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Dear Sirs:

Attached please find my comments re: the 2020 Title IX Regulations, a commentary which I authored and which was published recently in West's Education Law Reporter.

386 Ed. Law Rep. 557

West's Education Law Reporter
April 15, 2021

Commentary

Kathleen Conn, Ph.D., J.D., LL.M.

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SALVAGING AND SEPARATING THE 2020 TITLE IX REGULATIONS^{a1}

On May 19, 2020 the U.S. Department of Education (DOE) released new Title IX Regulations applicable to all federally funded educational institutions in the United States. DOE had promised to publish these new Regulations in September 2017 and educators and the public eagerly awaited them. Despite the ongoing Covid-19 pandemic upending schooling as traditionally conducted throughout the country, and despite the fact that nearly two years had elapsed before their ultimate publication, the Department mandated an ill-advised push for immediate implementation on August 14, 2020.

Without prior warning, the definition of sexual harassment was radically expanded and changed in scope and applicability.¹ All educational institutions at every level which received any modicum of federal funding for any part of their operations, preK-12 and beyond,² are included in its purview and, with few exceptions, held to exactly the same standards of compliance. However, the specifics of that compliance in many instances are imprecise and lacking in critical operational protocols, especially for K-12 schools and school districts.

***558** This lack of specificity in the 2020 Title IX Regulations, occasioned by persistent use of the phrase “the recipient must,” undermined attention to and support for the positive changes in the Regulations. Before throwing out the proverbial “baby with the bathwater,” a close analysis of the Regulations, especially with respect to K-12, is needed. This commentary points out provisions in the 2020 Regulations that merit serious reconsideration (possibly with supplementation) and possible retention in the case of K-12 institutions only, postsecondary institutions only, or across the board for all institutions. The commentary also notes where (and why) the need for specific expanded guidance exists, and, ultimately, explains why modifications to any set of Title IX Regulations must treat K-12 institutions differently from postsecondary institutions.

Part I reviews the basics of Title IX and the new definition of sexual harassment in the 2020 Regulations. Part II briefly explains and comments on the similarities and key differences between the new regulatory mandates for K-12 schools and postsecondary institutions. Part III analyzes how the “recipient must” language in the 2020 Regulations creates operational questions and problems, especially for K-12 institutions. Part IV then summarizes and discusses the features of the 2020 Regulations that, with consideration of the modifications suggested, should be retained. Part V advocates for a thoughtful overhaul of the new Regulations with separate treatment for K-12 and postsecondary institutions.

The current Title IX Regulations have been roundly criticized, especially for including mandatory “live hearings” at the postsecondary level and their untimely implementation pressure during the Covid pandemic.³ This commentary is not a comprehensive overview of the 2020 Title IX Regulations,⁴ but simply points the way to salvaging the improvements in the 2020 Regulations that ensure provision of due process to all involved in resolutions of allegations of sexual harassment. All Americans are stakeholders in education. Title IX Regulations that assure access and equality with respect to education, and the ability of officers and administrators of educational institutions to understand and enforce those regulations, are vitally important in achieving that access and equality to all sexes and gender choices.

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***559 Part I: A Brief Overview of Title IX and the 2020 Definition of Sexual Harassment**

Title IX, administratively enforced by the Office for Civil Rights (OCR)⁵ and enforceable in litigation by an implied private right of action,⁶ protects both students and employees of all federally funded educational institutions.⁷ The statement of Title IX is perhaps the most simplistic mandate of all the federal civil rights proclamations:

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.⁸

However, this brief and apparently simple sentence has caused litigation throughout the entire United States judicial system since it was first promulgated in 1972. Hardly any word of this brief statement has gone uncontested, from “person,”⁹ to the phrase “on the basis of sex” and to the word “sex” itself.¹⁰ And while “discrimination” may manifest itself in numerous overt and subtle ways, the Supreme Court in a 1992 decision¹¹ focused on discrimination “on the basis of sex” as sexual harassment and ruled that a complaint of “sexual harassment” constituted discrimination on the basis of sex that violates Title IX.

The new definition of sexual harassment in the 2020 Title IX Regulations, for all educational institutions receiving federal funding, K-12 and beyond, is defined as conduct on the basis of sex that satisfies one or more of the following:

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;

(2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity; or

(3) “Sexual assault” as defined in  20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in  34 U.S.C. 12291(a)(10), “domestic violence” as defined in  34 U.S.C. 12291(a)(8), or “stalking” as defined in  34 U.S.C. 12291(a)(30).¹²

The first element of the definition derives from Title VII,¹³ the statute that protects employees from discrimination on the basis of sex in the employment context, also known by the Latin phrase *quid pro quo* (“this for that”) sexual harassment. The second element, unwelcome conduct followed by stringent qualifying descriptors that apply only to this element, also partly sounds like a Title VII prohibition,¹⁴ but actually derives from a 1999 Supreme Court decision, *Davis v. Monroe County Board of Education*.¹⁵ In the *Davis* decision the Court expanded Title IX to apply in situations of peer-peer sexual harassment, and Justice Sandra Day O’Connor, writing for the 5-4 majority stated, “We thus conclude that funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so *severe, pervasive, and objectively offensive* [italics added] that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”¹⁶

Therefore, both the first and second elements of the new definition of sexual harassment derive at least partially from Title VII, a statute applicable in the K-12 and postsecondary employment context, and from a Supreme Court decision applicable to K-12 educational institutions. However, the third element of the definition of sexual harassment, the inclusion of sexual assault, dating violence, domestic violence, and stalking, derives exclusively from the postsecondary context.

***561** These four offenses in the final element of the definition of sexual harassment originated in the Jeanne Clery Disclosure

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of Campus Security Policy and Campus Crimes Security Act of 1990, otherwise known simply as the Clery Act.¹⁷ They were added to the Clery Act as part of the Reauthorization of the Violence Against Women Act (VAWA) of 2013.¹⁸ The addition of these elements to the new definition of sexual harassment caused consternation and confusion in many K-12 schools and school districts, despite the DOE's explanation that the offenses were added to align the definition of Title IX with the Clery Act.¹⁹ Whether or not this third element should have been added to the definition or reserved for separate application to the postsecondary context is a question for serious consideration.

Part II: Different Mandates for K-12 vs. Postsecondary Institutions

A. Reports of Sexual Harassment

Both K-12 and postsecondary institutions have long been advised by DOE's Dear Colleague Letters (DCLs)²⁰ (now rescinded)²¹ to designate institutional Title IX Coordinators who would handle complaints of sexual harassment.²² Despite their recognition only as "significant guidance," DCLs were backed by threats that the Office for Civil Rights (OCR) would withdraw Title IX funding for noncompliance.²³ Contrary to DCLs, the 2020 Title IX Regulations have the force of law, having been adopted through "notice and comment rulemaking" according to the Administrative Procedures Act (APA).²⁴ The 2020 Title IX regulations now lawfully mandate that all educational institutions which are recipients of federal funding must "designate and authorize at least one employee" as a Title IX Coordinator.²⁵

***562** However, although both K-12 and postsecondary institutions have been directed to designate Title IX Coordinators to receive complaints of sexual harassment, the first different regulatory mandate between the two levels appeared in the protocol for reporting sexual harassment. "Actual knowledge"²⁶ of sexual harassment now accrues to postsecondary educational institutions only if the complaint of sexual harassment is reported to the institution's Title IX Coordinator or to "any official of the recipient who has authority to institute corrective measures on behalf of the recipient."²⁷ K-12 institutions, on the other hand, receive actual knowledge of sexual harassment when "any employee of an elementary or secondary school" receives notice of sexual harassment.²⁸

The phrase "any official ... who has authority to institute corrective measures" first appeared in the Supreme Court decision *Gebser v. Lago Vista Independent School District*,²⁹ a K-12 suit unsuccessfully alleging teacher-on-student sexual harassment. The phrase was subsequently reiterated in many controversies to acquit school districts of liability for sexual harassment. In K-12 schools, the phrase became especially problematic, where young students reported sexual harassment to guidance counselors, teachers, and even principals, whom various courts decided were not officials with the required corrective authority.³⁰ Students in postsecondary institutions were held to the higher standard of reporting directly to the Title IX Coordinator or to upper levels of administration.

In both K-12 and postsecondary institutions, the Regulations now make clear that any individual may initially report sexual harassment, the alleged victim, a parent or caregiver, friend, bystander, or even an anonymous reporter, at any time including non-business hours, by any means available that results in knowledge imparted to the Title IX Coordinator.³¹ However, absent in both postsecondary and K-12 contexts is a mandate requiring that complaints of sexual harassment, received by anyone exclusive of the Title IX Coordinator, be *promptly* reported to the Title IX Coordinator. Neither is any indication of what constitutes prompt or timely reporting to the Title IX Coordinator. This omission deserves attention and a mandate for prompt reporting of complaints of sexual harassment to the Title IX Coordinator would close the reporting loop.

***563 B. Confidential Reports of Sexual Harassment**

The educational recipient of federal finances must ensure and maintain confidentiality for those disclosing reports of sexual harassment, and also forbids retaliation for any reports of sexual harassment.³² However, whether students in K-12 and/or postsecondary institutions who believe they have been victims of sexual harassment may report sexual harassment to a

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confidential advisor, without the complaint being forwarded to the Title IX Coordinator, depends on the students' educational levels. The Final Rule in the Federal Register contains an extended discussion of this issue, concluding that the Regulations must treat student requests for confidentiality differently in K-12 institutions versus postsecondary institutions:

... [T]he approach in these final regulations allows postsecondary institutions to decide which of their employees must, may, or must only with a student's consent, report sexual harassment to the recipient's Title IX Coordinator Postsecondary institutions ultimately decide which officials to authorize to institute corrective measures on behalf of the recipient.³³

Elementary and secondary school students cannot be expected to distinguish among employees to whom disclosing sexual harassment results in a mandatory school response, but students at postsecondary institutions may benefit from having options to disclose sexual harassment to college and university employees who may keep the disclosure confidential [T]he Department believes that students at postsecondary institutions benefit from retaining control over whether, and when, the complainant wants the recipient to respond to the sexual harassment that the complainant experienced.³⁴

With respect to elementary and secondary schools, the Department [of Education] is persuaded by commenters' concerns that *it is not reasonable* to expect young students to report to specific school employees or *to distinguish between a desire to disclose sexual harassment confidentially to a school employee, versus a desire to report sexual harassment for the purpose of triggering the school's response obligations* [italics added].³⁵

This distinction is not evident in [34 C.F.R. § 106.71 \(a\)](#), nor does any other subpart of the Regulations explicitly discuss the difference, nor consider its arbitrary nature. However, a relevant question is whether students sexually harassed in high school are fundamentally different from students in college with respect to desiring confidential guidance and advice before filing a formal report with a Title IX Coordinator.

A second very important consideration arises in connection with this different regulatory provision of access to confidential advisors in K-12 and postsecondary institutions. While the DOE is perhaps correct in noting that K-12 students, especially younger students, may not be able to distinguish *564 between employees who may be confidential advisors and employees who must report sexual harassment complaints to the Title IX Coordinator, parents and caregivers would be able to make this distinction if such confidential advisors were identified. Therefore, with respect to access to confidential advisors, any difference between K-12 and postsecondary institutions is unsupported. Parents and caregivers, as well as capable K-12 students, should be given the opportunity to seek advice and counsel from trained employees whom the institution has identified as confidential advisors before a report of sexual harassment is conveyed to the Title IX Coordinator.

C. Hearings

Live hearings are required at the postsecondary level while educational entities that are not K-12 "may, but need not, provide for a hearing" in their Title IX Grievance Processes.³⁶ This different requirement may pose a decision of grave concern to K-12 recipients of federal funding, second only to choosing the standard of evidence for resolving allegations of sexual harassment. However, although [34 C.F.R. § 106.45\(6\)\(i\)](#) describes the scheduling and requirements for conducting a hearing in very specific terms, [34 C.F.R. § 106.45\(6\)\(ii\)](#) includes only the brief sentence stipulating the choice available to educational institutions that are "not postsecondary institutions." Many operational questions at the K-12 level are left unanswered.

The first question that arises in the context of a non-postsecondary educational institution is critical: may the K-12 institution completely disregard the regulatory mention of hearings, and simply not provide notice of the option in their Title IX

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policies. That option is not addressed in the Regulations, nor was the question addressed in DOE's discussion of public comments to the posting of the Regulations in the May 19, 2020 Federal Register. Therefore, the question is unanswered.

In addition, vocational-technical institutions are defined in 34 C.F.R. § 106.2(o) and in 34 C.F.R. § 106.30(b) as postsecondary institutions. However, some vocational-technical institutions comprise both K-12 and postsecondary educational levels, as in some schools which contract to provide training programs for high school students and, in a separate division, specific training programs for adults. Since by definition such institutions are defined as postsecondary institutions, the question arises: may the recipient treat each level separately or must the recipient vocational school provide hearings throughout its Title IX grievance processes.

K-12 institutions face even more serious unaddressed questions. No details are provided in 34 C.F.R. § 106.45(6)(ii) as to how or by whom the choice to offer a live hearing is decided in K-12 institutions: by the Title IX Coordinator, a majority (or super-majority) vote of the elected School Board or other institutional governing body, the Superintendent, the state DOE, or even whether a respondent or complainant may *demand* a hearing in a specific case. No details are supplied as to whether, where a K-12 recipient chooses to provide for a hearing in its Title IX policy, a hearing must be provided in all grievance processes, for both employees and students, or whether the decision to hold a hearing may be decided on a case-by-case basis. These are serious and consequential questions which must be addressed in any subsequent Title IX Regulations.

***565 Part III: Problems with the “Recipient Must” Language of the 2020 Regulations**

The phrase “the recipient must” appears throughout the 2020 Title IX Regulations. This universal characterization of the multiplicity of educational institutions subject to Title IX is necessary to accommodate the different organizational charts and chain-of-command structures of the nearly 140,000 educational institutions of all levels in the United States.³⁷ However, at best, such a generalization leads to flexibility and institutional autonomy, but, at worst, may lead to institutional confusion, indecision, inconsistency, and inaction.

“Recipients,” both K-12 and postsecondary educational institutions which receive federal funding, have many different moving parts. Most, if not all, colleges and universities in the United States have Boards of Trustees whose members are appointed because of their financial generosity to the institution, their expertise in financial matters, their positive administrative experience, and/or their genuine desire to make decisions in the best interest of the institution they represent.³⁸ Most, if not all, colleges and universities in the United States have designated Title IX Coordinators, many of whom are attorneys, and all of whom have been hired for their expertise in various aspects of administration and knowledge of Title IX.³⁹ In Title IX cases, therefore, the postsecondary Title IX Coordinators are typically well prepared to implement Title IX responsibilities delegated to “the recipient.” Unfortunately, the same situation does not prevail uniformly in the K-12 context.

In the K-12 context, Title IX Coordinators are often appointed from the ranks of the Human Resources Department or other administrative departments, and the duties of the Title IX Coordinator are in addition to their “normal” duties. They are often only minimally trained in the responsibilities of this additional position and have minimum additional time to perform their extensive new Title IX responsibilities. Instead of a Board of Trustees with the overall good of the institution on their agendas, K-12 schools and school districts, identified as Local Educational Agencies (LEAs) in the Title IX Regulations,⁴⁰ are often governed by an elected School Board comprised of members of the community, many of whom ran for election because of personal dissatisfaction with the current operational situation in their respective districts. As the political leanings of the Boards evolve, the Boards as a group are sometimes even in conflict with the Superintendent whom a prior Board hired as the chief administrative officer of the district. This conflict may further lessen the scope of authority of administrators in direct report to the Superintendent, including the Title IX Coordinator. Private K-12 schools, also subject to Title IX Regulations, may be even less likely than LEAs to afford independent, well-trained Title IX Coordinators.

