UNIVERSITY OF OREGON
School of Law

To: United States Department of Education
From: Merle H. Weiner, Philip H. Knight Professor of Law
Re: ED-2018-OCR-0064
Date: January 30, 2019

Delivered via www.regulations.gov

I offer these comments to assist the Department of Education in its effort to create regulations regarding educational institutions' legal obligations to address sexual harassment under Title IX.

My Qualifications

I am a law professor with an interest in Title IX. Among other things, I have written two lengthy articles on the topic: *See, e.g., A Principled and Legal Approach to Title IX Reporting*, 85 TENN. L. REV. 71 (2017), and *Legal Counsel for Survivors of Campus Sexual Violence*, 29 YALE J. L & FEM. 123 (2017). Also, I am the faculty director of the University of Oregon's Domestic Violence Clinic and oversee Student Survivor Legal Services (SSLS), a program of the Clinic. SSLS provides legal services to students who allege that they have been victims of sexual harassment. I also have been involved in crafting various campus policies on this topic, on my own campus and more generally, including through the Members Consultative Group of the American Law Institute (*Project on Sexual and Gender-Based Misconduct on Campus: Procedural Framework and Analysis*) and as a peer reviewer for the American Bar Association's Commission on Domestic and Sexual Violence (*Project on Improving Campus Student Conduct Processes for Domestic, Dating, Sexual and Stalking (DSVST) Violence).* Finally, I have lectured on this topic, including at the Academic Chairpersons Conference and at a conference put on by the National Association of Student Personnel Administrators (NASPA). I offer these comments in my professional capacity, although not as a spokesperson for my institution.

Overall Impression

Although the objectives of the proposed regulations are noble (*e.g.*, to give complainants greater control over the process, to give respondents more due process, and to ensure sexual harassment is addressed as sex discrimination in regulations), the proposed regulations are problematic.

Most notably, the proposed regulations dramatically limit the usefulness of administrative enforcement by defining educational institutions' obligations very narrowly, *i.e.,* in a way that tracks the Supreme Court's case law regarding civil liability.

While I fundamentally disagree with this new approach for policy reasons, my comments are meant to be helpful given the Administration's objectives. My recommendations for improving the new regulations are included below, seriatim.

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§106.12: Obligations of Religious Institutions

This provision removes any requirement that religious institutions take advance action to claim an exemption from Title IX. Yet, students should know *before* they enroll in a college whether their institution of higher education will claim such an exemption. The Clery Act requires that certain information be shared with students so that they can make informed choices about where to attend college or university. Clery Act, 20 U.S.C. § 1092. It would be consistent with the spirit of the Clery Act and Title IX for the Department to require that religious institutions post whether the institution believes it is exempt from Title IX or not. Such an important piece of information could affect a student's choice of college.

§106.30: Definition of Sexual Harassment

Sexual harassment is defined to encompass three types of acts. Only the definition of quid pro quo activity is sufficient; the two other types of sexual harassment are defined too narrowly.

Sexual harassment is defined to include "sexual assault" as defined under the Clery regulations, 34 C.F.R. 668.46(a). However, the definition of sexual assault there only encompasses "rape, fondling, incest, or statutory rape." The definition omits considerable unwanted sexual touching because fondling is defined as the touching of "private body parts." Therefore, for example, an unwanted and unconsented kiss on the check, coupled with forcing open the person's legs, would not be sexual assault. Nor does the definition of sexual assault include attempts. Therefore, it would not be sexual assault if a bystander stops the perpetrator from committing rape even though the perpetrator pinned down the victim's hands and said, "I am going to rape you." Some of these activities may not fall within the final category either, as described next.

Sexual harassment is also defined to include unwelcome conduct that is "so severe, pervasive, and objectively offensive" that it effectively denies a person equal access to the recipient's education program or activity. This unreasonably high threshold was evident in *Davis v. Monroe Cty Bd. of Education*, 526 U.S. 629 (1999). There the Supreme Court remanded the case to see if the behavior met the standard. The plaintiff had alleged that over the course of five months, a fifth-grade male student touched or attempted to touch the fifth-grade female student's breasts and genitals, and had made vulgar statements to her. The behavior affected her so much that her grades dropped and she wrote a suicide note. *Id*. at 633-34, 653-54.

