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Brittany Bull
U.S. Department of Education
400 Maryland Avenue S.W., Room 6E310
Washington, D.C. 20202

Docket ID: ED-2018-OCR-0064
Name of Agency: Ohio Alliance to End Sexual Violence
Status: Submitting as an Agency

Dear Ms. Bull:

Enclosed please find the Ohio Alliance to End Sexual Violence's official comment in response to Docket ID: ED2018-OCR-0064. The Ohio Alliance to End Sexual Violence (OAESV) serves as Ohio's statewide sexual violence coalition.[1] Every state and U.S. Territory has one sexual assault coalition, a nonprofit, nongovernmental organization designated by the federal government, representing the state's rape crisis centers and advocating for critical public policy change. OAESV, like other statewide coalitions, serves as the main training and technical assistance provider for our state's rape crisis centers on best practices, and advocates on behalf of rape crisis centers and the survivors they serve in public policy advocacy efforts at the state and federal levels. State coalitions also lead statewide public awareness efforts and support local programs in engaging with diverse communities, survivors, and service providers in their service areas.

OAESV's mission is to advocate for comprehensive responses and rape crisis services for survivors and empower communities to prevent sexual violence. OAESV's position as stakeholder and evaluator for the Ohio Department of Higher Education Changing Campus Culture Initiative, member of the Ohio Attorney General Sexual Assault Kit Tracking Task Force, administrator of the Ohio Campus Task Force, along with its coordination of Title IX representation for survivors across Ohio, direct legal representation of campus complainants, and advocacy in K-12 institutions establish OAESV's expertise on campus Title IX processes, the dynamics of sexual violence, and civil rights legal standards.

OAESV employs advocates, attorneys, prevention specialists, training specialists, policy professionals, experts on working with underserved populations, and field coordinators. Individuals

[1] **NOTE ON THE DIFFERENCE BETWEEN STATEWIDE COALITIONS AND RAPE CRISIS CENTERS**: A state coalition primarily works to ensure that rape crisis centers throughout the state have the resources, capacity, and training they require to meet community's needs. Rape crisis centers provide a full range of direct advocacy services, public awareness, prevention, and service coordination for survivors.

on our team came to OAESV with prior experience working as public and charter school teachers, public defenders, campus Title IX personnel, university adjunct faculty, civil litigators, IT professionals, corporate human resource officers, rape crisis center and domestic violence service providers, and mental health professionals. This array of expertise enhances OAESV's understanding of Title IX and the Proposed Rule's implications for students, K-12 employees, and campus faculty across the United States.

Please accept for your review OAESV's experience, precedent-based, and data-driven suggestions for modifications to the Proposed Rule.

Regards,

Rosa Beltre
Executive Director, Ohio Alliance to End Sexual Violence

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I. Responses to Directed Questions

a. Response to Question 1: Applicability of the rule to elementary and secondary schools

The proposed rule would apply to all recipients of federal financial assistance, including institutions of higher education and elementary and secondary schools. The Department is interested in whether there are parts of the proposed rule that will be unworkable at the elementary and secondary school level, if there are additional parts of the proposed rule where the Department should direct recipients to take into account the age and developmental level of the parties involved and involve parents or guardians, and whether there are other unique aspects of addressing sexual harassment at the elementary and secondary school level that the Department should consider, such as systemic differences between institutions of higher education and elementary and secondary schools.

OAESV does not believe that the deliberate indifference standard and related safe harbor provision, the actual knowledge standard (which includes teachers), or the location reduction of qualifying sexual harassment are workable in the K-12 context. Specifically, many K-12 institutions have been exposed in the past several years for not having staff trained on Title IX, to the point that parents trying to report sexual harassment against their children are told that principals, assistant principals, and even administrative staff supporting the listed Title IX Coordinator do not know what Title IX is. This demonstrates that under the proposed "actual knowledge" standard, schools will have no motivation to invest their time into developing and executing policies that permit children and parents to rely on reasonable judgment when determining to whom they should report school-based sexual harassment.

As sexual harassment poses a significant threat to the health and safety of K-12 students, it is imperative that the Office for Civil Rights hold schools accountable for creating and implementing appropriate reporting policies for employees who learn of sexual harassment, regardless of whether they are employed as a teacher, coach, counselor, or other employee children could reasonably perceive as having the responsibility to trigger a report to a responsible employee under Title IX. Numerous other laws relating to bullying, hazing, and child sexual abuse demonstrate that most state legislatures and other regulation systems view the network of employees responsible for reporting harm to children to the proper person are in line with the *2001 Guidance*, and for that reason, we request that the new guidance specify that instead of only being responsible after a school tells a "teacher," a school is on notice if a student informs any employee a student could reasonably believe has the authority or responsibility to report to school officials, including coaches, and school counselors. Noting the distinction between criminal liability for failure to report child sexual abuse and subjection to administrative enforcement by the Department of Education for not having systems in place that encourage proper reporting of sexual harassment to responsible employees, we believe that state mandatory reporting systems are an appropriate reference, as they reflect the realities of K-12 student maturity, comprehension, and most importantly the vast array of persons who may become aware of sexual harassment because of their professional engagement as a school employee.

These instances have a massive impact on the health and safety of students and it is vital that K-12 institutions have an appropriate institutional response in order to effectively help their students.

- Four out of five K-12 students report having experienced sexual harassment, and explaining that the impact of sexual harassment in K-12 settings has been linked to poor sexual health and academic withdrawal.[2]
- "Relying on state education records, supplemented by federal crime data, a yearlong investigation by The Associated Press uncovered roughly 17,000 official reports of sex assaults by students over a four-year period, from fall 2011 to spring 2015. … Put another way, for every one child sexual assault committed by an adult, there were seven committed by other children."[3]
- After prolonged peer sexual harassment and continued inaction by teachers and administrators, the fifth grade complainant drafted a suicide letter.[4]
- "The younger the victim, the more devastating the impact, and the greater the vulnerability to repeated assault. It's a disturbing trend and one that some educators and parents are reluctant to acknowledge, especially when it involves kids so young. It's easier to label the acts as bullying or hazing than to call them sex crimes—and violations of federal Title IX safety protections—but advocates say the only way to eliminate these offenses is to face them head on."[5]
- "Not only do the survivors' emotional and psychological scars endure long after the attack, their social lives, education, and career dreams are shattered. … For some, the trauma is insurmountable; gender based harassment and sexual assault have driven an increasing number of adolescent students to suicide"[6]
- Where, after a student reported rape by another student at school, the school refused to investigate the accused student and suspended the complaining student, the student began engaging in suicidal and self-harming behavior as a coping mechanism.[7]
- "Evidence showing that child who allegedly was sexually assaulted by other students could not sleep, was at risk for suicide, experienced declining grades, had difficulty concentrating, was frequently absent from school, suffered posttraumatic stress disorder, and had become more aggressive with her peers as result of incident was sufficient to raise material issue of fact as to whether negative effects of her assault effectively barred her access to educational opportunities at school"[8]

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[2] Lauren F. Lichty et al, Sexual Harassment Policies in K 12 Schools: Examining Accessibility to Students and Content, 78 J. SCH. HEALTH LAW 607, 608 (2008).
[3] Robin McDowell et al., Hidden Horror of School Sex Assaults Revealed by AP, ASSOCIATED PRESS (May 1, 2017), https://www.ap.org/explore/schoolhouse-sex-assault/hidden-horror-of-school-sexassaults-revealed-by-ap.html
[4] Davis v. Monroe Cnty. Bd. of Ed., 526 U.S. 629, 634 (1999).
[5] Cindy Long, The Secret of Sexual Assault in Schools, NAT'L EDUC. ASS'N (December 4, 2017), http://neatoday.org/2017/12/04/sexual-assault-in-schools/.
[6] Cindy Long, The Secret of Sexual Assault in Schools, NAT'L EDUC. ASS'N (December 4, 2017), http://neatoday.org/2017/12/04/sexual-assault-in-schools/ (quoting Esther Warkov).
[7] *Murrell v. School Dist. No. 1*, 186 F.3d 1238, 1244 (10th Cir. 1999)
[8] *T.Z. v. City of New York*, 634 F. Supp. 2d 263, 273 (E.D.N.Y 2009)

Not only is it vital that teachers report this abuse, but given the age of students in K-12 institutions it is imperative that it goes beyond just teachers, to any individual whom a child is reasonably likely to assume they can trust to help in cases of sexual harassment. Furthermore, every state has mandatory reporting that goes beyond just "teachers." OAESV recommends that the Department closely analyze mandatory reporting statutes and modify the standard to include those employees state legislators have determined are reasonably likely to learn about sexual abuse, whether by peers or adults, as these lawmakers determined rightfully that these individuals are entrusted with student wellbeing.

Ultimately, the deliberate indifference standard and safe harbor provision are unworkable in K-12 contexts for the same reasons the actual knowledge requirement is inappropriate without an expanded definition. K-12 schools struggled to comply with Title IX even when prompted to employ the 2001 and 2011 standards. Reducing their liability will logically result in less compliance. At a time when cyber harassment and abuse is magnifying the impact of sexual harassment at rates that adults struggle to understand, it is critical that K-12 institutions be motivated by all means reasonably possible to create safe and secure environments for their students. The deliberate indifference standard and safe harbor provisions simply do not require enough effort to keep K-12 students safe.

Finally, OAESV cannot stress enough that the reduced definition of sexual harassment will have an immensely harmful impact on K-12 survivors. Significant scholarship, courts, and quantitative and qualitative data, belabor the point that sexual harassment impacts the school environment even when it does not happen at school. This is logically connected to the fact that K-12 students must go to school, and are often restricted[9] to one school option based on their address. Students must see the same peers each day, engage with the same students year after year in clubs, sports, and lunch periods. For K-12 students, very few experiences are isolated from their school experience. For this reason, sexual harassment that happens off school grounds will inevitably impact the school environment. Cyber-harassment will be viewed on school grounds whether or not it originated on school grounds. Because courts agree with this contention, it is critical that the Department make clear in the final rule that K-12 sexual harassment must be investigated and remedied regardless of whether it takes place in classroom, at a sporting event, in a library, store, park, or parking lot – if it impacts the school environment, it is actionable sexual harassment.

b. Response to Question 2: Applicability of provisions based on type of recipient or age of parties

Some aspects of our proposed regulations, for instance, the provision regarding a safe harbor in the absence of a formal complaint in proposed section 106.44(b)(3) and the provision regarding written questions or cross examination in proposed section 106.45(b)(3)(vi) and (vii), differ in applicability between institutions of higher education and elementary and secondary schools. We seek comment on whether our regulations should instead differentiate the applicability of these or other provisions on the basis of whether the complainant and respondent are 18 or over, in recognition of the fact that 18-year-olds are generally considered to be adults for many legal purposes.

OAESV does not agree with the suggestion that regulations should be differentiated based on whether the parties are 18-years-old or older. Differentiation based on school level recognizes that

[9] For reasons of district policy, parental finances, lack of charter or voucher availability, and others, students often must attend their home district school.

some students do not matriculate at the age of 18, for a variety of reasons, and recognizes the huge differences between college and K-12 power dynamics, privacy concerns, developmentally appropriate instruction practices, considerations for disabilities, and other features. A flat differentiation based on the idea that 18-year-olds are generally considered legal adults does not provide for any of these considerations.

c. Response to Question 3: Applicability of the rule to employees

Like the existing regulations, the proposed regulations would apply to sexual harassment by students, employees, and third parties. The Department seeks the public's perspective on whether there are any parts of the proposed rule that will prove unworkable in the context of sexual harassment by employees, and whether there are any unique circumstances that apply to processes involving employees that the Department should consider.

Sexual harassment of a student by an employee is extremely harmful and should be handled with extreme care. As it relates to K-12 institutions in Ohio, employee-student sexual harassment resulting in sexual conduct is a criminal offense. This crime, § 2907.03[10] Sexual battery, is a third degree felony if the student is over the age of 13, and a second degree felony if the student is 13 or under. As the same type of behavior is criminalized widely across states, it is critical to mandate that any Title IX policy clearly require all employees to be aware of the criminal nature of such conduct and adhere to any mandatory reporting requirements proscribed by state law. Because these behaviors often occur after significant grooming, it is absolutely essential in K-12 settings to require that all employees, not just Title IX Coordinators, investigators, and decision-makers, receive training on the dynamics of sexual harassment/violence perpetrated by adults in positions of authority. Early detection of this type of harassment/violence can reduce escalating harassment against the original victim, and prevent perpetration against future victims.

In the context of higher education institutions, the power dynamics between faculty and student must be recognized. Though OAESV strongly opposes advisor-driven cross-examination in all campus proceedings, we especially oppose it in hearings where the respondent is an employee. In these situations, employees will generally have the funding to pay for private attorneys experienced in cross-examination, while students will likely bring in non-attorneys (who for reasons discussed below will be risking the unauthorized practice of law) or seek lower cost legal representation options, likely resulting in an attorney with less cross-examination experience. This will only heighten the power differential already present between employees tied to the campus and students who stand to lose a degree for which they have invested significant time, energy, and financial resources.

d. Response to Question 4: Training

The proposed rule would require recipients to ensure that Title IX Coordinators, investigators, and decision-makers receive training on the definition of sexual harassment, and on how to conduct an investigation and grievance process, including hearings, that protect the safety of students, ensures due process for all parties, and promotes accountability. The Department is interested in seeking comments from the public as to whether this requirement is adequate to ensure

[10] (7) The offender is a teacher, administrator, coach, or other person in authority employed by or serving in a school for which the state board of education prescribes minimum standards pursuant to division (D) of section 3301.07 of the Revised Code, the other person is enrolled in or attends that school, and the offender is not enrolled in and does not attend that school.

that recipients will provide necessary training to all appropriate individuals, including those at the elementary and secondary school level.

OAESV believes that while training campus Title IX Coordinators, investigators, and decision-makers is critical to the effectiveness of any institution in addressing sexual violence, it is also critical that all institution employees likely to engage with potential complainants and respondents also receive training. This is especially important because no student plans to be sexually assaulted. Therefore, no student will preemptively research policies and federal regulations to determine which trusted employee is trained on Title IX response standards. That employee's response to the survivor should be compliant with Title IX, namely it should ensure the student understands that disclosing to that employee will not trigger a formal complaint process, help the student learn about where and how to file a formal complaint, where to access crisis services, and any other pertinent information. Further, a survivor who encounters a negative or uniformed response, or one laden with sex stereotypes, can experience additional trauma or feel discouraged from filing either a formal Title IX complaint or police report, decreasing student safety across campuses. The first person a survivor discloses to within an institution holds an important responsibility to clearly, objectively and non-judgmentally respond with the information necessary for the survivor to proceed in learning about the Title IX process and potential accommodations. Accordingly, it is essential that all campus personnel likely to interact with students receive training.

Additionally, it is critical that mandatory training include the topics of neurobiology of trauma and the dynamics of sexual violence. This is critically important, as understanding how the effects of sexual violence appear in victim behavior only helps identify the truth when sexual violence is alleged, demonstrated by the fact that law enforcement programs all over the United States employ training on the neurobiology of trauma, working with underserved communities (who are disproportionately impacted by sexual violence), and the dynamics of sexual violence.[11] The peer reviewed scholarship on neurobiology of trauma and the dynamics of sexual violence have improved sexual assault responses across the country, and engagement with this knowledge will only make campuses safer.

OAESV is concerned that the exclusion of these training topics may stem from unfounded allegations that they create bias against respondents. OAESV has directly observed respondents' advocacy groups exclaim that scientific research on the neurobiology of trauma and dynamics of sexual violence (despite its scientific validity) create a nationwide bias in favor of female students. OAESV is deeply concerned that, due to the frequent use of the term "sex stereotype" by the same groups that argue against use of this peer-reviewed scholarship, this section of the Proposed Rule (without further

[11] See, e.g., INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, Trauma Informed Sexual Assault Investigation Training, available at https://www.theiacp.org/projects/trauma-informed-sexual-assault-investigation-training ("The IACP is pleased to announce that the Department of Justice, Office on Violence Against Women (OVW) recently refunded the Trauma Informed Sexual Assault Investigation Training. The IACP conducted training for over 1,700 participants with 29 on-site training events held from 2014 to 2018 and we look forward to holding many more events over the next few years. At present, crimes of sexual assault go vastly under reported and perpetrators continue undetected. The goal of the Trauma Informed Sexual Assault Investigation Training program is to strengthen the capacity of law enforcement to provide effective response to victims of sexual assault while simultaneously holding offenders accountable. The training provides information on the neurobiological impact of trauma, the influence of societal myths and stereotypes, understanding perpetrator behavior, and conducting effective investigations.").

clarification) will discourage institutions of elementary, secondary, and post-secondary education from employee appropriate training on trauma and the dynamics of sexual violence that has been deemed reliable, acceptable, and useful by criminal justice systems across the United States. Ultimately, training Title IX staff on scientific data on the dynamics of sexual violence will result in more accurate Title IX procedures and reduce the likelihood of faulty findings of student responsibility for sexual harassment policy violations.

To avoid the erosion of valid science as the basis for training, OAESV recommends that the Department clarify that peer reviewed scholarship will not be deemed to rely on sex stereotypes for the purposes of training materials.

Note on K-12 Training: In OAESV's experience working with middle school survivors, it is apparent that students and families understand more than teachers and Title IX Coordinators to have the responsibility to assist in remedying sexual harassment impacting the school environment. It is therefore critical that Title IX Coordinators ensure training on the neurobiology of trauma, the impact on underserved communities (who are disproportionately impacted by sexual violence), the impact of sexual harassment/violence on children and young adults, and the dynamics of sexual violence for all employees who may find themselves learning about sexual violence from a student. As mentioned above, the first person a survivor discloses to can have an incredibly impact on a survivor's future. This is significantly heightened when the survivor is a K-12 student. Because students and families to not prepare in advance for sexual harassment/violence, it is critical that all employees who may come into contact with survivors (not just teachers and Title IX Coordinators) receive this level of training, to allow for efficient responses that allow for review of preserved evidence and safe K-12 institutions.

e. Response to Question 5: Individuals with Disabilities

The proposed rule addresses the rights of students with disabilities under the IDEA, Section 504, and Title II of the ADA in the context of emergency removals (proposed section 106.44(c)). The Department is interested in comments from the public as to whether the proposed rule adequately takes into account other issues related to the needs of students and employees with disabilities when such individuals are parties in a sex discrimination complaint, or whether the Department should consider including additional language to address the needs of students and employees with disabilities as complainants and respondents. The Department also requests consideration of the different experiences, challenges, and needs of students with disabilities in elementary and secondary schools and in postsecondary institutions related to sexual harassment.

For the following reasons, OAESV supports this proposed change subject to the recommended modification explained herein. In OAESV's experience representing survivors of sexual violence in K-12 institutions, we have observed institutional confusion as to the handling of intersections between Title IX, the ADA, and IDEA. Frequently, under 2011 guidance, pre-finding accommodations (which we find analogous to the emergency removal proposed here) were denied in situations where both complainant and respondent needed to be in the same classroom, but respondent had an IEP. Additionally, some K-12 schools struggled to maintain complainant IEP requirements in post-finding accommodations. In the experience of OAESV's former K-12 teacher[12] staff members, districts provide significant training on IDEA, with less training on Title IX and the

[12] Two members of OAESV's Legal Team taught in K-12 institutions, in the years 2008-2011 and 2016 - 2017, respectively.