***566** These realities signal that K-12 educational institutions and postsecondary educational institutions are fundamentally different “beings.” Both “recipients” collectively receive federal funding in different amounts and of different kinds, but now they are governed by the same Title IX Regulations, forced under penalty of law to implement the same definition of sexual

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harassment and related mandates, with only a few significant differences. Who, or what, is “the recipient” in either a K-12 or postsecondary institution is a valid question. However, mindful of the distinctions enumerated above, the question appears to be more easily answered in the postsecondary context, with the Title IX Coordinator better positioned to act independently on behalf of the recipient.

A. Hearings

In the case of the mandate for postsecondary institutions to include hearings in their grievance processes following formal complaints of sexual harassment,⁴¹ as described above, the dictate is clear. The Title IX Coordinator must implement the mandate on behalf of the recipient, scheduling the live hearing as part of the Grievance Process. However, when the Regulations state that recipients who are “elementary and secondary schools, and other recipients that are not postsecondary institutions,”⁴² “may, but need not”⁴³ include hearings in their grievance processes, the permissive dictate leads to questions, as noted in the preceding section. The nebulous wording “recipient” gives no directive as to who, or which deliberative body, decides whether or not, and when, a given K-12 institution must include live hearings in its Title IX sexual harassment policy. The wording that the non-postsecondary recipient’s grievance process “may, but need not” provide a hearing is unhelpful. Operationally, K-12 schools require more specific direction.

B. Training

A second “recipient must” dictate applies uniformly to both K-12 and postsecondary educational institutions but provides scant direction to either institutional level. In [34 C.F.R. § 106.45 \(b\)\(1\)\(iii\)](#), the Regulations provide that a “recipient must ensure that the Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training” on a specific and extensive list of topics, and also on more difficult to assess elements such as “how to serve impartially” and “avoiding prejudgment of the facts at issue.” However, no details of the nature or length of the training is given.

DOE states that its omission of training details is deliberate. In the Federal Register publication of May 19, 2020, the DOE states:

[T]he Department declines to recommend certain training practices or techniques aside from the requirements of [§ 106.45\(b\)\(1\)\(iii\)](#), [footnote omitted] leaving flexibility to recipients to determine how to meet training requirements in a manner that best fits the recipient’s unique educational community.⁴⁴

***567** The absence of training details may not create undue concern for postsecondary institutions in which the hiring process for Title IX Coordinators requires evidence of training and expertise in the indefinite elements listed in [34 C.F.R. § 106.45 \(b\)\(1\)\(iii\)](#), and whose budget provides the ability to “contract out” experienced investigators and other personnel necessary in conducting a Title IX Grievance Process. However, in K-12 institutions, as noted above, for the Title IX Coordinator and other personnel who may be drafted to provide service in resolving a formal complaint of Title IX, the issue of what constitutes appropriate training is critical.

With educational institutions’ budgets typically stressed to provide even minimal professional development of staff, especially in the K-12 context, a specific mandate for training requirements is necessary if the Title IX Grievance Process is to be executed as the Department envisions, with the involvement of a trained investigator, an independent decision-maker, and a different trained individual to conduct an appeal or an informal resolution, if either is required.⁴⁵ This more specific mandate for training should also extend to training on what constitutes sexual harassment and on Title IX policies for all employees and students, in both K-12 and postsecondary contexts.

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C. Actual Knowledge

A third concern in reference to the “recipient must” lack of specificity in the 2020 Regulations relates to the communication of actual knowledge of sexual harassment to the Title IX Coordinator. In the K-12 context, under the new Regulations, a report of sexual harassment to “any employee” communicates actual knowledge of sexual harassment to “the recipient.” Once “the recipient” receives actual knowledge of sexual harassment, the recipient “must respond promptly in a manner that is not clearly unreasonable.”⁴⁶

However, DOE’s discussion in the Final Rule adds an element of confusion. DOE states in the Final Rule:

[I]f an employee of an elementary or secondary school personally observes sexual harassment, ... then the elementary or secondary school recipient must respond to and address the sexual harassment in accordance with these final regulations.”⁴⁷ This comment is then followed by reference to Final Rule footnote 483.

An important point becomes unclear as a result of this statement. First, without actually turning to footnote 483, the phrase “personally observes sexual harassment” suggests that an employee may personally decide whether the observed conduct is actually sexual harassment that must be reported under the definition of sexual harassment in the 2020 Regulations.

However, footnote 483 states,

... an employee witnessing or hearing about conduct that “could constitute” sexual harassment defined in § 106.30 triggers the elementary and secondary school recipient’s response obligations, including having the Title IX Coordinator contact the complainant (and, where appropriate, the complainant’s parent or legal guardian) to confidentially discuss the *568 availability of supportive measures. Section 106.44(a). In other words, if an elementary or secondary school employee witnesses conduct but does not know “on the spot” whether the conduct meets the § 106.30 definition of sexual harassment ... the person victimized by the conduct is a “complainant” entitled to the school’s prompt response if the conduct “could” constitute sexual harassment.

The footnote clearly states that the employee must report any conduct witnessed or reported as a complaint of sexual harassment, even if the conduct merely suggests that it could constitute sexual harassment, to the Title IX Coordinator. The Title IX Coordinator shall then act as “the recipient” with actual knowledge and, eventually, shall decide if the conduct reported was sexual harassment as described in the definition. However, an employee’s delay in reporting to the Title IX Coordinator would delay “supportive measures,” as defined in 34 C.F.R. § 106.30 (a), to the complainant.

This explanation is too important to be buried in a footnote, as is the inclusion of the Title IX Coordinator’s mandate of sharing the complaint with the complainant’s parent or guardian, if appropriate. Without the background knowledge gleaned from DOE discussions in the Final Rule, the bare Regulations do not sufficiently emphasize that the Title IX Coordinator is the only individual who decides, after a formal complaint is filed, that the conduct reported or observed does, or does not, satisfy the definition of sexual harassment, thereby providing the authority to dismiss the complaint.⁴⁸

Not addressed in the 2020 Regulations with reference to reporting and “actual knowledge” is the role of “Mandated Reporters” in the K-12 context. In most K-12 schools and school districts, teachers and certain other employees are designated as Mandated Reporters who are legally responsible under state law to report any signs of child abuse or neglect to their supervisors and to file a report with the appropriate state authorities. These responsibilities are not negated by the 2020 Title IX Regulations, and, therefore, persist unchanged in the K-12 context in concert with Title IX reporting responsibilities.

Part IV: Provisions in the 2020 Title IX Regulations Worth Saving

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A. The Meaning of “On the Basis of Sex”

Perhaps the most surprising provision of the Final Rule, considering its publication during the Trump administration, is the reiteration of Title IX protection for LGBTQ individuals,⁴⁹ affirmed in the Obama-era DCLs but simply archived by direction of Trump’s Secretary of Education Betsy De-Vos.⁵⁰ The protections for LGBTQ individuals are referenced and reinforced 64 times in the Final Rule. The DOE explicitly declined to explain the word *569 “sex” in the Final Rule.⁵¹ However, DOE made clear that the definition of sex, *per se*, was irrelevant because sexual harassment was conduct that any person might experience, regardless of the definition of sex. As the Final Rule explained:

We emphasize that every person, regardless of demographic or personal characteristics or identity, is entitled to the same protections against sexual harassment under these final regulations, and that every individual should be treated with equal dignity and respect.⁵²

The tenor of this statement was reiterated throughout the Final Rule, leaving no doubt about the mandate for equal protection under Title IX for LGBTQ individuals:

These final regulations focus on prohibited conduct, irrespective of a person’s sexual orientation or gender identity

The Department will not tolerate sexual harassment as defined in § 106.30 against any student, including LGBTQ students.⁵³

These final regulations apply to prohibit certain conduct and apply to anyone who has experienced such conduct, irrespective of a person’s sexual identity or orientation. The Department believes that these final regulations provide the best protections for all persons, including women and people who identify as LGBTQ, in an education program or activity of a recipient of Federal financial assistance who experience sex discrimination, including sexual harassment.⁵⁴

In January 2021, OCR published a memorandum stating that the recent Supreme Court decision *Bostock v. Clayton County, Georgia*⁵⁵ dealt solely with LGBTQ protection under Title VII, and that the *Bostock* decision did not imply protection for LGBTQ individuals under Title IX.⁵⁶ However, the Department’s Final Rule firmly, and throughout the 2020 Regulations, established and reiterated protection for LGBTQ individuals under Title IX. *570 Commentators are confident that this Title IX protection of LGBTQ individuals from conduct constituting sexual harassment will be maintained under the new Secretary of Education, Miguel Cardona, in the Biden administration.⁵⁷

B. A. Timely Reports of Sexual Harassment to the Title IX Coordinator

Young children, especially students in Kindergarten through Grade 2, may not know the terminology to communicate sexual conduct or misconduct. For example, simple allegations of “that boy (or girl) was bothering me” may actually be a report of sexual harassment or sexual abuse.⁵⁸

Providing that a K-12 student may report sexual harassment to any employee of the educational institution⁵⁹ is a positive change from earlier requirements that mandated reports to a Title IX Coordinator or to an individual with authority to take corrective action in both K-12 and postsecondary contexts. The new reporting option was also an improvement over the limited reporting provision for K-12 students in the NPRM.⁶⁰

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However, this expansion of reporting options will only be helpful if accompanied by an additional statement that any employee who receives a report that may constitute sexual harassment must *promptly* communicate the report to the Title IX Coordinator. Without this additional mandate, the notice of sexual harassment to an employee who does not report to the Title IX Coordinator may actually compromise the institution's position in any subsequent litigation.

34 C.F.R. § 106.30 (a) unequivocally states that the K-12 student's report of sexual harassment communicates actual knowledge to the educational institution, and triggers the institution's responsibility to respond promptly to that knowledge.⁶¹ If the employee does not communicate the report to the Title IX Coordinator without delay, or worse, if the employee never informs the Title IX Coordinator (e.g., because he/she "forgot," or does not understand what the student tried to report, or makes the unilateral decision that the student's report was not actual sexual harassment), the educational institution may be in an indefensible position if sued by the student and/or parent or caregiver of the sexually harassed or abused student. The failure of the employee to report the notice of what may have been sexual harassment, *571 in a court of law, arguably translated to deliberate indifference on the part of the recipient. This possibility underscores the necessity for training of all staff in the definition of sexual harassment, the different ways in which young children may attempt to convey notice of sexual harassment, and employees' collective and individual responsibility to promptly convey any suspicious notifications of sexual harassment to the Title IX Coordinator.

The above comments also apply in the postsecondary context, where reports of sexual harassment may be communicated to an official with authority to take corrective action.⁶² The information must be communicated to the Title IX Coordinator promptly, and a notice of that requirement must be added to the Regulations for the reasons stated above.

C. Supportive Measures

Supportive measures are expansively defined in 34 C.F.R. § 106.30 (a). As opposed to "interim measures" which were required in previous DCLs as responses to a "hostile environment" created in the educational institution by sexual harassment,⁶³ "appropriate" and "reasonably available" supportive measures⁶⁴ under the 2020 Title IX Regulations do not require a suspected or demonstrated hostile environment but must be offered to a complainant confidentially and immediately after the report of sexual harassment has been made, whether or not a formal complaint has or shall be filed. Supportive measures may also be provided to a respondent, as appropriate.⁶⁵

The Final Rule indicates that supportive measures provide "sufficient flexibility and discretion to address the unique needs of each complainant."⁶⁶ This includes the needs of students with special needs, LGBTQ students, and students with disabilities. The Final Rule elaborates, "Such supportive measures are designed precisely to help complainants preserve equal access to their education."⁶⁷

For many who experience trauma, the most basic need is to be heard and understood.⁶⁸ Providing supportive measures may help a complainant (in concert with a parent or caregiver, if appropriate) decide whether or not to pursue a formal complaint. Providing supportive measures may inconvenience faculty or staff who may be asked/required to assist in the implementation of such measures as counseling, escort services on campus, changes in curriculum or work expectations or locations, and other provisions. Collective bargaining agreements for employees may require amendments to mandate *572 these responsibilities as needed. However, providing supportive measures to both complainants and respondents is the first step in bringing closure to complainants and treating respondents equitably and as not responsible until the final resolution of the complaint.

D. Formal Complaint Necessary Before Any Steps of the Grievance Process

While the 2020 Title IX Regulations provide different options for reporting sexual harassment at different educational levels, a formal complaint is necessary at both K-12 and postsecondary levels before an investigation or informal resolution of the complaint may begin.⁶⁹ If the alleged victim is unable or unwilling to file a formal complaint, the Title IX Coordinator may,

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for sufficient reason(s), file the formal complaint.⁷⁰

The regulatory mandate for the filing of a formal complaint before any investigation of a report of sexual harassment must be understood in concert with the mandate to the Title IX Coordinator to offer confidential supportive measures⁷¹ to the complainant or the respondent, even before a formal complaint is filed.⁷² These supportive measures, as described above, may include measures such as counseling, course-related modifications, escort services, and others⁷³ designed to allow student or employee complainants to continue to participate in, and benefit from, the educational program or activities of the institution.

With supportive measures in place, the complainant's (or respondent's) immediate needs may be met, and the complainant⁷⁴ may decide not to pursue a formal complaint. Regulations prohibit retaliation by the respondent or by any other party for the filing of a complaint.⁷⁵ Therefore, in requiring a formal complaint before taking action, the Title IX Coordinator has not prematurely expended institutional resources that may end up wasted when a complaint is unexpectedly withdrawn.

E. Definition Details Regarding Title IX Protections: “Who/Where/When”

The 2020 Title IX Regulations more clearly define the typical newspaper reporters' questions of the “Who, What, Where, and When” than earlier guidance from OCR. The three-prong definition of sexual harassment states the specific elements that constitute sexual harassment, with statutory references as needed. However, the sheer numbers of lawsuits challenging several of the apparently “clear” words and phrases of the Title IX statute⁷⁶ signaled *573 that additional clarification was warranted. That clarification appeared in several places in the 2020 Regulations.

First, the definition of the “complainant” who may file a formal complaint of sexual harassment should temper the extensive recent litigation about the meaning of the word “person” in 20 U.S.C. § 1681 (a).⁷⁷ An individual may not file a formal complaint of sexual harassment in an educational institution receiving federal funding (the “recipient”) unless the individual is “participating in or attempting to participate in the education program or activity of the recipient with whom the formal complaint is filed.”⁷⁸ The complainant is entitled to receive supportive measures immediately upon reporting sexual harassment, perhaps even independent of the individual's status with respect to the institution, but may not file a formal complaint without formal, or intended formal, affiliation with the institution.

This definition of complainant is further amplified and must be understood in conjunction with the definition of “education program or activity of the recipient” as “locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs.”⁷⁹ The significance of this delineation of the education program or activity is clear when considering that a lawsuit alleging sexual harassment at an educational institution is a suit against the educational institution itself for its lack of response to the complaint, i.e., its deliberate indifference.

An educational institution exercises “substantial control” over its students and employees by virtue of the contractual nature of their respective relationships. The institution has no comparable relationship with mere occasional visitors to the institution or with “third persons,” i.e., members of the general public, outside its locations or events. In prior OCR DCLs, Guidance stated that an institution was responsible for sexual harassment that occurred outside its sphere of substantial control, of which it knew or “should have known,” because that outside conduct created a “hostile environment” in the institution itself.⁸⁰ The 2020 Regulations recognize that the disciplinary arm of the educational institution cannot extend outside its legal purview, even in the K-12 context of *in loco parentis*. This clear statement of the institution's obligations with respect to sexual harassment, accompanied by safeguards of “Mandated Reporters” in the K-12 context⁸¹ and Campus Security Officers in higher education,⁸² will relieve institutions of uncertainty and avoid costly litigation.

F. Ongoing Notifications Required by Title IX Coordinator

The 2020 Title IX Regulations mandate a considerable amount of paperwork, with the Title IX Coordinator required to

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provide notifications at *574 every turn, before, during, and at the final resolution of a formal complaint of sexual harassment, most of them written. The Title IX Coordinator must also retain all documentation for seven years.

