

Letter re: June 7-11, 2021 Title IX Hearing

Re: 34 CFR Part 106 (August 14, 2020)

Nondiscrimination on the Basis of Sex in Education Programs or Activities

Receiving Federal Financial Assistance

Office for Civil Rights, Department of Education

Submitted June 11, 2021

Respectfully,

Janet Halley

Royall Professor of Law

Harvard Law School

Jeannie Suk Gersen

John H. Watson, Jr. Professor of Law

Harvard Law School

Judge Nancy Gertner (ret.)

Senior Lecturer on Law

Harvard Law School

Lara Bazelon

Professor of Law

Barnett Chair in Trial Advocacy

University of San Francisco School of Law

Dan Roth

Law Office of Dan Roth

Joshua Adam Engel

Managing Partner, Engel & Martin, LLC

Institutional affiliations are provided for identification purposes only.

Thank you for the opportunity to submit a letter related to the public hearing on Title IX held by the Department of Education Office for Civil Rights (“OCR”) on June 7-11, 2021. This hearing follows the adoption of Title IX regulations found at 34 CFR Part 106, which became effective August 14, 2020.

We are law school professors and legal practitioners who have researched, taught, written, and litigated on Title IX, sexual harassment, and sexual assault. Some of us have defended students and faculty accused of Title IX violations; within that sub-group, several of us defend almost exclusively students of color, students who are part of the LGBTQ community, and students from other marginalized groups. Some of us have advised Title IX complainants. And some of us advise both complainants and respondents.

We submit our letter to assist OCR in achieving its goal with this hearing, which is two-fold: to ensure that students are (1) allowed to pursue their education free from sexual harassment and assault and (2) treated fairly in the adjudicatory process—whether they are the complainant or the respondent—designed to investigate and resolve allegations of sexual harassment and sexual assault.

PART ONE:

DUE PROCESS

We share the concerns that animated the Dear Colleague Letter of 2011 (DCL), which acknowledged the prevalence of sexual assault on campus and the unwillingness or inability of many schools to adequately address it. Nothing in this letter should be taken to minimize the importance of the problem or the impact of sexual assault on victims, and we share the goal of eliminating sexual assault on campus.

We write because, in our view, in the years that followed the publication of the DCL, schools often went far beyond the few clear directives contained in it (and in OCR’s subsequent 2014 Q&A) out of fear of attracting negative attention from OCR. The results, as documented in a number of judicial decisions in state and federal courts around the country, were clear violations of individuals’ rights to due process. Due process is fundamental to our constitutional democracy, and has been since the nation’s founding. It is enshrined in the Fifth and Fourteenth Amendments, which guarantee equal protection and due process of law to every person in the jurisdiction of the United States. The various due process protections under discussion enhance both the truth finding function and faith in institutions.

In the Title IX context, due process protections are intended to assure the accuracy and reliability of investigations and adjudications that can result in the deprivation of an education. Departures from traditional due process protections have led to a loss of legitimacy for important Title IX enforcement. Due process protections are often portrayed as creating barriers to victim participation. We believe this is incorrect. Due process protections should be seen as supporting victims by enabling all parties to be heard, bolstering the search for the truth, and increasing the credibility of outcomes.

The Office for Civil Rights, in adopting the 2020 Regulations, committed itself to reforming unfair Title IX processes. The current Administration seeks to review those changes and solicit views on all points on the spectrum. We write to underscore the importance of certain aspects of the 2020 Regulations, particularly as they relate to due process protections in adjudicatory Title IX proceedings. We do not embrace the 2020 Regulations as a whole and indeed disagree with certain aspects of them. Where applicable, we discuss our disagreements.

Neutral and Independent Decision-makers

Provisions: 34 C.F.R. Sections 106.8(a), 106.45(b)(1)(iii), and 106.45(b)(7)(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)(7)(i) provides that “decision-maker(s) ... cannot be the same person(s) as the Title IX Coordinator or investigator[.]”

Discussion: These provisions make clear that the provision of neutral and independent decision-makers and a division of roles among them are fundamental aspects of due process. Prior to the adoption of the 2020 Regulations, too many schools lacked a process with separated roles and a neutral decisionmaker. For example, at some schools, the Title IX Coordinator counseled complainants on how to make their cases but had no such obligation to similarly counsel respondents. More concerning still, many schools adopted a “single investigator system” in which one person conducted investigations, made all findings of fact, and decided on responsibility. In some schools, that same individual also assigned sanctions, and even heard appeals from their own prior work. Many of these systems provided no hearing, so that the “single investigator”—whether that person was the Title IX Coordinator or someone who answered directly to that person—had plenary power on the question of responsibility. Exacerbating the bias that would naturally arise from having to play these multiple roles was the fact that at many schools, the Title IX Coordinator was 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, the investigator—who must be independent and neutral—and the decision-maker, whether that decision-maker is a single individual or a hearing panel. 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. The advocate role should never be played by the Title IX Coordinator.

