

**From:** (b)(6)  
**Sent:** Fri, 11 Jun 2021 10:19:02 -0400  
**To:** T9PublicHearing  
**Subject:** Written Comment: Title IX Public Hearing; Title IX Regulations in the K-12 Educational Environment  
**Attachments:** Coalition for Title IX.docx

**CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.**

Public Comment of Coalition for Title IX

The attached document was part of the Administrative Record leading to adoption of the Title IX regulations that went into effect in 2020.

The considerations in the attached document are directly pertinent to the new Public Hearings addressed to possible revision of the 2020 regulations.

The attached document is hereby incorporated into this comment as if fully set forth herein and is hereby made a part of the Administrative Record in the 2021 Public Hearings.

January 30, 2019

Kenneth L. Marcus  
Assistant Secretary for Civil Rights  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, DC 20202-1100

*Re: Comment and Recommendations on Proposed Rulemaking, Docket ID ED-2018-OCR-0064-0001 "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance."*

Dear Mr. Marcus,

We respectfully submit the following comment and recommendations regarding the above-captioned rulemaking, which would amend 34 CFR Part 106. This proposed rulemaking can also be found at 83 Fed. Reg. 61,462 (Nov. 29, 2018).

We sincerely hope that these comments and recommendations prove helpful as the Department of Education's Office for Civil Rights reviews its proposed rules. Thank you for providing the public with the opportunity to review and comment on these proposed regulations.

Respectfully submitted,

Coalition for Title IX

**Table of Contents**

*Page(s)*

- I. Preamble to Specific Comments on the Proposed Rule .....5
  - A. The Department of Education Has the Authority to Issue “Procedural” Regulations .....5
    - 1. Congress Has Directed the Department of Education to Issue Rules Effectuating Title IX’s Prohibition on Discrimination .....5
    - 2. The Department of Education Is Authorized to Promulgate and Enforce Requirements That Effectuate Title IX’s Nondiscrimination Mandate .....6
    - 3. The Procedures in the Proposed Rules Are a Reasonable Means of Effectuating Title IX’s Prohibitions on Sex Discrimination .....7
    - 4. Procedural Protections Are a Reasonable Means of Effectuating a Bar on Retaliation .....11
    - 5. The Regulations Are an Especially Appropriate Means of Addressing Sex Discrimination Because They Are Sex-Neutral .....12
  - B. Gender Bias and Gender Stereotyping in University Disciplinary Processes Are Serious Problems on College and University Campuses .....12
  - C. Any Rule Promulgated by the Department Must Adequately Address Procedural and Remedial Weaknesses in Existing College and University Disciplinary Processes .....13
    - 1. Any Rule Promulgated by the Department Should Make Colleges and Universities Responsible for Ensuring that Adjudicators Are Unbiased .....13
    - 2. Any Rule Promulgated by the Department Should Guarantee an Accused’s Right to Cross-Examine an Accuser Even when the Accused Refuses the Help of an Advisor .....14
      - a. Cross-examination Is a Bedrock of Our Legal System Because of Its Ability to Bring Out the Truth .....14
      - b. The Right to Represent Oneself.....15
      - c. The Balance of Interests Under *Mathews v. Eldridge* Requires the Accused to Have the Chance to Confront the Accuser Even in the Sexual Assault Context .....16

3.	Any Rule Promulgated by the Department Should Ensure the Burden of Proof in Proceedings Threatening Expulsion, Prolonged Suspension, or Withholding a University Degree Is “Clear and Convincing Evidence” .....	17
II.	Specific Comments on the Proposed Rule.....	18
A.	Specific Provisions of the Proposed Rule.....	18
1.	Proposed Section 106.30: <i>Actual Knowledge</i> .....	18
2.	Proposed Section 106.30: <i>Formal Complaint</i> .....	18
3.	Proposed Section 106.30: <i>Sexual Harassment</i> .....	19
4.	Proposed Section 106.30: <i>Supportive Measures</i> .....	20
5.	Proposed Section 106.44(b)(1): Specific Circumstances .....	20
6.	Proposed Section 106.45(c): Emergency Removal .....	21
7.	Proposed Section 106.45(b)(1)(ii): Basic requirements for grievance procedures (objective evaluation of all relevant evidence).....	22
8.	Proposed Section 106.45(b)(1)(iii): Basic requirements for grievance procedures (coordinator, investigator, or decision-maker).....	23
9.	Proposed Section 106.45(b)(1)(iii): Basic requirements for grievance procedures (availability of training materials) .....	23
10.	Proposed Section 106.45(b)(1)(v): Basic requirements for grievance procedures (reasonably prompt timeframes).....	24
11.	Proposed Section 106.45(b)(1)(vi): Basic requirements for grievance procedures (range of possible sanctions and remedies) .....	25
12.	Proposed Section 106.45(b)(1)(vii): Basic requirements for grievance procedures (standard of evidence) .....	26
13.	Proposed Section 106.45(b)(3)(i): Investigations of a formal complaint (burden of providing evidence) .....	26
14.	Proposed Section 106.45(b)(3)(iv): Investigations of a formal complaint (burden of providing evidence) .....	27
15.	Proposed Section 106.45(b)(3)(vii): Live hearing and cross-examination.....	28

16.	Proposed Section 106.45(b)(3)(vii): Cross-examination of investigators.....	28
17.	Proposed Section 106.45(b)(3)(vii): Limitations on cross-examination (advisor only).....	29
18.	Proposed Section 106.45(b)(3)(vii): Limitations on cross-examination (exceptions to the rape shield) .....	30
19.	Proposed Section 106.45(b)(3)(vii): Limitations on cross-examination (exceptions to the rape shield) .....	31
20.	Proposed Section 106.45(b)(3)(viii): Equal access to evidence .....	31
21.	Proposed Section 106.45(b)(3)(ix): Summary of investigative report.....	32
22.	Proposed Section 106.45(b)(4)(i): Determination regarding responsibility.....	33
23.	Proposed Section 106.45(b)(4)(ii)(C): Findings of fact “supporting” the determination.....	34
24.	Proposed Section 106.45(b)(5): Appeals.....	35
25.	Proposed Section 106.45(b)(6): Informal Resolution.....	35
26.	Proposed Section 106.45(b)(7): Recordkeeping (record of proceedings).....	36
27.	Proposed Section 106.45(b)(7): Recordkeeping (availability of records) .....	36
28.	Proposed Section 106.45(b)(7): Recordkeeping (maintenance of records) .....	37

## **Comment for the United States Department of Education Office of Civil Rights**

It is undisputed and indisputable that gender bias and sex discrimination have been, and continue to be, problems in education. The Department of Education has the statutory authority to investigate, deter, and remediate gender bias and sex discrimination in educational institutions that receive federal funding. From its inception, the Department of Education has promulgated and enforced regulations articulating prohibitions and requirements designed to accomplish the Department's legislative mandate.

The proposed regulations under this NPRM are in keeping with the Department's statutory authority and longstanding practices in the implementation of that authority. In particular, the proposed regulations represent important progress in removing gender bias and sex discrimination from educational institution investigations and adjudications involving allegations of sexual misconduct.

In some institutions and at some times, there have been concerns about gender bias and sex discrimination against females, as in the Larry Nassar matter at Michigan State University. In other instances, there have been concerns about gender bias and sex discrimination against males, as in the Duke University and University of Virginia false allegation matters.

As the agency itself recognizes in the text of § 106.45(a) of the Proposed Rule, a defective procedure can itself be a form of sex bias. While gender bias and sex discrimination vary in time and place, the proposed regulations provide a well-authorized framework for improving the assurance that both males and females, both accusers and accused, will receive protection against gender bias and sex discrimination as the Department continues its work to provide the protections of Title IX for all.

### **I. Preamble to Specific Comments on the Proposed Rule**

#### **A. The Department of Education Has the Authority to Issue "Procedural" Regulations**

##### **1. Congress Has Directed the Department of Education to Issue Rules Effectuating Title IX's Prohibition on Discrimination**

The Department of Education's authority to issue the final rule stems from Title IX of the Education Amendments Act of 1972 ("Title IX"). Title IX prohibits sex discrimination in education programs and activities receiving Federal financial assistance. 20 U.S.C. § 1681. Title IX also "directs" federal agencies that provide Federal financial assistance, like the Department of Education, to "effectuate" Title IX in those programs and activities through rules and regulations. 20 U.S.C. § 1682; *Davis, as Next Friend of LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 638-39 (1999).

Pursuant to that authority, the Department, through its Office for Civil Rights ("OCR"), has long promulgated regulations effectuating Title IX, *see* 34 C.F.R. Pt. 106. The Department of Education implements and enforces Title IX in coordination with the Department of Justice. *See* Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980) (delegating President's responsibility under § 1682 to approve all Title IX rules to the Attorney General); 28 C.F.R. 0.51 (1998).

The Department of Education has been the lead agency responsible for implementing Title IX since its inception.<sup>1</sup> In 1974, Congress recognized that the Department of Education was the lead agency by assigning its predecessor agency, the Department of Health, Education, and Welfare (“HEW”), the task of publishing rules implementing Title IX. *See* Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974) (“The Secretary shall prepare and publish ... proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972.”); *see also* 120 Cong. Rec. 15,322-23 (1974) (requirement to publish proposed rules “not intended to confer on HEW any authority it does not already have under the act.”). HEW adopted implementing regulations the following year. *See* 40 Fed. Reg. 24128 (1975). When HEW split in 1980 into two departments, the Department of Education and the Department of Health and Human Services, each new agency adopted the regulations. *See* 34 C.F.R. Part 106 and 45 C.F.R. Part 86, respectively. In 2000, the Department of Justice and 20 other participating agencies promulgated the Title IX “common rule,” establishing substantive nondiscrimination obligations for recipients of funds from those agencies. *See* 65 Fed. Reg. 52857 (2000). The requirements in the common rule were, for the most part, identical to those established by HEW in 1975.

Thus, it is now well-settled that courts accord the Department of Education’s regulations interpreting Title IX “controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.” *Cohen v. Brown Univ.*, 101 F.3d 155, 173 (1st Cir. 1996) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)).