The process of notification begins with the Title IX Coordinator's publication of a notice of the institution's policy on nondiscrimination on the basis of sex, and an identification of the Title IX Coordinator with multiple methods for communicating with the Coordinator.⁸³ The Title IX Coordinator must also provide notification of how to file complaints of sexual harassment and notice of the institution's grievance process.⁸⁴ This same notification mandate occurs repeatedly in the 2020 Regulations.⁸⁵

When a complaint of sexual harassment reaches the Coordinator, notification from the Title IX Coordinator must follow to advise the complainant that reasonable and appropriate supportive measures are available, and to discuss the complainant's wishes in that regard. The Title IX Coordinator must also provide information on how to file a formal complaint. This occurs even before a formal complaint is, or will be, filed.⁸⁶

Once a formal complaint is filed, the Title IX Coordinator must notify the parties of the allegations with sufficient details so parties may prepare responses, explain the grievance process, and include a specific notice that the alleged respondent is not responsible until the conclusion of the grievance process.⁸⁷ These notifications must be updated as the grievance process proceeds.⁸⁸ If the Title IX Coordinator dismisses the formal complaint, notification to the parties is also required.⁸⁹

Notification responsibilities predominate throughout the grievance process, making sure parties and their advisors are aware of all the evidence collected upon which a determination of responsibility rests.⁹⁰ The Title IX Coordinator's notifications responsibilities do not end until the Title IX Coordinator sends written notifications of the outcome of the entire investigation simultaneously to both parties.⁹¹

While several commenters to the publication of the 2020 Regulations in the Federal Register complained that the Title IX Coordinator's notification mandates were too onerous for K-12 institutions and were unnecessary for young students,⁹² their comments failed to recognize the utility of the notifications for parents and caregivers. In the context of notifications of the details of mandated disciplinary processes, and possibly in many other contexts, K-12 educational institutions must meet the needs and expectations not only of a diverse population of students, in ages ranging from four to eighteen and in very different developmental stages within those ages, but of parents and caregivers with histories of very different backgrounds in education and life in general.

*575 Postsecondary institutions, by comparison with K-12 institutions, have a more homogeneous population of students and parents, created so by numerous indicators such as wealth, standardized examination scores, and student and parent aspirations for life careers and status. Notifications at every step of the Title IX process may, therefore, be even more important at K-12 educational institutions than at postsecondary institutions.

G. Choice of Evidentiary Standards in Resolving Allegations of Sexual Abuse

The ability of recipients under the 2020 Regulations to choose between two standards of evidence in resolution of complaints of sexual harassment⁹³ has caused consternation and confusion among many, if not most, educational institutions, especially K-12 institutions. Former guidance from OCR directed that institutions apply the preponderance of evidence standard in resolving such complaints,⁹⁴ and most postsecondary institutions incorporated this standard in their Title IX policies. Prior to the publication of the NPRM in 2018, estimates suggested that over 80% of colleges and universities had adopted the preponderance of evidence standard for resolution of sexual harassment complaints.⁹⁵ However, this guidance contradicted the federal VAWA provision requiring that a recipient must simply state the standard of evidence used in deliberations of responsibility for sexual misconduct.⁹⁶

For virtually all K-12 institutions the preponderance of evidence OCR guidance was meaningless. When allegations of sexual misconduct arose, school administrators, typically principals, had more basic procedures in mind: notice to parents, due

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process to the student accused, and application of the disciplinary sanction at the appropriate level of offense prescribed by the institution's Code of Student Conduct. "Standard of evidence" or "burden of proof" were not phrases included in the typical Principal's Handbook or in any K-12 Student Handbook.⁹⁷

Therefore, while educational institutions overall were challenged to decide which standard of evidence to adopt in resolving formal complaints of sexual harassment, K-12 schools were starting from a serious disadvantage. The choice was even more troubling because, once decided, the choice had to be applied universally,⁹⁸ in all student-on-student sexual harassment cases, *576 and in all cases of employee-on-student or student-on-employee sexual harassment. Faculty were held to the same chosen standard of evidence as students.

At both K-12 and postsecondary levels questions arose, similar to those facing K-12 institutions in the context of choosing whether or not to provide a live hearing in their Title IX policy. Who would decide which standard of evidence to adopt? And on what would the institution rely in making the decision? Was any data available to help make the case for one standard or the other? (The response to that final question was "no.")

The DOE provided scant guidance in the Final Rule:

The Department is not aware of a Federal appellate court holding that the clear and convincing evidence standard is required to satisfy constitutional due process or fundamental fairness in Title IX proceedings, and the Department is not aware of a Federal appellate court holding that the preponderance of the evidence standard is required under Title IX.

Because recipients have historically used either the preponderance of the evidence standard or the clear and convincing evidence standard in sexual misconduct disciplinary proceedings, and because studies are inconclusive about which standard is more likely to reduce the risk of erroneous outcomes, the Department concludes that recipients must select and consistently apply a standard of evidence that is not lower than the preponderance of the evidence standard and not higher than the clear and convincing evidence standard, but that either the preponderance of the evidence standard or the clear and convincing evidence standard may be applied to reach accurate determinations in a Title IX grievance process, consistent with constitutional due process and fundamental fairness and with Title IX's non-discrimination mandate.

The Department believes that the predictable, fair grievance process prescribed under § 106.45 will convey to complainants and respondents that the recipient treats formal complaints of sexual harassment seriously and aims to reach a factually accurate conclusion; the Department does not agree that using one standard of evidence rather than the other conveys to respondents that Title IX sexual harassment can be perpetrated without consequence.⁹⁹

And

... all grievance processes regardless of which standard of evidence a recipient applies, are fair processes likely to lead to accurate determinations regarding responsibility.¹⁰⁰

*577 Contrary to this reassurance that the choice of either standard of evidence, preponderance of the evidence or clear and convincing evidence, will provide notice that the institution takes sexual harassment offenses seriously, many institutions,

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especially K-12 institutions, remain in a quandary of indecision. Especially troublesome and seemingly unfair to many decisionmakers is the mandate that the same standard of evidence be applied to both students and employees, especially faculty.¹⁰¹ The preponderance of evidence standard has been roundly criticized as denying due process to male respondents,¹⁰² but the reverse, adopting a clear and convincing standard of evidence, may disfavor the complainant's case.

The stated position of the DOE is that the mandate for a live hearing will add any necessary layer of opportunity to accomplish due process for both respondent and complainant, whichever standard of evidence is applied:

The Department agrees with commenters that postsecondary-level adjudications with live hearings and cross-examination will increase the reality and perception by parties and the public that Title IX grievance processes are reaching fair, accurate determinations, and that robust adversarial procedures improve the legitimacy and credibility of a recipient's process, making it more likely that no group of complainants or respondents will experience unfair treatment or unjust outcomes in Title IX proceedings (for example, where formal complaints involve people of color, LGBTQ students, star athletes, renowned faculty, etc.).¹⁰³

However, the mandate for including live hearings in the Title IX Grievance Process applies only to postsecondary institutions, many of which, as noted, have already adopted the preponderance of evidence standard, and shall, very likely, continue using the same standard.

If K-12 institutions choose the preponderance of evidence standard, the institutional decision makers may see a need to schedule a live hearing, especially in difficult decisions involving allegations of sexual misconduct against a faculty member. However, the questions described above now present themselves: who makes the decision to schedule a live hearing, may a party demand a live hearing, and must every resolution include a live hearing. These same questions may arise in the context where the K-12 institution has chosen to adopt a clear and convincing standard of evidence. Clarity on these points appears to be badly needed in the Title IX Regulations.

Part V: Stating the Case for Separate Title IX Regulations for K-12 and Postsecondary Institutions

With a Title IX Coordinator hired because of relevant training, experience, and expertise in the responsibilities of the position, and with an "overseer" Board of Trustees vested in ensuring the best decisions for the *578 good of the institution, postsecondary institutions are likely, on the whole, better positioned to act responsibly as the mandated "recipient." The "recipient must" language, therefore, may be more helpful in the postsecondary context than in the K-12 context. This difference may present the first cogent case for drafting separate Title IX Regulations for K-12 and for postsecondary educational institutions.

The second most cogent argument for separation of K-12 and postsecondary institutions, aside from the specific difficulties engendered by the previously noted lack of clarity in the 2020 Regulations, is the cost factor. Training, including the mandates for a trained investigator, independent decision-maker, and trained individuals to handle appeals and informal resolutions after every formal complaint of sexual harassment, will tax the budget for every institution. However, the costs for K-12 institutions will skyrocket because few of these trained individuals are already on staff. The K-12 Title IX Coordinator will need additional training; the rest of the K-12 employees who are effectively "mandated reporters" under the 2020 Regulations will need training to recognize and report sexual harassment. Parents, caregivers, and students will also need training in the new Regulations and in reporting sexual harassment.

Many generalized features of the 2020 Title IX Regulations are worth saving for both K-12 and postsecondary institutions. Following are examples:

- The emphasis on sexual harassment as conduct that can be experienced by any individuals, including those identifying as LGBTQ

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- The need to treat all individuals in the process, parties and witnesses alike, with dignity and respect
- Ongoing provision of notifications throughout the resolution of complaints of sexual harassment, providing the transparency that breeds trust
- Provision of supportive measures to all who allege having experienced sexual harassment, with or without the filing of a formal complaint
- The presumption of innocence of the alleged perpetrator until the conclusion of a grievance process
- The recognition of due process rights for both parties to a complaint of sexual harassment, and finally,
- The preservation of Constitutional rights and the preemption of Title IX Regulations over all state and local laws, as mandated by [34 C.F.R. § 106.6 \(a-h\)](#).

Specific provisions of the 2020 Regulations, however, would profit from being addressed to K-12 institutions exclusively, or to postsecondary institutions *579 exclusively. The definition of an institution of vocational education in [34 C.F.R. § 106.30 \(b\)](#) should also be classified as a K-12 institution if providing training for K-12 students or as a postsecondary institution if providing education for adult students.

The following is a brief identification of arguably the most critical specific changes proposed for the 2020 Title IX Regulations with respect to separating responsibilities for K-12 versus postsecondary institutions, in order to salvage the worthwhile improvements offered by the mandates of the Final Rule for each level of educational institution:

- Title IX Regulations should note that the offense of “domestic violence” is a criminal offense that does not apply in K-12 unless the K-12 institution provides housing for families on its campus,
- The C.F.R. § 106.45 Grievance Process should be streamlined for K-12 institutions, concentrating more heavily on the old model of providing due process for respondents along with a presumption of non-responsibility for the respondent until the conclusion of a non-biased investigation
- Training requirements should be more specifically defined in terms of topics covered and repetition at specific intervals, especially for K-12 employees, with teaching staff trained so that they may be called upon to assist in investigations or other parts of the resolution process, to minimize cost¹⁰⁴

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- The “recipient” language must be augmented for K-12 institutions by provision of examples of the entities who may make decisions regarding (1) choice of the standard of evidence to be adopted, and (2) considerations that would be helpful in deciding whether or not to provide for live hearings in their resolution of complaints of sexual harassment,
- Students in K-12 and postsecondary institutions should be educated to recognize and respond to sexual harassment, and the education should be delivered at least twice per academic year for K-12 students, at the beginning of each semester, in appropriate language and with specific instruction in fending off unwelcome sexual conduct, in small group instructional format
- Postsecondary institutions must be required to enact policies prohibiting the possession and/or consumption of alcohol or illegal substances on campus, and such policies should be consistently enforced with strict penalties, and
- Other considerations as noted in discussions in Parts II-IV above must be implemented.

***580** Also as noted repeatedly, the “playing field” of dealing with complaints of sexual harassment is not level for K-12 and postsecondary institutions with such an elaborate and extensive grievance process as described in C.F.R. § 106.45, especially as currently mandated with the expectation of immediate implementation. Most postsecondary institutions already resolved complaints of sexual harassment with a trained investigator model, many with a two-person model of trained investigator and trained decision-maker to determine responsibility and assign sanctions as appropriate. K-12 institutions have been traditionally more likely to resolve complaints of sexual harassment with a simple provision of due process to the accused and application of the different levels of Student Code of Conduct sanctions. The primary decisionmakers were the Principal and perhaps the Assistant Principal. Sensitivity to institutional history is necessary in any implementation mandates, as well as in deadlines for change.

The dichotomy of disciplinary practices regarding sexual harassment in postsecondary versus K-12 educational institutions was radically changed by the DOE’s new mandated 2020 Regulations. The 2020 Title IX Regulations mandated a one-size-fits-all, three-person resolution of sexual harassment complaints, cost and delays be damned, to be accomplished within months. However, the political crystal ball may presage a new era of 2021 Title IX Regulations. The new administration may decide to start anew, from scratch, but a careful review of the existing Regulations, will show that a “baby” is also in the tub with the bathwater. While rushed to implementation too peremptorily during an all-consuming pandemic, the 2020 Title IX Regulations contain many provisions that can be salvaged, and bifurcation of K-12 and postsecondary institutions under the revised Regulations may clarify the issues and assist the salvage process.

Footnotes

^{a1} The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 386 Ed.Law Rep. [557] (April 15, 2021).

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¹ Prior to the 2020 Title IX Regulations sexual harassment was defined simply as “unwelcome conduct of a sexual nature.” *See, e.g.*, White House Task Force to Protect Students from Sexual Assault, *Sample Language and Definitions of Prohibited Conduct for a School’s Sexual Misconduct Policy* (Apr. 2014), <https://www.justice.gov/archives/ovw/page/file/910276/download>. *See also*, DOE, *Proposal for the New Rule, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, hereinafter “NPRM,” 83 FED. REG. 61462, 61466 (Nov. 29, 2018) (where the proposed definition of sexual harassment differed from the final adoption), <https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.

² The 2020 Title IX Regulations as printed in the Federal Register on May 19, 2020 refer to “elementary and secondary schools” and many commentators translate this as “K-12,” failing to note that, when responding to sexual harassment, the new Regulations apply also to preschools that receive any form of federal assistance. *See* 34 C.F.R. § 106.30 (b). In this commentary, the designation K-12 incorporates preK-12.

³ R. Shep Melnick, *Analyzing the Department of Education’s Final Title IX Rules on Sexual Misconduct*, BROOKINGS (June 11, 2020), <https://www.brookings.edu/research/analyzing-the-department-of-educations-final-title-ix-rules-on-sexual-misconduct/>.

⁴ For a brief overview of the 2020 Title IX Regulations, *see* Suzanne Eckes & Charles Russo, *A New Dawn for Title IX and Sexual Harassment of Students?*, 377 Ed. Law Rep. 484 (2020). This commentary discusses and/or analyzes information from the following sections of the 2020 Title IX Regulations: 34 C.F.R. §§ 106.6, 106.8, 106.30, 106.44, 106.45, and 106.71, as well as information from the NPRM (*See* n.1) and from Comments and Discussions in *The New Rule, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 FED. REG. 30026 (May 19, 2020), hereinafter “Final Rule,” <https://www.federalregister.gov/documents/2020/05/19/2020-10512/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.

⁵ Cong. Research Service, *Title IX and Sexual Harassment: Private Rights of Action, Administrative Enforcement, and Proposed Regulations* (Apr. 12, 2019), <https://fas.org/sgp/crs/misc/R45685.pdf>.

⁶  *Cannon v. Univ. of Chi.*, 441 U.S. 677, 709, 717 (1979).

⁷ Office for Civil Rights (OCR), *Nondiscrimination in Employment Practices in Education* (Aug. 1991), (where OCR stated: “The [Title IX] regulation applies to all employment decisions by ED recipients, whether made directly or indirectly through contractual arrangements with referral agencies, labor unions, organizations providing or administering fringe benefits, or others.”), <https://www2.ed.gov/about/offices/list/ocr/docs/hq53e8.html>.

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⁸  20 U.S.C. § 1681 (a) (1972).

⁹ See, e.g., Kathleen Conn, *Defining Who Is a "Person" Under Title IX: Conflict in the Wings?*, 369 Ed. Law Rep. 546 (2019); Kathleen Conn, *Defining Who Is a "Person" Under Title IX*, 368 Ed. Law Rep. 575 (2019).

¹⁰ See, e.g., Kathleen Conn, *The Supreme Court and Protections for LGBT Individuals: The Beat Goes On*, 368 Ed. Law Rep. 1 (2019); Kathleen Conn, *Re-Interpreting Sex: Changing Judicial Views of Title VII and Title IX*, 357 Ed. Law Rep. 1 (2018).