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)(7)(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).

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. The Title IX Coordinator also should not be responsible for providing training to investigators and decision-makers. 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.

We ask that OCR consider amending the 2020 Regulations to add 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, decisionmakers and those to whom appeals may be made must have some degree of institutional independence from each other and from the Title IX Coordinator.

General Rules Requiring Due Process, Equity, and Non-Discrimination, and Controlling Bias and Conflicts of Interest, in Title IX Administration

Provisions: Section 106.45(a),(b)(1), and (b)(8)

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;¹

¹ We also caution against the use of “trauma-informed training,” which counsels investigators to disregard discrepancies, falsehoods, and inconsistencies in the accounts of complainants under the theory that these issues are due to trauma and cannot point to a lack of credibility. Trauma-informed training has been subject to significant criticism for its lack of empirical validity and its operating premise that all allegations should be believed. See ATIXA Position Statement on Trauma-Informed Training and the

- coordinators, investigators, and decision-makers must serve impartially; avoid prejudgment of the facts at issue; be without conflicts of interest; and receive nonbiased training; and may not rely on sex stereotypes;
- 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; and
- appeal must be available to challenge conflicts of interest and/or bias tainting the process.

Recommendation: These provisions should be left intact, as they are vital to ensuring that the Title IX investigatory and adjudicatory processes are fair to both complainants and respondents. Removing them would send a malign message: that due process and impartial decisionmaking are not values of Title IX enforcement.

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.

Recommendation: We support this regulation. 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, ever lead to their being held responsible for a policy violation. Complainants were given false hope that, if substantiated, their complaints would lead to a finding of responsibility and discipline of the accused. We support a clear rule that requires schools to dismiss non-meritorious complaints *ab initio*.

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

Neurobiology of Trauma, August 16, 2019, <https://cdn.atixa.org/website-media/atixa.org/wp-content/uploads/2019/08/20123741/2019-ATIXA-Trauma-Position-Statement-Final-Version.pdf>. To be clear, we have no opposition to trauma informed training that ensures that investigators do not re-traumatize those bringing allegations. But that training must be separate and distinct from the training used to evaluate the allegations themselves.

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

be amended to state that the formal procedure commences only after a decision not to dismiss on the grounds stated in this subsection.

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

Provision: Section 106.44(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 physical health or safety of others and only where the school provides the respondent with notice and an opportunity to contest this decision immediately following removal. 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: The Administration should amend the 2020 Regulations' requirement of sound grounds for the severe remedy of barring a student respondent from all educational programs, by adding that an allegation alone is insufficient to trigger removal. At least one major public school district in California is currently removing students without any factual basis other than an allegation.

Parallel protections should be provided to employees.

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.

Recommendation: Notice and an opportunity to be heard are the bedrock of due process. Before the adoption of the 2020 Regulations, some schools launched investigations without providing the accused basic information about the accusations against them, requiring them to answer questions in a vacuum. This rule is an important reform and should be kept in place.

Burden of Production and Proof Placed on the School

Provision: Section 106.45(b)(5)(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.

Recommendation: 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.

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

Provision: Section 106.45(b)(6)(i) and (ii)

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. There is no provision protecting the respondent from improper inquiry into sexual history.

Recommendation: It is unclear to us why this provision protects only the complainant. We are aware of situations where investigators engaged in wide-ranging inquiries into the sexual history of respondents, including asking about all prior sexual partners. 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 regulation should be amended to provide the same protection to the respondent.

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

Provision: Section 106.45(b)(6)(i)

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

Recommendation: This provision of the 2020 Regulations is crucial. Before the adoption of the 2020 Regulations, many institutions followed 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; at best parties must rely on reports provided by the investigator, which are of doubtful accuracy. 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 enhances the fairness and legitimacy of Title IX enforcement.

The Department should not attempt to prescribe the exact method by which a college or university must implement a hearing requirement. We believe that the Department should, instead, clarify that a hearing include, at a minimum, the following procedural guarantees: (i) an unbiased decision-maker; (ii) notice of the alleged violations; (iii) ability to view and challenge all of the evidence used against the respondent, as well as all exculpatory evidence collected during the investigation; (iv) ability to present a defense; and (v) the ability to question adverse witnesses.