The proposed definition of sexual harassment, with its three parts, omits other types of problematic behavior that can occur on the basis of sex, such as domestic violence, unless the behavior is "so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's educational program or activity." If the Department does not loosen the definition, the Department should at least clarify that 1) domestic violence is covered by Title IX and 2) batterers' overall behavior can meet the threshold of "severe, pervasive, and objectively offensive" even if the physical violence is not severe and pervasive. Batterers can be very controlling and dangerous without committing much, if any, physical violence. The totality of this behavior can be "severe, pervasive, and objectively offensive" and can deny a person equal access to the recipient's educational program or activity.[1]

[1] *See* Deborah Epstein & Lisa A. Goodman, *Discounting Credibility: Doubting the Testimony and Dismissing the Experiences of Domestic Violence Survivors and Other Women*, 167 U. PENN. L. REV. at 18

The Department justifies its definition by saying that schools had "overly broad definitions of sexual harassment," 83 Fed. Reg. at 61464, and that the schools' definitions posed threats to academic freedom and free speech. *Id.* at 61484. The scenarios mentioned above — *i.e.*, physical assault that is not "fondling" or "rape," attempted rape, and domestic violence — do not raise these issues.

It is important to broaden the definition to capture the above examples. While the Department suggests that a recipient can use its student conduct code to proscribe a broader range of behavior, *id.* at 61475, doing so is left to the recipient's discretion. As a consequence, behavior may not be addressed by a school even though it is likely to interfere with the victim's access to the recipient's educational program or activities.[2] Such a stringent definition does not "further the purpose of Title IX," contrary to the Department's claim. 83 Fed. Reg. at 61467.

§106.30: Definition of Complainant, Actual Knowledge Read in Conjunction with 106.44(3)

The safe harbor contained in 106.44(3) is triggered when, "in the absence of a formal complaint," a recipient offers and implements supportive measures for the complainant and informs the complainant of the right to file a formal complaint. This framework is a good one. It is valuable to separate a recipient's "obligation to respond to each known report of sexual harassment" from the recipient's obligation "to investigate formal complaints of sexual harassment" because it will give "complainants greater confidence to report and expect their school to respond in a meaningful way." 83 Fed. Reg. at 61465.

However, in my opinion, this proposed framework needs an adjustment. A greater number of employees should be required to inform students of their right to file a formal complaint and to obtain supportive measures. Consequently, the use of "complainant" in §106.44 is problematic because "complainant" is defined as one who has "reported" sexual harassment to the Title IX Coordinator or an "any official of the recipient who has authority to institute corrective measures on behalf of the recipient." That definition excludes all students who report or disclose sexual harassment to someone else at the institution. *See* 83 Fed. Reg. at 61470.

(footnotes omitted) (forthcoming) ("For many women, abusive relationships are characterized by episodic, sometimes relatively infrequent, outbursts of physical violence and threats. The day-to-day, routine abuse often occurs solely in the psychological realm. Psychologists explain that in many abusive relationships victims are subjected to their partners' coercive control through a wide variety of psychological tactics, including, for example, 'fear and intimidation . . . emotional abuse, destruction of property and pets, isolation and imprisonment, economic abuse, and rigid expectations of sex roles.' An abusive partner might effectively isolate a woman and increase his control over her life by sabotaging her efforts to find or keep a job or to attend a job-training session by: destroying homework assignments, keeping her up all night with arguments before a job interview, turning off alarm clocks, destroying clothing, inflicting visible facial injuries before job interviews, disabling the family car, threatening to kidnap the children from child care centers, and harassing her on the job.").

[2] *See* PRINCIPLES OF THE LAW, STUDENT MISCONDUCT: PROCEDURAL FRAMEWORKS FOR COLLEGES AND UNIVERSITIES 21 (Discussion Draft, Apr. 17, 2018) ("Data show that the experience of being sexually assaulted *or subjected to related misconduct* [which includes, inter alia, "relationship violence, stalking, sexual exploitation or coercion") poses special obstacles to students' educational experience, including their ability to succeed academically and participate fully in extracurricular opportunities available in their college or university.").