¹¹ See  *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60 (1992) (where the Court affirmed the availability of monetary damages from a school district for a Title IX violation). In *Franklin*, the student complained that the school district failed to remedy sexual harassment by her teacher/coach at the school. The failure of an educational institution to deal with actual knowledge of sexual harassment became, as established in the *Franklin* decision, a violation of Title IX.

¹² 34 C.F.R. § 106.30 (a). This statutory definition of sexual harassment was expanded from the definition suggested in the NPRM which contained a prohibition of sexual assault, but did not include dating violence, domestic violence, and stalking.

¹³ Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000 (e) *et seq.*

¹⁴ The exact language of Title VII, stated in  *Meritor Savings Bank v. Vinson* (477 U.S. 57, 67 (1986)) requires that “[f]or sexual harassment to be actionable, it must be ‘sufficiently severe or [italics added] pervasive to alter the conditions of [the victim’s] employment and create an abusive working environment,’” quoting  *Rogers v. Equal Employment Opportunity Comm. (EEOC)*, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied  406 U.S. 957 (1972).

¹⁵  526 U.S. 629 (1999).

¹⁶  *Id.* at 633, 650. Additional provisions in the 2020 Regulations also explain what constitutes actual knowledge and deprivation of access to educational opportunities or benefits in both K-12 and in postsecondary institutions. However, that the first and second elements of the new definition of sexual harassment bear a relationship to Title VII is not devoid of significance; rather they remind readers that Title IX also applies to protect employees, as well as students, from discrimination on the basis of sex.

¹⁷  20 U.S.C. § 1092 (f) (2018).

¹⁸ See 79 FED. REG. 62752 *et seq.* (Oct. 20, 2014), reauthorizing the Violence Against Women Act, Pub. L. 113-4 (2013) (hereinafter VAWA) and amending the Clery Act, 34 C.F.R. § 668.46, Institutional security policies and crime statistics, to include the four elements of sexual assault, dating violence, domestic violence, and stalking, as defined in

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the 2020 Title IX Regulations.

¹⁹ Final Rule at 30061 (where the DOE explicitly states that these four offenses were added to the new definition of sexual harassment to accomplish “alignment between the proposed rules and the Clery Act.” *See also*, DOE’s statement that, “By aligning the definition of sexual harassment in § 106.30 with the Clery Act, the Department is attempting to resolve confusion or perceived conflicts about a recipient’s obligations under Title IX and how these obligations may overlap with some of the conduct that the Clery Act requires.” *Id.* at 30513.

²⁰ Dear Colleague Letters issued under the Obama administration were “significant guidance documents” under the Office of Management and Budget’s [Final Bulletin for Agency Good Guidance Practices](#), 72 FED. REG. 3432 (Jan. 25, 2007), http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/012507.

²¹ See Diane Heckman, *The Nascent Trump Administration and the Vaporizing of the Title IX Arsenal of Policy Documents*, 370 Ed. Law Rep. 478 (2019) Diane Heckman, [The Nascent Trump Administration and the Vaporizing of the Title IX Arsenal of Policy Documents](#), 370 Ed. Law Rep. 478 (2019).

²² DCL on *Title IX Coordinators* (Apr. 24, 2015), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf>; *Letter to Title IX Coordinators* (Apr. 24, 2015), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-letter-201504.pdf>; and *Resource Guide for Title IX Coordinators* (Apr. 24, 2015), <https://www2.ed.gov/about/offices/list/ocr/docs/dc-ltitle-ix-coordinators-guide-201504.pdf>. DOE archived these three documents during the Trump administration.

²³ Withdrawal or withholding of Title IX funding did not occur then and has never occurred.

²⁴ Pub. L. 79-404, 60 Stat. 237 (June 11, 1946).

²⁵ See 34 C.F.R. § 106.8 (a).

²⁶ Receipt of actual knowledge of sexual harassment by an educational institution that is a recipient of federal funding means that the institution “must respond promptly in a manner that is not deliberately indifferent,” that is, not “clearly unreasonable in light of the known circumstances.” *See* 34 C.F.R. § 106.44 (a).

²⁷ 34 C.F.R. § 106.30 (a).

²⁸ *Id.*

²⁹  524 U.S. 274, 277, 283-290 (1998).

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³⁰ See, e.g., Sandra J. Perry & Tanya M. Marcum, *Liability for School Sexual Harassment Under Title IX: How the Courts Are Failing Our Children*, 30 U. LAVERNE L.R. 3, 18-30 (2008) (discussing courts' majority and minority views identifying the official with corrective authority).

³¹ 34 C.F.R. § 106.8 (a).

³² 34 C.F.R. § 106.71 (a) states, "The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness"

³³ Final Rule, at 30040.

³⁴ *Id.*

³⁵ *Id.* at 30107.

³⁶ 34 C.F.R. § 106.45 (6) (i-ii).

³⁷ Nat'l Ctr. for Educ. Statistics, *Digest of Education*, <https://nces.ed.gov/programs/digest/d19/tables/dt19105.50.asp> The most recent data lists 137,432 educational institutions in the U.S. in 2017-2018, including public and private K-12 schools and all postsecondary Title IV institutions. PreK institutions are not included.

³⁸ Grant Thornton, Higher Education Board Guidebook, <https://www.grantthornton.com/-/media/content-page-files/nfp/pdfs/2016/higher-ed-board-guide.ashx>.

³⁹ ZipRecruiter Marketplace Research Team, *What Is a Title IX Coordinator and How to Become One*, <https://www.ziprecruiter.com/Career>Title-IX-Investigator/What-Is-How-to-Become#How-to-Become-a-Title-IX-Investigator>

⁴⁰ 34 C.F.R. § 106.30 (b).

⁴¹ 34 C.F.R. § 106.45 (6)(i).

⁴² 34 C.F.R. § 106.45 (6)(ii).

⁴³ *Id.*

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⁴⁴ Final Rule at 30120.

⁴⁵ 34 C.F.R. § 106.45 (b)(1)(iii).

⁴⁶ 34 C.F.R. § 106.44 (a).

⁴⁷ Final Rule at 30109.

⁴⁸ 34 C.F.R. § 106.45 (b)(3) (i).

⁴⁹ “For consistency, throughout this preamble we use the acronym “LGBTQ” while recognizing that other terminology may be used or preferred by certain groups or individuals, and our use of “LGBTQ” should be understood to include lesbian, gay, bisexual, transgender, queer, questioning, asexual, intersex, nonbinary, and other sexual orientation or gender identity communities.” Final Rule at 30031.

⁵⁰ DOE rescinded and archived three DCLs: the DCL on *Sexual Violence* (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; the DCL *Q&A about Title IX and Sexual Violence* (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-titleix.pdf>; and the DCL on *Transgender Students* (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

⁵¹ “The Department declines to take commenters’ suggestions to include a definition of the word “sex” in these final regulations because defining sex is not necessary to effectuate these final regulations and has consequences that extend outside the scope of this rulemaking” These final regulations focus on prohibited conduct, irrespective of a person’s sexual orientation or gender identity. Final Rule at 30178.

⁵² Final Rule at 30031.

⁵³ *Id.* at 30179.

⁵⁴ *Id.* at 30477.

⁵⁵  140 S. Ct. 1731 (2020).

⁵⁶ U.S. DOE Office of the General Counsel, *Memorandum for Kimberly M. Richey Acting Assistant Secretary of the Office for Civil Rights Re: Bostock v. Clayton Cty.* (Jan. 8, 2021), <https://www2.ed.gov/about/offices/list/ocr/correspondence/other/ogc-memorandum-01082021.pdf>. DOE had also previously published guidance dealing with the *Bostock* decision on Title VII protection for LGBTQ individuals, negating any relevance to LGBTQ protection under Title IX. See

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<https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/index.html>. These communications were guidance documents that did not have the force of law, but espoused the Trump administration's animus to civil rights protections for LGBTQ individuals.

⁵⁷ See Greta Anderson, *Dept. of Ed Says Title IX Does Not Apply to LGBTQ Discrimination*, INSIDE HIGHER EDUC. (Jan. 12, 2021), <https://www.insidehighered.com/quicktakes/2021/01/12/dept-ed-says-title-ix-does-not-apply-lgbtq-discrimination>.

⁵⁸ Betty N. Gordon, Carolyn S. Schroeder, Peter A. Ornstein & Lynn E. Baker-Ward, *Clinical Implications of Research on Memory Development, in TRUE AND FALSE ALLEGATIONS OF CHILD SEXUAL ABUSE: ASSESSMENT AND CASE MANAGEMENT* 101-116 (Tara Ney ed., 1995).

⁵⁹ 34 C.F.R. § 106.30 (a).

⁶⁰ 34 C.F.R. § 106.30 (a) provision for reporting sexual harassment to "any employee" in elementary or secondary schools was a change from the NPRM, which stated that reports of sexual harassment by K-12 students may be made "to a teacher in the elementary and secondary context with regard to student-on-student harassment." NPRM at 61466, 61496. The NPRM was not clear in defining to whom K-12 students were required to report sexual harassment by an employee. The Final Rule does not distinguish between student-on-student sexual harassment and employee-on-student sexual harassment for K-12 reporting purposes.

⁶¹ 34 C.F.R. § 106.44 (a).

⁶² 34 C.F.R. § 106.30 (a).

⁶³ See, e.g., DCL Q&A about Title IX and Sexual Violence (Archived) G1-G3, 32-33 (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>. "Interim measures" were to be put in place for the alleged victim of sexual harassment during the course of the investigation into the complaint of misconduct.

⁶⁴ 34 C.F.R. § 106.30 (a).

⁶⁵ Final Rule, 30064.

⁶⁶ Id. at 30066.

⁶⁷ Id. at 30067, 30081.

⁶⁸ See Leon Seltzer, *Feeling Understood - Even More Important than Feeling Loved?*, PSYCHOLOGY TODAY (June 28, 2017),

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<https://www.psychologytoday.com/us/blog/evolution-the-self/201706/feeling-understood-even-more-important-feeling-loved>. See also TRAUMA-INFORMED CARE IN BEHAVIORAL HEALTH SCIENCES, Chapter 3, *Understanding the Impact of Trauma*, <https://www.ncbi.nlm.nih.gov/books/NBK207191/>.

⁶⁹ 34 C.F.R. § 106.44 (b)(1).

⁷⁰ 34 C.F.R. § 106.30 (a). Examples of circumstances in which a Title IX Coordinator may file a formal complaint include, e.g., (1) when the complainant desires to remain anonymous but inaction may endanger other students or employees, or (2) if alleged respondent(s) pose a threat to campus security.

⁷¹ The Regulations define supportive measures and describe examples of such in Final Rule 34 C.F.R. § 106.30 (a).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ In the case of students who have not reached their majority, these decisions may be made, of course, by parents or caregivers acting in the best interests of the child.

⁷⁵ 34 C.F.R. § 106.71 (a)

⁷⁶ See n. 8.

⁷⁷ See, e.g., *supra* n. 9.

⁷⁸ 34 C.F.R. § 106.30 (a), defining “Formal complaint.”

⁷⁹ 34 C.F.R. § 106.44 (a).

⁸⁰ See DCL on Sexual Violence (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>. See also, DCL Q&A about Title IX and Sexual Violence (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

⁸¹ Alicia Betz, *What it Means that Teachers are Mandated Reporters*, EDUC. CORNER, <https://www.educationcorner.com/teachers-mandated-reporters.html#:~:text=In%20most%C20states%C2C%C20teachers%C20and,to%C20the%20appropriate%20authorities%20immediately>.

⁸² Clery Center, Reporting Responsibilities,

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<https://clerycenter.org/policy-resources/title-ix-related-acts/#:~:text=Under%20the%C20Clery%C20Act%C2C%C20a,officials%C20with%C20significant%20responsibility%20for>.

⁸³ 34 C.F.R. § 106.8 (a-b).

⁸⁴ 34 C.F.R. § 106.8 (c).

⁸⁵ See 34 C.F.R. § 106.45.

⁸⁶ 34 C.F.R. § 106.44 (a).

⁸⁷ Several commenters to the Final Rule's publication complained that this sustained presumption of the respondent's innocence was "inequitable" to the complainant. Final Rule at 30245. However, DOE stressed that this presumption assured impartiality to the grievance process and avoided prejudgment of the facts. Final Rule at 30247.

⁸⁸ 34 C.F.R. § 106.45 (b)(2)(i-ii).

⁸⁹ 34 C.F.R. § 106.45 (b)(3)(iii).

⁹⁰ 34 C.F.R. § 106.45 (b)(5)(v-vi).

⁹¹ 34 C.F.R. § 106.45 (b)(5)(vii).

⁹² Final Rule at 30390.

⁹³ 34 C.F.R. § 106.45 (1)(vii).

⁹⁴ See *supra* n. 50. See also OCR, *Know Your Rights* (Archived) (where the OCR document stated, "Every complainant has the right for the complaint to be decided using a preponderance of the evidence standard (*i.e.*, it is more likely than not that sexual harassment or violence occurred"). <https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-rights-201104.html>

⁹⁵ Alice Herman, *The Department of Education Has Moved to Increase the Burden of Proof Required in Assault Cases* (Nov. 19, 2018), PROGRESSIVE, <https://progressive.org/dispatches/DOE-moves-to-increase-burden-of-proof-1881119/>.

⁹⁶ VAWA, § 304 (a)(8)(A)(ii). See also Kathleen Conn, *The Preponderance of the Evidence Standard: Is OCR Overstepping Its Authority?*, 310 Ed. Law Rep. 614, 623-24 (2015).

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⁹⁷ See Fred Lunenburg & Beverly Irby, THE PRINCIPALSHIP: VISION TO ACTION 416-18 (2006) (where reference to  *Goss v. Lopez* (419 U.S. 565 (1975)) set the standard for providing due process to students in disciplinary matters). Other notable texts on the principalship did not even discuss specifics of disciplinary action. See, e.g., Thomas Sergiovanni, THE PRINCIPALSHIP: A REFLECTIVE PERSPECTIVE (2009) (where the focus was more on fostering student achievement, overall school improvement, and building school culture than on specifics of disciplinary protocols).

⁹⁸ 34 C.F.R. § 106.45 (b)(1)(vii).

⁹⁹ Final Rule at 30384.

¹⁰⁰ *Id.* at 30385.

¹⁰¹ 34 C.F.R. § 106.45 (b)(1)(vii) requires a recipient to make the choice of standard of evidence applicable to all formal complaints of sexual harassment, including those against employees and faculty.

¹⁰² James Moore & Kursat Christoff Pekgoz, *The Unfairer Sex*, INSIDE HIGHER EDUC. (Dec. 8, 2019), <https://www.insidehighered.com/views/2019/12/18/men-are-banding-together-class-action-lawsuits-against-discrimination-title-ix>.

¹⁰³ Final Rule at 30314.

¹⁰⁴ For example, to cut costs, K-12 teachers and administrators from different LEAs may be cross-trained to act as investigators, independent decision-makers, and mediators for informal resolutions, and offered to sister LEAs, to assist the LEA's trained Title IX Coordinator, while their classes and other responsibilities are handled by trained and trusted substitute teachers when Title IX duties require. Students should also be trained to recognize sexual harassment before it spirals into a Title IX problem.

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End of Document

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From: Kathleen Conn
Sent: Wed, 16 Jun 2021 17:08:39 +0000
To: T9PublicHearing
Subject: Comments Re: 2020 Title IX Regulations
Attachments: SALVAGING AND SEPARATING THE 2020 TITLE IX REGULATIONS (2).doc

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.

Dear Sirs,

Thank you for the opportunity to comment on the 2020 Title Regulations effective August 14, 2020.

I attach a commentary which I authored, published in West's Education Law Reporter recently.

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West's Education Law Reporter
April 15, 2021

Commentary.