ADA. These OAESV staff members highly recommend that the Proposed Rule require training to all K-12 staff on the intersections of these laws, to ensure the civil rights of all complainants and respondents, regardless of disability, are upheld, while making sure that all students are kept safe.

Accordingly, OAESV recommends the Department more specifically addressing the intersection of these laws and recommends that should a school determine that the respondent poses an immediate threat to health or safety, that respondent's threat be treated as other threats would be under the IDEA[13] (for example, in non-Title IX contexts, a student with an IEP may lawfully be removed from the classroom if that person brings a weapon).

f. *R*esponse to Question 6: Standard of Evidence

In section 106.45(b)(4)(i), we are proposing that the determination regarding responsibility be reached by applying either a preponderance of the evidence standard or the clear and convincing standard, and that the preponderance standard be used only if it is also used for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. We seek comment on (1) whether it is desirable to require a uniform standard of evidence for all Title IX cases rather than leave the option to schools to choose a standard, and if so then what standard is most appropriate; and (2) if schools retain the option to select the standard they wish to apply, whether it is appropriate to require schools to use the same standard in Title IX cases that they apply to other cases in which a similar disciplinary sanction may be imposed.

OAESV believes that it is desirable to require a uniform standard of evidence for all Title IX cases rather than leave the option to schools to choose a standard. In that event, OAESV believes that preponderance of the evidence is the appropriate standard.

As articulated in the Proposed Rule, the purpose of Title IX is to provide equity. To preserve this equity on campuses, the preponderance of the evidence (PPE) standard must be maintained as the required standard in sexual harassment matters. Notably, no court has ever held that a higher standard than PPE is required for suspension or expulsion based on student conduct violations,[14] and the majority of courts that have examined the issue upheld and promoted an even lower standard.[15] This standard, "substantial evidence,"[16] is "defined as enough relevant evidence that a reasonable person would support the fact-finder's conclusion. And the substantiality of the evidence must be based on the record as a whole; that is, the factfinder's conclusion must be based on evidence that is

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[13] *See*, *e.g.*, *Glen by & Through Glen v. Charlotte-Mecklenburg Sch. Bd. of Educ.*, 903 F. Supp. 918, 935 (W.D.N.C. 1995) (where the parents of a student with an Individualized Education Plan (IEP pursuant to the IDEA) alleged an illegal "change in placement" after the school suspended the student for ten days after he brought a gun clip and bullets to school, the court reiterated that under the IDEA, "where a student poses an immediate threat to the safety of others, officials may temporarily suspend him or her for up to 10 school days.).

[14] Erin E. Buzuvis, *Title IX and Procedural Fairness: Why Disciplined Student Litigation Does Not Undermine the Role of Title IX in Campus Sexual Assault*, 78 MONT. L. REV. 71, 97-98 (2017) ("Lower courts agree that colleges and universities need not provide accused students the same procedural rights that criminal defendants receive, though they do not always agree on the particular rights a student must receive. . . . Notably, no court has ever held that more than a preponderance of evidence of a student's misconduct is constitutionally required to suspend or expel that student from school.").

[15] Lavinia M. Weizel, *The Process That Is Due: Preponderance of the Evidence As the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1633 (2012) ("Although few courts have directly addressed the constitutionally required evidentiary standard for school disciplinary proceedings, of those courts, the majority have held that due process requires disciplinary decisions to be based on 'substantial evidence.'").

[16] *Id.*

substantial in light of the evidence in the record that both bolsters and detracts from that conclusion."[17]

Despite judicial support for this lower standard of proof, campuses and scholars alike have embraced PPE. Proponents of PPE in this context believe it is the only appropriate standard for disciplinary proceedings "because it accommodates the interests of the accused student, the victimized student, and the campus community. Preponderance of the evidence acknowledges the gravity of the interests at stake for the accused student through application of a standard commonly applied in courts of law. But the preponderance of the evidence standard also enables schools to ensure that the interests of the victimized student and the school community are properly weighed against the interests of the accused."[18] Any standard higher than PPE standard would violate Title IX's core purpose of equity by placing a heavy burden on the complainant[19] than on the respondent.

Further, campus disciplinary hearings should not employ standards higher than those utilized in civil rights litigation,[20] heard in courts run by judges with significant enforcement mechanisms and powers that campuses do not have. Since the release of the Proposed Rule, OAESV has observed arguments that because of the damage accusations of sexual harassment or rape can cause respondents' reputations, the standard of proof should be higher than PPE. However, these arguments mistake the classification system for applying standards of proof.[21] The standard of proof used does not "depend on the alleged conduct of the defendant,"[22] it depends on the "nature of the proceedings-criminal or civil- and the specific cause of action."[23] For example, the same conduct can be subjected to the beyond a reasonable doubt standard in criminal court, while being subjected to PPE in a civil tort case.[24] Thus, "[b]ecause Title IX requires colleges to address sexual assault as a civil

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[17] *Id.*

[18] *Id.* at 1638.

[19] Erin E. Buzuvis, *Title IX and Procedural Fairness: Why Disciplined Student Litigation Does Not Undermine the Role of Title IX in Campus Sexual Assault*, 78 MONT. L. REV. 71, 107 (2017) ("Victims of sexual assault have an important stake in procedural fairness because its absence exposes the disciplinary outcome to internal and judicial appeals, which delay the process and risk overturning a potentially valid disciplinary outcome that was reached by a flawed process.").

[20] Amy Chmielewski, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 BYU EDUC. & L.J. 143, 149 ("Critics of the Dear Colleague Letter have emphasized the alleged criminal conduct of an accused student to argue that educational institutions should use a heightened evidentiary standard when adjudicating cases of rape or sexual assault. They reason that because rape is considered a serious crime, an alleged rapist must be found "guilty" beyond a reasonable doubt, regardless of where his adjudication takes place. However, this argument misconstrues the way that burdens of proof are allocated within the legal system. Because Title IX requires colleges to address sexual assault as a civil rights matter, OCR is legally justified-indeed, is following legal precedent-in requiring schools to use a civil standard. … The standard of evidence used depends on the nature of the proceedings-criminal or civil-and the specific causes of action; it does not depend on the alleged conduct of the defendant. Because many acts are both potential crimes and potential torts, the same act may be subject to two different standards of evidence in two separate proceedings.")

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

rights matter, OCR is legally justified-indeed, is following legal precedent-in requiring schools to use a civil standard."[25]

Ultimately, courts have provided that due process can be satisfied with the PPE standard, especially considering the additional protections provided by this Proposed Rule. Use of a standard higher than what is required by civil courts evaluating Title IX and other civil rights statutes would both misconstrue the way in which burdens of proof are assigned, and create a disproportionate burden for the complainant that violates the equity standard that Title IX embodies.

For the reasons stated above, OAESV recommends that the Department of Education mandate that all campus sexual harassment proceedings employ the preponderance of the evidence standard of proof.

Because, as stated above, PPE is the appropriate standard to ensure equitable procedures per Title IX, OAESV believes that all campuses should employ the PPE standard. If campuses are allowed to select a different standard, students at some institutions will be subjected to higher burdens than students at schools that employ the PPE standard. Specifically because PPE is the only standard with an effectively equal burden on complainants and respondents, it is the only equitable standard. Students should not be subjected to considering the standard of proof used at a prospective campus when determining which college to attend. Yet, as such a significant number of college students report experiencing sexual assault, this may very well become a deciding factor if campuses are permitted to use varying standards of proof.

g. Response to Question 7: Potential Clarification Regarding "Directly Related to the Allegations" Language

Proposed section 106.45(b)(3)(viii) requires recipients to provide each party with an equal opportunity to inspect and review any evidence directly related to the allegations obtained as part of the investigation, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility, and provide each party with an equal opportunity to respond to that evidence prior to completion of the investigative report. The "directly related to the allegations" language stems from requirements in FERPA, 20 U.S. Code § 1232g(a)(4)(A)(i). We seek comment on whether or not to regulate further with regard to the phrase, "directly related to the allegations" in this provision

For the following reasons, OAESV is requesting that additional clarification be provided for this provisoin. First, there is a question of who makes the decision about what is "directly related" and how that determination is made. As this information will be provide for inspection and review, how will any changes in this information be dealt with by the parties if there is a need for additional information or review? Will any excluded information be made available at appeal? What will the record's retention be for any excluded information? Can the excluded information be subpoenaed by court?

This may also be susceptible to manipulation. OAESV has observed one such situation, in which a party uploaded over 1,000 pages of documents to the file sharing system in one pdf less than

[25] *Id.*; *see*, *e.g.*, William E. Thro, *No Clash of Constitutional Values: Respecting Freedom and Equality in Public University Sexual Assault Cases*, 28 REGENT U. L. REV. 197, 210 (2016) ("Indeed, the civil courts use a preponderance of the evidence standard to adjudicate claims under the federal civil rights statutes.").

48 hours prior to the hearing. Because these pages were contained in one document, each page took several seconds to load. If the school had not granted an extension, OAESV's client would not have had time (a multiplication of loading time and pages revealed that it would take one sitting of over 50 hours to review) to review all of the documents prior to the hearing. This extended period of time will impact everyone involved in the case: complainant, respondent, advisors, investigators, decision-makers, and administrators. This extended loading time will impact preparation time for the party targeted with these file types and sizes.

Additionally, the regulations state "directly related to the allegations raised in a formal complaint." If an issue, topic, or piece of evidence is not listed in the formal complaint, which it will typically not be, will that evidence be deemed not directly related?

Further information is needed on what precisely is considered "directly related," who makes this decision, and what method will be available for appeal, review, or time to work with this information.

h. Response to Question 8: Appropriate Time Period for Record Retention

In section 106.45(b)(7), we are proposing that a recipient must create, make available to the complainant and respondent, and maintain records for a period of three years. We seek comments on what the appropriate time period is for this record retention.

For the following reasons, OAESV requests a longer retention period for records. Due to the high rate of complainants and respondents who file lawsuits after the completion of a Title IX hearing, it is critical that institutions be mandated to keep all files for a uniform time period that aligns with the longest statute of limitations for Title IX cases. Further, OAESV recommends that the file be retained at least for the life of the students involved on campus, and extend to a reasonably possible time period covering the possibility that the student may return for a graduate degree.

File retention rates vary by state and profession. Some states require file retention in civil matters for unspecified periods of time informed by statues of limitations and other factors, many states require licensed attorneys to retain client files for proscribed amounts of time. Examples include:

- Massachusetts Rules of Professional Conduct Rule 1.15A: Client files
  - " . . . a lawyer shall take reasonable measures to retain a client's file in a matter until at least six years have elapsed after completion of the matter or termination of the representation in the matter . . ."[26]
  - ". . . files relating to the representation of a minor shall be retained until at least six years after the minor reaches the age of majority."[27]
  - ". . . in all other criminal or delinquency matters, for ten years after the latest of the completion of the representation, the conclusion of all direct appeals, or the running of an incarcerated defendant's maximum period of incarceration, but in no event longer than the life of the client."[28]
- Washington State Bar Association recommends retaining client files for seven years in tort and contract cases:

[26] Massachusetts Rules of Professional Conduct, Rule. 1.15A
[27] *Id.*
[28] *Id.*

- Table of Dates for File Retention

PRACTICE SPECIALTY	GUIDELINES
Probate Claims & Estates	Excluding tax, 10 years after final judgment; tax basis information – permanently
Tort Claims (Plaintiff)	7 years after final judgment or dismissal, except when minor involved; then when minor attains majority plus three years
Tort Claims (Defense)	7 years after final judgment or dismissal.
Contract Action	7 years after satisfaction of judgment, dismissal, or settlement.
Bankruptcy Claims & Filings	7 years after discharge of debtor, payment of claim, or discharge of trustee or receiver
Dissolution	7 years after entry of final judgment or dismissal of action, or date at which settlement agreement is no longer effective, except when minor children are involved and then at the young attaining majority plus three years
Real Estate Transactions	Subject to guidelines and tax needs; otherwise 7 years after settlement date, judgment, termination of sale, foreclosure, or other completion of matter; Retain surveys and legal descriptions not of record
Leases	7 years after termination of lease
Original Wills	Return to client after signing and conclusion of matter or file with local court of proper jurisdiction
Criminal Cases	7 years after date of acquittal or length of incarceration

- California has been interpreted to require records retention for five years.[29]
- North Carline requires a six year retention.[30]

To avoid any confusion that may lead to the unintentional destruction of files before the statute of limitations in a Title IX claim, the Department should implement a consistent rule across

[29] Retaining the Client File after Representation Ends, ORANGE CNTY. BAR ASS'N (Apr. 2014), http://www.ocbar.org/All-News/News-View/ArticleId/1240/April-2014-Retaining-the-Client-File-Afterthe-Representation-Ends

[30] NORTH CAROLINA STATE BAR, DISPOSING OF CLIENT FILES, https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-209/.

the country that requires file retention for the length of the longest Title IX statue of limitations. Across the United States, statutes of limitations in Title IX claims range from one year to six years. The following statute of limitations highlight the range:

- Maine: 6 years. *Nelson v. University of Me. Sys.*, 914 F. Supp. 643 (D. Me. 1996)
- Ohio: 2 years. *Giffin v. Case Western Reserve Univ.*, 181 F.3d 100 (6th Cir. 1999)
- California: 1 year. *Stanley v. Trs. of the Cal. State Univ.*, 433 F.3d 1129 (9th Cir. 2006)
- Kansas: 2 years. *Clark v. Blue Valley Unified Sch. Dist. No. 229*, 2013 U.S. Dist. LEXIS (D. Kan. 2013)
- Missouri: 5 year., *Walker v. Barrett*, 650 F.3d 1198 (8th Cir. 2011)
- Florida: 4 years. *Porter v. Duval County Sch. Bd.*, No. 3:09-cv-285-J-32MCR, 2010 U.S. Dist. LEXIS 29399 (M.D. Fla. March 26, 2010).

Traditional higher education students range in attendance from two to seven years and may return to school for additional education. Students can transfer between schools, sometimes transferring credits and sometimes not. Minors have limited rights, with extended abilities to report for most crimes. OAESV recommends that files should be retained at least for as long as the student is at the institution and extend to a reasonably possible time period covering the possibility that the student may return for a graduate degree. Employees should also not be forgotten, and should have enough time to obtain their records to be able to file inside and outside the educational institution.

i. Response to Question 9: Technology Needed to Grant Requests for Parties to be in Separate Rooms at Live Hearings

In section 106.45(b)(3)(vii) we require institutions of higher education to grant requests from parties to be in separate rooms at live hearings, with technology enabling the decision-maker and parties to see and hear each other simultaneously. We seek comments on the extent to which institutions already have and use technology that would enable the institution to fulfill this requirement without incurring new costs or whether institutions would likely incur new costs associated with this requirement.

Because OAESV is not an educational institution, we are not qualified to respond to this Directed Question.

II. Responses and Suggested Changes, where applicable, to Proposed Rule Provisions

a. Proposed Changes to § 106.6 – Addition of (d)-(f) (Addition of Constitutional Protections)

OAESV supports constitutional protections for all parties and employee's rights under title VII. However, OAESV opposes a blanket statement that FERPA supersedes Title IX. Because educational judicial records are considered "educational records", they would be protected under FERPA and no information could be shared, even if a student is found responsible for sexual harassment, even in cases of sexual violence. OAESV recommends the Department utilizes the standard and language promulgated in the *2001 Revised Sexual Harassment Guidance*, after these concerns were raised by interested parties during the Notice and Comment Period and addressed by the Department. In the Department's own words, found in guidance it has been utilizing since removing the most recent Dear Colleague Letters:

> . . . Congress amended the General Education Provisions Act (GEPA_ - of which FERPA is a part – to state that nothing in GEPA 'shall be construed to affect the applicability of . . . Title IX of the Education Amendments of 1072 . . .' 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 requirements of FERPA and 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.[31]

Furthermore, once a respondent is found responsible for violating Title IX, that information, including name, finding, and sanction should be able to be shared even if part of their Educational Record. For example, if a student is found in violation of Title IX before transferring schools, the new school should be permitted to access the record. This creates accountability for sanctions and allows for increased safety on the new campus. Sharing this information, while keeping as confidential the complainant's name, will help achieve the goal of Title IX of eliminating sex-based discrimination in schools and create a safer environment for everyone.

b. Proposed Changes to § 106.8 (Reduction of Responsible Employees)

i. Campus

OAESV supports having a designated coordinator, which allows for everyone on and affiliated with an institution's campus to know who coordinates activities and responses in relationship to Title IX. However, to ensure accurate and up-to-date coordination and accountability, OAESV opposes simply having a title and entity account. To ensure that individuals always know who the Title IX Coordinator is, so that they can effectively choose who and when to report to, the Title IX Coordinator's name and contact information should be prominently displayed and included in policies and procedures. An entity account would provide consistency but should not be disconnected from

[31] UNITED STATES DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS, *2001 Revised Sexual Harassment Guidance* (2001), at vi-viii, https://www.nccpsafety.org/assets/files/library/Revised_Sexual_Harassment_Guidance_2001.pdf.

an actual employee. Rather than an unknown, faceless, disconnected entity account, individuals should know to whom they are reporting.

OAESV supports notifying individuals of the policy's existence and location. However, OAESV recommends that if the policy is changed students and employees should also be notified of these changes promptly in order for the community to be made aware of any alterations to the policy to which they are held accountable and by which they are protected.

OAESV opposes the notion that the Title IX Coordinator is the only person that can receive information sufficient to put the higher education institution on notice. While it is important to have clarity in this area, having the institution only officially on notice when instances are reported to the Title IX Coordinator removes the responsibility from the institution to train employees and otherwise implement compliant policies and creates an environment that is easily manipulated so that the institution would never have notice sufficient to create liability.

To create clarity while maintaining an incentivizing "on notice" system, OAESV recommends coordinating reporting and knowledge requirements with Jeanne Clery Disclosure of Campus Security Policy and Campus: Crime Statistics Act. However, since the Department recognizes the importance of advisors of choice in the Title IX process, OAESV recommends this coordination with the caveat that those individuals that are "victim advocates" should be excluded from reporting. Per the 2016 Clery Act Handbook, this would include

- A campus police department or a campus security department of an institution.
- Any individual or individuals who have responsibility for campus security but who do not constitute a campus police department or a campus security department (e.g., an individual who is responsible for monitoring the entrance into institutional property).
- Any individual or organization specified in an institution's statement of campus security policy as an individual or organization to which students and employees should report criminal offenses.
- An official of an institution who has significant responsibility for student and campus activities, including, but not limited to, student housing, student discipline and campus judicial proceedings. An official is defined as any person who has the authority and the duty to take action or respond to particular issues on behalf of the institution.