Instead, institutions of higher education should be required to have their employees provide information to students who disclose about how to report the harassment and the availability of supportive services. Otherwise, victims of sexual harassment will be greatly underserved. Victims will lack choices because they will not know the options for reporting and/or obtaining supportive services, despite written materials. Students do not necessarily understand that disclosure to someone such as a Dean or a faculty member may not qualify as a "report" for purposes of triggering the institutional obligation to respond. The misunderstandings are a very real risk when employees are not obligated to correct a student's misimpression about the employee's power to take action or to offer supportive measures. There will also be students will are too traumatized to find the information about reporting to the Title IX Coordinator or who do not know that reporting is even an option.

Because of this reality, the Department is wrong when it states, "The Department does not believe it is reasonable to assume that these proposed regulations will have a quantifiable effect on the underlying rate of sexual harassment occurring in the educational programs or activities of recipients." 83 Fed. Reg. at 61485. In fact, it is likely that fewer reports will occur, fewer perpetrators will be held accountable, and less deterrence will exist on campus.

Therefore, for purposes of receiving §106.44(3)'s safe harbor, recipients should have to require that any employee to whom a student discloses sexual harassment provide the student with information about the Title IX office, the possibility of reporting, and the availability of supportive services even without a report. The student should also be told that without a report the institution will not know of the incident and will therefore do nothing about it.

The University of Oregon, my institution, takes this approach. It limits the number of individuals who are mandatory reporters, but requires everyone at the institution to whom a student discloses to inform the student that reporting is an option, that services are available, and that the employee can report the incident to the Title IX coordinator for the student, if the student desires. *See* Investigations and Civil Rights Compliance, *Employee Responsibilities*, UNIVERSITY OF OREGON, https://investigations.uoregon.edu/employee-responsibilities (last visited January 6, 2019). This model best achieves the balance the Department seeks: maximizing victim choice but ensuring the rate of sexual harassment does not increase on campus. *See generally* Merle H. Weiner, *A Principled and Legal Approach to Title IX Reporting*, 85 TENN. L. REV. 71 (2017) (submitted as an attachment to these comments).

The regulations should require institutions to take this approach this because it is good policy. Moreover, requiring it would meet the Department's objectives of providing recipients with clear legal obligations. Otherwise, schools might be sued for inadequate reporting policies that violate Title IX. Simply, a recipient's failure to tell its employees to respond appropriately to disclosures arguably amounts to an intentional decision not to respond to third-party discrimination. The Supreme Court in *Gebser v. Lago Vista Independent School Dist.,* 524 U.S. 274 (1998), noted that an institution's "policy" could subject the institution to liability. *Id.* at 290. *See also Simpson v. Univ. of Colorado Boulder*, 500 F.3d 1170, 1177-78 (10th Cir. 2007). In *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180 (2005), the Supreme Court noted that reporting is the linchpin of an effective Title IX policy: "Reporting incidents of discrimination is integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished. Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel. Recall that Congress intended Title IX's private right of action to encompass claims of a recipient's deliberate indifference to sexual

harassment." Similarly, the Title IX enforcement scheme will unravel if institutions do not have a reasonable response to students' disclosure, such as directing the students to the Title IX Coordinator.

If the Department required recipients' employees to respond in the way suggested, the Department could still provide a safe harbor. To this end, §106.30 might be usefully changed by adding the bracketed language: "The mere ability or obligation to report sexual harassment [or to inform a student about options for reporting and accessing services] does not qualify an employee, even if that employee is an official, as one who has the authority to institute corrective measures on behalf of the recipient [so long as the institution has a policy that requires that employee to inform the student about the Title IX Coordinator and supportive measures when a student discloses]."

§106.30: Supportive Measures

The regulations should reference legal counsel as a potential supportive measure for the complainant. This is important because, as I explain in detail in my article, the survivor's lawyer can provide essential services apart from representation at the disciplinary hearing. *See generally* Merle H. Weiner, *Legal Counsel for Survivors of Campus Sexual Violence*, 29 YALE J. L & FEM. 123 (2017) (submitted as an attachment to these comments).