Cross-examination

Provision: Section 106.45(b)(6)(i)

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. It also provides that the decision-maker may not rely on the statements of any party or witness who refuses to submit to cross-examination, provided that a determination regarding responsibility may not be based solely on a negative inference from such refusal. Parties who don't have advisors will be provided with one. Videoconferencing must be provided at the request of either party.

Recommendation: Were this aspect of the 2020 Regulations to be amended, there is a suitable alternative that aims at the desired truth-seeking objective. That alternative was used in the Harvard Law School Procedures for Student/Student Sexual Harassment Cases, from 2015 to 2020, and was endorsed by the American Bar Association Criminal Justice Section and by the

³ *Doe v. Univ. of the Scis.*, 961 F.3d 203, 215 (3d Cir. 2020); *Doe v. Baum*, 903 F.3d 575, 578 (6th Cir. 2018), *reh'g en banc denied* (Oct. 11, 2018); *Doe v. Univ. of Cincinnati*, 872 F. 3d 393, 399-402 (6th Cir. 2017); *Lee v. The Univ. of N.M.*, 449 F. Supp. 3d 1071, 1124-26 (D.N.M. 2020); *Doe v. Univ. of So. Miss.*, 361 F. Supp. 3d 597 (S.D. Miss. 2019); *Doe v. Penn. State Univ.*, 336 F. Supp. 3d 441, 450-51 (M.D. Pa. 2018); *Doe v. Univ. of Mich.*, 325 F. Supp. 3d 821, 830 (E.D. Mich. 2018), *vacated on other grounds*, Nos. 18-1870, 18-1903 (6th Cir. Apr. 10, 2019); *Doe v. Alger*, 228 F. Supp. 3d 713, 730-31 (W.D. Va. 2016); *Doe v. Allee*, 242 Cal. Rptr. 3d 109, 134 (2019); *Doe v. Univ. of S. Cal. (USC)*, 241 Cal. Rptr. 3d 146, 163-64 (2018), *reh'g denied* (Dec. 27, 2018); *Doe v. Regents of Univ. of Cal.*, 238 Cal. Rptr. 3d 843, 856 (2018); *Doe v. Claremont McKenna Coll.*, 236 Cal. Rptr. 3d 655, 666 (2018).

University of California Post SB 169 Working Group.⁴ According to this procedure, each party is invited to submit questions to the presiding decision-maker, who proceeds to ask them to the other party. 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.”

Availability of Informal Resolution

Provision: Section 106.45(b)(9)

Summary of Provision: This provision allows recipient schools to use informal dispute resolution methods, including mediation and restorative justice, 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.

Recommendation: 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. This aspect of the 2020 Regulations is important and should be retained.

Acknowledgement of Other Rights

Provision: Section 106.44(a).

Summary of Provision: This section provides that nothing in the Regulations 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.

⁴ 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.

Discussion: We believe these savings clauses are important provisions.

In addition, we have long been concerned that Title IX is having a disproportionate negative impact on people of color and members of the LGTBQ community, 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.

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 definition of quid pro quo sexual harassment, which is entirely conventional. We do have concerns about the definitions of hostile environment sexual harassment.

Hostile-Environment Sexual Harassment

Provision: Section 106.30

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

Recommendation: The Department should provide a uniform, clear definition of hostile-environment sexual harassment. The definition provided in the 2020 Regulations, however, is too narrow. We recommend that it be amended as follows.

The Rule should require conduct that is severe *or* pervasive, not conduct that is severe *and* pervasive. To be sure, the language in the 2020 Regulations 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.⁵ As the

⁵ *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 educational program or activity” – “we think it unlikely that Congress would have thought such behavior

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.⁶

Meritor’s broader definition of hostile environment sexual harassment is thus the baseline legal definition, as the *Davis* Court recognized.⁷ The Court, moreover, has repeatedly affirmed the broader definition.⁸ Simply put, the 2020 Regulations have drawn their definition from the wrong Supreme Court case.

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. Both forms of conduct could dramatically impact a student’s equal access to education. To require the unwelcome conduct to be both severe and pervasive is under-inclusive in important ways.

At the same time, we applaud the introduction of the reasonable person standard. Without it, the definition of sexual harassment would be over-inclusive. As the Supreme Court and the Department have repeatedly affirmed,⁹ to be valid, a hostile environment claim must be

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.”).

⁶ *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.

⁷ *Davis*, 526 U.S. at 651-53.

⁸ *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”).