## **2. The Department of Education Is Authorized to Promulgate and Enforce Requirements That Effectuate Title IX’s Nondiscrimination Mandate**

The procedures in the proposed rule are a lawful method of implementing § 1682’s directive that the Department of Education “effectuate the provisions of section 1681.” 20 U.S.C. § 1682. Section 1681 provides in relevant part:

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.

20 U.S.C. § 1681(a). Section 1681(a) bars education programs or activities receiving Federal financial assistance from engaging in at least three types of prohibited discrimination: (1) disparate treatment discrimination, (2) disparate impact discrimination, and (3) retaliation. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74 (2005) (Title IX bars retaliation); *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 584 (1983) (similar provision of Title VI bars disparate impact discrimination); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 680-83 (1979) (Title IX bars disparate treatment discrimination).

One method by which the Department may “effectuate the provisions of section 1681,” 20 U.S.C. § 1682, is by requiring schools to adopt and implement procedures that reduce or eliminate discrimination. As the Supreme Court has held, specifically discussing the Department

---

<sup>1</sup> *See, e.g.*, Notice, Department of Health, Education, and Welfare, 37 Fed. Reg. 20122, 20123 (1972) (“We presently are in the process of developing procedures under which this agency will represent all Federal agencies in the administration of title IX, as is presently the case under title VI of the Civil Rights Act of 1964.”).

of Education’s authority to enforce its longstanding requirement that schools have grievance procedures for sexual harassment claims under Title IX: “Agencies generally have authority to promulgate and enforce requirements that effectuate the statute’s nondiscrimination mandate ... even if those requirements do not purport to represent a definition of discrimination under the statute.” *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998); *see also, e.g., Faragher v. City of Boca Raton*, 524 U.S. 775, 805-06 (1998) (citing approvingly EEOC regulations requiring employers to develop procedures effectuating Title VII because Title VII’s “primary objective ... is not to provide redress but to avoid harm”); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74 (2005) (explaining that Title IX must be interpreted broadly enough to permit it to effectuate its statutory purpose of preventing sex discrimination in education).

Consistent with their authority to impose procedural requirements, agencies have long required regulated parties to have procedures in place to prevent violations of substantive antidiscrimination provisions. To implement Title VII’s disparate-impact provisions, for example, four federal agencies jointly adopted the Uniform Guidelines on Employee Selection Procedures. 43 Fed. Reg. 38,290 (1978); 28 C.F.R. 50.14 (Department of Justice); 29 C.F.R. Pt. 1607 (EEOC); 41 C.F.R. Pt. 60-3 (Department of Labor); 5 C.F.R. 300.103(c) (Office of Personnel Management).<sup>2</sup> Similarly, the Department of Education itself has enacted procedural regulations in the past, such as the requirements that schools designate “responsible employees” charged with ensuring Title IX compliance, and institute procedures for resolving claims of sex discrimination in a “prompt and equitable manner.” 34 C.F.R. § 106.8(b).

### **3. The Procedures in the Proposed Rules Are a Reasonable Means of Effectuating Title IX’s Prohibitions on Sex Discrimination**

The procedures required by the proposed rule are a reasonable means by which the Department of Education may ensure that colleges and universities do not engage in unlawful discrimination.

The proposed rules are a reasonable means of guarding against sex discrimination. Schools are responsible for ensuring that their officials do not engage in intentional sex discrimination. *See Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) (Title IX “unquestionably” put the defendant school district on notice that it would be liable in damages for sex discrimination by its teachers against students); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290-91 (1998) (similarly holding that schools may not exhibit “deliberate indifference” to sex discrimination by their employees).

---

<sup>2</sup> With certain exceptions, the Guidelines state that, if an employment examination or other selection procedure has an adverse impact, an employer’s use of that procedure to hire or promote employees will be considered discriminatory unless the employer has conducted a “validity” study to establish the device’s job-relatedness. 29 C.F.R. 1607.3(A), 1607.5, 1607.14. Under the “four-fifths” rule of the Guidelines, “[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact.” 29 C.F.R. 1607.4(D). The Guidelines also state that an employer whose examination has an adverse impact should search for alternative selection devices with less adverse impact as part of the test-validation process. 29 C.F.R. 1607.3(B), 1607.15(B)(9), (C)(6) and (D)(8). Under the Guidelines, an employer whose examination has an adverse impact may forgo validation of the test if the employer adopts an alternative selection procedure without adverse impact. 29 C.F.R. 1607.6(A); 44 Fed. Reg. 12,001 (1979) (Q&A 31).

Because schools are responsible for sex discrimination by their disciplinary officials, the Department has the authority to require schools to put procedures in place to ensure those officials do not engage in sex discrimination. The proposed rule is a reasonable means of reducing sex discrimination.

The implementation of procedures works to reduce biases in decision-making in numerous ways. Imposing the requirement that decision-makers give reasons for their decisions, for example, has been shown to enhance the thoroughness with which individuals consider problems and to improve their willingness to engage in self-critical thinking. See Itamar Simonson & Peter Nye, *The Effect of Accountability on Susceptibility to Decision Errors*, 51 *Organizational Behav. & Hum. Decision Processes* 416, 430-32, 437 (1992); Itamar Simonson & Barry M. Staw, *Deescalation Strategies: A Comparison of Techniques for Reducing Commitment to Losing Courses of Action*, 77 *J. Applied Psychol.* 419, 422-25 (1992); Diederik A. Stapel et al., *The Impact of Accuracy Motivation on Interpretation, Comparison, and Correction Processes: Accuracy x Knowledge Accessibility Effects*, 74 *J. Personality & Soc. Psychol.* 878, 891 (1998); Erik P. Thompson et al., *Accuracy Motivation Attenuates Covert Priming: The Systematic Reprocessing of Social Information*, 66 *J. Personality & Soc. Psychol.* 474, 484 (1994). Requiring reason-giving also tends to foster independent decision-making, making individual decision-makers less susceptible to group pressure. See Marceline B.R. Kroon et al., *Managing Group Decision Making Processes: Individual Versus Collective Accountability and Groupthink*, 2 *Int'l J. Conflict Mgmt.* 91, 99 (1991). Requiring reason-giving is also likely to reduce overconfidence in decision-making. Karen Siegel-Jacobs & J. Frank Yates, *Effects of Procedural and Outcome Accountability on Judgment Quality*, 65 *Organizational Behav. & Hum. Decision Processes* 1, 15 (1996); Philip E. Tetlock & Jae Il Kim, *Accountability and Judgment Processes in a Personality Prediction Task*, 52 *J. Personality & Soc. Psychol.* 700, 706-07 (1987). All of these reasons for requiring decision-makers to engage in reason-giving are well known to the legal system. See Frederick Schauer, *Giving Reasons*, 47 *Stan. L. Rev.* 633, 657-58 (1995) (“[W]hen institutional designers have grounds for believing that decisions will systematically be the product of bias, self-interest, insufficient reflection, or simply excess haste, requiring decision-makers to give reasons may counteract some of these tendencies.”).

Requiring full-and-fair adversarial procedures is also likely to reduce bias in decision-making. The adversarial “system is premised on the well-tested principle that truth—as well as fairness—is ‘best discovered by powerful statements on both sides of the question.’” *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (quoting Irving R. Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 *A.B.A. J.* 569, 569 (1975)); see also *United States v. Cronin*, 466 U.S. 648, 656 (1984) (describing “crucible of meaningful adversarial testing”). The Supreme Court has described cross-examination, for example, as the “greatest legal engine ever invented for the discovery of truth.” *California v. Green*, 399 U.S. 149, 158 (1970) (citations omitted).

The proposed regulations also help reduce bias by ensuring that training programs are fair and neutral. Social scientists and legal academics have long argued that training programs can help adjudicatory bodies make better decisions. See Stephen E. Fienberg & Mark J. Schervish, *The Relevance of Bayesian Inference for the Presentation of Statistical Evidence and Legal Decisionmaking*, 66 *B.U. L. Rev.* 771 (1986) (advocating that jurors be instructed in Bayesian probabilities); James J. Gobert, *In Search of the Impartial Jury*, 79 *J. Crim. L. & Criminology* 269, 326 (1988) (suggesting that juries receive “impartiality training”); Justin D. Levinson,

*Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, Duke L.J. 345 (2007) (arguing for diversity training); Jennifer A. Richeson & Richard J. Nussbaum, *The Impact of Multiculturalism Versus Color-Blindness on Racial Bias*, 40 J. Experimental Soc. Psychol. 417 (2004) (explaining how diversity training can lead to less implicit bias). At the same time, however, it is clear that information provided to jurors prior to an adjudication can affect their decisions and can bias the eventual outcome. See, e.g., Christine L. Ruva & Michelle A. LeVasseur, *Behind Closed Doors: The Effect of Pretrial Publicity on Jury Deliberations*, 18 Psychol., Crime, & L. 431 (2012) (finding that exposure to anti-defendant pretrial publicity leads jurors to be more likely to construe ambiguous evidence in prosecutor's favor). Federal courts have also noted that improper training in the sexual misconduct context could lead to due process violations. *Doe v. Ohio State Univ.*, 219 F. Supp. 3d 645, 658 (S.D. Ohio 2016). While appropriate training can reduce bias, improper trainings can leave biases unchecked or, worse, exacerbate underlying biases.

Training documents given to adjudicators in universities' sexual misconduct processes can be, and have been, biased against the accused. In some cases, universities have informed decision-makers that they should believe alleged victims of sexual assault even if their accounts of the alleged incident are not fully coherent. As of 2014, Harvard Law School's disciplinary board training contained slides to this effect. One Harvard Law School professor said that these slides were "100% aimed to convince [adjudicators] to believe complainants, precisely when they seem unreliable and incoherent." Emily Yoffe, *The Bad Science Behind Campus Response to Sexual Assault*, THE ATLANTIC, Sept. 8, 2017. In other instances, training documents inform decision-makers about the benefits of finding in favor of the accused. At Ohio State University, for instance, decision-makers were told that a "victim centered approach can lead to safer campus communities." *Doe v. Ohio State Univ.*, No. 2:15-cv-2830, 2016 WL 692547, at \*3 (S.D. Ohio 2016). Still other training materials generalize about the sorts of individuals likely to have committed sexual misconduct. The same Ohio State University training guide, for example, told decision-makers that "[s]ex offenders are overwhelmingly white males." *Id.*; see also *Doe v. Univ. of Pa.*, 270 F. Supp. 3d 799, 823 (E.D. Pa. 2017). All of these sorts of biased training materials make it impossible for arbiters to be neutral and unbiased. OCR is well within its jurisdictional authority when it seeks to reduce bias and discrimination by making training documents more fair and less biased against any party.