The survivor's lawyer helps the survivor navigate the overlapping civil law system, criminal law system, and campus disciplinary system. "Navigating multiple systems can be daunting, frustrating, time consuming, and fraught with opportunities for survivors to make mistakes. The task itself can inhibit recovery." *Id*. at 146. In the civil system, a lawyer can be vital to accessing remedies, such as terminating a lease or securing job leave to deal with the effects of the victimization. *Id.* at 152-53. An attorney can also advise the victim about the implications of filing a criminal complaint and "help to minimize the secondary victimization that can come from reporting to and being investigated by the police." *Id.* at 155. In the campus system, the attorney can help advise the student about the legal implications of reporting. *Id.* at 159. The attorney can also help buffer the survivor from the abrasive investigatory technique of a defense attorney. *Id.* at 171. *See also* 106.45 (b)(3)(vii), *infra* (discussing the importance of an attorney for the complainant at the hearing).

§106.44(a): Obligation to Respond to Sexual Harassment

The Department adopts the Supreme Court's test for determining when an educational institutional will be in violation of Title IX. For institutions of higher education, "actual knowledge," as defined in §106.30, requires notice to the "Title IX Coordinator" or "any official of the recipient who has authority to institute corrective measures on behalf the recipient."

It is very unclear which officials at an institution of higher education have the "authority to institute corrective measures on behalf of the recipient." The commentary says it is "fact-specific." 83 Fed. Reg. at 61467. The proposed regulations make clear, however, that a mere obligation to report is insufficient to qualify an employee as such an official. No further guidance is provided.

As such, the proposed regulation fails to "set forth clear standards that trigger a recipient's obligation to respond to sexual harassment." *Id.* at 61465. Moreover, because the Department's test requires "someone with the authority to stop it," *id.* at 61467 (citing *Santiago v. Puerto Rico*, 655 F.3d 61, 75 (1st Cir. 2011)), only a very small number of individuals will likely qualify. For instance in the *Santiago* case, the court held that the child's classroom teacher, a school social worker, and the

principal did not qualify because none of them "had the authority to take corrective action against the bus driver" who was employed by a private company. There a six-year-old disabled student alleged that the driver had sexually abused him. Institutions of higher education are often bound by contracts (including student handbooks and union agreements) and obligations of due process that would limit those who can take corrective action. In some institutions, the only qualifying official may be the student conduct code officer.

Without imposing obligations on a wider swath of employees to inform the victim of the correct reporting channels, *see supra* discussion of 106.30 (Definition of Complainant et al.), the Department is ensuring that schools will *not* address much sexual harassment. Victims will undoubtedly tell people who they think will take action, those people will have no obligation to do anything, and nothing will be done. This will make campuses less safe.

§106.44(b)(1): Safe Harbor for Procedural Fairness

The proposed regulations will ensure procedural, but not substantive, fairness. The regulations provide a safe harbor to schools who follow the procedures set out in §106.45. *See* §106.44(b). However, §106.44(b)(5) also says that an institution will not be deemed to be "deliberate indifferent" if the Assistant Secretary would have reached a different determination on responsibility. In addition, the commentary states that the Department does not want to "second guess recipients' disciplinary decisions" and that "any disciplinary sanction decision rests within the discretion of the recipient." 83 Fed. Reg. at 61468. The unimportance of the substantive outcome is reinforced by the fact that a complainant cannot appeal the sanction unless "the remedies are not designed to restore or preserve the complainant's access to the recipient's education program or activity." §106.45(b)(5). It is irrelevant if the sanction insufficiently punishes the perpetrator. It also appears irrelevant that the remedies "will not" restore or preserve the complainant's access, if they are "designed" to do so.

As a matter of policy, the Department should not leave institutions totally unaccountable for their substantive decisions regarding accused students' responsibility and the appropriate sanctions, even if the decisions are egregious. Otherwise, the Department will reinforce some victims' fear that the institution will be biased in favor of the accused, either because the accused is a valuable person on campus (such as a sports star or a faculty member), or because the institution will have to provide a successful complainant with remedies and supportive measures. *Id.* at 61478. This fear of bias undermines the willingness of victims to come forward to report misconduct.

The proposed regulations will also make the proceedings seem unfair, regardless of the procedures. For instance, if a school merely sanctions a repeated rapist by requiring him to write an essay on why rape is wrong, the victim will feel the process has been unfair regardless of procedural fairness. Proportionality of the sanction to the offense is a key component of fairness for both the perpetrator and the victim. The Department noted as much when it said, "Any disciplinary decision must be made as a proportionate response to the violation." Office for Civil Rights, Q & A on Campus Sexual Misconduct (Sept. 22, 2017), at 6.