However, I also recently ran into a problem, which highlights a very important and potentially discriminatory effect on the respondent, with the requirement of the filing of a formal complaint before the grievance process can begin. In this case, a female student charged a professor of "Gender Bias." This complaint spurred the administration and the college's Title IX Coordinator into action as a possible Title IX violation.

The female student provided no details, and refused to speak with the Title IX Coordinator because she was allegedly studying for final exams. For two weeks, this student spread the rumor of the professor's alleged gender bias, alleging a Title IX violation and besmirching his name with her friends and with administrators and other faculty. The Title IX Coordinator issued no-contact orders between the student and professor, but what was needed was a confidentiality cloak against the complainant's spreading her complain to the school!

Please consider adding in the revised Regulations a proviso that a complainant be prevented from spreading information about the report of sexual harassment to anyone except the Title IX Coordinator. A revered and respected professor had his reputation put into question by the complainant's rumor-mongering and no beginning to an investigation.

Sincerely,

Kathleen Conn, Ph.D., J.D., LL.M.

Sent from [Mail](#) for Windows 10

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West's Education Law Reporter
April 15, 2021

Commentary

Kathleen Conn, Ph.D., J.D., LL.M.^{a1}

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SALVAGING AND SEPARATING THE 2020 TITLE IX REGULATIONS^{a1}

On May 19, 2020 the U.S. Department of Education (DOE) released new Title IX Regulations applicable to all federally funded educational institutions in the United States. DOE had promised to publish these new Regulations in September 2017 and educators and the public eagerly awaited them. Despite the ongoing Covid-19 pandemic upending schooling as traditionally conducted throughout the country, and despite the fact that nearly two years had elapsed before their ultimate publication, the Department mandated an ill-advised push for immediate implementation on August 14, 2020.

Without prior warning, the definition of sexual harassment was radically expanded and changed in scope and applicability.¹ All educational institutions at every level which received any modicum of federal funding for any part of their operations, preK-12 and beyond,² are included in its purview and, with few exceptions, held to exactly the same standards of compliance. However, the specifics of that compliance in many instances are imprecise and lacking in critical operational protocols, especially for K-12 schools and school districts.

***558** This lack of specificity in the 2020 Title IX Regulations, occasioned by persistent use of the phrase “the recipient must,” undermined attention to and support for the positive changes in the Regulations. Before throwing out the proverbial “baby with the bathwater,” a close analysis of the Regulations, especially with respect to K-12, is needed. This commentary points out provisions in the 2020 Regulations that merit serious reconsideration (possibly with supplementation) and possible retention in the case of K-12 institutions only, postsecondary institutions only, or across the board for all institutions. The commentary also notes where (and why) the need for specific expanded guidance exists, and, ultimately, explains why modifications to any set of Title IX Regulations must treat K-12 institutions differently from postsecondary institutions.

Part I reviews the basics of Title IX and the new definition of sexual harassment in the 2020 Regulations. Part II briefly explains and comments on the similarities and key differences between the new regulatory mandates for K-12 schools and postsecondary institutions. Part III analyzes how the “recipient must” language in the 2020 Regulations creates operational questions and problems, especially for K-12 institutions. Part IV then summarizes and discusses the features of the 2020 Regulations that, with consideration of the modifications suggested, should be retained. Part V advocates for a thoughtful overhaul of the new Regulations with separate treatment for K-12 and postsecondary institutions.

The current Title IX Regulations have been roundly criticized, especially for including mandatory “live hearings” at the postsecondary level and their untimely implementation pressure during the Covid pandemic.³ This commentary is not a comprehensive overview of the 2020 Title IX Regulations,⁴ but simply points the way to salvaging the improvements in the 2020 Regulations that ensure provision of due process to all involved in resolutions of allegations of sexual harassment. All Americans are stakeholders in education. Title IX Regulations that assure access and equality with respect to education, and the ability of officers and administrators of educational institutions to understand and enforce those regulations, are vitally important in achieving that access and equality to all sexes and gender choices.

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***559 Part I: A Brief Overview of Title IX and the 2020 Definition of Sexual Harassment**

Title IX, administratively enforced by the Office for Civil Rights (OCR)⁵ and enforceable in litigation by an implied private right of action,⁶ protects both students and employees of all federally funded educational institutions.⁷ The statement of Title IX is perhaps the most simplistic mandate of all the federal civil rights proclamations:

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.⁸

However, this brief and apparently simple sentence has caused litigation throughout the entire United States judicial system since it was first promulgated in 1972. Hardly any word of this brief statement has gone uncontested, from “person,”⁹ to the phrase “on the basis of sex” and to the word “sex” itself.¹⁰ And while “discrimination” may manifest itself in numerous overt and subtle ways, the Supreme Court in a 1992 decision¹¹ focused on discrimination “on the basis of sex” as sexual harassment and ruled that a complaint of “sexual harassment” constituted discrimination on the basis of sex that violates Title IX.

The new definition of sexual harassment in the 2020 Title IX Regulations, for all educational institutions receiving federal funding, K-12 and beyond, is defined as conduct on the basis of sex that satisfies one or more of the following:

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;

(2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity; or

(3) “Sexual assault” as defined in  20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in  34 U.S.C. 12291(a)(10), “domestic violence” as defined in  34 U.S.C. 12291(a)(8), or “stalking” as defined in  34 U.S.C. 12291(a)(30).¹²

The first element of the definition derives from Title VII,¹³ the statute that protects employees from discrimination on the basis of sex in the employment context, also known by the Latin phrase *quid pro quo* (“this for that”) sexual harassment. The second element, unwelcome conduct followed by stringent qualifying descriptors that apply only to this element, also partly sounds like a Title VII prohibition,¹⁴ but actually derives from a 1999 Supreme Court decision, *Davis v. Monroe County Board of Education*.¹⁵ In the *Davis* decision the Court expanded Title IX to apply in situations of peer-peer sexual harassment, and Justice Sandra Day O’Connor, writing for the 5-4 majority stated, “We thus conclude that funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so *severe, pervasive, and objectively offensive* [italics added] that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”¹⁶

Therefore, both the first and second elements of the new definition of sexual harassment derive at least partially from Title VII, a statute applicable in the K-12 and postsecondary employment context, and from a Supreme Court decision applicable to K-12 educational institutions. However, the third element of the definition of sexual harassment, the inclusion of sexual assault, dating violence, domestic violence, and stalking, derives exclusively from the postsecondary context.

***561** These four offenses in the final element of the definition of sexual harassment originated in the Jeanne Clery Disclosure

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of Campus Security Policy and Campus Crimes Security Act of 1990, otherwise known simply as the Clery Act.¹⁷ They were added to the Clery Act as part of the Reauthorization of the Violence Against Women Act (VAWA) of 2013.¹⁸ The addition of these elements to the new definition of sexual harassment caused consternation and confusion in many K-12 schools and school districts, despite the DOE's explanation that the offenses were added to align the definition of Title IX with the Clery Act.¹⁹ Whether or not this third element should have been added to the definition or reserved for separate application to the postsecondary context is a question for serious consideration.

Part II: Different Mandates for K-12 vs. Postsecondary Institutions

A. Reports of Sexual Harassment

Both K-12 and postsecondary institutions have long been advised by DOE's Dear Colleague Letters (DCLs)²⁰ (now rescinded)²¹ to designate institutional Title IX Coordinators who would handle complaints of sexual harassment.²² Despite their recognition only as "significant guidance," DCLs were backed by threats that the Office for Civil Rights (OCR) would withdraw Title IX funding for noncompliance.²³ Contrary to DCLs, the 2020 Title IX Regulations have the force of law, having been adopted through "notice and comment rulemaking" according to the Administrative Procedures Act (APA).²⁴ The 2020 Title IX regulations now lawfully mandate that all educational institutions which are recipients of federal funding must "designate and authorize at least one employee" as a Title IX Coordinator.²⁵

***562** However, although both K-12 and postsecondary institutions have been directed to designate Title IX Coordinators to receive complaints of sexual harassment, the first different regulatory mandate between the two levels appeared in the protocol for reporting sexual harassment. "Actual knowledge"²⁶ of sexual harassment now accrues to postsecondary educational institutions only if the complaint of sexual harassment is reported to the institution's Title IX Coordinator or to "any official of the recipient who has authority to institute corrective measures on behalf of the recipient."²⁷ K-12 institutions, on the other hand, receive actual knowledge of sexual harassment when "any employee of an elementary or secondary school" receives notice of sexual harassment.²⁸

The phrase "any official ... who has authority to institute corrective measures" first appeared in the Supreme Court decision *Gebser v. Lago Vista Independent School District*,²⁹ a K-12 suit unsuccessfully alleging teacher-on-student sexual harassment. The phrase was subsequently reiterated in many controversies to acquit school districts of liability for sexual harassment. In K-12 schools, the phrase became especially problematic, where young students reported sexual harassment to guidance counselors, teachers, and even principals, whom various courts decided were not officials with the required corrective authority.³⁰ Students in postsecondary institutions were held to the higher standard of reporting directly to the Title IX Coordinator or to upper levels of administration.

In both K-12 and postsecondary institutions, the Regulations now make clear that any individual may initially report sexual harassment, the alleged victim, a parent or caregiver, friend, bystander, or even an anonymous reporter, at any time including non-business hours, by any means available that results in knowledge imparted to the Title IX Coordinator.³¹ However, absent in both postsecondary and K-12 contexts is a mandate requiring that complaints of sexual harassment, received by anyone exclusive of the Title IX Coordinator, be *promptly* reported to the Title IX Coordinator. Neither is any indication of what constitutes prompt or timely reporting to the Title IX Coordinator. This omission deserves attention and a mandate for prompt reporting of complaints of sexual harassment to the Title IX Coordinator would close the reporting loop.

***563 B. Confidential Reports of Sexual Harassment**

The educational recipient of federal finances must ensure and maintain confidentiality for those disclosing reports of sexual harassment, and also forbids retaliation for any reports of sexual harassment.³² However, whether students in K-12 and/or postsecondary institutions who believe they have been victims of sexual harassment may report sexual harassment to a

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confidential advisor, without the complaint being forwarded to the Title IX Coordinator, depends on the students' educational levels. The Final Rule in the Federal Register contains an extended discussion of this issue, concluding that the Regulations must treat student requests for confidentiality differently in K-12 institutions versus postsecondary institutions:

... [T]he approach in these final regulations allows postsecondary institutions to decide which of their employees must, may, or must only with a student's consent, report sexual harassment to the recipient's Title IX Coordinator Postsecondary institutions ultimately decide which officials to authorize to institute corrective measures on behalf of the recipient.³³

Elementary and secondary school students cannot be expected to distinguish among employees to whom disclosing sexual harassment results in a mandatory school response, but students at postsecondary institutions may benefit from having options to disclose sexual harassment to college and university employees who may keep the disclosure confidential [T]he Department believes that students at postsecondary institutions benefit from retaining control over whether, and when, the complainant wants the recipient to respond to the sexual harassment that the complainant experienced.³⁴

With respect to elementary and secondary schools, the Department [of Education] is persuaded by commenters' concerns that *it is not reasonable* to expect young students to report to specific school employees or *to distinguish between a desire to disclose sexual harassment confidentially to a school employee, versus a desire to report sexual harassment for the purpose of triggering the school's response obligations* [italics added].³⁵

This distinction is not evident in 34 C.F.R. § 106.71 (a), nor does any other subpart of the Regulations explicitly discuss the difference, nor consider its arbitrary nature. However, a relevant question is whether students sexually harassed in high school are fundamentally different from students in college with respect to desiring confidential guidance and advice before filing a formal report with a Title IX Coordinator.

A second very important consideration arises in connection with this different regulatory provision of access to confidential advisors in K-12 and postsecondary institutions. While the DOE is perhaps correct in noting that K-12 students, especially younger students, may not be able to distinguish *564 between employees who may be confidential advisors and employees who must report sexual harassment complaints to the Title IX Coordinator, parents and caregivers would be able to make this distinction if such confidential advisors were identified. Therefore, with respect to access to confidential advisors, any difference between K-12 and postsecondary institutions is unsupported. Parents and caregivers, as well as capable K-12 students, should be given the opportunity to seek advice and counsel from trained employees whom the institution has identified as confidential advisors before a report of sexual harassment is conveyed to the Title IX Coordinator.

C. Hearings

Live hearings are required at the postsecondary level while educational entities that are not K-12 "may, but need not, provide for a hearing" in their Title IX Grievance Processes.³⁶ This different requirement may pose a decision of grave concern to K-12 recipients of federal funding, second only to choosing the standard of evidence for resolving allegations of sexual harassment. However, although 34 C.F.R. § 106.45(6)(i) describes the scheduling and requirements for conducting a hearing in very specific terms, 34 C.F.R. § 106.45(6)(ii) includes only the brief sentence stipulating the choice available to educational institutions that are "not postsecondary institutions." Many operational questions at the K-12 level are left unanswered.

The first question that arises in the context of a non-postsecondary educational institution is critical: may the K-12 institution completely disregard the regulatory mention of hearings, and simply not provide notice of the option in their Title IX

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policies. That option is not addressed in the Regulations, nor was the question addressed in DOE's discussion of public comments to the posting of the Regulations in the May 19, 2020 Federal Register. Therefore, the question is unanswered.

In addition, vocational-technical institutions are defined in 34 C.F.R. § 106.2(o) and in 34 C.F.R. § 106.30(b) as postsecondary institutions. However, some vocational-technical institutions comprise both K-12 and postsecondary educational levels, as in some schools which contract to provide training programs for high school students and, in a separate division, specific training programs for adults. Since by definition such institutions are defined as postsecondary institutions, the question arises: may the recipient treat each level separately or must the recipient vocational school provide hearings throughout its Title IX grievance processes.

K-12 institutions face even more serious unaddressed questions. No details are provided in 34 C.F.R. § 106.45(6)(ii) as to how or by whom the choice to offer a live hearing is decided in K-12 institutions: by the Title IX Coordinator, a majority (or super-majority) vote of the elected School Board or other institutional governing body, the Superintendent, the state DOE, or even whether a respondent or complainant may *demand* a hearing in a specific case. No details are supplied as to whether, where a K-12 recipient chooses to provide for a hearing in its Title IX policy, a hearing must be provided in all grievance processes, for both employees and students, or whether the decision to hold a hearing may be decided on a case-by-case basis. These are serious and consequential questions which must be addressed in any subsequent Title IX Regulations.

***565 Part III: Problems with the “Recipient Must” Language of the 2020 Regulations**

The phrase “the recipient must” appears throughout the 2020 Title IX Regulations. This universal characterization of the multiplicity of educational institutions subject to Title IX is necessary to accommodate the different organizational charts and chain-of-command structures of the nearly 140,000 educational institutions of all levels in the United States.³⁷ However, at best, such a generalization leads to flexibility and institutional autonomy, but, at worst, may lead to institutional confusion, indecision, inconsistency, and inaction.

“Recipients,” both K-12 and postsecondary educational institutions which receive federal funding, have many different moving parts. Most, if not all, colleges and universities in the United States have Boards of Trustees whose members are appointed because of their financial generosity to the institution, their expertise in financial matters, their positive administrative experience, and/or their genuine desire to make decisions in the best interest of the institution they represent.³⁸ Most, if not all, colleges and universities in the United States have designated Title IX Coordinators, many of whom are attorneys, and all of whom have been hired for their expertise in various aspects of administration and knowledge of Title IX.³⁹ In Title IX cases, therefore, the postsecondary Title IX Coordinators are typically well prepared to implement Title IX responsibilities delegated to “the recipient.” Unfortunately, the same situation does not prevail uniformly in the K-12 context.

In the K-12 context, Title IX Coordinators are often appointed from the ranks of the Human Resources Department or other administrative departments, and the duties of the Title IX Coordinator are in addition to their “normal” duties. They are often only minimally trained in the responsibilities of this additional position and have minimum additional time to perform their extensive new Title IX responsibilities. Instead of a Board of Trustees with the overall good of the institution on their agendas, K-12 schools and school districts, identified as Local Educational Agencies (LEAs) in the Title IX Regulations,⁴⁰ are often governed by an elected School Board comprised of members of the community, many of whom ran for election because of personal dissatisfaction with the current operational situation in their respective districts. As the political leanings of the Boards evolve, the Boards as a group are sometimes even in conflict with the Superintendent whom a prior Board hired as the chief administrative officer of the district. This conflict may further lessen the scope of authority of administrators in direct report to the Superintendent, including the Title IX Coordinator. Private K-12 schools, also subject to Title IX Regulations, may be even less likely than LEAs to afford independent, well-trained Title IX Coordinators.