Even if they are trained in an evenhanded manner, some arbiters may still not be neutral. The proposals help ensure that decision-makers themselves are neutral, unbiased individuals, and OCR is entitled to create procedures to ensure that this is the case. "Our system of law," the U.S. Supreme Court has observed, "has always endeavored to prevent even the probability of unfairness" by not allowing judges to even appear to be biased. *In re Murchison*, 349 U.S. 133, 136 (1955). The requirement of a fair and unbiased adjudicator "applies with equal force to ... administrative adjudicators." *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973). Even if, as some courts have suggested, university disciplinary committees are entitled to "a presumption of honesty and integrity, absent a showing of actual bias," *McMillan v. Hunt*, 968 F.2d 1215 (6th Cir. 1992), it still is essential that biased decision-makers are removed from the process because they can wreak havoc on the judicial process.

The Department of Education also has reasonable grounds to believe that there is a need for schools to adopt procedures specifically to reduce bias in the disciplinary process. Since at

least 1994, federal courts have recognized that schools may violate Title IX by failing to provide adequate procedures during the Title IX disciplinary process. For example, in *Yusuf v. Vassar Coll.*, 35 F.3d 709 (2d Cir. 1994), the Second Circuit recognized that a student may properly state a violation of Title IX by “alleg[ing] particular procedural flaws” affecting the outcome of the disciplinary process, *id.* at 715.

Since *Yusuf*, courts have routinely allowed cases to advance past the motion to dismiss stage when students allege procedural defects in the disciplinary process that led to an erroneous result. For instance, the Sixth Circuit recently held that a student sufficiently pled that a school violated Title IX by not providing “an opportunity for cross-examination” of the accuser. *Doe v. Baum*, 903 F.3d 575, 585-86 (6th Cir. 2018). The Second Circuit has held likewise, recognizing that a failure to follow “procedures designed to protect accused students” could constitute a Title IX violation. *See Doe v. Columbia Univ.*, 831 F.3d 46, 56-57 (2d Cir. 2016). District courts, including those outside of the Sixth and Second Circuits, have largely followed the same line of reasoning. *See, e.g., Doe v. Brown Univ.*, 327 F. Supp. 3d 397, 411 (D.R.I. 2018) (denying motion to dismiss Title IX claim, in part, because plaintiff alleged that university did not allow plaintiff “to assert any counterclaim or defense regarding the allegations, including being prohibited from posing certain questions” to his accuser); *Doe v. Marymount Univ.*, 297 F. Supp. 3d 573, 584 (E.D. Va. 2018) (denying a motion to dismiss a Title IX claim because the plaintiff alleged that he was “deprived the opportunity ... to cross-examine” his accuser); *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746 (S.D. Ohio 2014) (denying a motion to dismiss a Title IX claim because the plaintiff alleged that the school “denied Plaintiff counsel, and ... denied Plaintiff witnesses”); *Doe v. Univ. of Miss.*, No. 16-63, 2018 WL 3570229, at \*5 (S.D. Miss. July 24, 2018) (denying a motion to dismiss a Title IX claim because the plaintiff’s complaint “catalog[ed] exculpatory evidence” that the university investigator “excluded” from her report).

The proposed rules are also a reasonable means of ensuring against disparate-impact discrimination. Title IX disparate-impact discrimination occurs when the practices of a college or university have a disparate impact on members of one sex or another. *See, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (Title VII). The Supreme Court has “recognized that, ‘in appropriate cases,’ giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory” because “‘an employer’s undisciplined system of subjective decision-making [can have] precisely the same effects as a system pervaded by impermissible intentional discrimination.’” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 355-56 (2011); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988); *Brown v. Nucor Corp.*, 785 F.3d 895, 916 (4th Cir. 2015); *Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1221 (10th Cir. 2013).

For all the reasons that adopting procedural protections can reduce or eliminate intentional discrimination, such regulations can also reduce the effects of unconscious bias that cause or contribute to sex discrimination.

Unconscious sex-bias in decision-making is a serious problem. Stereotypes “operate as implicit expectancies that influence how incoming information is interpreted, the causes to which events are attributed, and how events are encoded into, retained in, and retrieved from memory. In other words, stereotypes cause discrimination by biasing how we process information about other people.” Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias*

*Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161, 1119 (1995); see also *Thomas v. Eastman Kodak Co.*, 183 F.3d 38 (1st Cir. 1999) (discussing implicit bias and citing to Krieger’s work); Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination*, 40 Harv. C.R.-C.L.L. Rev. 481 (2005) (discussing how “cognitive shortcuts” lead to bias).

This sort of gender-based stereotyping has been found improper in the analogous Title VII context. In *PriceWaterhouse v. Hopkins*, for instance, the Supreme Court found that an accounting firm could be found guilty of violating Title VII when a female employee was passed over for promotion in part due to gender-based stereotyping. 490 U.S. 228 (1989).

Universities’ disciplinary hearings face unique challenges that make unconscious biases and gender-based stereotypes particularly pernicious, and this stereotyping can, in turn, lead to a Title IX violation. Men, who are likely to be the accused in sexual harassment suits, may be stereotyped as sexually aggressive and overpowering. If left unchecked, those stereotypes and implicit biases may lead to biased decision-making.

One of the best ways to solve for this stereotyping is by exposing decision-makers to both parties as individuals rather than stereotypes. When decision-makers are given enough information to view the parties as individuals and consider the particularities of the case before them rather than merely rely on predefined generalities about their gender or appearance, they are more easily able to overcome internal biases and adjudicate a case properly. OCR’s proposed procedures help make this goal a reality. When processes typical to our adjudicative process, such as cross-examination, are introduced into university’s grievance proceedings, they allow for the “discovery of the truth,” *Maryland v. Craig*, 497 U.S. 836, 846 (1990) (quoting *California v. Green*, 399 U.S. 149, 158 (1970)), in a manner that reduces stereotyping. It is therefore within OCR’s jurisdiction to create regulations about cross-examination and other procedures that reduce impermissible implicit bias on the basis of gender stereotypes and unconscious sex-bias.

#### **4. Procedural Protections Are a Reasonable Means of Effectuating a Bar on Retaliation**

The proposed rules are also a reasonable means of guarding against unlawful retaliation. Retaliation occurs when an individual is discriminated against for seeking to enforce any right protected by Title IX. See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74 (2005). For the reasons already given, retaliation will be harder to effectuate where procedures require reasoned decision-making and adversarial processes.

The Department of Education also has reasonable grounds to believe that there is a need to adopt procedures that reduce schools’ propensity to engage in retaliation on the basis of sex bias or capitulation to external pressures demanding biased outcome, as occurred in the Duke and UVA false allegations matters. As discussed above, the procedures in the proposed rule will ensure fewer students are erroneously expelled or suspended because of a false sexual assault allegation. Equally, strong procedural safeguards help to ensure that allegations are not disregarded as many have suggested for the case in the Larry Nassar matter. And as one federal court has recognized, schools suffer when innocent students are suspended or expelled: a

school's "educational mission is, of course, frustrated if it allows dangerous students to remain on its campuses. Its mission is equally stymied, however, if [the school] ejects *innocent* students who would otherwise benefit from, and contribute to, its academic environment." *Doe v. Pa. State Univ.*, 336 F. Supp. 3d 441, 449 (M.D. Pa. 2018). If a school is less likely to erroneously expel or suspend a student and less likely to disregard legitimate complaints, Title IX has less utility for schools as a means of retaliation. For example, in *Doe v. University of Chicago*, No. 16-8298, 2017 WL 4163960 (N.D. Ill. 2017), the court held that a student had sufficiently pled a Title IX retaliation claim. The student had alleged that the school's Title IX investigator had "knowingly encouraged [a student] to file a false complaint against" the plaintiff. *Id.* at \*9. Had the plaintiff been assured a fair process that would root out false accusations, the Title IX investigator would have had less incentive to encourage the student to file a false claim against the plaintiff.

### **5. The Regulations Are an Especially Appropriate Means of Addressing Sex Discrimination Because They Are Sex-Neutral**

The regulations are especially reasonable because they are narrowly tailored to prevent unlawful discrimination. The Supreme Court has repeatedly recognized that methods of ensuring compliance with antidiscrimination laws that are neutral with respect to protected characteristics are strongly favored over those that require affirmative action on the basis of the protected characteristics to remedy. For example, in the Title VII context, an employer must have a "strong basis in evidence" for believing an employment practice will violate Title VII before that employer may take race-conscious action to prevent a Title VII violation. *See Ricci v. DeStefano*, 557 U.S. 557, 585 (2009). The Court has repeatedly admonished that "consideration of the use of race-neutral means" to resolve disparate impacts is preferred. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989); *accord Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237-38 (1995).

### **B. Gender Bias and Gender Stereotyping in University Disciplinary Processes Are Serious Problems on College and University Campuses**

Gender bias and gender stereotyping are prevalent problems throughout colleges and universities. Federal judges have not hesitated to hold that universities practice sex discrimination when adopting "a policy of bias favoring one sex over the other in a disciplinary dispute" regardless of whether the university does so "to avoid liability or bad publicity." *Doe v. Columbia University*, 831 F.3d 46 (2d Cir. 2016). More specifically, courts have expressed concerns about universities that have trainings that are sex-biased. For example, in *Doe v. Ohio State University*, the training materials stated that "[s]ex offenders are overwhelmingly white males" and listed a number of statistics about the prevalence of men committing sexual assault. No. 15-2830, 2016 WL 692547 at \*3. And in *Doe v. Brown University*, the court held that Brown's training was so one-sided "it appears . . . that a training presentation was given that resulted in at least one panelist completely disregarding an entire category of evidence." 210 F. Supp. 3d 310, 327 (D.R.I. 2016).