At a minimum, the Department should require institutions to allow the complainant to appeal the sanction if it seems unjust or inadequate, regardless of the complainant's ability to access his or her own education and regardless of the institution's "design" with respect to the sanction. The Department should also be willing to examine the outcome and/or sanction if either is clearly unreasonable, such as when there is an absence of proportionality between the offense and the

sanction. The Department could hold institutions accountable while also giving more deference to institutions that satisfy the requirements of the safe harbor.

Although the courts are a backstop in the event an institution's response is "clearly unreasonable," few victims will know that a court action is possible and fewer still will have an attorney to bring such an action on his or her behalf. The administrative process is what students look to for relief and that process should recognize the importance of both procedural and substantive fairness.

§106.44(b)(3): Safe Harbor

Please see discussion, *supra,* regarding § 106.30 and the definition of "complainant" as it affects the scope of this provision.

§106.45(b)(1)(iii): Training of Coordinators, Investigators and Decision-makers

Training is beneficial for coordinators, investigators, and decision-makers, but the required training should include information about how victims of sexual assault (and domestic violence) are affected by trauma and how to conduct an investigation and proceeding in a trauma-informed manner. Russell Strand, for example, has developed an array of useful techniques called FETI (forensic experimental trauma interview) that could be required as part of the training. In addition, there should also be training to dispel the myths about sexual violence and domestic violence (to the extent that domestic violence is covered by the proposed regulations). This type of training is arguably already required by the Clery Act regulations, which require that the proceedings be conducted by officials who "at a minimum, receive annual training on the issues related to dating violence, domestic violence, sexual assault, and stalking and on how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability." *See* 34 C.F.R. 668.46(k)(2)(ii). To ensure that this obligation applies to coordinators and investigators as well as decision makers, the Title IX regulations should include the obligation too.

§106.45(b)(3): Dismissal of Insufficient Complaints

Unrepresented complainants are likely to fail to put everything relevant into their complaints. The recipients may, therefore, dismiss their complaints because it appears there wasn't "sexual harassment" or an assault that occurred within the recipient's program or activity.

At a minimum, recipients should have to inform complainants of the exact definition of sexual harassment, the ways that off-campus conduct may be "within the recipient's program or activity," and the repercussion of failing to draft an appropriate complaint. That information will help complainants draft an appropriate complaint as well as understand the need for legal help. This particular problem is best addressed by offering complainants legal assistance as a supportive measure. *See supra* §106.30 (discussing supportive measures).

§106.45(b)(3)(iii): Prohibition on Gag Orders

The proposed regulations prohibit a recipient from restricting the ability of either party to discuss the allegations during an investigation. This is problematic because confidentiality agreements are often an important part of the proceedings. Confidentiality agreements protect the fact-finding

process from tampering (an especially important objective since witnesses are not under oath when they talk to the investigator) and protect the parties' privacy. The proposed regulations should make clear that it is acceptable to use confidentiality agreements so long as the obligation of confidentiality is imposed on both parties.

§106.45(b)(3)(v): Written Notice of Steps in the Investigation

The proposed regulations should require that the advisor be copied on correspondence between the institution and the parties. The advisor is explicitly mentioned as someone who receives the evidence in an electronic format, *see* §106.45(3)(viii). Complainants and respondents can find compliance with simple deadlines problematic in light of the harassment and the accusations. Advisors should be copied so that they can help the students prepare, ensure they attend interviews, etc.

106.45(b)(3)(vii): Appointing an Advisor for Purposes of Cross-Examination

The proposed regulations require a live hearing that includes cross-examination by the parties' advisors. 83 Fed. Reg. at 61474-5. Schools must appoint an advisor if a party lacks one. However, there is no requirement that the school appoint an advisor that is of equal skill or knowledge to the other party's advisor.