Not only would this coordination align two federal laws, it would clarify for students who has a duty to report knowledge of sexual harassment and simplify for higher education institutions who among their faculty and staff have a duty to report what. **PLEASE NOTE** that OAESV supports the formal complaint requirement (Addition of § 106.44(b)(1) & § 106.44(e)(5)). Therefore, OAESV recommends that persons classified under the suggested Clery/Title IX aligned reporting list be responsible for following campus protocols, informing students of who is qualified to receive a formal complaint, and notifying campus officials of becoming aware of the harassment without instigating a formal complaint.

ii. K-12

For the following reasons, OAESV opposes this change as it relates to K-12 institutions. Many K-12 institutions have been exposed in the past several years for not having staff trained on Title IX, to the point that parents trying to report sexual harassment against their children are told that principals, assistant principals, and even administrative staff supporting the listed Title IX Coordinator

do not know[32] what Title IX is.[33] This demonstrates that under the proposed "actual knowledge" standard, schools will have no external motivation to invest their time into developing and executing policies that permit children and parents to rely on reasonable judgment when determining to whom they should report school-based sexual harassment. As sexual harassment poses a significant threat to the health and safety[34] of K-12 students, it is imperative that the Office for Civil Rights hold schools accountable for creating and implementing appropriate reporting policies for employees who learn of sexual harassment, regardless of whether they are employed as a **teacher, coach, counselor, or other employee children could reasonably perceive as having the responsibility** to trigger a report to a responsible employee under Title IX. Numerous other laws relating to bullying, hazing, and child sexual abuse demonstrate that most state legislatures and other regulation systems view the network

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[32] In one case in which OAESV provided a K-12 client with direct representation, the client had complained about sexual harassment with screen shots of text messages and documents of statements multiple times to an assistant principal. During these conversations, the assistant principal declared she did not know that Title IX applied to sexual harassment. Ultimately, the assistant principal did not report the complaint to the district Title IX Coordinator, who only became aware of the sexual harassment when the client's attorney reached out with a letter of representation.

[33] *See*, *e.g.*, Brian Brehem, *Winchester School Board Denies Title IX Appeal in Sexual Assault Case*, WINCHESTER STAR, August 28, 2018, https://www.winchesterstar.com/winchester_star/winchester-school-board-denies-title-ix-appeal-in-sexual-assault/article_c1501b58-bb02-5ca5-8748-71153d0d5d5a.html (After a complainant was sexually assaulted by a peer, and the peer was charged by law enforcement and plead no contest, her school did not keep the respondent and complainant separate. After the complainant filed a complaint with the school board, the board claimed "**complainant's behavior in school did not support her assertion that seeing her attacker was traumatic**, denied that the situation had created a hostile environment for her education," and continued to refuse separating the students despite the criminal sentence); Mark Keierleber, *The Younger Victims of Sexual Violence in School*, ATLANTIC, Aug. 2017, *available at* https://www.theatlantic.com/education/archive/2017/08/the-younger-victims-of-sexual-violence-in-school/536418/ (quoting Attorney Adele Kimmel) (""What you see most commonly is that colleges are far ahead of K-12 schools in the development of their sexual-misconduct policies and procedures, their training, and their education of staff and students, making sure that students know who the Title IX coordinator is. … My concern is that—with the changes that seem to be coming from the Department of Education's Office for Civil Rights—K-12 schools are going to fall even further behind in terms of Title IX compliance."); Gabby Bess, *Teen Says She Was Sexually Assaulted in School—Then Suspended for Being 'Lewd'*, BROADLY, June 13, 2016, https://broadly.vice.com/en_us/article/gyj7y7/after-reporting-her-rape-a-teen-girl-says-she-was-pushed-out-of-high-school (where a 14-year-old Lansing, Michigan high school student was sexually assaulted in a stairwell and thereafter suspended for engaging in sexual conduct, and the complainant and her family met with student services specialist, [the specialist] found that [complainant] **had not consented to the activity**, which should have settled the matter. Instead, according to the complaint, **[the specialist] said that although the student did not consent to the sexual activity, she did not have a "strong enough no," did not "try to get away," and "did not fight back**.").

[34] *Davis v. Monroe Cnty. Bd. of Ed.*, 526 U.S. 629, 634 (1999) (after prolonged peer sexual harassment and continued inaction by teachers and administrators, the fifth grade complainant drafted a suicide letter); *Murrell v. School Dist. No. 1*, 186 F.3d 1238, 1244 (10th Cir. 1999) (where, after a student reported rape by another student at school, the school refused to investigate the accused student and suspended the complaining student, the student began engaging in suicidal and self-harming behavior as a coping mechanism); *T.Z. v. City of New York*, 634 F. Supp. 2d 263, 273 (E.D.N.Y 2009) ("Evidence showing that child who allegedly was sexually assaulted by other students could not sleep, was at risk for suicide, experienced declining grades, had difficulty concentrating, was frequently absent from school, suffered post-traumatic stress disorder, and had become more aggressive with her peers as result of incident was sufficient to raise material issue of fact as to whether negative effects of her assault effectively barred her access to educational opportunities at school."); Cindy Long, *The Secret of Sexual Assault in Schools*, NAT'L EDUC. ASS'N (December 4, 2017), http://neatoday.org/2017/12/04/sexual-assault-in-schools/ (quoting Esther Warkov) ("Not only do the survivors' emotional and psychological scars endure long after the attack, their social lives, education, and career dreams are shattered. … For some, the trauma is insurmountable; gender-based harassment and sexual assault have driven an increasing number of adolescent students to suicide.").

of employees responsible for reporting harm to children to the proper person are in line with the 2001 Guidance, and for that reason, we request that the new guidance specify that instead of only being responsible after a school tells a "teacher," a school is on notice if a student informs any employee a student could reasonably believe has the authority or responsibility to report to school officials, including coaches, and school counselors. Noting the distinction between criminal liability for failure to report child sexual abuse and subjection to administrative enforcement by the Department of Education for not having systems in place that encourage proper reporting of sexual harassment to responsible employees, OAESV believes that state mandatory reporting systems[35] are an appropriate reference, as they reflect the realities of K-12 student maturity, comprehension, and most importantly the vast array of persons who may become aware of sexual harassment because of their professional engagement as a school employee.

c. Feedback on Proposed Changes to § 106.12 (Religious Exemption)

For the following reasons, OAESV opposes this change. As noted in the citations below, under both 2001 and 2011 guidance, the Department was deferential and accommodating to religious institutions.[36] As the government has never denied a religious exemption and the issue has never been litigated, this proposed change is, on its face, unnecessary. OAESV believes that the minimal check in place on religious institutions under prior guidance was appropriate, specifically because it required pre-incident intentional action indicating the school would avail itself of the religious exemption. In theory, this allows students to inquire about Title IX exemptions when choosing institutions and receive an accurate and meaningful response they can use to make an informed decision about their enrollment. This change, without demonstrating necessity or benefit to religious institutions, removes the incentive to prepare and create informed systems for students, both existing and prospective.

On the ground, in addition to providing legal services to survivors, OAESV also provides technical assistance to rape crisis advocates working with student survivors. In numerous instances, OAESV provided technical assistance in cases where students of a small minority of religious institutions[37] were not aware of their school's religious exemption until they attempted to report their rapes and pursue Title IX remedies. These cases demonstrated to OAESV the need for religious institutions to maintain transparency in regard to their religious exemption, a standard which will be much easier to enforce if institutions must seek the religious exemption before problems occur.

d. Proposed Changes to § 106.44(a) and 106.44(b)(2)-(5) (Deliberate Indifference and Safe Harbor)

For the following reasons, OAESV opposes this provision of the Proposed Rule. Numerous courts have clarified the distinction between regulatory enforcement and civil litigation.[38] Importantly,

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[35] See Appendix A.

[36] Kif Augustine-Adams, *Religious Exemptions to Title IX*, 65 KAN. L. REV. 327, 327-328 (explaining that as of 2016, "[t]he parameters of religious exemptions to Title IX have never been litigated in court or subjected to judicial review," as "the agency standards and policies, as well as Title IX itself, are highly deferential to the educational institutions claiming religious exemptions."); Id. at 30 ("In more than forty years, the federal government has never denied a religious exemption claim to Title IX, not once.").

[37] OAESV has also worked with students at many religious institutions who have provided students with fair and compliant (per the *2001 Revised Sexual Harassment Guidance*) Title IX processes and have not sought the religious exemption.

[38] *See, e.g.*, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *Davis v. Monroe Cnty. Bd. of Ed.*, 526 U.S. 629 (1999).

Gebser[39] and *Davis*[40] created a standard for civil damage liability under Title IX, with specific references[41] to the detrimental impact that continued damage awards allowed by too low of a liability standard would infringe on districts' ability to provide an adequate public education. In so doing, each case took great care to distinguish the purposes of civil damage liability from the purposes of administrative enforcement. Thereafter, the Bush administration critically examined *Gebser* and *Davis* to ensure administrative compliance in Title IX regulations. Their examination resulted in the maintenance of an administrative standard lower than that applicable in civil litigation, specifically because both cases allowed for this, and the continued use of said standard was more likely to foster district policies and implementation that would reduce and prevent sexual harassment. Notably, *Gebser* and *Davis* deliberate indifference standard for civil liability is can only address the most extreme cases of institutional wrongdoing.[42] Addressing the most extreme cases of institutional wrongdoing need not and should not be the objective of the Department of Education. Instead, OAESV urges the Department to reexamine the benefits of maintaining the separate standard for administrative enforcement implemented by the Bush administration in 2001, as this standard is most likely to result in proactive engagement by institutions to create safe campuses and equitable processes.

OAESV is similarly opposed to the safe harbor provision, as articulated on Page 27 of the Proposed Rule, which makes very clear that the Department will not second guess institutional decisions for the purposes of deliberate indifference. Ultimately, this allows schools to escape Department enforcement if they do "something" to address the harassment, even if the chosen action is completely ineffective and leads to additional escalating sexual harassment or sexual harassment against new victims.[43] This creates a gaping loophole, in which clearly erroneous decisions not supported by evidence or clearly unreasonable sanctions that are in no way calculated to address sexual violence would not lead to liability. This bar ignores the fact that Department regulations have

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[39] 524 U.S. 274 (1998).

[40] 526 U.S. 629 (1999).

[41] *Gebser*, 524 U.S. at 290. ("Moreover, an award of damages in a particular case might well exceed a recipient's level of federal funding. … Where a statute's express enforcement scheme hinges its most severe sanction on notice and unsuccessful efforts to obtain compliance, we cannot attribute to Congress the intention to have implied an enforcement scheme that allows imposition of greater liability without comparable conditions."); *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 639 (1999) (distinguishing the analysis for civil damages from that of Department enforcement, "There is no dispute here that the Board is a recipient of federal education funding for Title IX purposes. Nor do respondents support an argument that student-on-student harassment cannot rise to the level of 'discrimination' for purposes of Title IX. Rather, at issue here is the question whether a recipient of federal education funding may be liable for damages under Title IX under any circumstances for discrimination in the form of student-on-student sexual harassment.").

[42] Erin E. Buzuvis, *Title IX and Procedural Fairness: Why Disciplined Student Litigation Does Not Undermine the Role of Title IX in Campus Sexual Assault*, 78 MONT. L. REV. 71, 78 (2017) ("As a result of the high burden that the deliberate indifference standard places on plaintiffs, private enforcement can only address the most egregious examples of institutional inaction. Litigation, therefore, has a limited ability to motivate institutions to address sexual assault, which may be difficult and costly to the institution's reputation. Importantly, however, as the next subpart explains, government regulators may enforce Title IX against a wider range of institutional misconduct.").

[43] *See Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 260-261 (6th Cr. 2000) ("[I]f this Court were to accept [the school district's argument] [that as long as the school district does something in response to harassment, it has satisfied [its burden under deliberate indifference], a school district could satisfy its obligation where a student has been raped by merely investigating and absolutely nothing more. Such minimalist response is not within the contemplation of a reasonable response.").

historically sought a system that encourages more proactive policy development and implementation than merely avoiding civil liability after significant harm has occurred. Further, the Department's proposed adoption of this safe harbor runs afoul of judicial opinions that specifically reject the safe harbor system this Department proposes to adopt. Specifically, in *Vance v. Spencer County Public School District*,[44] the Sixth Circuit Court of Appeals stated ""[i]f this Court were to accept [the school district's argument] [that as long as the school district does something in response to harassment, it has satisfied [its burden under deliberate indifference], a school district could satisfy its obligation where a student has been raped by merely investigating and absolutely nothing more. Such minimalist response is not within the contemplation of a reasonable response."[45]

Later in the Proposed Rule, on Page 40, the Department states that "[d]eliberate indifference to a complainant's allegations of sexual harassment may violate Title IX by separating the student from his or her education on the basis of sex." OAESV also opposes this educational access standard. Specifically, this verbiage indicates that the interpretation for "equal access" will be based on the physical inability to attend classes, and will disregard impacts on study group and service learning opportunities, impact of fear and trauma on academic performance, and other factors negatively impacting a complainant's educational attainment but not fully barring participation in education, all of which OAESV has seen clients face during and after Title IX investigations.

OAESV urges to consider the severity of adopting the deliberate indifference standard and the safe harbor system contemplated by the Proposed Rule. At this time, institutions are much more likely to be sued by respondents than by complainants. Creating a safe harbor could have a widespread and disastrous result – namely that campus risks for finding students responsible, even in the face of significant proof, will far outweigh the risk of failing to properly investigate sexual violence (as complainants are less likely to sue and the Department will provide a safe harbor mechanism). This will result in a decrease in campus willingness to engage in thorough and unbiased investigations, leaving more students vulnerable to sexual violence by repeat offenders.[46] Ultimately, lowering the standard of enforcement to deliberate indifference and permitting such an extreme safe harbor provision will result in complainants having less standing in the eyes of campuses than respondents, in direct opposition to Title IX's historic objectives.

e. Proposed Additions of § 106.44(b)(1) & § 106.44(e)(5) (Formal Complaint Requirement)

For the following reasons, OAESV supports this proposed change. Under the 2011 Dear Colleague Letter, survivors seeking OAESV's services often found themselves involved in Title IX processes they had not wished to initiate, due to disclosing their sexual assault to an individual they

[44] 231 F.3d 253 (6th Cir. 2000).

[45] *Id.* at 260-61.

[46] *See*, *e.g.*, *Murrell v. School Dist. No. 1*, 186 F.3d 1238, 1248 (10th Cir. 1999) ("According to the complaint, the principal and teachers 'never appropriately disciplined [respondent],' and he continued to enjoy access to unsupervised parts of the [school building and grounds]."); *McGrath v. Dominican College of Blauvelt*, 672 F. Supp. 2d 477, 488 (S.D.N.Y. 2009) ("[The impacted student and her mother] attempted to engage the College administrators in a dialogue during the summer to discuss accommodations that would allow [student]to feel comfortable about attending the College in the fall and that the College failed to engage them in any meaningful discussions or take steps to ameliorate the discrimination and that Ms. Wright could not safely return to school in the fall, where two of her three attackers were still enrolled.").

did not know was required to report to the Title IX Coordinator. Many survivors choose not to report[47], and involuntary participation in a conduct process goes against standard knowledge on trauma and sexual violence recovery that emphasizes the importance of allowing survivors to retain control of their recovery to the extent possible. OAESV believes that implementing a formal complaint process will empower survivors to report to higher education institutions if and when they are ready, with the caveat that campuses should require all staff that would previously have been required to report to the Title IX Coordinator to inform survivors that their conversation will not trigger a formal complaint and direct survivors to the office in which they may find the information for submitting a formal complaint.

As seen in one case by an OAESV staff member: Did she want to press charges with the police or file a complaint through the institution? One, both, or neither? However, she didn't know if she was ready to do so. There had been a pattern of abuse over an extended period of time, but she didn't know which incidents, if any to report. Without her knowledge, the institution became aware of an incident and progressed forward on opening the case. She became aware when they notified her and the respondent. She often expressed a desire that the investigation initiation would have happened a little differently, allowing for her to describe the specific events to report and investigate. Not only would this have given more control to the complainant in providing information to initiate an investigation, it would have provided the institution with more complete starting information to investigate, and the respondent with a more complete picture as to what the complaint alleged.

f. Proposed Additions of § 106.44(b)(2) (Multiple Reports)

For the following reasons, OAESV supports this proposed change subject to the recommended modifications explained herein. In OAESV's experience, one of the most traumatic aspects for survivors involuntarily[48] required to participate in campus Title IX proceedings was the prospect of being sued by the respondent after the Title IX process concluded. In the current climate it is increasingly common for respondents to add complainants as defendants[49] in their lawsuits against universities, including in situations in which the complainant did not report the sexual harassment to the campus. In the past three years, OAESV's legal program has come into direct contact with

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[47] RACHEL E. MORGAN & GRACE KENA, U.S. DEP'T OF JUSTICE, OFFICE FOR JUSTICE PROGRAMS, CRIMINAL VICTIMIZATION: 2016 REVISED 5, *available at* https://www.bjs.gov/content/pub/pdf/cv16re.pdf ("Nationally in 2016, 44% of violent crime victims do not report to law enforcement. … Victims may not report a victimization for a variety of reasons, including fear of reprisal or getting the offender in trouble, believing that police would not or could not do anything to help, and believing the crime to be a personal issue or too trivial to report.").

[48] Some OAESV clients were contacted by Title IX offices that became aware of their rape through statements by other students. The majority of these clients did not wish to proceed with the Title IX hearing process for a variety of reasons, including fear of the respondent, a desire to minimize the prospect of further trauma, a desire to focus on academic work, and others.

[49] ALYSSA KEEHAN ET AL., UNITED EDUCATORS, CONFRONTING CAMPUS SEXUAL ASSAULT: AN EXAMINATION OF HIGHER EDUCATION CLAIMS 14-15 (2015), *available at* http://www.ncdsv.org/ERS_Confronting-Campus-Sexual-Assault_2015.pdf. (Reporting that 72% of accused students who file a Title IX-related lawsuit against their university also sue their individual accuser for defamation.); *see also* Tyler Kingkade, *As More College Students Say "Me Too," Accused Men Are Suing For Defamation*, BUZZFEED NEWS, Dec. 5, 2017, HTTPS://WWW.BUZZFEEDNEWS.COM/ARTICLE/TYLERKINGKADE/AS-MORE-COLLEGE-STUDENTS-SAY-ME-TOO-ACCUSED-MEN-ARE-SUING.

survivors in receipt of service for telling[50] a student school employee about their rape, even if they did not know the employee was a mandatory reporter. With that danger in mind, and the continued need to allow survivors to keep all control over their recovery possible, OAESV would like the Department to consider adding confidentiality protections for survivors to protect them from having to defend themselves, at a significant financial cost, in lawsuits filed by respondents. OAESV posits that should institutions file complaints without a survivor's consent, that certain requirements (such as the cross-examination requirement that would identify the survivor) be considered and adjusted in cases where the survivor chose not to file a complaint, for lawsuit risk aversion, privacy concerns, fear of retaliation, or other reasons.

g. Proposed Additions of § 106.44(c) (Emergency Removal)

For the following reasons, OAESV supports this proposed change subject to the recommended modification explained herein. In OAESV's experience representing survivors of sexual violence in K-12 institutions, we have observed institutional confusion as to the handling of intersections between Title IX, the ADA, and IDEA. Frequently, under 2011 guidance, pre-finding accommodations (which we find analogous to the emergency removal proposed here) were denied in situations where both complainant and respondent needed to be in the same classroom, but respondent had an IEP. Additionally, some K-12 schools struggled to maintain complainant IEP requirements in post-finding accommodations. In the experience of OAESV's former K-12 teacher[51] staff members, districts provide significant training on IDEA, with less training on Title IX and the ADA. These OAESV staff members highly recommend that the Proposed Rule require training to all K-12 staff on the intersections of these laws, to ensure the civil rights of all complainants and respondents, regardless of disability, are upheld, while making sure that all students are kept safe.