Gender bias against accused males in adjudications is well known even in settings where the full procedural protections of courts are in place. Researchers have long documented that gender bias against males exists even in criminal proceedings with the full due process

protections. See, e.g., Sonja B. Starr, *Estimating Gender Disparities in Federal Criminal Cases*, 17 AM. L. & ECON. REV. 127 (2015) (finding “large gender gaps favoring women throughout the sentence length distribution”). After controlling for the arrest offense, criminal history, and other prior characteristics, “men receive 63% longer sentences on average than women do,” and “[w]omen are also significantly likelier to avoid charges and convictions, and twice as likely to avoid incarceration if convicted.” *Id.* This gender gap is about six times as large as the racial disparity that Prof. Starr found in another recent paper. See M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Charging and Its Sentencing Consequences*, U. OF MICH. L. & ECON., EMPIRICAL LEGAL STUDIES CENTER (2012), <https://bit.ly/2G7tVTG>. Other research has found evidence of the same gender gap. See, *Men Sentenced To Longer Prison Terms Than Women For Same Crimes, Study Says*, HUFFINGTON POST, Sept. 11, 2012, <https://bit.ly/2E5RyMy> (discussing Starr’s research and stating that “other research has found evidence of the same gender gap.”).

Similarly, the Bureau of Justice Statistics has found gender bias in directly matching crimes. Women who commit unprovoked killings of their husbands receive sentences less than half as long as men who commit unprovoked killings of their wives. Bureau of Justice Statistics, *Spouse Murder Defendants in Large Urban Counties*, 3 (1995), <https://bit.ly/2TisCF6>. (“The average prison sentence for unprovoked wife defendants was 7 years, or 10 years shorter than the average 17 years for unprovoked husband defendants”)

In a “Tip of the Week,” the consulting organization NCHERM argues that procedural protections are actually less important than rooting out the bias that can subvert procedural protections because, “[t]he solution isn’t about evidence. More evidence will not overcome bias, because bias inherently causes decision-makers to ignore and overlook evidence.” *Tip of the Week: Nightmare at Old Main*, NCHERM GROUP (Jan 14, 2019), <https://bit.ly/2sVq58m>. NCHERM does not fully follow the logic of its conclusion, but does understand half of the equation. Bias can subvert procedural protections. Procedural protections are necessary but not sufficient to render fair outcomes. It also is necessary to prohibit bias, to detect bias and to eliminate bias.

The well-documented problem of gender bias in adjudications, even in settings with strong procedural protections such as criminal courts, demonstrates the criticality of also making a direct and explicit effort to reduce gender bias. The bias that is present in too many college settings is blatant and transparent. That bias violates Title IX and mandates strong measures to reduce and ultimately eliminate its pernicious and unlawful effects.

### **C. Any Rule Promulgated by the Department Must Adequately Address Procedural and Remedial Weaknesses in Existing College and University Disciplinary Processes**

#### **1. Any Rule Promulgated by the Department Should Make Colleges and Universities Responsible for Ensuring that Adjudicators Are Unbiased**

Unbiased adjudicators are a bedrock principle of any disciplinary proceeding. The Founders understood the importance of unbiased adjudicators. The Federalist No. 10 (J. Madison) (“No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.”). Common law

recognized the need for unbiased adjudicators. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 867 (2009). The Constitution incorporated and expanded upon the protections at common law against unbiased adjudicators. *Id.* at 877.

Biased adjudicators cannot properly carry out their duties. Adjudicators must “balance between vindicating the interests of the court and interests of the accused.” *Taylor v. Hayes*, 418 U.S. 488, 501 (1974). But, as the Supreme Court has recognized, “as a practical matter it is difficult if not impossible” for an adjudicator “to free himself from the influence” of the circumstances that would give rise to bias. *In re Murchison*, 349 U.S. 133, 138 (1955).

Assessing bias is “often a private” inquiry. *Caperton*, 556 U.S. at 883. And judges, through no fault of their own, may “misread[] or misapprehend[] the real motives at work in deciding [a] case.” *Id.* The private nature of motives and the possibility of mistake “underscore the need for objective rules” for determining when an adjudicator is biased. *Id.* For these reasons, the Supreme Court has set out objective standards for determining whether the actions or associations of an adjudicator rises to the level of a undue bias. *Id.* at 883-84. Similarly, schools must have objective rules for determining whether an adjudicator is biased.

## **2. Any Rule Promulgated by the Department Should Guarantee an Accused’s Right to Cross-Examine an Accuser Even when the Accused Refuses the Help of an Advisor**

### **a. Cross-examination Is a Bedrock of Our Legal System Because of Its Ability to Bring Out the Truth**

Pop culture provides ample evidence for cross-examination’s utility and necessity. Few movie lines are more iconic than Jack Nicholson confessing as he bellows “You can’t handle the truth,” at a young Tom Cruise during cross-examination. *A Few Good Men* (Castle Rock Entertainment 1992). Those of a younger generation may remember Elle Woods winning a murder case as a first-year law student using the science of perms to catch a witness lying during cross-examination. *Legally Blonde* (Metro-Goldwyn-Mayer 2001). Those who prefer novels might recall Edmond Dantes could have benefitted greatly from the ability to cross-examine any witnesses against him—had he even received the luxury of a trial. Dumas, Alexandre, *The Count of Monte Cristo* (1844). Fans of nonfiction will tell you that, before being sentenced to death, Sir Walter Raleigh at least got a trial, although not much of one after being denied the chance to confront the sole witness against him. *Crawford v. Washington*, 541 U.S. 36, 43 (2004) (recounting the conviction of Sir Walter Raleigh). After the fact, one of Raleigh’s trial judges stated that “the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.” 1 D. Jardine, *Criminal Trials* 430 (1832).

While these examples take place centuries apart, they all hit at the heart of why cross-examination is such a fundamental aspect of our judicial system today: cross-examination is the “greatest legal engine ever invented for the discovery of truth.” *Maryland v. Craig*, 497 U.S. 836, 846 (1990) (quoting *California v. Green*, 399 U.S. 149, 158 (1970)). Indeed, according to the Supreme Court, “no one experienced in the trial of lawsuits ... would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case.” *Pointer v. Texas*, 380 U.S. 400, 404 (1965). For this reason, courts have not hesitated to

zealously protect the right to cross-examination. In particular, the Supreme Court has held that due process requires the right to cross-examine and confront a witness in “almost every setting where important decisions turn on questions of fact.” *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

There are a number of reasons cross-examination is so important for and effective at discovering the truth. Some of the importance of cross-examination is purely symbolic: “there is something deep in human nature that regards face-to-face confrontation between accused and accuser as ‘essential to a fair trial in a criminal prosecution.’” *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988). But on a more practical level, the Supreme Court has found that it “is always more difficult to tell a lie about a person ‘to his face’ than ‘behind his back.’” *Id.* at 1019.

Cross-examination also provides a great service to the trier-of-fact. In the Supreme Court’s first case interpreting the Sixth Amendment’s Confrontation Clause, the Court noted that cross-examination provides the trier-of-fact an opportunity to “judge by [the witness’s demeanor] upon the stand and the manner in which he gives his testimony whether he is worthy of belief.” *Mattox v. United States*, 156 U.S. 237, 242-43 (1895).

The importance of cross-examination has not been lost on states, either. “Under many state APAs, students have a right to cross-examine their accuser, as courts have made clear in cases such as *Arishi v. Washington State University*, 385 P.3d 251 (Wash. App. 2016) and *Liu v. Portland State University*, 383 P.3d 294 (Or. App. 2016).” Hans Bader, *Time to End Obama-Era Fed Micromanagement of Colleges Under Title IX*, CNS News (Feb. 22, 2017), <https://bit.ly/2Se5qKU>. Any regulation that does not provide for cross-examination runs the risk of violating both federal and state constitutions and laws.

At its heart, cross-examination, according to the Supreme Court, is about “ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings.” *Craig*, 497 U.S. at 846. One needs to look no further than the nearest bookshelf or movie theater to see the perils of a judicial system without it.

#### **b. The Right to Represent Oneself**

The right to represent oneself in federal court dates back to George Washington. *See* Judiciary Act of 1789, 1 Stat. 73, 92, *now codified at* 28 U.S.C. § 1654. The Supreme Court has held that states cannot force an attorney onto an unwilling defendant. *See Faretta v. California*, 422 U.S. 806 (1974). Even before the Supreme Court heard *Faretta*, 36 states had included constitutional provisions that protected the accused’s right to represent themselves. *See id.* at 813.

The right to represent oneself stems in part from the “premise the defense may be made easier if the accused is permitted ... to supersede his lawyers altogether and conduct the trial himself.” *Id.* at 816 (quotation marks omitted). And even if a lawyer could more aptly represent an accused in a proceeding, “the potential advantage of a lawyer’s training and experience can be realized, if at all, only imperfectly” without an accused’s cooperation. *Id.* at 834. On top of that,

forcing a lawyer onto an unwilling accused “can only lead [the accused] to believe that the law contrives against him.” *Id.*

Practical considerations aside, the text of the Sixth Amendment itself indicates that “the accused, not counsel,” *id.* at 819, must be “confronted with the witnesses against him,” U.S. Const. amend. VI. “The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.” *Faretta*, 422 U.S. at 819-20.

To be sure, the proposed regulation currently requires the recipient to provide an advisor for any accused to conduct a cross-examination. This requirement on recipients to provide an advisor should not be read as a requirement on the accused to use the advisor. That is, the accused should have the ability to conduct a cross-examination themselves, regardless of whether they want to use an advisor. In discussing the Sixth Amendment, the Supreme Court has recognized that the right to counsel “shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally.” *Id.* at 820. Representing oneself “affirm[s] the dignity and autonomy of the accused.” *McKaskle v. Wiggins*, 465 U.S. 168, 176-77 (1984). That dignity and autonomy cannot be maintained if an accused is required to sit by unwillingly as an appointed advisor cross-examines the accuser.

**c. The Balance of Interests Under *Mathews v. Eldridge* Requires the Accused to Have the Chance to Confront the Accuser Even in the Sexual Assault Context**

Due process, according to the Supreme Court, is “not a technical conception,” but rather “calls for such procedural protections as the particular situation demands.” *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). Courts consider three factors when determining which procedural protections a situation demands. First, courts look at “the private interest that will be affected by the official action.” *Id.* at 335. Second, courts determine “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards.” *Id.* And third, courts weigh the “Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Id.*

In the context of Title IX sexual assault allegations, all three factors weigh in favor of including cross-examination. First, as it relates to the accused, the risks of suspension or expulsion “clearly implicate a protected property interest, and allegations of sexual assault may impugn [a student’s] reputation and integrity, thus implicating a protected liberty interest.” *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 399 (6th Cir. 2017).