It is important for students to have advisers with equivalent competency during the proceedings. An imbalance will create unfairness, if not the perception of unfairness. In fact, "when only one party is represented by a lawyer, allowing that lawyer a very active role may work to the disadvantage of the unrepresented party, and thus to the fairness of the process as a whole." *See* AMERICAN LAW INSTITUTE, PRELIMINARY DRAFT NO. 5F, PROJECT ON SEXUAL AND GENDER-BASED MISCONDUCT ON CAMPUS: PROCEDURAL FRAMEWORKS AND ANALYSIS (Vicki C. Jackson, Professor, Harvard Law School, Reporter), Oct. 18, 2018, at § 6.5 rptr's notes, p. 76. Berger and Berger explained, "If a full-blow hearing does ensue, a law-trained advisor, provided she is sensitive to the setting (it is not a courtroom, and the panel members are not judges or jurors) brings skills that lay advisors are far less apt to possess….The right to cross-examine hostile witnesses, one of the pillars of due process, becomes far less sturdy when an untrained person…is questioning the witness. If the student himself testifies…his testimony should be rehearsed….Also, a lawyer is better able than a lay person to make the initial assessment whether or not the client should speak at all…." *See* Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student,* 99 COLUM. L. REV. 289, 341 (1999) (discussing the right to counsel in cases involving academic wrongdoing). While the proposed regulations would allow schools to limit the advisors' role during the proceedings (including advisors who are attorneys), *see* §106.45(b)(3)(iv), the attorney could still benefit the student in many ways, including during cross examination.

The Department is under a misimpression that complainants often have representatives who are attorneys. The cost estimate assumes that the complainant will have legal counsel when the student files a formal complaint, attends the hearing, and files an appeal.[3] However, experience suggests that

[3] The Department assumes that both parties will have counsel when a formal complaint is filed and at the hearing. *See* 83 Fed. Reg. at 61488. ("At the IHE level, we assume that the average response to a formal complaint would require 24 hours from the Title IX Coordinator, 40 hours from an administrative assistant, 40 hours each for 2 lawyers (assuming both parties obtain counsel), 40 hours for an investigator, and 6 hours for a

assumption is not grounded in fact. "[S]tudent survivors rarely, if ever, have lawyers." Weiner, *Legal Counsel for Survivors of Campus Sexual Violence*, *supra,* at 133 (citing sources).

Because parties with attorneys are uniquely advantaged, both sides should have an attorney if one side has an attorney. Therefore, the proposed regulation should require the recipient to appoint an adviser for cross-examination of the same skill level as the other party's adviser.

106.45(b)(3)(vii): Exclusion of Evidence if Party Does not Submit to Cross-Examination

The proposed regulations says, "If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility." *See* §106.45(b)(3)(vii). Such a provision is overbroad and will have unintended consequences. First, this provision would exclude a statement by the complainant even if the complainant's absence was procured by the respondent. The rule in court is otherwise. Forfeiture by wrongdoing is a doctrine that says a respondent gives up his right to confront the witness when he has procured that person's absence. *Reynolds v. United States*, 98 U.S. 145, 158 (1878). Second, this rule would exclude statements that otherwise are allowed in court even if the witness cannot be cross examined, such all hearsay statements offered in civil trials. In addition, only a fraction of the hearsay offered by the government against the accused in a criminal trial is subject to confrontation rights. The right to cross-examination of the government's hearsay declarants only extends to those declarants who, at the time of their statements, recognize that they were giving evidence likely to be used in a later prosecution. This excludes one common category of statements in the Title IX investigations, statements to friends and family members who are consoling the victim and not investigating crimes. *See Crawford v. Washington*, 541 U.S. 36 (2004). Third, perversely, this rule would give a respondent who has been convicted of the act in criminal court a reason not to appear at the Title IX proceedings. The respondent's absence would ensure that any admission, such as part of a plea bargain, could not be used.

106.45(b)(3)(viii): Electronic Transmission of Evidence

The proposed regulations require that evidence be transmitted to the parties electronically. While parties and advisors are supposed to be restricted from downloading or copying the evidence, the regulation provides scant assurance that the evidence won't be copied. Someone could simply take a picture of the evidence on the screen with a phone camera. The potential inability of schools to place a confidentiality order on the parties increases the dangers associated with this proposed provision. *See supra* discussion of §106.45(b)(3)(iii) (Prohibition on Gag Orders). This possible scenario will deter reporting.