⁹ *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

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. Objective reasonableness under all the circumstances is a necessary guard against arbitrary enforcement and should be retained in the regulations' definition of hostile environment.

Sexual Assault

Provision: Section 106.30

Summary of Provision: In addition to quid-pro-quo sexual harassment and hostile-environment sexual harassment, the 2020 Regulations include in its sexual harassment definition the category of “[s]exual assault” as defined in the Clery Act.

Discussion: The question of what is “sexual assault” has been confusing to commentators, school administrators, and the public for quite some time. Because the term is in hundreds of inconsistent statutes and is often used in a colloquial, non-legal sense, there is little consensus on what it means. Specifying what it is for the purposes of Title IX is of the highest importance for fair, focused enforcement. The 2020 Regulations attempt to do so with reference to Clery Act definitions. Those provisions use the term “consent” in defining sexual assault, but do not define consent. Thus the 2020 Regulations leave each school to define “consent” as it sees fit, with the result that consent definitions adopted not only vary from school to school but may be too broad, too narrow, vague, ad hoc, or nonexistent. The results may risk over-inclusiveness, under-inclusiveness, unfairness and lack of notice.

We respectfully propose that the Department adopt the following definition of consent, which we believe includes the most important elements of the states' provisions on this subject:

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.

In this consent definition, the factfinder must conclude that, under all the circumstances, a party 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.

For the focused purposes of discipline or punishment, the concept of “affirmative consent” as an aspirational concept is over-inclusive and vague. Though debates in this area will never be entirely settled, our proposed definition of consent is sufficiently clear to give notice of what conduct a party 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

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).

conduct. Including it in the definition of sexual harassment under Title IX would usefully enhance the clarity of the entire regime.

PART THREE:

SCHOOL’S LEGALLY REQUIRED RESPONSE TO ALLEGATIONS OF PROHIBITED CONDUCT

The 2020 Regulations limit 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.

Conduct in a Program or Activity of the School and in the United States

Provision: Section 106.44(a)

Summary of Provision: The school’s Title IX responsibilities are triggered when it has “actual knowledge of sexual harassment in an educational program or activity . . . against a person in the United States[.]” The school’s “program or activity” includes “locations, events, or circumstances over which the recipient exercised substantial control . . . and also includes any building owned or controlled by a student organization that is officially recognized by” the school. Furthermore, the conduct must have occurred “in the United States.”

Discussion: We believe that this inappropriately narrows the Title IX responsibilities of schools. 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, or in a building that is not controlled by any recognized student organization, the *effects* of that harassment may arise on campus and produce a highly discriminatory impact on the victim’s access to education. Consider a simple hypothetical: a student is raped by another student in a fraternity that is unrecognized by 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, the school should supply supportive measures to this hypothetical victim and sanction the hypothetical assailant. (Of course, a fair procedure is needed to determine the facts presumed in this hypothetical.) Yet the 2020 Regulations treat the sexual misconduct as not covered by Title IX and therefore permits schools not to address the conduct or to address it outside of the Department’s regulations.

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. The focus should be on access to education, and that turns on education-constricting effects on an individual due to the alleged offender’s discriminatory conduct.

Similarly, limiting Title IX enforcement to conduct committed within the United States is under-inclusive. Schools' programs and activities often include educational opportunities taking place abroad. Sexual harassment taking place in those settings can severely impact the educational opportunity of a person attending school within the United States. To see why, merely modify our hypothetical so that the rape occurs in a study abroad program in a foreign country, and the two students involved return to campus inside the United States and are required to sit together in class there. The extraterritoriality discussion in the Preamble misreads Title IX, which provides that "no *person* in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance."¹⁰ Converting this clear statement into a requirement of *conduct* within the United States is fanciful.

Finally, the dramatic underinclusiveness of these provisions has had a malign effect on due process in student discipline across the country. Schools have reacted by creating what we call two-tier systems: one enforcing this excessively narrow conception of Title IX sexual harassment and compliant with the Regulations, and another addressing extramural wrongful conduct without the important due process protections required by the Regulations. These provisions are effectively a license for schools to maintain unfair disciplinary procedures. They should be removed. We address the two-tier problem below.

Recommendation: The Department should clarify 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 as a direct result of the conduct of the school's students, staff, or faculty. The Department should clarify that all sexual misconduct allegations involving conduct that impairs access to the school's education programs or activities must be resolved in accordance with the Department's regulations, regardless of location.