Second, our understanding of the risk of erroneously finding that someone committed sexual assault is growing by the day. Examples of men being exonerated years and sometimes decades after conviction grow greater with every year. *See, e.g., Cummings, William, ‘Every district attorney’s nightmare’: Two men exonerated in 1991 rape claim*, USA Today (May 7, 2018). In the Title IX context, it involves suspension or expulsion of a student preparing to enter the professional world for the first time, potentially delaying or altering once-promising futures in the worst cases. The Supreme Court has recognized that “[t]he concern would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken

and never unfair. Unfortunately, that is not the case, and no one suggests that it is.” *Goss v. Lopez*, 419 U.S. 565, 579-80 (1975).

False accusations are a fact of life in sexual assault accusations on campuses. While there are disputes about the rate of false accusations, even estimates at the lowest end acknowledge that between two and ten percent of accusations were proven false over a ten-year period and more were “unfounded” even if not proven to be deliberately false. Lisak, David, et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, Symposium on False Allegations of Rape (2010). And one needs to look no further than recent appellate decisions regarding Title IX actions involving sexual assault to see that these cases often come down to factual disputes. Indeed, credibility has often been the deciding factor. *See, e.g., Doe v. Univ. of Cincinnati*, 872 F.3d 393, 401 (6th Cir. 2017). Thus, the risk of erroneous suspension or expulsion weighs in favor of including cross-examination in Title IX investigations.

Third, the Government’s interest here is two-fold. It must protect vulnerable fellow students from having the traumatic experience of being confronted by someone who sexually assaulted them. But that interest must be balanced with the school’s interest in fewer erroneous decisions. *See Doe v. Pa. State Univ.*, 336 F. Supp. 3d 441, 449 (M.D. Pa. 2018) (“Complementing [school’s] interest in discipline ... is [school’s] interest in securing *accurate* resolutions of student complaints.”). Moreover, it must be acknowledged that the trauma of the proceeding is every bit as severe for the accused who faces sanctions as it is for the accuser. Given the power of cross-examination in discovering the truth, the balance of these two interests must weigh in favor of whatever interest is most dependent on the truth. Here, that is the school’s interest in fewer erroneous decisions and fewer instances of the use of institutional power to inflict an unfair injury upon the accused.

### **3. Any Rule Promulgated by the Department Should Ensure the Burden of Proof in Proceedings Threatening Expulsion, Prolonged Suspension, or Withholding a University Degree Is “Clear and Convincing Evidence”**

In general, OCR should mandate that the “clear-and-convincing” standard of evidence be used by universities’ adjudicatory bodies. The U.S. Supreme Court has made clear that when the government seeks to deprive an individual of *any* “particularly important individual interest [],” *Addington v. Texas*, 441 U.S. 418, 424 (1979), it bears the burden of proof by clear and convincing evidence. *See Santosky v. Kramer*, 455 U.S. 745 (1982) (parental termination); *Addington*, 441 U.S. at 432 (civil commitment); *Woodby v. INS*, 385 U.S. 276, 285-286 (1966) (requiring “clear, unequivocal, and convincing” evidence in removal cases); *Chaunt v. United States*, 364 U.S. 350, 354-55 (1960) (same, for denaturalization).

A number of federal courts have found that the weighty stakes of a university’s grievance necessitate the use of a clear-and-convincing standard of evidence, as opposed to the lesser “preponderance of the evidence” standard. In *Lee v. Univ. of New Mexico*, No. 1:17-cv-01230 (D.N.M. Sept. 20, 2018), a federal court held that the preponderance of evidence standard was improper in a sexual misconduct proceeding, “given the significant consequences of having a permanent notation such as the one UNM placed on [the respondent’s] transcript.” *Id.* at 3. And two other federal courts have raised doubts on the preponderance standard’s appropriateness in

these sorts of proceedings. *Doe v. Univ. of Colorado, Boulder*, 255 F. Supp. 3d 1064, 1082 n.13 (D. Colo. 2017) (“At a minimum, there is a fair question whether preponderance of the evidence is the proper standard for disciplinary investigations such as the one that led to Plaintiff’s expulsion.”).

In light of the courts’ general direction on evidentiary standards in cases that jeopardize an important personal interest, and the judiciary’s recent decisions in cases concerning this question, OCR would be within its jurisdiction to mandate that universities adopt a clear-and-convincing standard of evidence. Given the serious interests at stake, this would also be a prudent decision.

## **II. Specific Comments on the Proposed Rule**

### **A. Specific Provisions of the Proposed Rule**

#### **1. Proposed Section 106.30: *Actual Knowledge***

##### **Regulatory Text**

##### **Proposed Section 106.30: *Actual Knowledge***

[Fed. Reg. p. 61496, column 2]

Section 106.30 states that “Actual knowledge” means “notice of sexual harassment or allegations of sexual harassment to a” to a relevant college or university official.

##### **Comment**

In the second sentence of this definition, the regulation correctly notes that “constructive notice is insufficient to constitute actual knowledge.” But in the first sentence of the definition, the regulation states that “*actual knowledge* means notice.” To avoid any confusion and make clear what type of notice the regulation requires, the first sentence of this definition should say “actual notice,” instead of “notice.”

The text should be edited to say “*Actual knowledge* means *actual* notice . . . .”

\* \* \*

#### **2. Proposed Section 106.30: *Formal Complaint***

##### **Regulatory Text**

##### **Proposed Section 106.30: *Formal Complaint***

[Fed. Reg. p. 61496, column 3]

Section 106.30 states that “Formal complaint” means “a document signed by a complainant or by the Title IX Coordinator alleging sexual harassment against a respondent about conduct within its education program or activity and requesting initiation of the recipient’s grievance procedures consistent with § 106.45.”

## **Comment**

Colleges and universities are inherently transient institutions. Oftentimes, the principal witnesses and people involved in an allegation will be at the institution for only a few years after an incident occurs. The longer the process drags on or the longer a person waits to file a formal complaint, the harder it will be for the Title IX process to discover the truth. Not only will witnesses' memories fade, but if witnesses graduate or leave the university, it can be difficult to track them down and bring them back to the university for the Title IX process.

The text should be edited to say “a document, *filed without undue delay*, which is signed by a complainant ... .”

\* \* \*

### **3. Proposed Section 106.30: *Sexual Harassment***

## **Regulatory Text**

### **Proposed Section 106.30: *Sexual Harassment***

[Fed. Reg. p. 61496, column 3]

Section 106.30 states that “Sexual harassment means ... (3) Sexual assault, as defined in 34 CFR 668.46(a).”

## **Comment**

As discussed in the comment for Concerned Lawyers and Educators in Support of Fundamental Fairness for All Parties, incorporating the definition of sexual assault under the Clery regulation is adequate to ensure that Title IX grievance procedures are available for a single alleged instance of sexual assault.

However, by merely including a cross-reference to the Clery regulation, this Title IX regulation could have its definition of sexual assault changed without going through OCR's comment and rulemaking process, due to unilateral action in a different agency of the Government, which may alter that Clery regulation. To avoid this and any potential confusion in the future, OCR should amend this text to explicitly define sexual assault in its regulation, rather than do so by a cross-reference that is changeable by others.

The text should be edited to remove the cross-reference to 34 CFR 668.46(a) and to state explicitly what the definition of sexual assault is under this regulation.

\* \* \*

#### **4. Proposed Section 106.30: *Supportive Measures***

##### **Regulatory Text**

##### **Proposed Section 106.30: *Supportive Measures***

[Fed. Reg. p. 61496, column 3 - Fed Reg. p. 61497, column 1]

Section 106.30 states that “Supportive measures” means “non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.”

##### **Comment**

Nothing in the current draft requires supportive measures to be offered to the complainant and respondent on an equal basis. Supportive measures must be available to complainants and respondents on an equal basis, except to the extent that public safety requires differential treatment in accordance with § 106.44(c) (discussing emergency removal). Supportive measures are often readily provided to complainants consistent with the general need for supportive measures of people who have been the victim of a traumatic experience, but often are not provided to respondents who have equal needs for such supportive measures.

We support universities’ efforts as it relates to complainants. But at the same time, respondents also deal with their own pressures and stresses that come with going through the Title IX process, especially when that process can result in expulsion or suspension. These pressures and stresses are particularly acute when a respondent has been falsely accused. For that reason, whatever supportive measures are available to complainants must be available to respondents. This includes obtaining permission to miss exams or classes and similar accommodations. Like defendants in our criminal justice system, Title IX respondents are entitled to a presumption of innocence. Absent public safety concerns, they should not be punished, burdened, or prejudiced merely for having been accused under a Title IX complaint.

\* \* \*

#### **5. Proposed Section 106.44(b)(1): *Specific Circumstances***

##### **Regulatory Text**

##### **Proposed Section 106.44(b)(1): *Definitions***

[Fed. Reg. p. 61497, column 1]

Section 106.44(b)(1) states that “[a] recipient must follow procedures consistent with § 106.45 in response to a formal complaint” but makes no mention of timeliness.

##### **Comment**

This provision fails to adequately address any requirement that a formal complaint be filed in a timely matter. The text should be edited to say that a “*formal complaint must be filed*”

*within a time frame that does not create a prejudicial effect or bias against the accused.”*

Additionally, the text should include language about compulsory process once a formal complaint is filed. For example, once a formal complaint is filed, witnesses must be forced to appear within a certain time period. We suggest these changes for the same reasons outlined in the comment on Proposed Section 106.30’s definition of Formal Complaint.

\* \* \*

## **6. Proposed Section 106.45(c): Emergency Removal**

### **Regulatory Text**

#### **Proposed Section 106.44(c): Emergency Removal**

[Fed. Reg. p. 61497, column 2]

Section 106.44(c) states—

(c) Emergency removal. Nothing in this section precludes a recipient from removing a respondent from the recipient’s education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the health or safety of students or employees justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision shall not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or title II of the Americans with Disabilities Act.

### **Comment**

The university should use the “least restrictive” means for responding and make an effort to not restrict a respondent’s coursework. As previously mentioned, respondents are entitled to a presumption of innocence in these proceedings. Until a Title IX panel has concluded their proceedings, respondents should be able to remain, as much as possible, regular students.

