that funding recipients are properly *held liable in damages* only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.") (emphasis added).

¹⁶ 20 U.S. Code Section 1681.

unreasonably to sexual harassment allegations. Recast the safe harbors of Section 106.44(b) as obligations of recipient schools.

PART FOUR:
DIRECTED QUESTIONS

In this Comment, above, we have provided answers to several of the Department's Directed Questions:

Directed Question 3. Applicability to employees. See Emergency Removal of Accused Students and Administrative Leave of Faculty and Staff, above, p. 7.

Directed Question 4. Training. See General Rules Requiring Due Process, Equity, and Non-Discrimination, above, p. 5.

Directed Question 5. Individuals with disabilities. See Emergency Removal of Accused Students and Administrative Leave of Faculty and Staff, above, p. 7.

Directed Question 6. Standard of Evidence. See Standard of Evidence, above, p. 12.

Inquiries please contact:

Jeannie Suk Gersen, jsg@law.harvard.edu

Nancy Gertner, ngertner@law.harvard.edu

Janet Halley, jhalley@law.harvard.edu