Apart from the practical concerns related to student privacy and reporting, this proposed regulation appears inconsistent with FERPA. Section 106.45(b)(3)(viii) would allow each party to inspect and respond to any evidence "directly related to the allegations" that were obtained during the investigation, even if the recipient does not intend to rely on it. The Department suggests that this

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decision-maker. We note that, under these proposed regulations, recipients are required to provide parties with advisors to conduct cross-examination. Given that our estimates assume all parties obtain counsel, we do not believe that this additional requirement would result in an increased cost not otherwise captured by our estimates"). The Department assumes that more robust due process will require "20 hours each from two lawyers." When speaking of appeals at the IHE level, the Department assumes that an appeal will require "10 hours each from 2 lawyers."

proposed regulation is consistent with FERPA because a student has a right "to inspect and review records that directly relate to that student." See 83 Fed. Reg. at 61476-77. FERPA does expressly say that the right to inspect applies to information that "directly relate[s]" to that student, 20 U.S.C. § 1232g(a)(4)(A)(i) ("educational records" means "those records, files, documents, and other materials which—(i) contain information directly related to a student").

However, information that "directly relates" to the student is not necessarily co-extensive with records that "directly relate" to the incident. For example, the investigator may have evidence from the complainant about how the alleged assault affected her learning, and particularly her need for remedial services. That information directly relates to the incident, it directly relates to the complainant, but it does not directly relate to the respondent.

FERPA suggests such information should not be shared with the respondent. It states: "If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material." 20 U.S.C. §1232g(1)(a). This is reinforced in the regulations, specifically 34 C.F.R. §99.12(a): "If the education records of a student contain information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student." The Department's proposed regulation also seems broader than the instructions in the FERPA regulation, which says that a party can inspect information directly related to that student, even if the information is also "directly related to another student, if the information cannot be segregated and redacted without destroying its meaning." 73 Fed. Reg. at 74832-33.

Some courts have found that a complainant's details are "directly related" to the *complainant*, and have rejected that the complainant's information is "primary related" to the dispute and therefore not protected by FERPA. *See, e.g., Rhea v. Dist. Bd. Of Trustees of Santa Fe College*, 109 So. 3d 851, 857-58 (D. Ct. App. Florida 2014) (holding that student email about teacher was a student record under FERPA; "although [the teacher] may be the primary subject of the e-mail, the e-mail also directly relates to its student author").

The 2013 VAWA Amendments require that the proceeding be "Conducted in a manner that - …Provides timely and equal access to the accuser, the accused, and appropriate officials to any information that will be used during informal and formal disciplinary meetings and hearings." 34 C.F.R. 668.46(k)(3)(1)(B)(3). But that provision does not include all information that is gathered by the investigator. Existing Departmental regulations that allow the sharing of information in connection with disciplinary hearings are limited to particular information and do not extend to everything contemplated in the proposed regulations. *See* 34 C.F.R. §99.31.[4]

Therefore, the proposed regulations appear to violate FERPA. The Department suggests that the proposed regulations trump FERPA to the extent that the two are inconsistent: "The obligations to

[4] 34 C.F.R. §99.31(a)(13) permits disclosure to "a victim of an alleged perpetrator of a crime of violence or a non-forcible sex offense," but only of the final results of the disciplinary proceeding. Section (a)(14) does not allows a disclosure to others of the final results unless the student is found to be an alleged perpetrator of a crime of violence or non-forcible sex offense and the student has committed a violation of the institution's rules or policies. The regulations also say that the institution "may not disclose the name of any other student, including a victim or witness, without the prior written consent of the other student." 34 C.F.R. §99.31(a)(14)(2).

comply with this part is not obviated or alleviated by the FERPA statute or regulations." *See* §106.6(e). This interpretation is reinforced by proposed §106.6(f), which uses the following alternative language to show that Title VII would trump the proposed Title IX regulations, to the extent of any inconsistencies: "[N]othing in this part shall be read in derogation of an employee's rights under title VII of the Civil Rights Act of 1964…or any regulations promulgated thereunder." The Department cites GEPA, specifically 20 U.S.C. § 1221(d), and claims that the following language gives it the authority to override FERPA with inconsistent Title IX regulations: "Nothing in this chapter shall be construed to affect the applicability of …title IX of the Education Amendments of 1972 … to any applicable program."