Accordingly, OAESV recommends the Department more specifically addressing the intersection of these laws and recommends that should a school determine that the respondent poses an immediate threat to health or safety, that respondent's threat be treated as other threats would be under the IDEA[52] (for example, in non-Title IX contexts, a student with an IEP may lawfully be removed from the classroom if that person brings a weapon).

h. Proposed Additions of § 106.44(e)(1) (Definition of Sexual Harassment)

1. Changes to Location of Actionable Activities

For the following reasons, OAESV opposes a reduction in location of applicable sexual harassment. Where the Obama-era guidance focused on the impact of access to education benefits and was thus not restrictive on the location of student/student sexual harassment, and the Bush-era guidance referenced school control but did not emphasize campus ownership of property or direct

[50] Lawsuits filed against students for this disclosure include instances where survivors told a friend employed by the school in the immediate aftermath of the rape, while in the process of seeking medical care, or to inquire about accessing rape crisis services.

[51] Two members of OAESV's Legal Team taught in K-12 institutions, in the years 2008-2011 and 2016-2017, respectively.

[52] *See, e.g.*, *Glen by & Through Glen v. Charlotte-Mecklenburg Sch. Bd. of Educ.*, 903 F. Supp. 918, 935 (W.D.N.C. 1995) (where the parents of a student with an Individualized Education Plan (IEP pursuant to the IDEA) alleged an illegal "change in placement" after the school suspended the student for ten days after he brought a gun clip and bullets to school, the court reiterated that under the IDEA, "where a student poses an immediate threat to the safety of others, officials may temporarily suspend him or her for up to 10 school days.).

facilitation of activity,[53] the 2018 Proposed Rule clearly and significantly reduces the scope of sexual harassment schools are responsible for and allowed to investigate, emphasizing that the location of the sexual harassment is more significant for the purposes of liability than the continuing impact of sexual harassment on the complainant's ability to access the education provided by the institution.

Regarding in-person sexual harassment, OAESV is deeply concerned about and opposed to this particular change, in large part because the majority of post-secondary students experience sexual harassment, particularly sexual assault, by other students in off-campus environments. Though, in these instances, the physical location of the sexual harassment takes place off campus, the complainant must still confront the impacts of the sexual harassment while on campus. This is particularly impactful for students attending smaller institutions and graduate students, who nearly always live in off-campus housing and frequently attend classes with the same small number of peers repeatedly for the life of their program. In one of many tragic examples, in *McGrath v. Dominican College of Blauvelt*, where a college student was raped by two students and her school refused to investigate until the conclusion of a police investigation and ultimately did not pursue a Title IX inquiry, complainant unenrolled from the university and committed suicide."[54]

However, it is not just institutions of higher education that see this impact the lives of their students. "Not only do the survivors' emotional and psychological scars endure long after the attack, their social lives, education, and career dreams are shattered. … For some, the trauma is insurmountable; gender based harassment and sexual assault have driven an increasing number of adolescent students to suicide."[55] For these complainants, the location of the incident is irrelevant to their ability to attend classes, be on the school grounds, and feel safe in the school environment. For complainants of all ages, the sexual harassment has impacted their access to and life at school regardless of where the incident occurred.

"For all types of sexual victimizations, it was more common for students to be victimized off campus (66% of completed rapes occurred off campus) than on campus."[56] By adhering to "on campus" locations, the Department is limiting the reach of schools to places where most assaults don't occur: on campus. Furthermore, "the most commonly reported locations of either type of victimization, on and off-campus, were the victim's or some other person's living quarters."[57] Non-residential campuses will essentially be barred from taking action on sexual harassment cases that are directly affecting their students, despite their students having to live nearby. Online schools will have little to no recourse for their students. Furthermore, very few employees physically live on campus, removing protections and recourses for incidents that happen to or by employees in their homes.

Unfortunately, violent incidents also occur more frequently off campus. "College students were more likely to be violently victimized off campus than on campus. Off campus, violent crimes were more likely to occur in the evening or at night than during the day (72% vs. 25 %). On campus,

[53] *2001 Revised Guidance*, at 7, 12.
[54] *McGrath v. Dominican College of Blauvelt*, 672 F. Supp. 2d 477, 485 (S.D.N.Y. 2009)
[55] Cindy Long, *The Secret of Sexual Assault in Schools*, NAT'L EDUC. ASS'N (December 4, 2017), http://neatoday.org/2017/12/04/sexual-assault-in-schools/ (quoting Esther Warkov)
[56] CHRISTOPHER P. KREBS ET AL., NAT'L INST. OF JUSTICE, THE CAMPUS SEXUAL ASSAULT STUDY, 2-4 (2004), available at https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf
[57] *Id.* 4-15.

56% occurred during the day."[58] The proposed limitation may actually force schools to dismiss the most egregious of cases that occur against members of their community simply because of geography.

Similarly, OAESV would like the Department to address the impact of cyber harassment, which frequently originates off school grounds. This addition should be seamless, as the courts have deemed cyber harassment that is reasonably calculated to impact the school environment to be actionable harassment. OAESV recommends the additional clarification because confusion could arise among administrators due to the Proposed Rule's language about physical location. Courts reinforce the impact of off-campus, electronic speech in their holdings on First Amendment issues, which speak readily to the issue of sexual harassment in schools. Including court-produced standards about cyber harassment's point of origin will assist institutions in responding to the ever increasing presence of cyber harassment in both primary and secondary institutions.

Online activity is an inexorable part of life in the modern era.

> About half (48%) the students in grades 7–12 experienced sexual harassment at school during the 2010–11 school year. Nearly half the students (44%) encountered sexual harassment in person, and 30% encountered sexual harassment through texting, e-mail, Facebook, or other electronic means. Many experienced sexual harassment both in person and electronically. … More than one-third of girls (36%) and nearly one quarter of boys (24%) reported experiencing cyber-harassment.[59]

Online activity must be addressed and cannot be ignored as part of the lives of students and employees. There are classes based entirely online, some schools are online only, students exchange notes online, teachers/professors assign online materials and online discussions with or without supervision. Meanwhile Facebook, Skype, Instagram, Twitter, Snapchat, Blackboard, and many other online sites are used daily for academic and non-academic activities alike.

> [Seventeen percent] of girls and [11%] of boys reported that the most harmful form of sexual harassment they experienced was "Having someone spread unwelcome sexual rumors about you by text, e-mail, Facebook, or other electronic means." Another 8% of girls and 11% of boys cited the most harmful form of harassment experienced as "Being sent unwelcome sexual comments, jokes, or pictures or having someone post them about or of you by text, e-mail, Facebook, or other electronic means.[60]

Similarly to reducing the location, by not addressing online materials the institution is being limited in addressing some of the most damaging and pervasive forms of sexual harassment.

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[58] STATE OF OHIO OFFICE OF CRIMINAL JUSTICE SERVICES, VIOLENT VICTIMIZATION OF COLLEGE STUDENTS: 1995-2002 2 (2005), https://www.publicsafety.ohio.gov/links/ocjs_Violentvictimizationofcollegestudents.pdf

[59] CATHERINE HILL & HOLLY KEARL, AM. ASS'N OF UNIV. WOMEN, CROSSING THE LINE: SEXUAL HARASSMENT AT SCHOOL 11 (2011), available at https://eric.ed.gov/?id=ED525785

[60] CATHERINE HILL & HOLLY KEARL, AM. ASS'N OF UNIV. WOMEN, CROSSING THE LINE: SEXUAL HARASSMENT AT SCHOOL 21-22 (2011), available at https://eric.ed.gov/?id=ED525785

The courts have also addressed the issue of cyber harassment and routinely find that online harassment can be addressed by schools.

- *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379, 395-396 (5th Cir. 2015), ("[W]hen a student intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher, even when such speech originated, and was disseminated, off-campus without the use of school resources.").
- *Rosario v. Clark County Sch. Dist.*, No. 2: 13-CV-362 JCM (PAL), 2013 U.S. Dist. LEXIS 93963, at *12 (D. Nev. July 13, 2013) ("Although the Ninth Circuit has not ruled on a factually similarly situation, other circuits have addressed a school's ability to punish students for off-campus speech on social media websites. The test that has emerged from the circuit courts when considering off-campus student speech, including online social networking speech, is that school officials have the authority to discipline students for off-campus speech that will foreseeably reach the campus and cause a substantial disruption. [Some courts also require that a sufficient nexus exist between the off-campus student speech and the disruption at school.[]").
- *Kowalski v. Berkeley County Sch*., 652 F.3d 565, 573-574 (4th Cir. 2011) ("While [Plaintiff disciplined for sexual harassment] does not seriously dispute the harassing character of the speech on the "S.A.S.H." webpage, she argues mainly that her conduct took place at home after school and that the forum she created was therefore subject to the full protection of the First Amendment. This argument, however, raises the metaphysical question of where her speech occurred when she used the Internet as the medium. … First, the creation of the "S.A.S.H." group forced [sexual harassment victim] to miss school in order to avoid further abuse. Moreover, had the school not intervened, the potential for continuing and more serious harassment of [victim] as well as other students was real. Experience suggests that unpunished misbehavior can have a snowballing effect, in some cases resulting in "copycat" efforts by other students or in retaliation for the initial harassment…. Thus, even though [Plaintiff] was not physically at the school when she operated her computer to create the webpage and form the "S.A.S.H." MySpace group and to post comments there … it was foreseeable in this case that [Plaintiff's] conduct would reach the school via computers, smartphones, and other electronic devices.").
- *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 220-221 (3d Cir. 2011) (Jordan, J. concurring) (en banc) (The "heavy focus [] on an 'off-campus versus on-campus' distinction is artificial and untenable in the world we live in today. For better or worse, wireless internet access, smart phones, tablet computers, social networking services like Facebook, and stream-of-consciousness communications via Twitter give an omnipresence to speech that makes any effort to trace First Amendment boundaries along the physical boundaries of a school campus a recipe for serious problems in our public schools. Tinker teaches that schools are not helpless to enforce the reasonable order necessary to accomplish their mission.").
- *S. J. W. v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 777 (8th Cir. 2012) ("The Second Circuit held "that a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct 'would foreseeably create a risk of

substantial disruption within the school environment,' at least when it was similarly foreseeable that the off-campus expression might also reach campus.").

- *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 257 (3d Cir. 2002) (indicating that administrators may regulate student speech any time they have a "particular and concrete basis" for forecasting future substantial disruption).
- *Shen v. Albany Unified Sch. Dist.*, 2017 U.S. Dist. LEXIS 196340, *12-*13 (N.D. Cal. 2017) ("Earlier decisions addressing school speech often focused on whether the speech occurred on- or off-campus. Geographic location is still a relevant factor, [], but strict tests of locality are not compatible with the online methods of communication in our digital age. In response to our internet world, where today's students are particularly comfortable residents, the courts have developed updated approaches to analyzing school speech issues. Our circuit has 'identified two tests used . . . to determine when a school may regulate off-campus speech.' [] The first test looks for a sufficient nexus between the speech and the school and was applied by the Fourth Circuit in Kowalski v. Berkeley County Sch., 652 F.3d 565 (4th Cir. 2011). The second test asks whether it was reasonably foreseeable that the offcampus speech would reach the school and was applied by the Eighth Circuit in S.J.W. v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771 (8th Cir. 2012). The Ninth Circuit has declined to choose between the two approaches, noting that both tests 'rely on the speech's close connection with the school to permit administrative discipline.' [] The same result is readily reached under the Eighth Circuit test, which asks whether it was reasonably foreseeable that the speech or conduct would reach the school and create a risk of a substantial disruption. …"

Limiting location, limits access to education.

> "The notion that sexual harassment, including sexual assault, can obstruct a student's access to educational opportunities is well established in research on the effects of rape and sexual assault. In general, sexual assault and rape victims are far more likely than non-victims to experience depression and post-traumatic stress disorder. These effects are not limited to women who have experienced violent, stranger-perpetrated rapes. In a study of 2,000 college women, respondents who had experienced drug- or alcohol-facilitated rape were about three times as likely as non-victim women to experience post-traumatic stress disorder and about four times as likely to suffer a major depressive episode. . . . The psychological effects of sexual assault and rape can make a victim unable to take advantage of educational opportunities."[61]

By focusing narrowly on-campus harassment, the Department is ignoring the whole student and focusing solely on geography. Students live, work, and go to school on and off campus. "When victims interrupt or end their education to avoid further harassment, they experience the ultimate deprivation of their rights to equal educational opportunities under Title IX."[62]

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[61] Amy Chmielewski, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 BYU EDUC. & L.J. 143, 166-167

[62] *Id.* 167.

Finally, OAESV recommends that the Department clarify its use of "in the United States." As with court cases on cyber harassment, courts have determined that prior guidance references to "in the United States" includes students from United States institutions who are enrolled in a study abroad program. Including this in the language of the final rule will reduce confusion and increase effectiveness in processing complaints submitted by students regarding sexual harassment instances experienced abroad.

Stated very clearly by a court,

> Equality of opportunity in study abroad programs, unquestionably mandated by Title IX, requires extraterritorial application of Title IX. Holding otherwise could clearly create discrimination within the United States. That is, allowing sex discrimination to occur unremedied in study abroad programs could close those educational opportunities to female students by requiring them to submit to sexual harassment in order to participate. This is exactly the situation that Title IX was meant to remedy: female students should not have to submit to sexual harassment as the price of educational opportunity.[63]

By denying these protections to individuals as soon as they leave the boundaries of the United States, the Department is limiting access to educational opportunities. Sexual harassment should be unacceptable as part of policy and law, regardless of geography as similarly stated by the courts.[64] Additionally, "Should students abroad experience sexual assault, language, cultural, and barriers may make it dangerous to seek assistance from law enforcement or the local university. Reporting to and being able to rely on their American institution may be the safest way for them to report abuse and stop further sexual harassment."[65] Not only would these proposed regulations limit a school from helping, but they may also further endanger an individual who is looking for assistance after an incident occurs.

2. Changes to Definition of Actions that Constitute Sexual Harassment

For the following reasons, OAESV opposes the definitional change to Sexual Harassment which reduces what acts constitute sexual harassment. The new definition, which requires the conduct to be so severe, pervasive and objectively offensive that it denies a person access to the school's education program or activity, creates a framework that encourages institutions not to act until there have been repeated instances, or the sexual harassment has escalated to such a degree that significant and avoidable harm to the complainant has occurred. Further, the Proposed Rule heightens the required severity of impact on the student, to that which "effectively denies equal access to the recipient's education program or activity." Later in the Proposed Rule, on Page 40, the Department states that "[d]eliberate indifference to a complainant's allegations of sexual harassment may violate Title IX by separating the student from his or her education on the basis of sex." This indicates that the interpretation for "equal access" will be based on the physical inability to attend classes, and will disregard impacts on study group and service learning opportunities, impact of fear and trauma on academic performance, and other factors negatively impacting a complainant's educational attainment but not fully barring participation in education.

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[63] *King v. Bd. of Control*, 221 F. Supp. 2d 783, 791 (E.D. Mich. 2002)

[64] *See also*, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180 (2005).

[65] See Pathways to Safety International, *Sexual Assault Abroad*, https://pathwaystosafety.org/sexual-assault-barriers-obstacles/.

Survivors of sexual violence in K-12 institutions already frequently face challenges to reporting, including but not limited to school districts not adhering to internal Title IX policies, Title IX staff alleging that conduct is not actually severe enough to limit access to education, and efforts by school staff to minimize actions as minor bullying. On some college campuses, survivors and personnel creating accommodations often differ in opinion about what constitutes interference with or limitations on participating or benefiting from a school's program. Increasing the level of severity required for enforcement will create confusion on campuses, and render institutions less effective at reducing and preventing sexual violence. With the risk of litigation from respondents already much higher than the risk of litigation from complainants, increasing this severity level and requiring more frequent and escalating acts before requiring action will leave institutions in the impossible position of having to evaluate the risk of litigation for investigating sexual harassment that significantly interferes with a complainants education, but may not meet the new Department standard.

By severely limiting what is included in the definition of sexual harassment, the department is minimizing the devastating effects of sexual harassment. The effects of even one incident of sexual harassment can severely impact an individual.

> Evidence showing that child who allegedly was sexually assaulted by other students could not sleep, was at risk for suicide, experienced declining grades, had difficulty concentrating, was frequently absent from school, suffered post-traumatic stress disorder, and had become more aggressive with her peers as result of incident was sufficient to raise material issue of fact as to whether negative effects of her assault effectively barred her access to educational opportunities at school.[66]

These proposed regulations "[mean] many students would be forced to endure repeated and escalating levels of abuse without being able to ask their schools for help. By the time their school would be legally required to intervene, it might be too late—the student might already be ineligible for an important AP course, disqualified from a dream college, or derailed from graduating altogether."[67] It is crucial that schools be able to intervene early. Not only will this help the student that is being directly affected, but it will prevent its recurrence and teach the respondent that this behavior is unacceptable. These new regulations would require institutions to undergo more damaging, harmful harassment before they are able to act. This "narrowing the definition may cause some schools to only focus on repeated conduct, which 'fails to take into account the age and developmental level of K-12 students, who are particularly sensitive to sexual harassment."[68]

Finally,

> The psychological effects of sexual assault and rape can make a victim unable to take advantage of educational opportunities. Frequently, victims experience

[66] *T.Z. v. City of New York*, 634 F Supp 2d 263 (E.D.N.Y. 2009).
[67] Elizabeth Tang, *Three Reasons Why Betsy DeVos's Proposed Title IX Rules Would Hurt Survivors*, NAT'L ORG. FOR WOMEN THE LATEST, https://nwlc.org/blog/three-reasons-why-betsy-devoss-draft-titleix-rules-would-hurt-survivors/ (Nov. 16, 2018).
[68] Alyson Klein and Evie Blad, *DeVos Rewrites Title IX Guidance on Sexual Assault and Harassment*, EDUC. WEEK Vol., Nov. 27, 2018, at 8, available at https://www.edweek.org/ew/articles/2018/11/28/devos-rewrites-title-ix-guidance-onsexual.html?print=1.

> a drop in their grades, as they may find that depression, anxiety, or insomnia interfere with their ability to attend class or focus on their coursework. Those women who seek medical and psychological care may find that appointments interfere with their class schedules, and those who file criminal charges are likely to have little control over when they are called to meet with prosecutors or attend proceedings. Additionally, some research demonstrates that female students who have been raped or sexually assaulted cope by dropping out of school, primarily because they do not want to encounter the alleged perpetrator who is still on campus or because they feel betrayed by a lack of support from the administration. When victims interrupt or end their education to avoid further harassment, they experience the ultimate deprivation of their rights to equal educational opportunities under Title IX[69]

The ability of a school to act on reports of sexual harassment cannot be overstated. A complainant should not have to wait to be subjected to repeated, harassing, emotionally debilitating incidents before an institution can take action.