***566** These realities signal that K-12 educational institutions and postsecondary educational institutions are fundamentally different “beings.” Both “recipients” collectively receive federal funding in different amounts and of different kinds, but now they are governed by the same Title IX Regulations, forced under penalty of law to implement the same definition of sexual

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harassment and related mandates, with only a few significant differences. Who, or what, is “the recipient” in either a K-12 or postsecondary institution is a valid question. However, mindful of the distinctions enumerated above, the question appears to be more easily answered in the postsecondary context, with the Title IX Coordinator better positioned to act independently on behalf of the recipient.

A. Hearings

In the case of the mandate for postsecondary institutions to include hearings in their grievance processes following formal complaints of sexual harassment,⁴¹ as described above, the dictate is clear. The Title IX Coordinator must implement the mandate on behalf of the recipient, scheduling the live hearing as part of the Grievance Process. However, when the Regulations state that recipients who are “elementary and secondary schools, and other recipients that are not postsecondary institutions,”⁴² “may, but need not”⁴³ include hearings in their grievance processes, the permissive dictate leads to questions, as noted in the preceding section. The nebulous wording “recipient” gives no directive as to who, or which deliberative body, decides whether or not, and when, a given K-12 institution must include live hearings in its Title IX sexual harassment policy. The wording that the non-postsecondary recipient’s grievance process “may, but need not” provide a hearing is unhelpful. Operationally, K-12 schools require more specific direction.

B. Training

A second “recipient must” dictate applies uniformly to both K-12 and postsecondary educational institutions but provides scant direction to either institutional level. In [34 C.F.R. § 106.45 \(b\)\(1\)\(iii\)](#), the Regulations provide that a “recipient must ensure that the Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training” on a specific and extensive list of topics, and also on more difficult to assess elements such as “how to serve impartially” and “avoiding prejudgment of the facts at issue.” However, no details of the nature or length of the training is given.

DOE states that its omission of training details is deliberate. In the Federal Register publication of May 19, 2020, the DOE states:

[T]he Department declines to recommend certain training practices or techniques aside from the requirements of [§ 106.45\(b\)\(1\)\(iii\)](#), [footnote omitted] leaving flexibility to recipients to determine how to meet training requirements in a manner that best fits the recipient’s unique educational community.⁴⁴

***567** The absence of training details may not create undue concern for postsecondary institutions in which the hiring process for Title IX Coordinators requires evidence of training and expertise in the indefinite elements listed in [34 C.F.R. § 106.45 \(b\)\(1\)\(iii\)](#), and whose budget provides the ability to “contract out” experienced investigators and other personnel necessary in conducting a Title IX Grievance Process. However, in K-12 institutions, as noted above, for the Title IX Coordinator and other personnel who may be drafted to provide service in resolving a formal complaint of Title IX, the issue of what constitutes appropriate training is critical.

With educational institutions’ budgets typically stressed to provide even minimal professional development of staff, especially in the K-12 context, a specific mandate for training requirements is necessary if the Title IX Grievance Process is to be executed as the Department envisions, with the involvement of a trained investigator, an independent decision-maker, and a different trained individual to conduct an appeal or an informal resolution, if either is required.⁴⁵ This more specific mandate for training should also extend to training on what constitutes sexual harassment and on Title IX policies for all employees and students, in both K-12 and postsecondary contexts.

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C. Actual Knowledge

A third concern in reference to the “recipient must” lack of specificity in the 2020 Regulations relates to the communication of actual knowledge of sexual harassment to the Title IX Coordinator. In the K-12 context, under the new Regulations, a report of sexual harassment to “any employee” communicates actual knowledge of sexual harassment to “the recipient.” Once “the recipient” receives actual knowledge of sexual harassment, the recipient “must respond promptly in a manner that is not clearly unreasonable.”⁴⁶

However, DOE’s discussion in the Final Rule adds an element of confusion. DOE states in the Final Rule:

[I]f an employee of an elementary or secondary school personally observes sexual harassment, ... then the elementary or secondary school recipient must respond to and address the sexual harassment in accordance with these final regulations.”⁴⁷ This comment is then followed by reference to Final Rule footnote 483.

An important point becomes unclear as a result of this statement. First, without actually turning to footnote 483, the phrase “personally observes sexual harassment” suggests that an employee may personally decide whether the observed conduct is actually sexual harassment that must be reported under the definition of sexual harassment in the 2020 Regulations.

However, footnote 483 states,

... an employee witnessing or hearing about conduct that “could constitute” sexual harassment defined in § 106.30 triggers the elementary and secondary school recipient’s response obligations, including having the Title IX Coordinator contact the complainant (and, where appropriate, the complainant’s parent or legal guardian) to confidentially discuss the *568 availability of supportive measures. Section 106.44(a). In other words, if an elementary or secondary school employee witnesses conduct but does not know “on the spot” whether the conduct meets the § 106.30 definition of sexual harassment ... the person victimized by the conduct is a “complainant” entitled to the school’s prompt response if the conduct “could” constitute sexual harassment.

The footnote clearly states that the employee must report any conduct witnessed or reported as a complaint of sexual harassment, even if the conduct merely suggests that it could constitute sexual harassment, to the Title IX Coordinator. The Title IX Coordinator shall then act as “the recipient” with actual knowledge and, eventually, shall decide if the conduct reported was sexual harassment as described in the definition. However, an employee’s delay in reporting to the Title IX Coordinator would delay “supportive measures,” as defined in 34 C.F.R. § 106.30 (a), to the complainant.

This explanation is too important to be buried in a footnote, as is the inclusion of the Title IX Coordinator’s mandate of sharing the complaint with the complainant’s parent or guardian, if appropriate. Without the background knowledge gleaned from DOE discussions in the Final Rule, the bare Regulations do not sufficiently emphasize that the Title IX Coordinator is the only individual who decides, after a formal complaint is filed, that the conduct reported or observed does, or does not, satisfy the definition of sexual harassment, thereby providing the authority to dismiss the complaint.⁴⁸

Not addressed in the 2020 Regulations with reference to reporting and “actual knowledge” is the role of “Mandated Reporters” in the K-12 context. In most K-12 schools and school districts, teachers and certain other employees are designated as Mandated Reporters who are legally responsible under state law to report any signs of child abuse or neglect to their supervisors and to file a report with the appropriate state authorities. These responsibilities are not negated by the 2020 Title IX Regulations, and, therefore, persist unchanged in the K-12 context in concert with Title IX reporting responsibilities.

Part IV: Provisions in the 2020 Title IX Regulations Worth Saving

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A. The Meaning of “On the Basis of Sex”

Perhaps the most surprising provision of the Final Rule, considering its publication during the Trump administration, is the reiteration of Title IX protection for LGBTQ individuals,⁴⁹ affirmed in the Obama-era DCLs but simply archived by direction of Trump’s Secretary of Education Betsy De-Vos.⁵⁰ The protections for LGBTQ individuals are referenced and reinforced 64 times in the Final Rule. The DOE explicitly declined to explain the word *569 “sex” in the Final Rule.⁵¹ However, DOE made clear that the definition of sex, *per se*, was irrelevant because sexual harassment was conduct that any person might experience, regardless of the definition of sex. As the Final Rule explained:

We emphasize that every person, regardless of demographic or personal characteristics or identity, is entitled to the same protections against sexual harassment under these final regulations, and that every individual should be treated with equal dignity and respect.⁵²

The tenor of this statement was reiterated throughout the Final Rule, leaving no doubt about the mandate for equal protection under Title IX for LGBTQ individuals:

These final regulations focus on prohibited conduct, irrespective of a person’s sexual orientation or gender identity

The Department will not tolerate sexual harassment as defined in § 106.30 against any student, including LGBTQ students.⁵³

These final regulations apply to prohibit certain conduct and apply to anyone who has experienced such conduct, irrespective of a person’s sexual identity or orientation. The Department believes that these final regulations provide the best protections for all persons, including women and people who identify as LGBTQ, in an education program or activity of a recipient of Federal financial assistance who experience sex discrimination, including sexual harassment.⁵⁴

In January 2021, OCR published a memorandum stating that the recent Supreme Court decision *Bostock v. Clayton County, Georgia*⁵⁵ dealt solely with LGBTQ protection under Title VII, and that the *Bostock* decision did not imply protection for LGBTQ individuals under Title IX.⁵⁶ However, the Department’s Final Rule firmly, and throughout the 2020 Regulations, established and reiterated protection for LGBTQ individuals under Title IX. *570 Commentators are confident that this Title IX protection of LGBTQ individuals from conduct constituting sexual harassment will be maintained under the new Secretary of Education, Miguel Cardona, in the Biden administration.⁵⁷

B. A. Timely Reports of Sexual Harassment to the Title IX Coordinator

Young children, especially students in Kindergarten through Grade 2, may not know the terminology to communicate sexual conduct or misconduct. For example, simple allegations of “that boy (or girl) was bothering me” may actually be a report of sexual harassment or sexual abuse.⁵⁸

Providing that a K-12 student may report sexual harassment to any employee of the educational institution⁵⁹ is a positive change from earlier requirements that mandated reports to a Title IX Coordinator or to an individual with authority to take corrective action in both K-12 and postsecondary contexts. The new reporting option was also an improvement over the limited reporting provision for K-12 students in the NPRM.⁶⁰

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However, this expansion of reporting options will only be helpful if accompanied by an additional statement that any employee who receives a report that may constitute sexual harassment must *promptly* communicate the report to the Title IX Coordinator. Without this additional mandate, the notice of sexual harassment to an employee who does not report to the Title IX Coordinator may actually compromise the institution's position in any subsequent litigation.

34 C.F.R. § 106.30 (a) unequivocally states that the K-12 student's report of sexual harassment communicates actual knowledge to the educational institution, and triggers the institution's responsibility to respond promptly to that knowledge.⁶¹ If the employee does not communicate the report to the Title IX Coordinator without delay, or worse, if the employee never informs the Title IX Coordinator (e.g., because he/she "forgot," or does not understand what the student tried to report, or makes the unilateral decision that the student's report was not actual sexual harassment), the educational institution may be in an indefensible position if sued by the student and/or parent or caregiver of the sexually harassed or abused student. The failure of the employee to report the notice of what may have been sexual harassment, *571 in a court of law, arguably translated to deliberate indifference on the part of the recipient. This possibility underscores the necessity for training of all staff in the definition of sexual harassment, the different ways in which young children may attempt to convey notice of sexual harassment, and employees' collective and individual responsibility to promptly convey any suspicious notifications of sexual harassment to the Title IX Coordinator.

The above comments also apply in the postsecondary context, where reports of sexual harassment may be communicated to an official with authority to take corrective action.⁶² The information must be communicated to the Title IX Coordinator promptly, and a notice of that requirement must be added to the Regulations for the reasons stated above.

C. Supportive Measures

Supportive measures are expansively defined in 34 C.F.R. § 106.30 (a). As opposed to "interim measures" which were required in previous DCLs as responses to a "hostile environment" created in the educational institution by sexual harassment,⁶³ "appropriate" and "reasonably available" supportive measures⁶⁴ under the 2020 Title IX Regulations do not require a suspected or demonstrated hostile environment but must be offered to a complainant confidentially and immediately after the report of sexual harassment has been made, whether or not a formal complaint has or shall be filed. Supportive measures may also be provided to a respondent, as appropriate.⁶⁵

The Final Rule indicates that supportive measures provide "sufficient flexibility and discretion to address the unique needs of each complainant."⁶⁶ This includes the needs of students with special needs, LGBTQ students, and students with disabilities. The Final Rule elaborates, "Such supportive measures are designed precisely to help complainants preserve equal access to their education."⁶⁷

For many who experience trauma, the most basic need is to be heard and understood.⁶⁸ Providing supportive measures may help a complainant (in concert with a parent or caregiver, if appropriate) decide whether or not to pursue a formal complaint. Providing supportive measures may inconvenience faculty or staff who may be asked/required to assist in the implementation of such measures as counseling, escort services on campus, changes in curriculum or work expectations or locations, and other provisions. Collective bargaining agreements for employees may require amendments to mandate *572 these responsibilities as needed. However, providing supportive measures to both complainants and respondents is the first step in bringing closure to complainants and treating respondents equitably and as not responsible until the final resolution of the complaint.

D. Formal Complaint Necessary Before Any Steps of the Grievance Process

While the 2020 Title IX Regulations provide different options for reporting sexual harassment at different educational levels, a formal complaint is necessary at both K-12 and postsecondary levels before an investigation or informal resolution of the complaint may begin.⁶⁹ If the alleged victim is unable or unwilling to file a formal complaint, the Title IX Coordinator may,

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for sufficient reason(s), file the formal complaint.⁷⁰

The regulatory mandate for the filing of a formal complaint before any investigation of a report of sexual harassment must be understood in concert with the mandate to the Title IX Coordinator to offer confidential supportive measures⁷¹ to the complainant or the respondent, even before a formal complaint is filed.⁷² These supportive measures, as described above, may include measures such as counseling, course-related modifications, escort services, and others⁷³ designed to allow student or employee complainants to continue to participate in, and benefit from, the educational program or activities of the institution.

With supportive measures in place, the complainant's (or respondent's) immediate needs may be met, and the complainant⁷⁴ may decide not to pursue a formal complaint. Regulations prohibit retaliation by the respondent or by any other party for the filing of a complaint.⁷⁵ Therefore, in requiring a formal complaint before taking action, the Title IX Coordinator has not prematurely expended institutional resources that may end up wasted when a complaint is unexpectedly withdrawn.

E. Definition Details Regarding Title IX Protections: “Who/Where/When”

The 2020 Title IX Regulations more clearly define the typical newspaper reporters' questions of the “Who, What, Where, and When” than earlier guidance from OCR. The three-prong definition of sexual harassment states the specific elements that constitute sexual harassment, with statutory references as needed. However, the sheer numbers of lawsuits challenging several of the apparently “clear” words and phrases of the Title IX statute⁷⁶ signaled *573 that additional clarification was warranted. That clarification appeared in several places in the 2020 Regulations.

First, the definition of the “complainant” who may file a formal complaint of sexual harassment should temper the extensive recent litigation about the meaning of the word “person” in 20 U.S.C. § 1681 (a).⁷⁷ An individual may not file a formal complaint of sexual harassment in an educational institution receiving federal funding (the “recipient”) unless the individual is “participating in or attempting to participate in the education program or activity of the recipient with whom the formal complaint is filed.”⁷⁸ The complainant is entitled to receive supportive measures immediately upon reporting sexual harassment, perhaps even independent of the individual's status with respect to the institution, but may not file a formal complaint without formal, or intended formal, affiliation with the institution.

This definition of complainant is further amplified and must be understood in conjunction with the definition of “education program or activity of the recipient” as “locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs.”⁷⁹ The significance of this delineation of the education program or activity is clear when considering that a lawsuit alleging sexual harassment at an educational institution is a suit against the educational institution itself for its lack of response to the complaint, i.e., its deliberate indifference.

An educational institution exercises “substantial control” over its students and employees by virtue of the contractual nature of their respective relationships. The institution has no comparable relationship with mere occasional visitors to the institution or with “third persons,” i.e., members of the general public, outside its locations or events. In prior OCR DCLs, Guidance stated that an institution was responsible for sexual harassment that occurred outside its sphere of substantial control, of which it knew or “should have known,” because that outside conduct created a “hostile environment” in the institution itself.⁸⁰ The 2020 Regulations recognize that the disciplinary arm of the educational institution cannot extend outside its legal purview, even in the K-12 context of *in loco parentis*. This clear statement of the institution's obligations with respect to sexual harassment, accompanied by safeguards of “Mandated Reporters” in the K-12 context⁸¹ and Campus Security Officers in higher education,⁸² will relieve institutions of uncertainty and avoid costly litigation.