The pre-emptive or emergency use of sanctions against an accused person is essentially the equivalent of an injunction. A person who previously had unrestricted rights now faces restrictions. The emergency action is a reduction of liberty and a reduction in personal rights and autonomy. A core requirement of all injunctive relief is that it should impose the minimum restriction on personal freedom and prior rights as is necessary to accomplish a specific, important public purpose. Any use of emergency restrictions must not go beyond what is necessary for the circumstances. Severe measures such as removal of an individual from the campus are not appropriate if the situation merely calls for a mutual “no contact” order to separate two individuals who are parties to a dispute.

Additionally, the regulation must create a mechanism for students to modify or dissolve an emergency removal order. As the Supreme Court has recognized, the proper way to dissolve or modify an injunction is to go through the adjudicatory body that issued the injunction. *See Walker v. Birmingham*, 388 U.S. 307, 317 (1967).

Section 106.44(c) should be revised as follows:

*(c) Emergency removal. Nothing in this section precludes a recipient from removing a respondent from the recipient's education program or activity or taking interim safety measures on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the health or safety of students or employees justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. Any emergency removal or interim safety measure must be the least restrictive measure sufficient to achieve the public safety purpose and must provide continuing mechanisms for review and reform or rescission of the measure. This provision shall not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or title II of the Americans with Disabilities Act.*

\* \* \*

**7. Proposed Section 106.45(b)(1)(ii): Basic requirements for grievance procedures (objective evaluation of all relevant evidence)**

**Regulatory Text**

**Proposed Section 106.45(b)(1)(ii): Basic requirements for grievance procedures (objective evaluation of all relevant evidence)**

[Fed. Reg. p. 61497, column 3]

Section 106.45(b)(1)(ii) states that grievance procedures must “require an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence—and provide that credibility determinations may not be based on a person’s status as a complainant, respondent, or witness.”

**Comment**

The text should be edited to include the phrase “*with careful evaluation of bias in the process*” after the word “witness.” As discussed at length in the preamble, bias has been a significant problem for Title IX institutions. The proposed regulations must ensure that institutions are continuously attempting to weed out any bias involved in the proceeding.

\* \* \*

**8. Proposed Section 106.45(b)(1)(iii): Basic requirements for grievance procedures (coordinator, investigator, or decision-maker)**

**Regulatory Text**

**Proposed Section 106.45(b)(1)(iii): Basic requirements for grievance procedures (coordinator, investigator, or decision-maker)**

[Fed. Reg. p. 61497, column 3]

Section 106.45(b)(1)(iii) states that grievance procedures must “Require that any individual designated by a recipient as a coordinator, investigator, or decision-maker not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.”

**Comment**

The text of the regulation should be edited to include a mechanism for either party to demand a recusal for bias, by adding a sentence such as the following: “*A recipient has a responsibility to avoid bias in its training staffing and administration of Title IX and must provide a mechanism whereby parties may request and obtain appropriate recusals to remove bias.*” As the Supreme Court has recognized, and as discussed in the preamble at greater length, “as a practical matter it is difficult if not impossible” for an adjudicator “to free himself from the influence” of the circumstances that would give rise to bias. *In re Murchison*, 349 U.S. 133, 138 (1955). And assessing bias is “often a private” inquiry. *Caperton v. A.T. Massey Coal Company, Inc.*, 556 U.S. 868, 883 (2009). In addition, judges, through no fault of their own, may “misread[] or misapprehend[] the real motives at work in deciding [a] case.” *Id.* Thus, the parties to a case must have some mechanism to remove biased judges who are unable to see their own bias.

\* \* \*

**9. Proposed Section 106.45(b)(1)(iii): Basic requirements for grievance procedures (availability of training materials)**

**Regulatory Text**

**Proposed Section 106.45(b)(1)(iii): Basic requirements for grievance procedures (availability of training materials)**

[Fed. Reg. p. 61497, column 3]

Section 106.45(b)(1)(iii) states that “any materials used to train coordinators, investigators, or decision-makers may not rely on sex stereotypes and must promote impartial investigations and adjudications of sexual harassment.”

**Comment**

Without full disclosure of everything that was used during the training, there is no way to verify that Title IX institutions are complying with the regulation. Also, audio and video

recordings of the trainings will prevent any rogue employees from undermining otherwise impartial trainings by injecting sex stereotypes and bias into the proceedings. As discussed in the comment of Concerned Lawyers and Educators in Support of Fundamental Fairness for All Parties and the comment for [\_\_\_\_\_] prepared by Eric Rosenberg, Kimberly Lau, KC Johnson, and Cynthia Garrett, trainings with sex stereotypes are a prevalent problem in Title IX institutions. In fact, at least one court has held that a complaint survived a motion to dismiss because the plaintiff alleged that he had “asked for training material during the appeals process and it wasn’t obtained or given to him.” *Doe v. Johnson & Wales Univ.*, No. 18-00106 (D.R.I. 2018). Transparency and disclosure are the most effective means of eradicating this problem.

The text of the proposed rule should be edited to ensure that all training materials are made publicly available. That includes audio and video of the training as well as any documents or presentations used during the training. The regulatory text should be revised as follows:

any materials, *including live presentations*, used to train coordinators, investigators, or decision-makers may not rely on sex stereotypes and must promote impartial investigations and adjudications of sexual harassment. *All such materials, including audio or video recordings of any live presentations, must be publicly available without any charge, cost or fee.*

\* \* \*

#### **10. Proposed Section 106.45(b)(1)(v): Basic requirements for grievance procedures (reasonably prompt timeframes)**

##### **Regulatory Text**

##### **Proposed Section 106.45(b)(1)(v): Basic requirements for grievance procedures (reasonably prompt timeframes)**

[Fed. Reg. p. 61497, column 3]

Section 106.45(b)(1)(v) states that grievance procedures must “include reasonably prompt timeframes for conclusion of the grievance process, including reasonably prompt timeframes for filing and resolving appeals if the recipient offers an appeal ... .”

##### **Comment**

As discussed in earlier comments, undue delay can undermine the integrity of the investigatory and adjudicatory processes. Delay can bias both parties—if a complaint is filed well after an alleged incident occurred, the respondent is harmed by being unable to collect contemporaneous evidence for their defense. If, on the other hand, a complaint is promptly filed but the recipient university is unreasonably slow in processing the complaint and proceeding with the grievance process, the complainant is prejudiced by this delay and the lack of closure that comes from a swift resolution of the process. Timeliness is important to both parties and the current language should be expanded to better take account for the problems that arise in the process from time delays.

This provision should be altered to state that grievance procedures must “include reasonably prompt timeframes for *the submission of a formal complaint and for conclusion of the grievance process.*”

\* \* \*

#### **11. Proposed Section 106.45(b)(1)(vi): Basic requirements for grievance procedures (range of possible sanctions and remedies)**

##### **Regulatory Text**

##### **Proposed Section 106.45(b)(1)(vi): Basic requirements for grievance procedures (range of possible sanctions and remedies)**

[Fed. Reg. p. 61497, column 3]

Section 106.45(b)(1)(v) states that grievance procedures must “describe the range of possible sanctions and remedies that the recipient may implement following any determination of responsibility . . . .”

##### **Comment**

The proposed rule should be modified in two respects. First, it is important that any sanction imposed be proportional to the offense committed. This principle reflects our societal understanding of punishment, as reflected in the Seventh Amendment to the U.S. Constitution’s prohibition on “cruel and unusual punishment,” *see, e.g., Enmund v. Florida*, 458 U.S. 782 (1982) (construing the Seventh Amendment to mean that sentences must be proportional to offenses). The current language would allow minor violations of university policy to be punished in extreme, disproportionate ways. It would also allow for different violations of different magnitudes to be punished in the same, imprecise manner. The language should be altered to avoid this problem.

Second, the language should be altered to clarify that collective punishment is unacceptable to the extent that it punishes individuals or organizations that did not perpetrate, or were not found guilty of perpetrating, the offense in question. OCR has the jurisdiction to enforce a regulation barring collective punishment because of the role gender bias and stereotyping plays in these punishments, and should create language to this effect to prevent this sort of stereotyping from occurring.

This sentence should be expanded to state that the grievance procedures must “describe the range of possible sanctions and remedies, *which must be proportional to the offense*, that the recipient may implement following any determination of responsibility, *and ensure that no sanction is imposed as group punishment on any individual or organization other than the perpetrator of the sanctioned activity.*”

\* \* \*

**12. Proposed Section 106.45(b)(1)(vii): Basic requirements for grievance procedures (standard of evidence)**

**Regulatory Text**

**Proposed Section 106.45(b)(1)(vii): Basic requirements for grievance procedures (standard of evidence)**

[Fed. Reg. p. 61497, column 3]

Section 106.45(b)(1)(vii) states that grievance procedures must “describe the standard of evidence to be used to determine responsibility.”

**Comment**

As discussed in the preamble to this comment, a “clear and convincing” standard of evidence should be the norm in this sort of case. Not only would such a decision be in-line with general legal principles, it also would comply with orders and suggestions from an increasing number of courts that have said that the lower “preponderance of the evidence” standard is inappropriate in these cases.

\* \* \*

**13. Proposed Section 106.45(b)(3)(i): Investigations of a formal complaint (burden of providing evidence)**

**Regulatory Text**

**Proposed Section 106.45(b)(3)(i): Investigations of a formal complaint (burden of providing evidence)**

[Fed. Reg. p. 61498, column 1]

Section 106.45(b)(3)(i) states that when investigating a formal complaint a recipient must “ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties.”

**Comment**

The proposed language does well to note that the process must be fair to both the complainant and respondent, but it fails to account for the fact that a third party—the recipient university—is also part of the process. The university may, of its own accord, present evidence to the adjudicatory body. Under the current language, a recipient university could limit both the complainant’s and respondent’s ability to speak or present evidence equally, but could give itself unlimited power to accuse the respondent and present evidence. This cannot be allowed to occur; respondents must be able to defend themselves by having the ability to present exculpatory evidence and exonerate themselves.