Advocates hear many complainants speak about what happened. Within these statements, advocates commonly hear:

- "I don't know if I should bother you with this."
- "Do you think it's enough."
- "I don't want to make a big deal."
- "I didn't become pregnant, so."
- "I didn't go to the hospital."
- "My friend said . . ."

These and so many other statements came to OAESV staff from complainants of all genders. Minimizing what happened to them, questioning their memory, societal stereotypes weighing on what's happened and how to think about what has happened. Upon further conversation, that doubt and minimizing had less to do with what occurred than the lack of power they felt they had to do anything about it. Minimizing the definition of Sexual Harassment confirms what complainants have feared: don't tell anyone because it's not worth telling someone.

i. Proposed Addition of § 106.44(e)(6) (Actual Knowledge)

For the following reasons, OAESV opposes the federal regulation mandating actual notice while removing respondeat superior and constructive notice. In the wake of *Gebser* and *Davis*, the Department followed the Supreme Court's clarification that these decisions did not necessitate changes to administrative enforcement, because the purposes of administrative regulations and civil damage awards are clearly distinct. Therefore, the 2001 Revised Sexual Harassment Guidance maintained the standard that:

[69] Amy Chmielewski, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 BYU EDUC. & L.J. 143, 166-167.

> [W]hether an employee is a responsible employee or whether it would be reasonable for a student to believe the employee is, even if the employee is not, will vary depending on factors such as the age and education level of the student, the type of position held by the employee, and school practices and procedures, both formal and informal.

The Supreme Court held that a school will only be liable for money damages in a private lawsuit where there is actual notice to a school official with the authority to address the alleged discrimination and take corrective action.[70] The Proposed Rule specifically states that its purpose is to align Department enforcement rules with *Gebser* and *Davis*, hugely reducing agency responsibility by imputing agency liability only in cases where (on campus) an employee with the authority to respond to sexual harassment allegations has actual knowledge. In the Proposed Rule, K-12 actual knowledge only exists if a student has told a "teacher" or a school official with the authority to address the alleged discrimination. This is far too limiting considering the full context of K-12 education. While "[t]eachers specifically have a 'degree of familiarity with, and authority over, their students that is unparalleled except perhaps in the relationship between parent and child,'"[71] the courts have noted that a public school as an institution has power over its students is "custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults."[72] Numerous non-teacher employees interact with students regularly, take on occasional or regular supervision, and have authority to take action.

As the Department is aware, the *Gebser* court determined the scope of liability and damages specifically for civil litigation, which the court noted was a process distinct from the Title IX administrative enforcement procedures.[73] Notably, the *Gebser* court's response to the plaintiff's unique fact pattern does not suggest that the court believes the Department should have followed its opinion by restricting standards of administrative liability. Specifically, in *Gebser*, a teacher engaged in sexual relationships with a female student for over a year. During the same time period, the teacher led a book club and made sexual comments to the student members. Parents of the book club members complained to the principal about the sexually harassing behavior, but because the district had no sexual harassment policy in place, the principal never notified the Superintendent (who also served as the Title IX Coordinator). In a separate series of events, the school discovered the teacher's sexual relations with the female student and was terminated promptly. The court discussed that, arguably, a compliant sexual harassment policy could have resulted in the principal reporting the sexual language to the Title IX Coordinator, but that this would not have necessarily revealed the sexual relations. The court noted that it could not, without precedent, classify a lack of policy itself as a discriminatory action, but specifically stated that, per Grove City … 465 U.S. at 547-575, the Department has the authority to "enforce requirements that effectuate the statute's non-discrimination mandate, even if those requirements do not purport to represent a definition of discrimination under the statute."

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[70] *Gebser*, 524 U.S. at 290, and *Davis*, 529 U.S. at 642.
[71] *New Jersey v. T.L.O.*, 469 U.S. 325, 348 (1985) (Powell, J., concurring).
[72] *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 646 (1999), citing *Veronica Sch. Dist. v. Acton*, 515 U.S. 646, 655 (1995).
[73] *Gebser* at 643-644.

Though the district in *Gebser* failed to implement a sexual harassment policy as mandated by OCR's then-standing guidance, the actual facts at issue in that case did not involve the lack of policy. Instead, the holding was based on sexual abuse perpetrated by a teacher that would not have been discovered by the Title IX Coordinator even if a policy had been in place, as the student did not report the sexual abuse to a teacher, guidance counselor, or any employee who likely would have been required to report to the Title IX Coordinator if a compliant policy were in place.

Ultimately, the Bush Administration's Department of Education examined *Gebser* closely and deliberately relied on the Supreme Court's statement that the Department had the authority to "enforce requirements that effectuate the statute's non-discrimination mandate, even if those requirements do not purport to represent a definition of discrimination under the statute." With this clarifying distinction in hand, the Bush Department noted in its responsive 2001 Revised Sexual Harassment Guidance that "if a responsible employee knew, or in the exercise of reasonable care should have known" about the harassment, a school has notice sufficient for Department of Education action. Further, the Bush Administration defined a "responsible employee" as including "any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school official's sexual harassment or misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility."

This piece of the Bush-era response to *Gebser* and *Davis* represents the importance of maintaining a distinction between administrative enforcement and liability for the purposes of monetary damages. Specifically, it would be very difficult to enforce Office for Civil Rights (OCR) mandates if a campus could subvert liability for OCR violations simply by failing to put a reporting policy into place, or for failing to adequately train staff on that policy. For example, if a college student pursuant to school policy reported to a staff member listed as a Deputy or Assistant Title IX Coordinator (or something similar), and that individual failed to follow policy and report the assault to staff with the authority to take responsive action (or inform the student they must report to this person), the student could continue to face an increasing hostile environment that would impact educational access, and the institution should be subject to every possible OCR enforcement mechanism. Because the purpose of administrative enforcement differs from the purpose of civil damages, it is critical that the administrative guidelines be carved out with the goal of motivating robust policies with active and effective oversight and implementation.

Similarly, many K-12 institutions have been exposed in the past several years for not having staff trained on Title IX, to the point that parents trying to report sexual harassment against their children are told that principals, assistant principals, and even administrative staff supporting the listed Title IX Coordinator do not know what Title IX is. This demonstrates that under the proposed "actual knowledge" standard, schools will have no motivation to invest their time into developing and executing policies that permit children and parents to rely on reasonable judgment when determining to whom they should report school-based sexual harassment. As sexual harassment poses a significant threat to the health and safety of K-12 students, it is imperative that the Office for Civil Rights hold schools accountable for creating and implementing appropriate reporting policies for employees who learn of sexual harassment, regardless of whether they are employed as a teacher, coach, counselor, or other employee children could reasonably perceive as having the responsibility to trigger a report to a responsible employee under Title IX. Numerous other laws relating to bullying, hazing, and child

sexual abuse demonstrate that most state legislatures and other regulation systems view the network of employees responsible for reporting harm to children to the proper person are in line with the 2001 Guidance, and for that reason, we request that the new guidance specify that instead of only being responsible after a school tells a "teacher," a school is on notice if a student informs any employee a student could reasonably believe has the authority or responsibility to report to school officials, including coaches, and school counselors. Noting the distinction between criminal liability for failure to report child sexual abuse and subjection to administrative enforcement by the Department of Education for not having systems in place that encourage proper reporting of sexual harassment to responsible employees, we believe that state mandatory reporting systems are an appropriate reference, as they reflect the realities of K-12 student maturity, comprehension, and most importantly the vast array of persons who may become aware of sexual harassment because of their professional engagement as a school employee.

These instances have a massive impact on the health and safety of students and it is vital that K-12 institutions have an appropriate institutional response in order to effectively help their students.

- Four out of five K-12 students report having experienced sexual harassment, and explaining that the impact of sexual harassment in K-12 settings has been linked to poor sexual health and academic withdrawal.[74]
- "Relying on state education records, supplemented by federal crime data, a yearlong investigation by The Associated Press uncovered roughly 17,000 official reports of sex assaults by students over a four-year period, from fall 2011 to spring 2015. … Put another way, for every one child sexual assault committed by an adult, there were seven committed by other children."[75]
- After prolonged peer sexual harassment and continued inaction by teachers and administrators, the fifth-grade complainant drafted a suicide letter.[76]
- "The younger the victim, the more devastating the impact, and the greater the vulnerability to repeated assault. It's a disturbing trend and one that some educators and parents are reluctant to acknowledge, especially when it involves kids so young. It's easier to label the acts as bullying or hazing than to call them sex crimes—and violations of federal Title IX safety protections—but advocates say the only way to eliminate these offenses is to face them head on."[77]
- "Not only do the survivors' emotional and psychological scars endure long after the attack, their social lives, education, and career dreams are shattered. … For some, the

[74] Lauren F. Lichty et al, *Sexual Harassment Policies in K 12 Schools: Examining Accessibility to Students and Content*, 78 J. SCH. HEALTH LAW 607, 608 (2008).
[75] Robin McDowell et al., *Hidden Horror of School Sex Assaults Revealed by AP*, ASSOCIATED PRESS (May 1, 2017), https://www.ap.org/explore/schoolhouse-sex-assault/hidden-horror-of-school-sexassaults-revealed-by-ap.html
[76] Davis v. Monroe Cnty. Bd. of Ed., 526 U.S. 629, 634 (1999).
[77] Cindy Long, *The Secret of Sexual Assault in Schools*, NAT'L EDUC. ASS'N (December 4, 2017), http://neatoday.org/2017/12/04/sexual-assault-in-schools/.

trauma is insurmountable; gender based harassment and sexual assault have driven an increasing number of adolescent students to suicide"[78]

- Where, after a student reported rape by another student at school, the school refused to investigate the accused student and suspended the complaining student, the student began engaging in suicidal and self-harming behavior as a coping mechanism.[79]
- "Evidence showing that child who allegedly was sexually assaulted by other students could not sleep, was at risk for suicide, experienced declining grades, had difficulty concentrating, was frequently absent from school, suffered posttraumatic stress disorder, and had become more aggressive with her peers as result of incident was sufficient to raise material issue of fact as to whether negative effects of her assault effectively barred her access to educational opportunities at school"[80]

Not only is it vital that teachers report this abuse, but given the age of students in K-12 institutions it is imperative that it goes beyond just teachers, to any individual whom a child is reasonably likely to assume they can trust to help in cases of sexual harassment.

Furthermore, every state has mandatory reporting that goes beyond just "teachers." OAESV recommends that the Department closely analyze mandatory reporting statutes and modify the standard to include those employees state legislators have determined are reasonably likely to learn about sexual abuse, whether by peers or adults, as these lawmakers determined rightfully that these individuals are entrusted with student wellbeing.

State	Mandated Reporters of Child Abuse	State Statute
Alabama	School employees, teachers, school officials	ALA. CODE § 26-14-3 (2018)
Alaska	Teachers and school administrators, including athletic coaches, of public and private schools	ALASKA STAT. §§ 47.17.020; 47.17.023 (2018)
Arizona	School Personnel	ARIZ. REV. STAT. § 13-3620 (2018)
Arkansas	Public or private school counselors; school officials, including without limitation institutions of higher education; and teachers	ARK. ANN. CODE § 12-18-402(2017) (LexisNexis)
California	Teachers, teacher's aides, administrators, and employees of public or private schools	CAL. PENAL CODE § 11165.7 (West 2018)
Colorado	Public or private school officials or employees	COLO. REV. STAT. § 19-3-304 (2018)
Connecticut	School Officials: "School employee" means: (A) A teacher, substitute teacher, school administrator, school superintendent, guidance counselor, psychologist, social worker, nurse, physician, school	CONN. GEN. STAT. §§ 17a-101; 53a-65 (2018)

[78] Cindy Long, *The Secret of Sexual Assault in Schools*, NAT'L EDUC. ASS'N (December 4, 2017), http://neatoday.org/2017/12/04/sexual-assault-in-schools/ (quoting Esther Warkov).
[79] *Murrell v. School Dist. No. 1*, 186 F.3d 1238, 1244 (10th Cir. 1999).
[80] *T.Z. v. City of New York*, 634 F. Supp. 2d 263, 273 (E.D.N.Y 2009.)

	paraprofessional or coach employed by a local or regional board of education or a private elementary, middle or high school or working in a public or private elementary, middle or high school; or (B) any other person who, in the performance of his or her duties, has regular contact with students and who provides services to or on behalf of students enrolled in (i) a public elementary, middle or high school, pursuant to a contract with the local or regional board of education, or (ii) a private elementary, middle or high school, pursuant to a contract with the supervisory agent of such private school.	
Delaware	School employees, social workers, or psychologists	DEL. CODE. ANN. tit. 16, § 903 (2017)
District of Columbia	School officials, teachers, or athletic coaches	D.C. CODE § 4-1321.02 (2018)
Florida	Teachers or other school officials or personnel	FLA. STAT. § 39.201 (2018)
Georgia	Teachers, school administrators, school counselors, visiting teachers, school social workers, or school psychologists	GA. CODE ANN. §§ 19-7-5; 16-12-100 (2018)
Hawaii	Employees or officers of any public or private school	HAW. REV. STAT. § 350-1.1 (2017)
Idaho	Teachers or daycare personnel	IDAHO CODE ANN. § 16-1605 (2017)
Illinois	School personnel, including administrators and employees, educational advocates, or truant officers	ILL. COMP. STAT. Ch. 325, § 5/4; Ch. 720, § 5/11-20.2 (2018)
Indiana	Mandatory reporters include any staff member of a medical or other public or private institution, school, facility, or agency.	IND. CODE § 31-33-5-2 (2018)
Iowa	School employees, certified paraeducators, coaches, or instructors employed by community colleges	IOWA CODE §§ 232.69; 728.14 (2018)
Kansas	Teachers, school administrators, or other employees of an educational institution that the child is attending	KAN. STAT. ANN. § 38-2223 (2017)
Kentucky	Teachers, school personnel, or child care personnel	KY. REV. STAT. ANN. § 620.030 (West 2018)
Louisiana	Teaching or child care providers, including public or private teachers, teacher's aides, instructional aides, school principals, school staff members, bus drivers, coaches, professors, technical or vocational instructors, technical or vocational school staff members, college or university administrators, college or university staff members, social workers, probation officers, foster home parents, group home or other child care institutional staff members, personnel of residential home facilities, daycare providers, or any individual who provides such services to a child in a voluntary or professional capacity	LA. CODE CHILDREN'S ANN. ART. 603(17) (2017)
Maine	Teachers, guidance counselors, school officials, youth camp administrators or counselors, or social workers; School bus drivers or attendants	ME. REV. STAT. tit. 22, § 4011-A (2017)

Maryland	Educators or Human Service Workers	MD. CODE ANN. FAM. LAW § 5-704 (West 2017)
Massachusetts	Public or private schoolteachers, educational administrators, guidance or family counselors, or child care workers	MASS. GEN. LAWS ANN. ch. 119, § 21 (West 2018)
Michigan	School administrators, counselors, or teachers	MICH. COMP. LAWS § 722.623 (2017)
Minnesota	A professional or professional's delegate who is engaged in the practice … child care, education, social services…	MINN. STAT. § 626.556, Subd. 3 (2018)
Mississippi	Public or private school employees or child care givers	MISS. CODE ANN. § 43-21-353 (2017)
Missouri	Daycare center workers or other child care workers, teachers, principals, or other school officials	MO. REV. STAT. §§ 210.115; 352.400; 568.110 (2017)
Montana	Teachers, school officials, or school employees who work during regular school hours	MONT. CODE ANN. §§ 41-3-201; 15-6-201(2)(b) (2017)
Nebraska	School Employees	NEB. REV. STAT. § 28-711 (2017)
Nevada	Persons working in schools	NEV. REV. STAT. § 432B.220 (2018)
New Hampshire	Teachers, school officials, nurses, or counselors	N.H. REV. STAT. ANN. § 169-C:29 (2017)
New Jersey	No professional groups are specified in statute; all persons are required to report.	N.J. STAT. ANN. § 9:6-8.10 (2018)
New Mexico	Teachers or school officials	N.M. STAT. ANN. § 32A-4-3 (West 2017)
New York	School officials, including but not limited to, teachers, guidance counselors, school psychologists, school social workers, school nurses, or administrators	N.Y. SOC. SERV. LAW § 413 (Consol. 2018)
North Carolina	Any person or institution that has cause to suspect abuse or neglect shall report.	N.C. GEN. STAT. § 7B-301 (2018)
North Dakota	Schoolteachers, administrators, or school counselors	N.D. CENT. CODE § 50-25.1-03 (2018)
Ohio	Teachers, school employees, or school authorities	OHIO REV. CODE § 2151.421 (West 2018)
Oklahoma	All persons	OKLA. STAT. ANN. tit. 10A, § 1-2-101; Tit. 21, § 1021.4 (2018)
Oregon	School employees, including employees of higher education institutions (such as community colleges and public and private universities)	OR. REV. STAT. §§ 419B.005; 419B.010 (2018)

Pennsylvania	A 'school employee' is an individual who is employed by a school or who provides an activity or service sponsored by a school. The term does not apply to administrative personnel unless that person has direct contact with children.	23 PA. CONS. STAT. § 6311(2018)
Rhode Island	Only physicians or duly certified nurse practitioners in professional capacity, but "Any person who has reasonable cause to know or suspect that a child has been abused or neglected must report."	R.I. GEN. LAWS § 40-11-3(a) (West 2018)
South Carolina	School teachers, counselors, principals, assistant principals, or school attendance officers	S.C. CODE ANN. § 63-7-310 (2018)
South Dakota	Teachers, school counselors or officials, or licensed or registered child welfare providers	S.D. CODIFIED LAWS § 26-8A-3 (2018)
Tennessee	Teachers, other school officials or personnel, daycare center workers	TENN. CODE ANN. §§ 37-1-403; 37-1-605 (2017)
Texas	Teachers or daycare employees	TEX. FAM. CODE ANN. § 261.101 (West 2018)
Utah	Professionally: Any person licensed under the Medical Practice Act or the Nurse Practice Act is required to report. Personally: Any person who has reason to believe that a child has been subjected to abuse or neglect must report.	UTAH CODE ANN. § 62A-4a-403 (LexisNexis 2018)
Vermont	Individual who are employed or contracted and paid by a school district or an approved or recognized independent school, including school superintendents, headmasters, teachers, student teachers, school librarians, school principals, and school guidance counselors	VT. STAT. ANN. tit. 33, § 4913 (2018)
Virginia	Teachers or other employees at public or private schools, kindergartens, or nursery schools	VA. CODE ANN. § 63.2-1509 (2017)
Washington	Professional school personnel	WASH. REV. CODE § 26.44.030 (2018)
West Virginia	Teachers or other school personnel	W. VA. CODE § 49-2-803 (2017)
Wisconsin	Schoolteachers, administrators, or counselors; School employees not otherwise specified above	WIS. STAT. ANN. § 48.981 (2018)
Wyoming	All persons must report.	WYO. STAT. ANN. § 14-3-205 (2017)

j. Proposed Addition of § 106.45(b)(1)(iii) (Impartiality and Sex Stereotypes in Training Materials)

For the following reasons, OAESV opposes this proposed change. In its work with individual survivors and in providing technical assistance to Ohio's rape crisis programs, OAESV has participated directly or indirectly in numerous Title IX hearings at various institutions across Ohio. In both its direct participation and review of data from rape crisis programs, OAESV found that there exists no notable trend in which Ohio campuses find in favor of complainants more than they find in

favor of respondents.[81] In K-12 cases, OAESV has seen far fewer findings in favor of complainants than findings in favor of respondents.[82] This calls into question arguments from groups claiming that pressure from the Department of Education to find in favor of female complainants led campuses to rely on sex stereotypes[83] to find against respondents. Further eroding[84] the notion that education institutions rely on sex stereotypes to find in favor of female students are numerous court decisions evaluating the use of supposedly stereotype-based materials.[85]

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[81] This qualitative information stems from experiences with public institutions, private religious institutions, private secular institutions, and graduate school programs. *See* CHRISTOPHER P. KREBS ET AL., NAT'L INST. OF JUSTICE, THE CAMPUS SEXUAL ASSAULT STUDY XVII (2004), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf ("Not surprisingly, given the very low percentage of victims who reported the incident to law enforcement, a very small number of victims of either type of sexual assault reported that they pursued any action against the assailant, including seeking a restraining order, filing civil charges, pursuing criminal charges, or filing a grievance or initiating other disciplinary action with university officials. A very small number of victims reported that the assailant received any disciplinary action from the university or that the assailant was arrested, prosecuted, or convicted by the criminal justice system.").