However, the Department's own interpretation of this GEPA provision suggests that Congress intended FERPA to be interpreted *consistent with* an application of Title IX that would eliminate sex-based discrimination. *See* U.S. Department of Education Revised Sexual Harassment Guidance at vii (2001) ("[I]f there is a direct conflict between the requirements of FERPA and the requirements of Title IX, *such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools*, the requirements of Title IX override any conflicting FERPA provisions."). Similar language was reiterated in 2011. *See* 2011 Dear Colleague Letter, p. 13 n. 32 ("The Department interprets this provision to mean that FERPA continues to apply in the context of Title IX enforcement, but if there is a direct conflict between the requirements of FERPA and the requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions. *See 2001 Guidance* at vii."). To the extent that the proposed regulation would cause a school to violate FERPA *and* would undermine the purpose of Title IX, the proposed regulation is *ultra vires*.

106.45(b)(4)(i): Burden of Proof

The proposed regulations give recipients a choice between using a preponderance of the evidence standard and the clear and convincing evidence standard. This choice, however, is accompanied by some confusing, and arguably unfair, directives.

First, a recipient can only use the preponderance standard if the recipient uses it for other types of conduct code violations that carry the same maximum disciplinary sanction. The flipside is not required, however: the recipient is not required to use the preponderance standard if the recipient uses the preponderance standard for other types of conduct code violations that carry the same maximum disciplinary sanction. This asymmetry is unwarranted and unfair, and may allow sexual harassment allegations to be treated differently than other serious misconduct charges.

Second, it is unclear what a recipient should do if it uses a clear and convincing standard for other conduct code violations that carry the same maximum disciplinary sanction as sexual harassment but only uses a preponderance of the evidence standard for complaints against employees, including faculty. In such a case, the proposed regulations give two diametrically-opposed instructions to institutions.

See also Directed Question 6, *infra.*

106.45(b)(5): Appeals

It is heartening to see that a recipient must offer a right of appeal to both parties if it offers it to either. Unfortunately, however, the proposed regulation makes it impossible for the complainant to complain that the sanction was insufficiently punitive when there has been a finding of responsibility. That should be changed. Substantive fairness is just as important as procedural fairness. *See supra* discussion of §106.44(b)(1) (Safe Harbor for Procedural Fairness).

106.45(b)(6). Informal Resolution

It is a positive development that the rule expressly permits a recipient to facilitate an informal resolution. While there is nothing inherently wrong with the items to be included in the written notice, the list implies that a recipient may elect to preclude a formal complainant once an informal resolution process has begun. That would be a highly unfortunate result if, for example, the accused student did not participate in the alternative process in good faith. To the extent that informal processes are being permitted, the Department should give more direction about the limits to their use as a shield to relieve institutions of the obligation of addressing a formal complaint.

Directed Questions. I offer my thoughts on the following directed questions.

4. Training

As suggested above, all individuals at an institution of higher education should have the obligation to tell a student who discloses sexual harassment about the Title IX Coordinator and to inform the student of the ability to access supportive services without filing a formal complaint. *See supra* discussion of §106.30 (Definition of Complainant, Actual Knowledge Read in Conjunction with 106.44(3)). That obligation would require some minimal training of employees, and that training should be required.

See also supra discussion of §106.45(b)(1)(iii) (Training of Coordinators, Investigators and Decision-maker).

6. Standard of Evidence

(1) It is more important to require institutions to treat in a uniform way all allegations of discrimination than to have a uniform standard across institutions.

(2) If schools retain the option to select a standard, then they should be required to use the same standard in Title IX cases that they apply in other cases in which a similar disciplinary sanction may be imposed. Importantly, this should operate in both directions. Now the proposed regulations only require that institutions ratchet up the Title IX proceedings to a higher burden of proof, but they should also require ratcheting down Title IX proceedings to a lower burden of proof when the Title IX proceedings are treated differently. *See supra* discussion of 106.45(b)(4)(i) (Burden of Proof).

7. Potential Clarification Regarding "Directly Related to the Allegations" Language

See supra comments to §106.45(b)(3)(viii) (Electronic Transmission of Evidence).