A new sentence should be added to the end of the current language that states that “*All procedures must ensure that the respondent has a full and fair opportunity to present any defense or exculpation.*”

\* \* \*

#### **14. Proposed Section 106.45(b)(3)(iv): Investigations of a formal complaint (burden of providing evidence)**

##### **Regulatory Text**

##### **Proposed Section 106.45(b)(3)(iv): Investigations of a formal complaint (burden of providing evidence)**

[Fed. Reg. p. 61498, columns 1 and 2]

Section 106.45(b)(3)(iv) states that when investigating a formal complaint a recipient “may establish restrictions regarding the extent to which [an] advisor may participate in the [grievance] proceedings, as long as the restrictions apply equally to both parties.”

##### **Comment**

This language restricting the ability of an advisor to participate in the proceedings should be removed for a number of reasons. First, respondents, who stand accused of a serious offense that comes with equally serious potential punishments, should be allowed access to a full legal process in order to allow them a fair opportunity to exonerate themselves. This is particularly true because the complainant and respondent are typically not the only two parties to a proceeding. The university itself often hires paid investigators to investigate and “prosecute” the case. *See Doe v. Univ. of Ky.*, No. 17-345, 2019 WL 267719, at \*7 (E.D. Ky. Jan. 17, 2019) (noting that the school’s Dean had described herself as “akin to a prosecutor working with a victim” whose “goal is often aligned with a complainant”). The respondent should be allowed to have an advisor who can represent the respondent in all aspects of the proceedings in order to make up for this power imbalance between this paid adult working for the university and a college student who is not trained in this sort of proceeding.

Second, this provision restricts the ability of students with disabilities to properly participate in the process. Students with speech impediments or other disabilities may find their ability to represent themselves limited. It is essential that these students be afforded an advisor who can fully participate in the process and properly represent the student’s interests and positions.

Lastly, the provision is internally contradictory with the proposed regulatory text in section 106.45(b)(3)(vii), which states that advisors must be able to cross-examine witnesses. This language should be removed to avoid confusion and conflict with that provision.

\* \* \*

## 15. Proposed Section 106.45(b)(3)(vii): Live hearing and cross-examination

### Regulatory Text

#### **Proposed Section 106.45(b)(3)(vii): Live hearing and cross-examination**

[Fed. Reg. p. 61498, columns 2 and 3]

Section 106.45(b)(3)(vii) states that “For institutions of higher education, the recipient’s grievance procedure must provide for a live hearing,” but says nothing about whether and how that hearing should be recorded or transcribed.

### Comment

Maintaining a video-recorded or transcribed record is essential for ensuring that the parties have a full and fair account of the disciplinary proceedings that they can rely on during any internal appeal process or during a civil case they may choose to file after the conclusion of a grievance procedure. *See Pl. Opp’n to Defs. Mot. Summ. J., Montague v. Yale Univ.*, No. 16-885 (July 18, 2018) (noting that Yale University had a custom of destroying Title IX proceeding notes after the proceeding concluded). Not having such a record can allow a grievance board’s illegal bias against a party to fester and remain unchecked by the university, regulatory agencies, or the courts.

This language should be expanded to clarify that “the recipient’s grievance procedure must provide for a live hearing, *along with a transcription or video and audio recording of the hearing.*”

\* \* \*

## 16. Proposed Section 106.45(b)(3)(vii): Cross-examination of investigators

### Regulatory Text

#### **Proposed Section 106.45(b)(3)(vii): Cross-examination of investigators**

[Fed. Reg. p. 61498, columns 2 and 3]

Section 106.45(b)(3)(vii) states that at a “hearing, the decision-maker must permit each party to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility,” but makes no mention of the right to cross-examine investigators and other officials who may have contributed evidence used at the hearing.

### Comment

Grievance procedures often rely heavily on the report prepared by the university’s investigator. The entire procedure is oftentimes based on the findings of this report. It is therefore essential that both parties be able to examine the individual or individuals who prepared this report in order to determine how they reached their conclusions and whether their report is credible.

This language should be expanded to state that “the decision-maker must permit each party to ask the other party and any witnesses, *including any investigator or preparer of an investigative report*, all relevant questions and follow-up questions, including those challenging credibility.”

\* \* \*

### **17. Proposed Section 106.45(b)(3)(vii): Limitations on cross-examination (advisor only)**

#### **Regulatory Text**

#### **Proposed Section 106.45(b)(3)(vii): Limitations on cross-examination (advisor only)**

[Fed. Reg. p. 61498, columns 2 and 3]

Section 106.45(b)(3)(vii) states that “If a party does not have an advisor present at the hearing, the recipient must provide that party an advisor aligned with that party to conduct cross-examination.”

#### **Comment**

As explained in the preamble, a party’s ability to cross-examine opposing witnesses is an essential part of the trial process. In some cases, parties do not have the financial means to find their own advisor, and may find that the advisors appointed for them are unable or unwilling to properly represent their interests in the cross-examination process. In those instances, the parties should be able to represent themselves in a cross-examination.

This proposed regulatory language does not limit the ability of a recipient university to temper cross-examination. The university can limit a cross-examination when, for instance, questions have become irrelevant or a party has become unruly. Equally, a university can provide procedures that account for sensitivities that may arise if parties are conducting their own cross-examination. Nevertheless, the parties should be afforded the fundamental right to properly have access to the “greatest legal engine ever invented for the discovery of truth.” *California v. Green*, 399 U.S. 149, 158 (1970) (citations omitted).

The language should include the following sentence after the current text: “*In the event that the advisor is unacceptable to the respondent, the respondent must have the right to self-represent in all cross-examinations.*”

\* \* \*

## 18. Proposed Section 106.45(b)(3)(vii): Limitations on cross-examination (exceptions to the rape shield)

### Regulatory Text

#### **Proposed Section 106.45(b)(3)(vii): Limitations on cross-examination (exceptions to the rape shield)**

[Fed. Reg. p. 61498, columns 2 and 3]

Section 106.45(b)(3)(vii) states that “All cross-examination must exclude evidence of the complainant’s sexual behavior or predisposition, unless such evidence about the complainant’s sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant’s sexual behavior with respect to the respondent and is offered to prove consent.”

### Comment

OCR’s current proposal tracks the first two exceptions to Fed. R. Evid. 412’s “rape shield” law. However, the Federal Rules of Evidence contain two further exceptions that are not included in the proposed language, but should rationally be included.

First, the federal rules permit this sort of evidence to be admitted where excluding would deprive the respondent of a constitutionally guaranteed right. The same should be the case here. University procedures should not be able to violate the basic protections guaranteed by the Constitution in administering their grievance process.

Second, the federal rules permit evidence to be admitted in civil cases where the probative value substantially outweighs the danger of harm to any complainant or unfair prejudice to any party. In these sorts of cases, usually caused by complainants choosing to make their reputation part of the case and placing it in controversy, there is no general harm that occurs from allowing other parties to discuss this evidence as well. If any prejudice would occur, the grievance board retains discretion to not allow the evidence to be presented.

The proposed regulatory language should be expanded to state that “All cross-examination must exclude evidence of the complainant’s sexual behavior or predisposition, unless such evidence about the complainant’s sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant’s sexual behavior with respect to the respondent and is offered to prove consent *or if the exclusion of the evidence would violate the respondent’s constitutional rights, or the evidence’s probative value substantially outweighs the danger of harm to the complainant and of unfair prejudice to any party.*”

\* \* \*

**19. Proposed Section 106.45(b)(3)(vii): Limitations on cross-examination (exceptions to the rape shield)**

**Regulatory Text**

**Proposed Section 106.45(b)(3)(vii): Limitations on cross-examination (exceptions to the rape shield)**

[Fed. Reg. p. 61498, columns 2 and 3]

Section 106.45(b)(3)(vii) states that “If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility.”

**Comment**

The proposed regulation correctly provides that testimony that cannot be tested through the crucible of cross-examination should not be credited. But the proposed regulation does not affirmatively advise that an accused’s decision not to provide testimony cannot give rise to an inference of guilt. It is a basic tenet of the legal system that the decision by an accused not to testify has no probative value and is irrelevant to questions of culpability. The gravity of these proceedings, with their quasi-criminal overtones and possible relationship with *actual* criminal proceedings in some circumstances, further establishes that an accused’s decision not to submit to testimony cannot possibly provide any basis for drawing an inference of culpability.

The text of the proposed regulation should be modified to provide that “*An accused person’s decision not to testify is irrelevant and cannot be the basis for any adverse inference of culpability or responsibility.*”

\* \* \*

**20. Proposed Section 106.45(b)(3)(viii): Equal access to evidence**

**Regulatory Text**

**Proposed Section 106.45(b)(3)(viii): Equal access to evidence**

[Fed. Reg. p. 61498, column 3]

Section 106.45(b)(3)(viii) states that a grievance procedure must “Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint.”

**Comment**

The text of the proposed rule unduly restricts the evidence to which the accused may obtain access by limiting the evidence to that which is “directly” related to the allegations raised in a formal complaint. Clearly, large amounts of relevant exculpatory and inculpatory evidence could be *indirectly* related to the allegations in a formal complaint. They would nonetheless still be extremely relevant to the accused’s ability to put on a defense. As countless Federal courts

have recognized, basic fairness requires the disclosure of any evidence that even *could* lead to the discovery of further material evidence. *See Price v. Thurmer*, 514 F.3d 729, 730 (7th Cir. 2008) (Posner, J.) (“There is no obligation to turn over immaterial evidence to a defendant ..., unless it is apparent that it might lead to the discovery of material evidence.”); *United States v. Rodriguez*, 496 F.3d 221, 226 n.4 (2d Cir. 2007) (“The objectives of fairness to the defendant, as well as the legal system’s objective of convicting the guilty rather than the innocent, require that the prosecution make the defense aware of material information potentially leading to admissible evidence favorable to the defense.”); *United States v. Phillip*, 948 F.2d 241, 249 (6th Cir. 1991) (“Certainly, information withheld by the prosecution is not material unless the information consists of, or would lead directly to, evidence admissible at trial for either substantive or impeachment purposes.”); *United States v. Kennedy*, 890 F.2d 1056, 1059 (9th Cir. 1989).

No fair process would deny the accused access to potentially relevant evidence obtained as part of an investigation.