[82] In one such case, counsel for the school district stated that the ramifications of being sued by respondent's family were far more expensive than any outcome in which the complainant sued.

[83] For more information on the impact of these stereotypes in education agencies, see Fernanda Zamudio-Suarez, *Civil-Rights Official Apologizes for Saying 90% of Campus Rape Cases Stem From Regret*, CHRONICLE OF HIGHER ED., July 12, 2017, https://www.chronicle.com/blogs/ticker/civil-rights-official-says-sexual-assault-policies-ignore-rights-of-the-accused/119310 ("In a statement released by the department, Ms. Jackson said: "As a survivor of rape myself, I would never seek to diminish anyone's experience. My words in The New York Times poorly characterized the conversations I've had with countless groups of advocates. What I said was flippant, and I am sorry. All sexual harassment and sexual assault must be taken seriously — which has always been my position and will always be the position of this department.")

[84] *See also*, *Mancini v. Rollins Coll.*, No. 6:16-cv-2232-Orl-37KRS, 2017 U.S. Dist. LEXIS 113160, at *6 (M.D. Fla. 2017) ("[A]bsent university-specific allegations of community pressure, **allegations of a national bias against males based on the [2011 DCL] have been found insufficient to support an inference of gender bias**.").

[85] *See, e.g.,* Lavinia M. Weizel, *The Process That Is Due: Preponderance of the Evidence As the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1634 (2012) ("A court declined to find that gender bias could plausibly be inferred from the university's ramped up efforts to prevent and address sexual assault, given that the announcements for its awareness and prevention claims were presented in a 'gender-neutral tone, addressed to all students, and published to improve campus safety for both men and women.' Similarly, funding a sexual assault prevention program with a grant from the Avon Fund for Women did not suggest gender bias because the program was advertised 'for all students.'); *Doe v. Univ. of Chicago*, No. 16 C 08298, 2017 U.S. Dist. LEXIS 153355, at *12-*14 (N.D. Ill. 2017) ("Rounding off the attempt to portray the University as pervasively anti-male, [plaintiff] notes that the University has endorsed the Clothesline Project, a project dedicated to breaking the silence about violence against women, and the Red Flag Campaign, which seeks to raise awareness about sexual and dating violence. … The University also sponsors a chapter of the 'Phoenix Survivor's Alliance,' an organization dedicated to 'encourag[ing] an active dialogue on and an engagement with women[']s and gender issues.' … The University also sponsored a showing [] 'The Hunting Ground,' a documentary about campus sexual assault … . All of those high-level allegations do little to advance the actual gender discrimination claim at issue in this case. With the conclusory characterizations (as distinct from factual allegations) of 'anti-male' bias set to the side, these allegations do not plausibly allege anti-male bias."); *Doe v. Univ. of Cincinnati*, 173 F. Supp. 3d 586 (S.D. Ohio 2016) (rejecting plaintiff's claim that the university's sensitivity to the complainant's trauma indicated gender bias, given the possibility that the university has only ever received complaints that name male students as perpetrators of sexual assault, and the possibility that women are more likely than men to report sexual assault); *Doe v. Columbia Univ.*, 101 F. Supp. 3d 356, at 371 (S.D.N.Y. 2015) (concluding that any favoritism towards the complainant "could equally have been—and more plausibly was—prompted by lawful, independent goals, such as a desire (enhanced, perhaps, by the fear of negative publicity or Title IX liability to the victims of sexual assault) to take allegations of rape on campus seriously and to treat complainants with a high degree of sensitivity.").

OAESV staff has directly observed successful strategies that rely on female stereotypes, including that women who regret sex claim sexual assault,[86] women lie about rape to get back[87] at ex-boyfriends, women who have consensual sex with multiple partners are not capable of being raped,[88] that students from other countries claim rape because of shame. At the same time, we have both read about and directly observed respondents' advocacy groups exclaim that scientific research on the neurobiology of trauma and dynamics of sexual violence create a nationwide bias in favor of female students.

This same peer reviewed scholarship, argued by respondents and their advisors as the basis for gender stereotypes, is used by law enforcement agencies at the federal,[89] state,[90] and local[91] level. OAESV is deeply concerned that, due to the frequent use of the term "sex stereotype" by the same groups that argue against use of this peer-reviewed scholarship, this section of the Proposed Rule (without further clarification) will discourage institutions of elementary, secondary, and post-secondary education from employee appropriate training on trauma and the dynamics of sexual violence that has been deemed reliable, acceptable, and useful by criminal justice systems across the United States. Ultimately, training Title IX staff on scientific data on the dynamics of sexual violence will result in more accurate Title IX procedures and reduce the likelihood of faulty findings of student responsibility for sexual harassment policy violations. Use of the notion that information provided by experts on sexual violence is somehow based on sex stereotypes by the Department will likely result in the opinions of lawyers for respondents replacing objective, peer-reviewed, scientific data with sex stereotypes erroneously characterizing female complainant behavior before, during, and after sexual harassment.

To avoid this result, OAESV recommends that the Department clarify that the materials must avoid sex stereotypes regarding "regret sex," women lying about being sexually assaulted, or other commonly-used stereotypes about complainants of sexual harassment and sexual assault. Further,

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[86] OAESV has seen this argument used frequently, even when no one aside from the accused knows about the rape before the complainant reports.

[87] Nina Bahadur, *Want To Know Why Women Don't Report Sexual Assault?*, SELF, Oct. 13, 2016 ("But there is a specific, damaging myth that women fabricate rape accusations to ruin men's lives, and that stops so many people from reporting what happened to them. Survivors worry that they won't be believed.").

[88] In many cases where complainants have a history of positive sexual experiences with more than one partner, OAESV has seen respondents make arguments during hearings that prior history demonstrates a promiscuity that casts all complainant statements into doubt, even where rape shield type protections are supposed to be in place.

[89] Rebecca Campbell, The Neurobiology of Sexual Assault, NAT. INST. OF JUST., Dec. 3, 2012, https://nij.gov/multimedia/presenter/presenter-campbell/Pages/presenter-campbell-transcript.aspx.

[90] See, e.g., INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, Trauma Informed Sexual Assault Investigation Training, available at https://www.theiacp.org/projects/trauma-informed-sexual-assault-investigation-training ("The IACP is pleased to announce that the Department of Justice, Office on Violence Against Women (OVW) recently refunded the Trauma Informed Sexual Assault Investigation Training. The IACP conducted training for over 1,700 participants with 29 on-site training events held from 2014 to 2018 and we look forward to holding many more events over the next few years. At present, crimes of sexual assault go vastly under reported and perpetrators continue undetected. The goal of the Trauma Informed Sexual Assault Investigation Training program is to strengthen the capacity of law enforcement to provide effective response to victims of sexual assault while simultaneously holding offenders accountable. The training provides information on the neurobiological impact of trauma, the influence of societal myths and stereotypes, understanding perpetrator behavior, and conducting effective investigations.").

[91] *Id.*

OAESV recommends that the Department clarify that peer reviewed scholarship will not be deemed to rely on sex stereotypes for the purposes of training materials.

k. Proposed Addition of § 106.45(b)(1)(iv) (Presumption of Innocence)

For the following reasons, OAESV supports this provision of the Proposed Rule but requests the following modification, based on examples from numerous campus Title IX policies effective on January 29, 2019. OAESV does not object to the inclusion of a presumption that the respondent is not responsible until a determination has been made at the conclusion of a compliant grievance process, with the caveat that, in order for the policy to be equitable, it must contain an accompanying provision that the institution's policy will state that a presumption of innocence for the respondent does not require that the institution treat a complainant as though that person is providing a false report or false statement(s). Namely, if there is a presumption of innocence for the respondent there should be a presumption of reporting in good faith. Ultimately, sexual violence is among the most difficult crimes to prove.[92] Given the policy reasons behind wanting survivors of sexual violence to feel safe reporting to their campus and seeking accommodations and medical care, it is critical that survivors receive equitable treatment and protections against delayed accommodations after making a report. Including a presumption that the complainant is not lying aligns with both civil and criminal justice standards and is a critical step toward equitable protections.

l. Proposed Addition of § 106.45(b)(1)(v) (Reasonably Prompt Timeframes)

OAESV proposes the following modification to this Proposed Rule provision. Because of the increased likelihood that complainants will need to retain an attorney as an advisor of choice (see citations in "Cross-Examination" section), OAESV recommends that "reasonably prompt" be clarified by the suggestion that institutions conclude Title IX investigations within one semester of the complaint, and indicate in policy that a complainant will not be required to participate in a Title IX hearing process during such time that the student is studying abroad, or otherwise engaged in an academic program that requires the student to spend a significant amount of time away from campus.

m. Proposed Addition of Proposed § 106.45(b)(2) (i)-(ii) (Formal Complaint Procedures)

For the following reasons, OAESV requests additional language be included in the final regulations. This language is as follows: "The written notice must include a statement that the institution presumes that the complainant is making a truthful complaint, and that a determination of not responsible will not, on the basis of the finding alone, result in allegations of a false complaint." The presumption of innocence in any judicial hearing is crucial to a fair and impartial hearing. However, this presumption of innocence or a finding of not responsible, does not mean that a complainant was lying or provided a false report. Within the criminal justice system, only 230 out of

[92] Out of every 1,000 rapes, only 230 are reported to police, and just five (5) result in conviction. FEDERAL BUREAU OF INVESTIGATION, NATIONAL INCIDENT-BASED REPORTING SYSTEM, 2012-2016 (2017); *See*, *e.g.*, Bernice Yeong, *A Problem of Evidence*, HUFFPOST (Sept. 14, 2013), https://www.huffingtonpost.com/bernice-yeung/sexual-assault-rape_b_3917144.html ("Even rape kits often aren't enough — they can only prove that sexual intercourse had taken place, not that there had been the use of force.").

a 1,000 rapes are reported to the police and of those, only 5 result in a conviction.[93] "Even rape kits often aren't enough – they can only prove that sexual intercourse had taken place, not that there had been the use of force."[94] The findings of educational institutions are a statement that there was not enough evidence presented to the decision-maker to meet the evidentiary burden of the process. As innocence should be presumed prior to a finding, complainants should be presumed innocent of making a false report. OAESV does not object to the inclusion of a presumption that the respondent is not responsible until a determination has been made at the conclusion of a compliant grievance process, with the caveat that, in order for the policy to be equitable, it must contain an accompanying provision that the institution's policy will include a presumption that the complainant is telling the truth, and that a finding of not responsible does not equate to a presumption that the complainant was falsifying allegations

n. Proposed Addition of § 106.45(3)(i)-(iii) (Mandatory Dismissal of Complaints Involving Conduct Off Campus & Not Meeting Definition)

For the following reasons, OAESV opposes this provision of the Proposed Rule. OAESV believes that requiring institutions to dismiss large quantities of sexual harassment complaints impacting the campus community will significantly reduce safety. Specifically, the majority of college peer sexual assaults occur off campus.[95] Though the initial attack takes place off official school grounds, the harm from that sexual assault impacts a significant percentage of the survivor's campus experience. If campuses are not allowed to, under Title IX, investigate and remedy sexual harassment taking place off campus, many students will have no option but to continue attending classes with their perpetrator, sharing libraries and other study spaces with their perpetrator, forgoing normal college social experiences to avoid potential contact with the perpetrator, and adjusting their academic and non-academic routines to avoid additional harm. Ultimately, this will lead to inequitable access for survivors of rape, who will not be given the opportunity to report to their campus, seek an investigation and hearing, and receive accommodations. This will result in survivors of sexual harassment, particularly in cases of sexual violence, not having equal access to their education. This will likely manifest itself in reduced academic performance, impacting graduate school admissions and

[93] FEDERAL BUREAU OF INVESTIGATION, NATIONAL INCIDENT-BASED REPORTING SYSTEM, 2012-2016 (2017).

[94] Bernice Yeong, A Problem of Evidence, HUFFPOST (Sept. 14, 2013), https://www.huffingtonpost.com/bernice-yeung/sexual-assault-rape_b_3917144.html.

[95] STATE OF OHIO OFFICE OF CRIMINAL JUSTICE SERVICES, VIOLENT VICTIMIZATION OF COLLEGE STUDENTS: 1995-2002 2 (2005), https://www.publicsafety.ohio.gov/links/ocjs_Violentvictimizationofcollegestudents.pdf ("College students were more likely to be violently victimized off campus than on campus. Off campus, violent crimes were more likely to occur in the evening or at night than during the day (72 percent vs. 25 percent). On campus, 56 percent occurred during the day."); CHRISTOPHER P. KREBS ET AL., NAT'L INST. OF JUSTICE, THE CAMPUS SEXUAL ASSAULT STUDY 2-15 (2004), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf ("For all types of sexual victimizations, it was more common for students to be victimized off campus (66% of completed rapes occurred off campus) than on campus. … A surprisingly large number of respondents reported that they were at a party when the incident happened, with a significantly larger proportion of incapacitated sexual assault victims reporting this setting (58% compared with 28%). The majority of sexual assault victims of both types reported that the incident had happened off campus (61% of incapacitated sexual assault victims and 63% of physically forced sexual assault victims). A higher proportion of physically forced than incapacitated sexual assaults occurred outside. The most commonly-reported locations of either type of victimization, on and off-campus, were the victim's or some other person's living quarters.").

career opportunities, reduced professional development, and even withdrawal from the institution. Because most instances of sexual assault occur of campus grounds,[96] regulations prohibiting investigations of the majority of sexual assaults impacting students will sabotage instead of further the goals of Title IX.

OAESV employees have worked with countless survivors whose victimization took place off campus grounds but still impacted the educational environment. We share these anecdotes to illustrate a sample of the survivors who would not be able to seek a safe school environment under the new definition of sexual harassment.

- A 15-year-old reports an assault. It was her boyfriend. She is a Sophomore. He is a Junior. She reports it happened away from school. They attend the same school. Tomorrow they are in the same class. She is afraid of going to class, him sitting next to her, having to respond to questions, him looking at her, and everyone knowing. Title IX offered her protection even though it happened away from the school, because it impacted her schooling. She remained in her school, felt safe in her school, and successfully graduated.
- A survivor lived a short stroll from the institution. It was her first apartment, as she had spent the last couple years living on campus. She had roommates, of course, but it was her own room in her own apartment. They had met a couple weeks ago in class. He had walked her home. It was dark and cold and they were walking in the same direction so he dropped her off at her apartment. She reported it happened on Saturday night. They shared a class together on Tuesday. She was scared and confused about what to do. The reason she asked for help was because she found Title IX information online and it said the school could help her. That students' were responsible to school policies provided they were students, just because they were a couple minutes off campus didn't excuse their behavior.

Any effort institutions could utilize outside of Title IX (e.g. use of non-sexual harassment student conduct code provisions) will leave institutions vulnerable to lawsuits by respondents, on the logical basis that pursuing sexual harassment deemed off limits by the United States Department of Education indicates sex-based discrimination against the respondent. This makes it increasingly likely institutions, even those that understand the danger posed by off-campus peer sexual harassment and want to address it, will forgo any effort to address sexual harassment occurring off official campus grounds. For example, with current OCR support for investigating and addressing sexual harassment impacting the campus environment (not just those acts that occur on property owned or controlled by the campus), 60% of parties filing Title IX lawsuits against institutions are respondents.[97] In OAESV's experience, campuses tend to be more averse to violating respondent's rights than violating complainant rights, because the threat of a lawsuit by respondents is higher and the threat of OCR

[96] *Id.*

[97] ALYSSA KEEHAN ET AL., UNITED EDUCATORS, CONFRONTING CAMPUS SEXUAL ASSAULT: AN EXAMINATION OF HIGHER EDUCATION CLAIMS 14-15 (2015), *available at* http://www.ncdsv.org/ERS_Confronting-Campus-Sexual-Assault_2015.pdf.

withholding federal funding is virtually non-existent.[98] Without a mandate from OCR to investigate/address all complaints, institutions will find themselves increasingly impacted by lawsuits if they choose to address acts that do not meet the Department's definition of sexual harassment.

o. Proposed Addition of § 106.45(3)(iv) (Equitable Opportunity to be Heard, Role of Advisor of Choice)

For the following reasons, OAESV requests modifications related to this provision of the Proposed Rule. Specifically, for the reasons stated below in the "Cross-Examination" section, OAESV believes that the Proposed Rule puts non-attorney advocates at risk for the unauthorized practice of law. For that reason, OAESV believes complainants and respondents alike will be stripped of their ability to choose an advisor, and requests a modification to proposed § 106.45(3)(iv) consistent with its suggestions for removing the duty of conducting cross-examination from the advisor of choice's role.

p. Proposed Addition of § 106.45(3)(vii) (Cross-Examination)

For the following reasons, OAESV opposes this provision of the Proposed Rule.

1. Cross-Examination is not a Fundamental Element of Due Process in Student Conduct Matters

Historically, legal scholars, judicial committees, and courts have consistently declared that cross-examination is not an element of the process due to students accused of violating academic conduct codes, including provisions related to sexual violence.[99] The notion present in the Proposed Rule that cross-examination is a core necessity of campus disciplinary hearings comes from a 1904 legal treatise, which labels cross-examination the "the greatest legal engine ever invented for the discovery of truth."[100] This treatise discusses justice systems implemented by judges and attorneys, not student conduct systems. In the many decades that followed the treatise's publication, judicial committees and courts examined the specific process due students accused of violating campus conduct codes and the applicability of cross-examination to those processes. Their findings did not echo the treatise. Specifically, in 1965, the General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education [101] declared

> The nature and procedures of the disciplinary process in such cases should not be required to conform to federal processes of criminal law, which are far from perfect

[98] As of the date of this letter, no institution has lost federal funding for sexual harassment violations since Title IX became law.