The Deliberate Indifference Standard

Provision: Section 106.44(a)

Summary of Provision: The 2020 Regulations create broad liability protections for schools. Specifically, 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 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

¹⁰ 20 U.S.C. 1681 (emphasis added).

to limit schools' exposure to lawsuits for money damages.¹¹ See the discussion of *Davis* in Part Two above. The 2020 Regulations equate the entire enforcement obligation of schools with their *Davis* liability exposure. This legal standard substantially undercuts recipient schools' responsibility to adhere to the requirement of Title IX.

Anti-discrimination law imposes an obligation on those it regulates not to discriminate "on the basis of sex." It is not enough to hold schools responsible for Title IX violations only when they engage in egregious institutional misconduct.

Much of the public outcry over the 2020 Regulations arises from the perception that *all* a school need do to insulate itself from liability is to refrain from being deliberately indifferent to sexual wrongdoing of which they have actual knowledge in school programs and activities. In determining whether a school responded reasonably to harassment, the Department should consider the full scope of the school's response including before and after the school became aware of the harassment.

Recommendations: We urge that the "deliberate indifference" or "clear unreasonableness" standard be abandoned and replaced with a simple unreasonableness standard, and that the Department affirm its commitment to robust nondiscrimination in federally funded educational institutions. The Department should clarify that a school can be liable for harassment taking place both before and after the school had actual knowledge, if the school acted unreasonably.

A Two-Tier System

Provision: Section 106.45(b)(3)

Summary of Provision: This section provides that "[i]f the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint," but that "such a dismissal does not preclude action under another provision of the recipient's code of conduct."

Discussion: Many schools believe that the 2020 Regulations excessively narrowed the definition of sexual harassment, unduly limited Title IX's reach to sexual harassment that occurs within the recipient's education program or activity, and required a too-burdensome grievance procedure involving a live hearing and cross-examination. As a result of the disagreement, many schools responded to the 2020 Regulations by adopting a two-tier system in which they have a policy and procedure for handling sexual misconduct that is covered by the 2020 Regulations, and another, separate policy and procedure for handling other sexual misconduct that is not covered by the 2020 Regulations. In this two-tier system, identical conduct is adjudicated subject to different

¹¹ *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).

sets of procedures based on the fortuity of the location of the conduct. And sexual misconduct that takes place within a school's program or activity but is deemed to lie outside the 2020 Regulations' definition of "sexual harassment" is adjudicated using procedures specifically designed to avoid a live hearing and other basic fairness requirements of a Title IX grievance procedure. This bifurcated system has arisen because schools believe that, in order to preserve equal access to education, it is important to address (1) sexual misconduct that impairs a person's access to the school's programs or activities, whether or not the misconduct takes place within the school's programs or activities; and (2) sexual misconduct that is broader what the 2020 Regulations define as "sexual harassment."¹²

The bifurcation unfortunately creates two classes of complainants and respondents in sexual misconduct cases, those who get live hearings and those who do not. It sets up parties in each class to feel they are being treated less well than parties in the other class, particularly when the misconduct they are complaining or accused of is identical but occurred in programs, activities, and/or locations that are differently categorized. If the goal is to provide a fair process for all parties equitably, then the bifurcation of procedures undermines that goal in both its effect and its message.

The bifurcation is also concerning to the extent that some recipients have created the two tiers for the purpose of avoiding the basic Title IX grievance procedure where it is possible to avoid it. Allowing this bifurcation to continue makes it likely that some schools will similarly feel justified in circumventing this Administration's rules or guidance implementing civil rights statutes in the same manner that some schools are avoiding procedures required by the current Title IX Regulations.

Recommendation: The Department should clarify that notwithstanding section 106.45(b)(3)'s reference to a recipient's ability to address conduct "under another provision of the recipient's code of conduct," a recipient must resolve an allegation of *sexual misconduct that impairs access to the school's education programs or activities*, regardless of whether it occurred within the school's programs or activities, in accordance with the Department's Title IX grievance procedures. Only if the sexual misconduct is *not* alleged to impair access to the school's programs or activities, or only if the alleged misconduct is not sexual in nature, should the school be permitted to use an adjudication procedure that does not follow the grievance procedure set out in the Department's Regulations.

¹² For example, Harvard University responded to the 2020 Regulations by creating a new two-track system: The [Interim Title IX Sexual Harassment Policy](#) ("Policy 1") and its accompanying [Procedures](#) ("Procedures 1") apply to complaints governed by the 2020 Regulations and involve a live hearing as the Regulations require. The [Interim Other Sexual Misconduct Policy](#) ("Policy 2") and its accompanying [Procedures](#) ("Procedures 2") purport to operate outside the jurisdiction of the 2020 Regulations and do not involve a live hearing.