F. Ongoing Notifications Required by Title IX Coordinator

The 2020 Title IX Regulations mandate a considerable amount of paperwork, with the Title IX Coordinator required to

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provide notifications at *574 every turn, before, during, and at the final resolution of a formal complaint of sexual harassment, most of them written. The Title IX Coordinator must also retain all documentation for seven years.

The process of notification begins with the Title IX Coordinator's publication of a notice of the institution's policy on nondiscrimination on the basis of sex, and an identification of the Title IX Coordinator with multiple methods for communicating with the Coordinator.⁸³ The Title IX Coordinator must also provide notification of how to file complaints of sexual harassment and notice of the institution's grievance process.⁸⁴ This same notification mandate occurs repeatedly in the 2020 Regulations.⁸⁵

When a complaint of sexual harassment reaches the Coordinator, notification from the Title IX Coordinator must follow to advise the complainant that reasonable and appropriate supportive measures are available, and to discuss the complainant's wishes in that regard. The Title IX Coordinator must also provide information on how to file a formal complaint. This occurs even before a formal complaint is, or will be, filed.⁸⁶

Once a formal complaint is filed, the Title IX Coordinator must notify the parties of the allegations with sufficient details so parties may prepare responses, explain the grievance process, and include a specific notice that the alleged respondent is not responsible until the conclusion of the grievance process.⁸⁷ These notifications must be updated as the grievance process proceeds.⁸⁸ If the Title IX Coordinator dismisses the formal complaint, notification to the parties is also required.⁸⁹

Notification responsibilities predominate throughout the grievance process, making sure parties and their advisors are aware of all the evidence collected upon which a determination of responsibility rests.⁹⁰ The Title IX Coordinator's notifications responsibilities do not end until the Title IX Coordinator sends written notifications of the outcome of the entire investigation simultaneously to both parties.⁹¹

While several commenters to the publication of the 2020 Regulations in the Federal Register complained that the Title IX Coordinator's notification mandates were too onerous for K-12 institutions and were unnecessary for young students,⁹² their comments failed to recognize the utility of the notifications for parents and caregivers. In the context of notifications of the details of mandated disciplinary processes, and possibly in many other contexts, K-12 educational institutions must meet the needs and expectations not only of a diverse population of students, in ages ranging from four to eighteen and in very different developmental stages within those ages, but of parents and caregivers with histories of very different backgrounds in education and life in general.

*575 Postsecondary institutions, by comparison with K-12 institutions, have a more homogeneous population of students and parents, created so by numerous indicators such as wealth, standardized examination scores, and student and parent aspirations for life careers and status. Notifications at every step of the Title IX process may, therefore, be even more important at K-12 educational institutions than at postsecondary institutions.

G. Choice of Evidentiary Standards in Resolving Allegations of Sexual Abuse

The ability of recipients under the 2020 Regulations to choose between two standards of evidence in resolution of complaints of sexual harassment⁹³ has caused consternation and confusion among many, if not most, educational institutions, especially K-12 institutions. Former guidance from OCR directed that institutions apply the preponderance of evidence standard in resolving such complaints,⁹⁴ and most postsecondary institutions incorporated this standard in their Title IX policies. Prior to the publication of the NPRM in 2018, estimates suggested that over 80% of colleges and universities had adopted the preponderance of evidence standard for resolution of sexual harassment complaints.⁹⁵ However, this guidance contradicted the federal VAWA provision requiring that a recipient must simply state the standard of evidence used in deliberations of responsibility for sexual misconduct.⁹⁶

For virtually all K-12 institutions the preponderance of evidence OCR guidance was meaningless. When allegations of sexual misconduct arose, school administrators, typically principals, had more basic procedures in mind: notice to parents, due

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process to the student accused, and application of the disciplinary sanction at the appropriate level of offense prescribed by the institution's Code of Student Conduct. "Standard of evidence" or "burden of proof" were not phrases included in the typical Principal's Handbook or in any K-12 Student Handbook.⁹⁷

Therefore, while educational institutions overall were challenged to decide which standard of evidence to adopt in resolving formal complaints of sexual harassment, K-12 schools were starting from a serious disadvantage. The choice was even more troubling because, once decided, the choice had to be applied universally,⁹⁸ in all student-on-student sexual harassment cases, *576 and in all cases of employee-on-student or student-on-employee sexual harassment. Faculty were held to the same chosen standard of evidence as students.

At both K-12 and postsecondary levels questions arose, similar to those facing K-12 institutions in the context of choosing whether or not to provide a live hearing in their Title IX policy. Who would decide which standard of evidence to adopt? And on what would the institution rely in making the decision? Was any data available to help make the case for one standard or the other? (The response to that final question was "no.")

The DOE provided scant guidance in the Final Rule:

The Department is not aware of a Federal appellate court holding that the clear and convincing evidence standard is required to satisfy constitutional due process or fundamental fairness in Title IX proceedings, and the Department is not aware of a Federal appellate court holding that the preponderance of the evidence standard is required under Title IX.

Because recipients have historically used either the preponderance of the evidence standard or the clear and convincing evidence standard in sexual misconduct disciplinary proceedings, and because studies are inconclusive about which standard is more likely to reduce the risk of erroneous outcomes, the Department concludes that recipients must select and consistently apply a standard of evidence that is not lower than the preponderance of the evidence standard and not higher than the clear and convincing evidence standard, but that either the preponderance of the evidence standard or the clear and convincing evidence standard may be applied to reach accurate determinations in a Title IX grievance process, consistent with constitutional due process and fundamental fairness and with Title IX's non-discrimination mandate.

The Department believes that the predictable, fair grievance process prescribed under § 106.45 will convey to complainants and respondents that the recipient treats formal complaints of sexual harassment seriously and aims to reach a factually accurate conclusion; the Department does not agree that using one standard of evidence rather than the other conveys to respondents that Title IX sexual harassment can be perpetrated without consequence.⁹⁹

And

... all grievance processes regardless of which standard of evidence a recipient applies, are fair processes likely to lead to accurate determinations regarding responsibility.¹⁰⁰

*577 Contrary to this reassurance that the choice of either standard of evidence, preponderance of the evidence or clear and convincing evidence, will provide notice that the institution takes sexual harassment offenses seriously, many institutions,

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especially K-12 institutions, remain in a quandary of indecision. Especially troublesome and seemingly unfair to many decisionmakers is the mandate that the same standard of evidence be applied to both students and employees, especially faculty.¹⁰¹ The preponderance of evidence standard has been roundly criticized as denying due process to male respondents,¹⁰² but the reverse, adopting a clear and convincing standard of evidence, may disfavor the complainant's case.

The stated position of the DOE is that the mandate for a live hearing will add any necessary layer of opportunity to accomplish due process for both respondent and complainant, whichever standard of evidence is applied:

The Department agrees with commenters that postsecondary-level adjudications with live hearings and cross-examination will increase the reality and perception by parties and the public that Title IX grievance processes are reaching fair, accurate determinations, and that robust adversarial procedures improve the legitimacy and credibility of a recipient's process, making it more likely that no group of complainants or respondents will experience unfair treatment or unjust outcomes in Title IX proceedings (for example, where formal complaints involve people of color, LGBTQ students, star athletes, renowned faculty, etc.).¹⁰³

However, the mandate for including live hearings in the Title IX Grievance Process applies only to postsecondary institutions, many of which, as noted, have already adopted the preponderance of evidence standard, and shall, very likely, continue using the same standard.

If K-12 institutions choose the preponderance of evidence standard, the institutional decision makers may see a need to schedule a live hearing, especially in difficult decisions involving allegations of sexual misconduct against a faculty member. However, the questions described above now present themselves: who makes the decision to schedule a live hearing, may a party demand a live hearing, and must every resolution include a live hearing. These same questions may arise in the context where the K-12 institution has chosen to adopt a clear and convincing standard of evidence. Clarity on these points appears to be badly needed in the Title IX Regulations.

Part V: Stating the Case for Separate Title IX Regulations for K-12 and Postsecondary Institutions

With a Title IX Coordinator hired because of relevant training, experience, and expertise in the responsibilities of the position, and with an "overseer" Board of Trustees vested in ensuring the best decisions for the *578 good of the institution, postsecondary institutions are likely, on the whole, better positioned to act responsibly as the mandated "recipient." The "recipient must" language, therefore, may be more helpful in the postsecondary context than in the K-12 context. This difference may present the first cogent case for drafting separate Title IX Regulations for K-12 and for postsecondary educational institutions.

The second most cogent argument for separation of K-12 and postsecondary institutions, aside from the specific difficulties engendered by the previously noted lack of clarity in the 2020 Regulations, is the cost factor. Training, including the mandates for a trained investigator, independent decision-maker, and trained individuals to handle appeals and informal resolutions after every formal complaint of sexual harassment, will tax the budget for every institution. However, the costs for K-12 institutions will skyrocket because few of these trained individuals are already on staff. The K-12 Title IX Coordinator will need additional training; the rest of the K-12 employees who are effectively "mandated reporters" under the 2020 Regulations will need training to recognize and report sexual harassment. Parents, caregivers, and students will also need training in the new Regulations and in reporting sexual harassment.

Many generalized features of the 2020 Title IX Regulations are worth saving for both K-12 and postsecondary institutions. Following are examples:

- The emphasis on sexual harassment as conduct that can be experienced by any individuals, including those identifying as LGBTQ

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- The need to treat all individuals in the process, parties and witnesses alike, with dignity and respect
- Ongoing provision of notifications throughout the resolution of complaints of sexual harassment, providing the transparency that breeds trust
- Provision of supportive measures to all who allege having experienced sexual harassment, with or without the filing of a formal complaint
- The presumption of innocence of the alleged perpetrator until the conclusion of a grievance process
- The recognition of due process rights for both parties to a complaint of sexual harassment, and finally,
- The preservation of Constitutional rights and the preemption of Title IX Regulations over all state and local laws, as mandated by [34 C.F.R. § 106.6 \(a-h\)](#).

Specific provisions of the 2020 Regulations, however, would profit from being addressed to K-12 institutions exclusively, or to postsecondary institutions *579 exclusively. The definition of an institution of vocational education in [34 C.F.R. § 106.30 \(b\)](#) should also be classified as a K-12 institution if providing training for K-12 students or as a postsecondary institution if providing education for adult students.

The following is a brief identification of arguably the most critical specific changes proposed for the 2020 Title IX Regulations with respect to separating responsibilities for K-12 versus postsecondary institutions, in order to salvage the worthwhile improvements offered by the mandates of the Final Rule for each level of educational institution:

- Title IX Regulations should note that the offense of “domestic violence” is a criminal offense that does not apply in K-12 unless the K-12 institution provides housing for families on its campus,
- The C.F.R. § 106.45 Grievance Process should be streamlined for K-12 institutions, concentrating more heavily on the old model of providing due process for respondents along with a presumption of non-responsibility for the respondent until the conclusion of a non-biased investigation
- Training requirements should be more specifically defined in terms of topics covered and repetition at specific intervals, especially for K-12 employees, with teaching staff trained so that they may be called upon to assist in investigations or other parts of the resolution process, to minimize cost¹⁰⁴

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- The “recipient” language must be augmented for K-12 institutions by provision of examples of the entities who may make decisions regarding (1) choice of the standard of evidence to be adopted, and (2) considerations that would be helpful in deciding whether or not to provide for live hearings in their resolution of complaints of sexual harassment,
- Students in K-12 and postsecondary institutions should be educated to recognize and respond to sexual harassment, and the education should be delivered at least twice per academic year for K-12 students, at the beginning of each semester, in appropriate language and with specific instruction in fending off unwelcome sexual conduct, in small group instructional format
- Postsecondary institutions must be required to enact policies prohibiting the possession and/or consumption of alcohol or illegal substances on campus, and such policies should be consistently enforced with strict penalties, and
- Other considerations as noted in discussions in Parts II-IV above must be implemented.

***580** Also as noted repeatedly, the “playing field” of dealing with complaints of sexual harassment is not level for K-12 and postsecondary institutions with such an elaborate and extensive grievance process as described in C.F.R. § 106.45, especially as currently mandated with the expectation of immediate implementation. Most postsecondary institutions already resolved complaints of sexual harassment with a trained investigator model, many with a two-person model of trained investigator and trained decision-maker to determine responsibility and assign sanctions as appropriate. K-12 institutions have been traditionally more likely to resolve complaints of sexual harassment with a simple provision of due process to the accused and application of the different levels of Student Code of Conduct sanctions. The primary decisionmakers were the Principal and perhaps the Assistant Principal. Sensitivity to institutional history is necessary in any implementation mandates, as well as in deadlines for change.

The dichotomy of disciplinary practices regarding sexual harassment in postsecondary versus K-12 educational institutions was radically changed by the DOE’s new mandated 2020 Regulations. The 2020 Title IX Regulations mandated a one-size-fits-all, three-person resolution of sexual harassment complaints, cost and delays be damned, to be accomplished within months. However, the political crystal ball may presage a new era of 2021 Title IX Regulations. The new administration may decide to start anew, from scratch, but a careful review of the existing Regulations, will show that a “baby” is also in the tub with the bathwater. While rushed to implementation too peremptorily during an all-consuming pandemic, the 2020 Title IX Regulations contain many provisions that can be salvaged, and bifurcation of K-12 and postsecondary institutions under the revised Regulations may clarify the issues and assist the salvage process.

Footnotes

^{a1} The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 386 Ed.Law Rep. [557] (April 15, 2021).

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¹ Prior to the 2020 Title IX Regulations sexual harassment was defined simply as “unwelcome conduct of a sexual nature.” *See, e.g.*, White House Task Force to Protect Students from Sexual Assault, *Sample Language and Definitions of Prohibited Conduct for a School’s Sexual Misconduct Policy* (Apr. 2014), <https://www.justice.gov/archives/ovw/page/file/910276/download>. *See also*, DOE, *Proposal for the New Rule, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, hereinafter “NPRM,” 83 FED. REG. 61462, 61466 (Nov. 29, 2018) (where the proposed definition of sexual harassment differed from the final adoption), <https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.

² The 2020 Title IX Regulations as printed in the Federal Register on May 19, 2020 refer to “elementary and secondary schools” and many commentators translate this as “K-12,” failing to note that, when responding to sexual harassment, the new Regulations apply also to preschools that receive any form of federal assistance. *See* 34 C.F.R. § 106.30 (b). In this commentary, the designation K-12 incorporates preK-12.

³ R. Shep Melnick, *Analyzing the Department of Education’s Final Title IX Rules on Sexual Misconduct*, BROOKINGS (June 11, 2020), <https://www.brookings.edu/research/analyzing-the-department-of-educations-final-title-ix-rules-on-sexual-misconduct/>.

⁴ For a brief overview of the 2020 Title IX Regulations, *see* Suzanne Eckes & Charles Russo, *A New Dawn for Title IX and Sexual Harassment of Students?*, 377 Ed. Law Rep. 484 (2020). This commentary discusses and/or analyzes information from the following sections of the 2020 Title IX Regulations: 34 C.F.R. §§ 106.6, 106.8, 106.30, 106.44, 106.45, and 106.71, as well as information from the NPRM (*See* n.1) and from Comments and Discussions in *The New Rule, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 FED. REG. 30026 (May 19, 2020), hereinafter “Final Rule,” <https://www.federalregister.gov/documents/2020/05/19/2020-10512/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.

⁵ Cong. Research Service, *Title IX and Sexual Harassment: Private Rights of Action, Administrative Enforcement, and Proposed Regulations* (Apr. 12, 2019), <https://fas.org/sgp/crs/misc/R45685.pdf>.

⁶  *Cannon v. Univ. of Chi.*, 441 U.S. 677, 709, 717 (1979).

⁷ Office for Civil Rights (OCR), *Nondiscrimination in Employment Practices in Education* (Aug. 1991), (where OCR stated: “The [Title IX] regulation applies to all employment decisions by ED recipients, whether made directly or indirectly through contractual arrangements with referral agencies, labor unions, organizations providing or administering fringe benefits, or others.”), <https://www2.ed.gov/about/offices/list/ocr/docs/hq53e8.html>.