[99] CHRIS LOSCHIAVO AND JENNIFER WALKER, ASS'N FOR STUDENT CONDUCT ADMIN., THE PREPONDERANCE OF THE EVIDENCE STANDARD: USE IN HIGHER EDUCATION CAMPUS CONDUCT PROCESSES, *available at* https://www.theasca.org/files/The%20Preponderance%20of%20Evidence%20Standard.pdf ("In higher education, fundamental fairness is commonly considered a notice of a possible violation of the code of conduct and an opportunity to be heard.").

[100] Suzanne B. Goldberg, *Keep Cross-Examination out of College Sexual-Assault Cases*, CHRONICLE OF HIGHER EDUC., Jan. 10, 2019, https://www.chronicle.com/article/Keep-Cross-Examination-Out-of/245448

[101] CHRIS LOSCHIAVO AND JENNIFER WALKER, ASS'N FOR STUDENT CONDUCT ADMIN., THE PREPONDERANCE OF THE EVIDENCE STANDARD: USE IN HIGHER EDUCATION CAMPUS CONDUCT PROCESSES, *available at* https://www.theasca.org/files/The%20Preponderance%20of%20Evidence%20Standard.pdf (quoting General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F.R. D133 C.F.R. at 142 (1968)).

> and designed for circumstances and ends unrelated to the academic community. By judicial mandate to impose upon the academic community in student discipline the intricate, time-consuming, sophisticated procedures, rules and safeguards of criminal law would frustrate the teaching process and render the institutional control impotent.[102]

Since 1965, the general consensus outside of the 6th Circuit remains that cross-examination is not a component of the process due students accused of violating conduct codes.[103] Introducing advisor-led cross-examination into campus hearing processes will force Title IX offices to build mini court systems inherently limited by the participants' lack of legal training[104] and the powers and enforcement mechanisms afforded to federal, state, and municipal courts.[105] In such systems, the only way campuses can guarantee equitable access to advisors of choice capable of engaging in cross-examination will be or campuses to offer attorneys to both parties. With varying financial implications based on institution size, campuses will find themselves tasked with creating a contract attorney system or faced with adding multiple licensed attorneys to their Title IX staff. For institutions not able to create the budget for these additions, gender discrimination against both respondents and claimants

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[102] *Id.*

[103] *See*, *e.g.*, *Nash* v. *Auburn University*, 812 F.2d 655, 664 (11th Cir. 1987) (where two students accused of academic dishonesty sued their institution for violating due process on the grounds that they were barred from cross-examining adverse witnesses directly (but were allowed to pose their intended questions through a hearing officer), the court found that, while due process required the university to allow the students to respond to the charges, due process didn't require cross-examination of witnesses since student "rights in the academic disciplinary process are not co-extensive with the rights of litigants in a civil trial or with those of defendants in a criminal trial."); *Winnick* v. *Manning*, 460 F.2d 545, 549 (2d Cir. 1972) (holding that a college student's right to cross-examine witnesses was not an essential due process requirement); William J. Migler, *Comment: An Accused Student's Right to Cross-Examination in University Sexual Assault Adjudicatory Proceedings*, 20 CHAP. L. REV. 357, 380-381 ("Lower federal courts and state courts have applied both Goss and Eldridge (or similar reasoning behind these cases) to the question of whether cross-examination is a due process requirement in university disciplinary proceedings, resulting in a split amongst the jurisdictions. Among the states that have directly decided on the issue, courts in eleven states have held that an accused student has the right to some form of cross-examination of witnesses. 135 Likewise, the Ninth Circuit and district courts in the First, Second, Third, and Eighth Circuits have held accused students have the right to some form of cross-examination. Conversely, courts in sixteen states, the First, Second, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits, and district courts in the Seventh and Eighth Circuits, have found that cross-examination is not required to protect a student's Due Process rights in a disciplinary proceeding.").

[104] PETER F. LAKE, NASPA-STUDENT AFFAIRS ADMINISTRATORS IN HIGHER EDUCATION, FOUNDATIONS OF HIGHER EDUCATION LAW AND POLICY: BASIC LEGAL RULES, CONCEPTS, AND PRINCIPLES FOR STUDENT AFFAIRS 19 (2011) (""Litigation and education are very dissimilar in their goals and structure, and are often populated by very different professional personalities").

[105] CHRIS LOSCHIAVO AND JENNIFER WALKER, ASS'N FOR STUDENT CONDUCT ADMIN., THE PREPONDERANCE OF THE EVIDENCE STANDARD: USE IN HIGHER EDUCATION CAMPUS CONDUCT PROCESSES, *available at* https://www.theasca.org/files/The%20Preponderance%20of%20Evidence%20Standard.pdf ("[I]t is important to articulate that campus conduct process are not courts of law or legal institutions, nor do they have the same authority to act as the legal system or desire to replace the criminal justice system. For example, federal, state and local courts have the ability to issue warrants for arrest, subpoena witnesses, and change venues. They have rules for the admission of evidence and discovery. Institutions of higher education have none of these powers. A college or university campus conduct process is not endowed with the authority to do any of these things. They cannot compel or subpoena a witness to participate in the campus conduct process. They have no rules of evidence.").

will logically result, and numerous additional legal claims will be filed against campuses for their advisor of choice provisions.[106]

2. Advisor of Choice Led Cross-Examination will Lead to Significant Income-Based Inequities

In addition to concerns about the unauthorized practice of law, OAESV is also concerned that the requirement of advisor of choice led cross-examination will create a new and lucrative market for private attorneys, as well as an income-based outcome disparity[107] similar to that found in the criminal justice system. Specifically, cross-examination is a particular legal skill, based on legal academic instruction and improved over time with experience. Effectively delivered cross-examination can be the difference between winning or losing a trial, and more experienced attorneys typically have a strong advantage. Ultimately, shifting cross-examination from a system in which the same hearing officer delivers questions provided by the parties to a system in which attorneys directly question the student parties will create a system in which high priced, experienced lawyers can provide superior representation to their clients.[108] This means that respondents and complainants coming from higher income families can hire the most effective attorney they can find, while students paying for college with loans or by working multiple jobs may have to seek free legal services or attorneys provided by the campus who do not specialize in aggressive cross-examination.[109] Worse yet, students in these circumstances may have to bring in a non-attorney advisor who is not concerned about the risk of unauthorized practice of law. In that case, one party will be represented with counsel highly trained on cross-examination strategy and delivery, and the other party will be advised by a non-attorney who may have never contemplated the exercise of cross-examination prior to serving as an advisor of choice. These income-driven inequities will likely drive down reporting of sexual assaults – if a survivor knows they will have to spend tens of thousands of dollars on an attorney after they report and they

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[106] Andrew Kreighbaum, *New Uncertainty on Title IX*, INSIDE HIGHER ED, Nov. 20, 2018, https://www.insidehighered.com/news/2018/11/20/title-ix-rules-cross-examination-would-make-colleges-act-courts-lawyers-say (quoting Naomi Shatz) ("These cases are already on an incredibly unlevel playing field," … "Are we going to start having ineffective-assistance-of-counsel issues after these cases?").

[107] Benjamin Wermund, *The Biggest Sticking Point in DeVos' Title IX Rules*, POLITICO, Nov. 19, 2018, https://www.politico.com/newsletters/morning-education/2018/11/19/the-biggest-sticking-point-in-devos-title-ix-rules-420436 (quoting Terry W. Hartle, Senior Vice President of the American Council on Education) ("'This would apparently permit one student to hire a highly paid legal pit bull to grill another student in a campus disciplinary proceeding … We will have serious concerns about such a provision … To the extent that they're trying to turn a campus disciplinary proceeding into a courtroom, we are deeply troubled, because we aren't courts.'").

[108] Suzanne B. Goldberg, *Keep Cross-Examination out of College Sexual-Assault Cases*, CHRONICLE OF HIGHER EDUC., Jan. 10, 2019, https://www.chronicle.com/article/Keep-Cross-Examination-Out-of/245448 ("To be sure, some students will hire lawyers or find a family friend to help. For many, though, that option will be unaffordable or unavailable. This disparity between students may not be as significant when advisers play a quiet, supporting role, but it almost certainly will amplify inequities and increase the risk of obscuring efforts to learn the truth of what happened when a lawyer questions one student and a nonlawyer questions the other.").

[109] Gabrielle Schwartz, *POV: Proposed Title IX Rules Will Discourage Victims from Coming Forward*, BU TODAY, Dec. 12, 2018, http://www.bu.edu/today/2018/pov-proposed-title-ix-rules-will-discourage-victims-from-coming-forward/ ("DeVos' proposed rule changes will also exacerbate social and economic inequities. Students are not appointed representation, but will have to choose their own advisor for the live hearing. Wealthier students will be more likely to hire a lawyer, while lower-income students and those lacking in social capital will be less able to do so. This places some students at greater disadvantage within the campus judicial process.")

cannot afford that sum, they may strongly consider forgoing reporting[110] altogether, making both the individual and campus community less safe. Further, as most trial attorneys rely on litigation strategies and negotiation, the increased use of attorneys in campus processes will inevitably increase use of courts for post-campus litigation and bullying negotiation tactics[111]

In one circumstance, and OAESV employee worked with a student experiencing the following:

- A student knocked lightly on the door frame, a bag slung over her shoulder and smartphone in hand. She asks if she's at the right place and if she can bring her friend in with her. Options and resources are discussed, along with available services. The role of the advocate in the process play a prominent role in the conversation. How they provide holistic support and let survivors guide what happens, they are there for them. "Do I need an attorney?" She was a student on scholarship. Her parents were supportive, not all were, but didn't have the funding to help her. Maybe they could take a loan out, but college wasn't covered entirely so she already had some debt. It was a campus case, looking at a violation of campus policy. She didn't know if he (the accused) had a lawyer, she simply wanted to feel safe. Victims' of Crime Compensation wouldn't accept it and she didn't want even more people involved. She just wanted someone to go with her to support her, it was just a campus process.

3. *Requiring Advisors of Choice to Conduct Cross-Examination will likely Result in Numerous Unauthorized Practice of Law Violations, Resulting in Large Costs to Campuses and Parties, and Reductions in Meaningful Choice of Advisors*

Similarly, *Doe v. Baum* has led a small number of campuses to allow for cross-examination by advisors of choice. This has caused significant concern for the rape crisis center advocates who typically serve as advisors of choice in hearings, specifically because of the risk of practicing law without a license. Some rape crisis programs are taking the preventative step of not allowing staff to serve as advisors of choice until such time as an advisory opinion from the Ohio Bar Association and/or the American Bar Association become available on the applicability of unauthorized practice of law rules and potential risks for their non-attorney staff members. Should the Title IX rule mandate advisor of choice directed cross-examination, this result will be widespread. For years, survivors have

[110] Andrew Kreighbaum, *New Uncertainty on Title IX*, INSIDE HIGHER ED, Nov. 20, 2018, https://www.insidehighered.com/news/2018/11/20/title-ix-rules-cross-examination-would-make-colleges-act-courts-lawyers-say (quoting Brett Sokolow, President of the Association of Title IX Administrators) ("For a lot of those victims -- male, female or otherwise identified individuals -- who know they can't afford good legal advice going in, if the other side has high-paid lawyers, I think it's going to create a powerful incentive to not persist."); Suzanne B. Goldberg, *Keep Cross-Examination out of College Sexual-Assault Cases*, CHRONICLE OF HIGHER EDUC., Jan. 10, 2019, https://www.chronicle.com/article/Keep-Cross-Examination-Out-of/245448 ("[A]lthough the Department of Education says that its proposal will avoid "any unnecessary trauma" that might come from students questioning one another directly, some advocates argue that concerns about trauma remain strong and will probably deter students — especially those who are afraid of the accused student — from filing complaints at all.").

[111] For example, OAESV observed one respondent's attorney threaten to file sanctions against the complainant for seeking protection orders if the complainant did not ask the campus to drop the Title IX process.

worked closely with rape crisis center advocates from the time of their report through the conclusion of their campus Title IX process. These trusted advisors of choice provide consistent, informed support, and are often the survivor's preference for advisor of choice. As the vast majority of these advocates are not licensed attorneys, they will no longer be able to engage as advisors of choice without seriously risking the unauthorized practice of law. For example, as noted several times in this comment, 72%[112] of respondents who file suit against campuses after the conclusion of a Title IX process also name the complainant as a defendant. Thus, any legal tactic or strategy applied by the advisor of choice will very likely have an impact on any subsequent civil litigation, and in the case of criminal matters, the criminal trial. This is by definition the unauthorized practice of law, as articulated by the numerous state restrictions listed below. Informed advocates will no longer be available as advisors of choice, which means that either both parties will have to hire attorneys, or the institution will have to provide both parties with attorneys, increasing costs for everyone involved.

4. *Direct Cross-Examination in Rape Cases, due to Trauma, more often Hinders Truth Seeking than Helps*

An OAESV employee case example includes:

- A young man stood nervously in the hall, all alone. He continued to glance in, then down at his hand. He introduced himself and sat nervously in the chair in the corner, facing the door. Some idle chatter, lamenting the weather and class assignments. No one knew, he said, but he wanted something done. His parents couldn't know, he didn't want anyone to know. He just wanted something done. What happened to him wasn't right and he needed something done. Resources and supports? He quickly said no. He would do it himself, he didn't want more people involved. He knew what the system looked like. He shook his head, "no". He didn't want yet another person involved, to explain it to another person again and again.

Due to the very personal and traumatic nature of sex crimes, victims are more impacted by aggressive cross-examination than victims of other crimes.[113] This often has the impact of making the

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[112] ALYSSA KEEHAN ET AL., UNITED EDUCATORS, CONFRONTING CAMPUS SEXUAL ASSAULT: AN EXAMINATION OF HIGHER EDUCATION CLAIMS 14-15 (2015), *available at* http://www.ncdsv.org/ERS_Confronting-Campus-Sexual-Assault_2015.pdf. (Reporting that 72% of accused students who file a Title IX-related lawsuit against their university also sue their individual accuser for defamation.).

[113] Megan Reidy, *Comment: The Impact of Media Coverage on Rape Shield Laws in High-Profile Cases: Is the Victim Receiving a "Fair Trial"*, 54 CATH. U.L. REV. 297, 308-309 ("An example of such treatment is cross-examination, which allows rape victims to be treated as if they are on trial. Due to this unfair treatment, rape victims need heightened protection during the trial process. Although cross-examination is not unique to rape victims, attorneys use cross-examination to treat rape victims differently than victims of other crimes. Because 'rape is a sensitive crime of a sexual nature,' private, intimate details about the victim's life take on added significance. Some defense attorneys, through cross-examination of rape victims, endeavor to introduce evidence about the victim's past sexual behavior in an effort to discredit the victim's testimony. This evidence also is used to create reasonable doubt in the minds of the jurors as to the defendant's culpability and to question the victim's willingness to participate in the sexual act alleged to be rape. As a result of this treatment of rape victims, cross-examinations have been described as a 'second rape.' Rape shield statutes serve as a means of protecting the victim from this 'second rape.'"); Suzanne B. Goldberg, Keep Cross-Examination out of College Sexual-Assault Cases, CHRONICLE OF HIGHER EDUC., Jan. 10, 2019, https://www.chronicle.com/article/Keep-Cross-Examination-Out-of/245448 ("And although the Department of Education says that its proposal will avoid "any unnecessary trauma" that might come

truth less likely[114] to be found, a result that negatively impacts respondents, complainants, and campuses at large. Specifically, one study reported that when subjected to forceful cross-examination, 73% of participating witnesses recanted "at least one accurate fact stated in their testimony."[115] In the same study, "84% of the witnesses conceded at least once that they may have been mistaken as to one fact about which they were actually correct, and 68% of the witnesses conceded they may have been mistaken as to two or more facts."[116] Commenters attributed this outcome to "the of common cross-examination techniques, such as leading questions, negative feedback, and double or triple negative questions, lead either to confusion, memory distortion, or the witness just relenting and agreeing with the examining attorney.[117] Combined with the impact of trauma, which already often leads to counterintuitive testimony or disordered memories,[118] the impact of cross-examination in rape cases is anything but settled.

Examples of State Language Implicating Non-Attorneys for Engaging in Cross-Examination in Campus Title IX Hearings		
State	Law	Language
Arkansas	*Arkansas Bar Association* v. *Block*, 323 S.W.2d 912 (Ark. 1959).	Research of authorities by able counsel and by this court has failed to turn up any clear, comprehensible definition of what really constitutes the practice of law. Courts are not in agreement. We believe it is impossible to frame any comprehensive definition of what constitutes the practice of law. Each case must be decided upon its own particular facts.--The practice of law is difficult to define. Perhaps it does not admit of exact definition.
California	*People* v. *Merchants Protective Corp.*, 209 P. 363, 365 (Cal. 1922)	[I]n a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or

from students questioning one another directly, some advocates argue that concerns about trauma remain strong and will probably deter students — especially those who are afraid of the accused student — from filing complaints at all. … Research shows, for example, that a witness's nervous or stumbling response to adversarial questioning is more likely an ordinary human reaction to stress than an indicator of false testimony.").

[114] William J. Migler, *Comment: An Accused Student's Right to Cross-Examination in University Sexual Assault Adjudicatory Proceedings*, 20 CHAP. L. REV. 357, 366-372

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

		may not be depending in a court.' (quoting *In the case of Eley v. Miller*, 7 Ind. App. 529, 34 N. E. 836.).
Connecticut	*State Bar Association of Connecticut* v. *Connecticut Bank & Trust Co.*, 140 A.2d 863, 870 (Conn. 1958)	The practice of law consists in no small part of work performed outside of any court and having no immediate relation to proceedings in court. It embraces the giving of legal advice on a large variety of subjects and the preparation of legal instruments covering an extensive field.
Hawaii	*Fought & Co., Inc.* v. *Steel Engineering and Erection, Inc.*, 951 P.2d 487 (Haw. 1998)	It consists, among other things of the giving of advice, the preparation of any document or the rendition of any service to a third party affecting the legal rights ... of such party, where such advice, drafting or rendition of service requires the use of any degree of legal knowledge, skill or advocacy. Sen
Illinois	*Continental Cas. Co.* v. *Cuda*, 715 N.E.2d 663 (Ill. App. 1st Dist., 1999)	Our supreme court has described the practice of law as: "[T]he giving of advice or rendition of any sort of service by any person, firm or corporation when the giving of such advice or rendition of such service requires the use of any degree of legal knowledge or skill."
Indiana	*Fink v. Peden*, 17 N.E.2d 95 (Ind. 1938)	[T]o make it one's business to act for, and by the warrant of, others in legal formalities, negotiations, or proceedings.
Iowa	*Iowa Supreme Court Com'n on Unauthorized Practice of Law* v. *Sturgeon*, 635 N.W.2d 679 (Iowa 2001)	The essence of professional judgment of the lawyer is the educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment.