The text of the proposed regulation should be modified to delete the word “directly” and to provide that a grievance procedure must “Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is *directly* related to the allegations raised in a formal complaint, *or that might lead to the discovery of material evidence related to the allegations raised in a formal complaint.*”

\* \* \*

## **21. Proposed Section 106.45(b)(3)(ix): Summary of investigative report**

### **Regulatory Text**

#### **Proposed Section 106.45(b)(3)(ix): Summary of investigative report**

[Fed. Reg. p. 61498, column 3]

Section 106.45(b)(3)(vii) states that a grievance procedure must “create an investigative report that fairly summarizes relevant evidence and, at least ten days prior to a hearing (if a hearing is required under section 106.45) or other time of determination regarding responsibility, provide a copy of the report to the parties for their review and written response.”

### **Comment**

The proposed language fails to require that the investigative report include all potentially exculpatory and inculpatory evidence. The failure to require that the summary include all potentially exculpatory and inculpatory evidence (1) deprives any subsequent reviewer of an adequate record, (2) may jeopardize the accused’s ability to use the additional evidence to pursue relevant leads in developing a defense, (3) will tend to diminish the thoroughness with which the facts are considered, and (4) unduly raises the risk of bias in the reports.

The language should be modified to delete the word “relevant” and instead to provide for the creation of an “investigative report that fairly summarizes *all potentially exculpatory and inculpatory* evidence ... .”

\* \* \*

## 22. Proposed Section 106.45(b)(4)(i): Determination regarding responsibility

### Regulatory Text

#### **Proposed Section 106.45(b)(4)(i): Determination regarding responsibility**

[Fed. Reg. p. 61499, column 1]

Section 106.45(b)(4)(i) states that “The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply either the preponderance of the evidence standard or the clear and convincing evidence standard, although the recipient may employ the preponderance of the evidence standard only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. The recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.”

### Comment

The method by which disciplinary decisions are made, and especially the burden of proof used to assess culpability, are among the most crucial aspects of any disciplinary process. The proposed rule is correct to permit universities to choose the standard of proof as long as the standards used are consistently applied.

The ABA Criminal Justice Section’s Task Force on College Due Process Rights and Victim Protections’ *Recommendations for Colleges and Universities in Resolving Allegations of Campus Sexual Misconduct* correctly noted the appropriate focus for adjudication should be on ensuring that the evidence is thoroughly considered and that any resulting conclusion is well-supported, rather than that the decision-maker apply any particular evidentiary standard. *See* 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* 7-8 (June 2017), <https://bit.ly/2Ws0YHU>.

The ABA Task Force spent considerable time discussing the standard of proof to be used by decision-makers in determining whether a violation of a university disciplinary policy has occurred. *Id.* Some Task Force members thought it was unfair to have a lower standard of proof when respondents were facing suspension and possible expulsion, coupled with the potential collateral consequences that accompany a finding of responsibility. *Id.* Other Task Force members considered it unjust to have an elevated standard of proof given the historical challenges complainants often faced in getting schools to respond adequately to allegations of sexual misconduct. *Id.* Some Task Force members did not agree with the common interpretation of “preponderance of the evidence” as requiring a mechanical weighing of the evidence in which a mere feather is enough to tip the scales towards a finding of responsibility. *Id.* At the same time, other Task Force members felt “clear and convincing evidence” is a vague standard and thus easily subject to potential abuse. *Id.* In light of these concerns, the Task Force

concluded that it is best to avoid labels and instead articulate the appropriate basis for a finding of responsibility, with corresponding instructions (preferably in written form) provided to decision-makers to ensure a clear understanding of the manner in which they should consider, review, and weigh the evidence. *Id.*

The proposed rule should be modified to ensure that decision-makers reach conclusions in a manner consistent with the compromise recommended by the ABA Task Force. *Id.* Namely, the final rule should add the following language, “*Regardless of the standard of proof applied, after assessing the quality of the evidence, the decision-maker should find the respondent responsible for alleged misconduct only if the evidence firmly convinces the decision-maker to reasonably conclude that a finding of responsibility is justified. That is, the decision-maker should find that there is sufficient evidence that is relevant, probable, and persuasive to firmly convince him or her that the respondent engaged in the alleged misconduct, and that the evidence supporting a finding of responsibility significantly outweighs any evidence that the respondent is not responsible for the alleged misconduct.*” *Id.* at 8.

\* \* \*

### **23. Proposed Section 106.45(b)(4)(ii)(C): Findings of fact “supporting” the determination**

#### **Regulatory Text**

#### **Proposed Section 106.45(b)(4)(ii)(C): Findings of Fact Supporting Written Determinations** [Fed. Reg. p. 61499, column 1]

Section 106.45(b)(4)(ii)(C) states that a “written determination” following a disciplinary proceeding “must include,” among other things, “(C) Findings of fact supporting the determination ... .”

#### **Comment**

The proposed language fails to require that findings of fact in a written determination also included facts that challenge the determination. The failure to include all facts in the written determination, both those that tend to support and undermine the final conclusions, (1) deprives any subsequent reviewer of an adequate record and (2) will tend to diminish the thoroughness with which the facts are considered.

Section 106.45(b)(4)(ii)(C) should be revised to state that “[t]he written determination must include,” among other things, “(C) Findings of fact *supportingsufficient to allow the parties and any appellate reviewer to understand the facts tending to support or refute* the determination.”

\* \* \*

## **24. Proposed Section 106.45(b)(5): Appeals**

### **Regulatory Text**

#### **Proposed Section 106.45(b)(5): Appeals**

[Fed. Reg. p. 61499, column 2]

Section 106.45(b)(5) states that “If a recipient offers an appeal, it must allow both parties to appeal.”

### **Comment**

Disciplinary proceedings, like criminal trials, exact a heavy personal, reputational, financial, and professional toll on the accused. *Cf. Green v. United States*, 355 U.S. 184, 187-188 (1957). The power of a recipient institution to subject an individual to prolonged disciplinary proceedings, involving lengthy appeals by the institution, would grant recipient institutions the power to punish accused students without ever actually finding them culpable for the conduct for which they are accused.

Recipient institutions, with all their resources and power, should not be allowed to make repeated attempts to discipline an individual for an alleged offense, thereby subjecting that person to embarrassment, expense, and ordeal and compelling the person to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent the person may be found guilty. The same concerns ground the Constitutional prohibition on permitting prosecutors to appeal criminal acquittals. *See United States v. Jorn*, 400 U.S. 470, 479 (1971). Accusers and accused persons are not on the same footing since only the accused faces the risk of institutional sanctions from repeated trials by the recipient.

In light of the foregoing concerns, only the accused should be able to appeal from an adverse ruling in a disciplinary proceeding.

\* \* \*

## **25. Proposed Section 106.45(b)(6): Informal Resolution**

### **Regulatory Text**

#### **Proposed Section 106.45(b)(6): Informal Resolution**

[Fed. Reg. p. 61499, columns 2 and 3]

Section 106.45(b)(6) states that “At any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication . . . .”

### **Comment**

The proposed regulation rightly recognizes the important role that informal resolution, including mediation and settlement, can play in resolving disputes. But the proposed rule does

not go far enough in protecting the autonomy of accusers and accused students to reach resolutions. If both parties want to end a case, it is important that the process come to an end. The university should not be allowed to override the wishes of the accused and the accuser merely because it initiated disciplinary proceedings. Colleges and universities' primary concerns should be the unique needs of the parties in any proceeding.

The regulation should be revised to state that “*if the parties, having reached consent, both request an end to the proceedings or entry into the informal process, the recipient shall carry out their requested relief.*”

\* \* \*

## **26. Proposed Section 106.45(b)(7): Recordkeeping (record of proceedings)**

### **Regulatory Text**

#### **Proposed Section 106.45(b)(7): Recordkeeping (record of proceedings)**

[Fed. Reg. p. 61499, column 3]

Section 106.45(b)(7) states that recipients should “maintain for a period of three years records of ... each sexual harassment investigation,” but makes no mention of records generated during disciplinary hearings.

### **Comment**

As noted above, to ensure fairness and create a record for subsequent review, all disciplinary proceedings must be recorded and preserved via video, audio, or a written transcript. Without a full and complete historical account of the most crucial aspect of a disciplinary proceeding—the hearings in which arguments are made and evidence is presented—there would be no way to verify that recipient institutions are complying with the regulation.

The text of the proposed rule should be edited to ensure that a record of all disciplinary hearings is generated and maintained for a period of three years, along with all other materials arising out of a sexual harassment investigation. Thus, recipients should “maintain for a period of three years records of ... *any disciplinary hearings.*”

\* \* \*

## **27. Proposed Section 106.45(b)(7): Recordkeeping (availability of records)**

### **Regulatory Text**

#### **Proposed Section 106.45(b)(7): Recordkeeping (availability of records)**

[Fed. Reg. p. 61499, column 3]

Section 106.45(b)(7)(i)(D) states that “a recipient must create, make available to the complainant and respondent, and maintain for a period of three years records of ... all materials used to train coordinators, investigators, and decision-makers with regard to sexual harassment.”

## **Comment**

As noted above, full public disclosure of all materials used to train coordinators, investigators, and decision-makers is an essential way to ensure that recipient institutions comply with Title IX.

The text of the proposed rule should be modified to provide that “a recipient must create, make available *publicly*, and maintain for a period of three years records of ... all materials used to train coordinators, investigators, and decision-makers with regard to sexual harassment *including audio or video recordings of all presentations.*”

\* \* \*

## **28. Proposed Section 106.45(b)(7): Recordkeeping (maintenance of records)**

### **Regulatory Text**

#### **Proposed Section 106.45(b)(7): Recordkeeping (maintenance of records)**

[Fed. Reg. p. 61499, column 3]

Section 106.45(b)(7)(ii) states that “A recipient must create and maintain for a period of three years records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment.”

### **Comment**

The language above does not make clear when the three-year recordkeeping requirement is triggered. Clarity will serve both recipient institutions and those accused by ensuring that both sides know the precise period over which records will be kept. Furthermore, the three-year period should not begin to run until *at least* the completion of the grievance process at the recipient institution, so as to allow adequate time for appeal or filing a civil action in court.

The text of the proposed rule should be modified to provide that “A recipient must create and maintain for a period of three years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. *All records must be kept for at least three years following the generation of the last record associated with the report or complaint.*”