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⁸  20 U.S.C. § 1681 (a) (1972).

⁹ See, e.g., Kathleen Conn, *Defining Who Is a "Person" Under Title IX: Conflict in the Wings?*, 369 Ed. Law Rep. 546 (2019); Kathleen Conn, *Defining Who Is a "Person" Under Title IX*, 368 Ed. Law Rep. 575 (2019).

¹⁰ See, e.g., Kathleen Conn, *The Supreme Court and Protections for LGBT Individuals: The Beat Goes On*, 368 Ed. Law Rep. 1 (2019); Kathleen Conn, *Re-Interpreting Sex: Changing Judicial Views of Title VII and Title IX*, 357 Ed. Law Rep. 1 (2018).

¹¹ See  *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60 (1992) (where the Court affirmed the availability of monetary damages from a school district for a Title IX violation). In *Franklin*, the student complained that the school district failed to remedy sexual harassment by her teacher/coach at the school. The failure of an educational institution to deal with actual knowledge of sexual harassment became, as established in the *Franklin* decision, a violation of Title IX.

¹² 34 C.F.R. § 106.30 (a). This statutory definition of sexual harassment was expanded from the definition suggested in the NPRM which contained a prohibition of sexual assault, but did not include dating violence, domestic violence, and stalking.

¹³ Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000 (e) *et seq.*

¹⁴ The exact language of Title VII, stated in  *Meritor Savings Bank v. Vinson* (477 U.S. 57, 67 (1986)) requires that “[f]or sexual harassment to be actionable, it must be ‘sufficiently severe or [italics added] pervasive to alter the conditions of [the victim’s] employment and create an abusive working environment,’” quoting  *Rogers v. Equal Employment Opportunity Comm. (EEOC)*, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied  406 U.S. 957 (1972).

¹⁵  526 U.S. 629 (1999).

¹⁶  *Id.* at 633, 650. Additional provisions in the 2020 Regulations also explain what constitutes actual knowledge and deprivation of access to educational opportunities or benefits in both K-12 and in postsecondary institutions. However, that the first and second elements of the new definition of sexual harassment bear a relationship to Title VII is not devoid of significance; rather they remind readers that Title IX also applies to protect employees, as well as students, from discrimination on the basis of sex.

¹⁷  20 U.S.C. § 1092 (f) (2018).

¹⁸ See 79 FED. REG. 62752 *et seq.* (Oct. 20, 2014), reauthorizing the Violence Against Women Act, Pub. L. 113-4 (2013) (hereinafter VAWA) and amending the Clery Act, 34 C.F.R. § 668.46, Institutional security policies and crime statistics, to include the four elements of sexual assault, dating violence, domestic violence, and stalking, as defined in

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the 2020 Title IX Regulations.

¹⁹ Final Rule at 30061 (where the DOE explicitly states that these four offenses were added to the new definition of sexual harassment to accomplish “alignment between the proposed rules and the Clery Act.” *See also*, DOE’s statement that, “By aligning the definition of sexual harassment in § 106.30 with the Clery Act, the Department is attempting to resolve confusion or perceived conflicts about a recipient’s obligations under Title IX and how these obligations may overlap with some of the conduct that the Clery Act requires.” *Id.* at 30513.

²⁰ Dear Colleague Letters issued under the Obama administration were “significant guidance documents” under the Office of Management and Budget’s [Final Bulletin for Agency Good Guidance Practices](#), 72 FED. REG. 3432 (Jan. 25, 2007), http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/012507.

²¹ See Diane Heckman, *The Nascent Trump Administration and the Vaporizing of the Title IX Arsenal of Policy Documents*, 370 Ed. Law Rep. 478 (2019) Diane Heckman, [The Nascent Trump Administration and the Vaporizing of the Title IX Arsenal of Policy Documents](#), 370 Ed. Law Rep. 478 (2019).

²² DCL on *Title IX Coordinators* (Apr. 24, 2015), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf>; *Letter to Title IX Coordinators* (Apr. 24, 2015), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-letter-201504.pdf>; and *Resource Guide for Title IX Coordinators* (Apr. 24, 2015), <https://www2.ed.gov/about/offices/list/ocr/docs/dc-ltitle-ix-coordinators-guide-201504.pdf>. DOE archived these three documents during the Trump administration.

²³ Withdrawal or withholding of Title IX funding did not occur then and has never occurred.

²⁴ Pub. L. 79-404, 60 Stat. 237 (June 11, 1946).

²⁵ See 34 C.F.R. § 106.8 (a).

²⁶ Receipt of actual knowledge of sexual harassment by an educational institution that is a recipient of federal funding means that the institution “must respond promptly in a manner that is not deliberately indifferent,” that is, not “clearly unreasonable in light of the known circumstances.” *See* 34 C.F.R. § 106.44 (a).

²⁷ 34 C.F.R. § 106.30 (a).

²⁸ *Id.*

²⁹  524 U.S. 274, 277, 283-290 (1998).

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³⁰ See, e.g., Sandra J. Perry & Tanya M. Marcum, *Liability for School Sexual Harassment Under Title IX: How the Courts Are Failing Our Children*, 30 U. LAVERNE L.R. 3, 18-30 (2008) (discussing courts' majority and minority views identifying the official with corrective authority).

³¹ 34 C.F.R. § 106.8 (a).

³² 34 C.F.R. § 106.71 (a) states, "The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness"

³³ Final Rule, at 30040.

³⁴ *Id.*

³⁵ *Id.* at 30107.

³⁶ 34 C.F.R. § 106.45 (6) (i-ii).

³⁷ Nat'l Ctr. for Educ. Statistics, *Digest of Education*, <https://nces.ed.gov/programs/digest/d19/tables/dt19105.50.asp> The most recent data lists 137,432 educational institutions in the U.S. in 2017-2018, including public and private K-12 schools and all postsecondary Title IV institutions. PreK institutions are not included.

³⁸ Grant Thornton, Higher Education Board Guidebook, <https://www.grantthornton.com/-/media/content-page-files/nfp/pdfs/2016/higher-ed-board-guide.ashx>.

³⁹ ZipRecruiter Marketplace Research Team, *What Is a Title IX Coordinator and How to Become One*, <https://www.ziprecruiter.com/Career>Title-IX-Investigator/What-Is-How-to-Become#How-to-Become-a-Title-IX-Investigator>

⁴⁰ 34 C.F.R. § 106.30 (b).

⁴¹ 34 C.F.R. § 106.45 (6)(i).

⁴² 34 C.F.R. § 106.45 (6)(ii).

⁴³ *Id.*

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⁴⁴ Final Rule at 30120.

⁴⁵ 34 C.F.R. § 106.45 (b)(1)(iii).

⁴⁶ 34 C.F.R. § 106.44 (a).

⁴⁷ Final Rule at 30109.

⁴⁸ 34 C.F.R. § 106.45 (b)(3) (i).

⁴⁹ “For consistency, throughout this preamble we use the acronym “LGBTQ” while recognizing that other terminology may be used or preferred by certain groups or individuals, and our use of “LGBTQ” should be understood to include lesbian, gay, bisexual, transgender, queer, questioning, asexual, intersex, nonbinary, and other sexual orientation or gender identity communities.” Final Rule at 30031.

⁵⁰ DOE rescinded and archived three DCLs: the DCL on *Sexual Violence* (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; the DCL *Q&A about Title IX and Sexual Violence* (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-titleix.pdf>; and the DCL on *Transgender Students* (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

⁵¹ “The Department declines to take commenters’ suggestions to include a definition of the word “sex” in these final regulations because defining sex is not necessary to effectuate these final regulations and has consequences that extend outside the scope of this rulemaking” These final regulations focus on prohibited conduct, irrespective of a person’s sexual orientation or gender identity. Final Rule at 30178.

⁵² Final Rule at 30031.

⁵³ *Id.* at 30179.

⁵⁴ *Id.* at 30477.

⁵⁵  140 S. Ct. 1731 (2020).

⁵⁶ U.S. DOE Office of the General Counsel, *Memorandum for Kimberly M. Richey Acting Assistant Secretary of the Office for Civil Rights Re: Bostock v. Clayton Cty.* (Jan. 8, 2021), <https://www2.ed.gov/about/offices/list/ocr/correspondence/other/ogc-memorandum-01082021.pdf>. DOE had also previously published guidance dealing with the *Bostock* decision on Title VII protection for LGBTQ individuals, negating any relevance to LGBTQ protection under Title IX. See

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<https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/index.html>. These communications were guidance documents that did not have the force of law, but espoused the Trump administration's animus to civil rights protections for LGBTQ individuals.

⁵⁷ See Greta Anderson, *Dept. of Ed Says Title IX Does Not Apply to LGBTQ Discrimination*, INSIDE HIGHER EDUC. (Jan. 12, 2021), <https://www.insidehighered.com/quicktakes/2021/01/12/dept-ed-says-title-ix-does-not-apply-lgbtq-discrimination>.

⁵⁸ Betty N. Gordon, Carolyn S. Schroeder, Peter A. Ornstein & Lynn E. Baker-Ward, *Clinical Implications of Research on Memory Development, in TRUE AND FALSE ALLEGATIONS OF CHILD SEXUAL ABUSE: ASSESSMENT AND CASE MANAGEMENT* 101-116 (Tara Ney ed., 1995).

⁵⁹ 34 C.F.R. § 106.30 (a).

⁶⁰ 34 C.F.R. § 106.30 (a) provision for reporting sexual harassment to "any employee" in elementary or secondary schools was a change from the NPRM, which stated that reports of sexual harassment by K-12 students may be made "to a teacher in the elementary and secondary context with regard to student-on-student harassment." NPRM at 61466, 61496. The NPRM was not clear in defining to whom K-12 students were required to report sexual harassment by an employee. The Final Rule does not distinguish between student-on-student sexual harassment and employee-on-student sexual harassment for K-12 reporting purposes.

⁶¹ 34 C.F.R. § 106.44 (a).

⁶² 34 C.F.R. § 106.30 (a).

⁶³ See, e.g., DCL Q&A about Title IX and Sexual Violence (Archived) G1-G3, 32-33 (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>. "Interim measures" were to be put in place for the alleged victim of sexual harassment during the course of the investigation into the complaint of misconduct.

⁶⁴ 34 C.F.R. § 106.30 (a).

⁶⁵ Final Rule, 30064.

⁶⁶ Id. at 30066.

⁶⁷ Id. at 30067, 30081.

⁶⁸ See Leon Seltzer, *Feeling Understood - Even More Important than Feeling Loved?*, PSYCHOLOGY TODAY (June 28, 2017),

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<https://www.psychologytoday.com/us/blog/evolution-the-self/201706/feeling-understood-even-more-important-feeling-loved>. See also TRAUMA-INFORMED CARE IN BEHAVIORAL HEALTH SCIENCES, Chapter 3, *Understanding the Impact of Trauma*, <https://www.ncbi.nlm.nih.gov/books/NBK207191/>.

⁶⁹ 34 C.F.R. § 106.44 (b)(1).

⁷⁰ 34 C.F.R. § 106.30 (a). Examples of circumstances in which a Title IX Coordinator may file a formal complaint include, e.g., (1) when the complainant desires to remain anonymous but inaction may endanger other students or employees, or (2) if alleged respondent(s) pose a threat to campus security.

⁷¹ The Regulations define supportive measures and describe examples of such in Final Rule 34 C.F.R. § 106.30 (a).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ In the case of students who have not reached their majority, these decisions may be made, of course, by parents or caregivers acting in the best interests of the child.

⁷⁵ 34 C.F.R. § 106.71 (a)

⁷⁶ See n. 8.

⁷⁷ See, e.g., *supra* n. 9.

⁷⁸ 34 C.F.R. § 106.30 (a), defining “Formal complaint.”

⁷⁹ 34 C.F.R. § 106.44 (a).

⁸⁰ See DCL on Sexual Violence (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>. See also, DCL Q&A about Title IX and Sexual Violence (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

⁸¹ Alicia Betz, What it Means that Teachers are Mandated Reporters, EDUC. CORNER, <https://www.educationcorner.com/teachers-mandated-reporters.html#:~:text=In%20most%C20states%C2C%C20teachers%C20and,to%C20the%20appropriate%20authorities%20immediately>.

⁸² Clery Center, Reporting Responsibilities,

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<https://clerycenter.org/policy-resources/title-ix-related-acts/#:~:text=Under%20the%C20Clery%C20Act%C2C%C20a,officials%C20with%C20significant%20responsibility%20for>.

⁸³ 34 C.F.R. § 106.8 (a-b).

⁸⁴ 34 C.F.R. § 106.8 (c).

⁸⁵ See 34 C.F.R. § 106.45.

⁸⁶ 34 C.F.R. § 106.44 (a).

⁸⁷ Several commenters to the Final Rule's publication complained that this sustained presumption of the respondent's innocence was "inequitable" to the complainant. Final Rule at 30245. However, DOE stressed that this presumption assured impartiality to the grievance process and avoided prejudgment of the facts. Final Rule at 30247.

⁸⁸ 34 C.F.R. § 106.45 (b)(2)(i-ii).

⁸⁹ 34 C.F.R. § 106.45 (b)(3)(iii).

⁹⁰ 34 C.F.R. § 106.45 (b)(5)(v-vi).

⁹¹ 34 C.F.R. § 106.45 (b)(5)(vii).

⁹² Final Rule at 30390.

⁹³ 34 C.F.R. § 106.45 (1)(vii).

⁹⁴ See *supra* n. 50. See also OCR, *Know Your Rights* (Archived) (where the OCR document stated, "Every complainant has the right for the complaint to be decided using a preponderance of the evidence standard (*i.e.*, it is more likely than not that sexual harassment or violence occurred"). <https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-rights-201104.html>

⁹⁵ Alice Herman, *The Department of Education Has Moved to Increase the Burden of Proof Required in Assault Cases* (Nov. 19, 2018), PROGRESSIVE, <https://progressive.org/dispatches/DOE-moves-to-increase-burden-of-proof-1881119/>.

⁹⁶ VAWA, § 304 (a)(8)(A)(ii). See also Kathleen Conn, *The Preponderance of the Evidence Standard: Is OCR Overstepping Its Authority?*, 310 Ed. Law Rep. 614, 623-24 (2015).

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⁹⁷ See Fred Lunenburg & Beverly Irby, THE PRINCIPALSHIP: VISION TO ACTION 416-18 (2006) (where reference to  *Goss v. Lopez* (419 U.S. 565 (1975)) set the standard for providing due process to students in disciplinary matters). Other notable texts on the principalship did not even discuss specifics of disciplinary action. See, e.g., Thomas Sergiovanni, THE PRINCIPALSHIP: A REFLECTIVE PERSPECTIVE (2009) (where the focus was more on fostering student achievement, overall school improvement, and building school culture than on specifics of disciplinary protocols).

⁹⁸ 34 C.F.R. § 106.45 (b)(1)(vii).

⁹⁹ Final Rule at 30384.

¹⁰⁰ *Id.* at 30385.

¹⁰¹ 34 C.F.R. § 106.45 (b)(1)(vii) requires a recipient to make the choice of standard of evidence applicable to all formal complaints of sexual harassment, including those against employees and faculty.

¹⁰² James Moore & Kursat Christoff Pekgoz, *The Unfairer Sex*, INSIDE HIGHER EDUC. (Dec. 8, 2019), <https://www.insidehighered.com/views/2019/12/18/men-are-banding-together-class-action-lawsuits-against-discrimination-title-ix>.

¹⁰³ Final Rule at 30314.

¹⁰⁴ For example, to cut costs, K-12 teachers and administrators from different LEAs may be cross-trained to act as investigators, independent decision-makers, and mediators for informal resolutions, and offered to sister LEAs, to assist the LEA's trained Title IX Coordinator, while their classes and other responsibilities are handled by trained and trusted substitute teachers when Title IX duties require. Students should also be trained to recognize sexual harassment before it spirals into a Title IX problem.

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