Maine	*Attorney Grievance Commission of Maryland* v. *Shaw*, 354 Md. 636, 732 A.2d 876, 882 (1999) (quoting *In re Application of Mark W.*, 303 Md. 1, 491 A.2d 576, 585 (1985)).	"The focus of the inquiry is, in fact, 'whether the activity in question required legal knowledge and skill in order to apply legal principles and precedent.' "
Minnesota	*Cardinal* v. *Merrill Lynch Realty/Burnet, Inc.*, 433 N.W.2d 864 (Minn. 1988)	The line between what is and what is not the practice of law cannot be drawn with precision. Lawyers should be the first to recognize that between the two there is a region wherein much of what lawyers do every day in their practice may also be done by others without wrongful invasion of the lawyers' field.
New Hampshire	Sup.Ct.Rules, Rule 35, Rule 1	The essence of the professional judgment of a lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment.
New Jersey	*In re Jackman*, 761 A.2d 1103 (N.J. 2000)	One is engaged in the practice of law whenever legal knowledge, training, skill, and ability are required. *Id.* at 66, 705 A.2d 397.
Pennsylvania	*Gmerek v. State Ethics Com'n*, 751 A.2d 1241 (Pa. 2000)	He appears for clients before public tribunals to whom is committed the function of determining rights of life, liberty and property according to the law of the land, in order that he may assist the deciding official in the proper interpretation and enforcement of the law...
Utah	*Board of Com'rs of Utah State Bar* v. *Petersen*, 937 P.2d 1263 (Utah 1997)	The practice of law, although difficult to define precisely, is generally acknowledged to involve the rendering of services that require the knowledge and application of legal principles to serve the interests of another with his

		consent. It not only consists of performing services in the courts of justice throughout the various stages of a matter, but in a larger sense involves counseling, advising, and assisting others in connection with their legal rights, duties, and liabilities. It also includes the preparation of contracts and other legal instruments by which legal rights and duties are fixed.
Vermont	*In re Welch*, 185 A.2d 458 (Vt. 1962)	In general, one is deemed to be practicing law whenever he furnishes to another advice or service under circumstances which imply the possession and use of legal knowledge and skill. The practice of law includes all advice to clients, and all actions taken for them in matters connected with the law.

q. Proposed Addition of § 106.45(3)(viii) (Electronic File Sharing System)

For the following reasons, OAESV opposes this provision of the Proposed Rule. This opposition is based upon concerns for access, privacy, expenses, time, and individuals with disabilities.

A respondent, complaint, and/or advisor of choice who experiences technical difficulties while accessing the file sharing system, such as the computer not working, the computer lacking compatibility with the file sharing system, or the computer slowing down while using the file sharing system, may find themselves unable to access all the files or fully prepare for the process without an extension. Not all students and employees own computers, and if they do there may be compatibility issues with the file sharing system program. If the person does not own a computer they will be forced to review private, sensitive evidence on a borrowed, peer, or public computer. All of these options significantly impact the privacy of all individuals involved. Borrowing a computer limits the time to be able to access the information and compromises privacy by putting the file sharing system on a third-party's computer. A public computer has limited hours, often unsecure wireless networks, and compromises the individual's ability to review and prepare in a private setting. Additionally, this requires a secure internet connection in a private area, which may not be available to all students and employees. If not paying for personal home internet, it will need to be accessed in a public place on campus, a public computer lab, a public library, or other location which is not private, secure, or conducive to effective preparation. Further, if one party has access to a laptop computer and the other does not, the party with access will have more time to review documents and less restrictions on how and when that review happens.

The electronic file sharing system contemplated by the Proposed Rule will not allow for copying or saving. Not only is this different than how students can prepare for classes, with pdfs, screenshots, document highlighting, and various other studying techniques; this is a significant departure from normal preparation for attorneys. Attorneys will require more time to access and utilize the file sharing system in order to effectively represent and assist their client. Therefore, the use of a filing sharing system will drive up costs of attorneys in Title IX hearings, making it less likely that complainants will have access to an advisor of choice who can engage in cross-examination without risking stepping into the unauthorized practice of law, not to mention limiting a complainants access to an individual trained to present evidence and prepare a case.

This method of file sharing is susceptible to manipulation. Not all files are created equal, in the file sharing systems. Depending upon the file type (pdf, jpg, png, doc, gif, tiff, eps, raw, psd, ai, and others), files uploaded in certain formats or over certain page numbers will take an extended period of time to load during the viewing process. OAESV has observed one such situation, in which a party uploaded over 1,000 pages of documents to the file sharing system in one pdf less than 48 hours prior to the hearing. Because these pages were contained in one document, each page took several seconds to load. If the school had not granted an extension, OAESV's client would not have had time (a multiplication of loading time and pages revealed that it would take one sitting of over 50 hours to review) to review all of the documents prior to the hearing. This extended period of time will impact everyone involved in the case: complainant, respondent, advisors, investigators, decision-makers, and administrators. This extended loading time will impact preparation time for the party targeted with these file types and sizes.

Finally, file sharing systems are particularly detrimental for individuals with disabilities. Individuals that are unable to have extended screen time would be unable to fully prepare without harming themselves. If they choose to use their screen time on the Title IX case, the school work will be negatively impacted. If they choose to use their screen time on school work, the Title IX report will be negatively impacted. This is a choice they should not be forced to make.

Thus, OAESV opposes this proposed regulation because an electronic file sharing system is detrimental to all parties involved.

r. Proposed Addition of § 106.45(3)(ix) (Time Frame for Evidentiary Report)

OAESV is requesting additional clarifications regarding the time frame of the evidentiary report. There are several features in this proposed rule that should be clarified in order to be equitable to the parties, including the complainant, respondent, and educational institution.

First, clarification would assist on whether ten days is business days or calendar days. Additionally, clarification regarding what days are included or excluded in this number would assist institutions in ensuring the appropriate amount of time. For example, how are holidays, intercession, closed days, emergency closures classified in this ten day count.

Second, clarification is needed on how much time the parties have to submit any changes prompted by their review. Although the regulation says that the report must be provided at least ten days prior and that the parties can review and provide a written response, no information is provided as to when that written response is due.

Third, the proposed regulation provides no information on what will be done with the review. What amount of additional time will be given before the hearing should any additional evidence be provided, information added, or if there is any issue brought forward with the review.

OAESV recommends that should additional evidence or information be added, an additional ten days be provided before the hearing after provision of the updated report, to avoid exploitive efforts by either the complainant or the respondent to reduce the amount of time available for the other party to review and respond to changes to the evidentiary report.

s. Proposed Addition of § 106.45(4) (Standard of Proof)

For the following reasons, OAESV opposes this provision of the Proposed Rule. As articulated in the Proposed Rule, the purpose of Title IX is to provide equity. To preserve this equity on campuses, the preponderance of the evidence (PPE) standard must be maintained as the required standard in sexual harassment matters. Notably, no court has ever held that a higher standard than PPE is required for suspension or expulsion based on student conduct violations,[119] and the majority of courts that have examined the issue upheld and promoted an even lower standard.[120] This standard, "substantial evidence,"[121] is "defined as enough relevant evidence that a reasonable person would support the fact-finder's conclusion. And the substantiality of the evidence must be based on the record as a whole; that is, the factfinder's conclusion must be based on evidence that is substantial in light of the evidence in the record that both bolsters and detracts from that conclusion."[122]

Despite judicial support for this lower standard of proof, campuses and scholars alike have embraced PPE. Proponents of PPE in this context believe it is the only appropriate standard for disciplinary proceedings "because it accommodates the interests of the accused student, the victimized student, and the campus community. Preponderance of the evidence acknowledges the gravity of the interests at stake for the accused student through application of a standard commonly applied in courts of law. But the preponderance of the evidence standard also enables schools to ensure that the interests of the victimized student and the school community are properly weighed against the interests of the accused."[123] Any standard higher than PPE standard would violate Title IX's core purpose of equity by placing a heavy burden on the complainant[124] than on the respondent.

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[119] Erin E. Buzuvis, *Title IX and Procedural Fairness: Why Disciplined Student Litigation Does Not Undermine the Role of Title IX in Campus Sexual Assault*, 78 MONT. L. REV. 71, 97-98 (2017) ("Lower courts agree that colleges and universities need not provide accused students the same procedural rights that criminal defendants receive, though they do not always agree on the particular rights a student must receive. . . . Notably, no court has ever held that more than a preponderance of evidence of a student's misconduct is constitutionally required to suspend or expel that student from school.").

[120] Lavinia M. Weizel, *The Process That Is Due: Preponderance of the Evidence As the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1633 (2012) ("Although few courts have directly addressed the constitutionally required evidentiary standard for school disciplinary proceedings, of those courts, the majority have held that due process requires disciplinary decisions to be based on 'substantial evidence.'").

[121] *Id.*

[122] *Id.*

[123] *Id.* at 1638.

[124] Erin E. Buzuvis, *Title IX and Procedural Fairness: Why Disciplined Student Litigation Does Not Undermine the Role of Title IX in Campus Sexual Assault*, 78 MONT. L. REV. 71, 107 (2017) ("Victims of sexual assault have an important stake in procedural fairness because its absence exposes the disciplinary outcome to internal and judicial appeals, which delay the process and risk overturning a potentially valid disciplinary outcome that was reached by a flawed process.").

Further, campus disciplinary hearings should not employ standards higher than those utilized in civil rights litigation,[125] heard in courts run by judges with significant enforcement mechanisms and powers that campuses do not have. Since the release of the Proposed Rule, OAESV has observed arguments that because of the damage accusations of sexual harassment or rape can cause respondents' reputations, the standard of proof should be higher than PPE. However, these arguments mistake the classification system for applying standards of proof.[126] The standard of proof used does not "depend on the alleged conduct of the defendant,"[127] it depends on the "nature of the proceedings-criminal or civil- and the specific cause of action."[128] For example, the same conduct can be subjected to the beyond a reasonable doubt standard in criminal court, while being subjected to PPE in a civil tort case.[129] Thus, "[b]ecause Title IX requires colleges to address sexual assault as a civil rights matter, OCR is legally justified-indeed, is following legal precedent-in requiring schools to use a civil standard."[130]

Ultimately, courts have provided that due process can be satisfied with the PPE standard, especially considering the additional protections provided by this Proposed Rule. Use of a standard higher than what is required by civil courts evaluating Title IX and other civil rights statutes would both misconstrue the way in which burdens of proof are assigned, and create a disproportionate burden for the complainant that violates the equity standard that Title IX embodies.

For the reasons stated above, OAESV recommends that the Department of Education mandate that all campus sexual harassment proceedings employ the preponderance of the evidence standard of proof.

t. Proposed Addition of § 106.45(5) (Appeal)

For the following reasons, OAESV supports this provision of the Proposed Rule subject to the modification described herein. Specifically, OAESV supports the Proposed Rule requirement that institutions may not restrict appeal opportunities to one party. However, due to the decreased standard

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[125] Amy Chmielewski, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 BYU EDUC. & L.J. 143, 149 ("Critics of the Dear Colleague Letter have emphasized the alleged criminal conduct of an accused student to argue that educational institutions should use a heightened evidentiary standard when adjudicating cases of rape or sexual assault. They reason that because rape is considered a serious crime, an alleged rapist must be found "guilty" beyond a reasonable doubt, regardless of where his adjudication takes place. However, this argument misconstrues the way that burdens of proof are allocated within the legal system. Because Title IX requires colleges to address sexual assault as a civil rights matter, OCR is legally justified-indeed, is following legal precedent-in requiring schools to use a civil standard. … The standard of evidence used depends on the nature of the proceedings-criminal or civil-and the specific causes of action; it does not depend on the alleged conduct of the defendant. Because many acts are both potential crimes and potential torts, the same act may be subject to two different standards of evidence in two separate proceedings.")

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.*; *see*, *e.g.*, William E. Thro, *No Clash of Constitutional Values: Respecting Freedom and Equality in Public University Sexual Assault Cases*, 28 REGENT U. L. REV. 197, 210 (2016) ("Indeed, the civil courts use a preponderance of the evidence standard to adjudicate claims under the federal civil rights statutes.").

of liability in the Proposed Rule, OAESV believes that campuses should be mandated to afford appeals to both parties in all cases related to sexual harassment.

u. Proposed Addition of § 106.45(6) (Informal Resolution/Mediation)

For the following reasons, OAESV opposes this provision of the Proposed Rule. OAESV opposes the option to use mediation in sexual harassment cases, due to significant peer-reviewed research on the inappropriate nature of traditional mediation in such cases. This research, along with significant quantitative data, analysis on mediation in violence against women cases, and qualitative narratives from campus complainants demonstrates the dangerous nature of mediation in sexual harassment and violence cases to such a degree that other federal programs prohibit grant recipients serving victims from engaging clients in mediation related to their abuse.[131] The inapplicability of mediation, even when voluntary, to sexual harassment cases is illustrated clearly by examining the circumstances for which campuses typically and traditionally employ mediation.[132] These situations, which include roommate conflicts, student group management disputes, and landlord/tenant conflicts, necessarily involve problem solving through mutual admissions of (albeit differing) degrees of wrongdoing and compromise. Experts agree that "[m]ediation does not fit situations where someone has been harmed by another person because it provides neutrality and treats parties as equal partners."[133] In cases of sexual harassment, the complainant seeks an end to sexual harassment and remedies that will curtail further harm caused by continued exposure to the perpetrating party. Concessions by a victim cannot stop sexual harassment that was prohibited in the first place.[134] Further, mediation is inappropriate because it requires not only the complainant to admit some form of wrongdoing, it also requires the respondent to admit a form of wrongdoing. In cases with such high stakes, it is inappropriate to request that either party admit wrongdoing without an investigation and hearing.

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[131] STOP VAWA Statement of Acknowledgement, *available at* https://publicsafety.ohio.gov/links/ocjs_STOP_VAWA_Statement.pdf (requiring VAWA STOP Grant recipients to acknowledge that required mediation in sexual violence matters compromises victim safety).

[132] Mary P. Koss & Elise C. Lopez, *VAWA After the Party: Implementing Proposed Guidelines on Campus Sexual Assault Resolution*, 18 CUNY L. REV. F. 4, 7 (2014) (agreeing that mediation is inappropriate for sexual assault, stating "The typical issues addressed by these programs include cases such as roommate conflict, fights between students, landlord/tenant disputes, and conflicts arising within student groups.").

[133] *Id.*; *see also* MARK S. UMBRIGHT AND JEAN GREENWOOD, OFFICE FOR VICTIMS OF CRIME, VICTIM-SENSITIVE VICTIM-OFFENDER MEDIATION: RESTORATIVE JUSTICE THROUGH DIALOGUE 2, *available at* https://www.ncjrs.gov/ovc_archives/reports/96517-gdlines_victims-sens/ncj176346.pdf (differentiating Victim-Offender Mediation from regular mediation, where "the parties are called 'disputants,' and the assumption made is that **both are contributing to the conflict and therefore both need to compromise** to reach a settlement. Often, mediation in these cases focuses heavily upon reaching a settlement, with less emphasis upon discussing the full impact of the conflict on the disputants' lives."); William C. Warters, *Models of Mediation*, *in* REFRAMING CAMPUS CONFLICT: STUDENT CONDUCT PRACTICE THROUGH A SOCIAL JUSTICE LENS 126 (Jennifer M. Schrage & Nancy G. Giacomini eds. 2009) (defining mediation as "conciliatory interventions by an acceptable third party who works with individuals or groups in conflict to facilitate the development of a shared and mutually acceptable solution to **their problem(s)**.").

[134] This assertion is supported by the significant scholarship developing the "victim-respondent" mediation model, which differs significantly in approach. *See*, *e.g.*, Margo Kaplan, *Restorative Justice and Campus Sexual Misconduct*, 89 TEMP. L. REV. 701, 715 (2017) ("Victim-responsible party mediation, in contrast, does not bring in the community, but rather is limited to the victim and responsible party. It uses trained mediators to help the parties develop a reparative plan, though reaching an agreement is often secondary to the goals of communication and emotional healing.").

Should the mediation option be retained, OAESV urges the Department to mandate that no school permitting mediation be allowed to require students to give up the option of a formal disciplinary process as a condition of engaging in mediation. OAESV believes that institutions will have significant incentive, due to the difficulties caused by the cross-examination by advisor of choice requirement, to promote the mediation option and foreclose the disciplinary process option.[135] In addition, persons suffering from trauma in the wake of a sexual assault may not fully comprehend that they are giving up a significantly different alternative. Thus, allowing campuses to preclude formal Title IX processes with the mediation option ignores the impact of trauma on the brain and scientific data on the dynamics of sexual assault.

v. Proposed Addition of § 106.45(7) (Record Keeping and Retention)

For the following reasons, OAESV requests a longer retention period for records. Due to the high rate of complainants and respondents who file lawsuits after the completion of a Title IX hearing, it is critical that institutions be mandated to keep all files for a uniform time period that aligns with the longest statute of limitations for Title IX cases. Further, OAESV recommends that the file be retained at least for the life of the students involved on campus, and extend to a reasonably possible time period covering the possibility that the student may return for a graduate degree.

File retention rates vary by state and profession. Some states require file retention in civil matters for unspecified periods of time informed by statues of limitations and other factors, many states require licensed attorneys to retain client files for proscribed amounts of time. Examples include:

- Massachusetts Rules of Professional Conduct Rule 1.15A: Client files
  - " . . . a lawyer shall take reasonable measures to retain a client's file in a matter until at least six years have elapsed after completion of the matter or termination of the representation in the matter . . ."[136]
  - ". . . files relating to the representation of a minor shall be retained until at least six years after the minor reaches the age of majority."[137]
  - ". . . in all other criminal or delinquency matters, for ten years after the latest of the completion of the representation, the conclusion of all direct appeals, or the running of an incarcerated defendant's maximum period of incarceration, but in no event longer than the life of the client."[138]
- Washington State Bar Association recommends retaining client files for seven years in tort and contract cases:

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[135] Adam Harris, *Betsy DeVos's Sexual-Assault Rules Would Let the Accused Cross-Examine Accusers*, ATLANTIC, November 17, 2018, https://www.theatlantic.com/education/archive/2018/11/betsy-devos-campus-sexual-assault/576100/ (suggesting that "due to labor and budget constraints, institutions might find informal processes—such as issuing no-contact orders, counseling, and other methods of resolving sexual-misconduct allegations—more appealing."); *id.* (quoting Catherine Lhamon, Chair of the U.S. Commission on Civil Rights) ("Virtually everybody would try to avoid live hearing. … It would be difficult to administer effectively and difficult to live through as either the accuser or the accused student.").

[136] Massachusetts Rules of Professional Conduct, Rule. 1.15A

[137] *Id.*

[138] *Id.*

- Table of Dates for File Retention[139]

PRACTICE SPECIALTY	GUIDELINES
Probate Claims & Estates	Excluding tax, 10 years after final judgment; tax basis information – permanently
Tort Claims (Plaintiff)	7 years after final judgment or dismissal, except when minor involved; then when minor attains majority plus three years
Tort Claims (Defense)	7 years after final judgment or dismissal.
Contract Action	7 years after satisfaction of judgment, dismissal, or settlement.
Bankruptcy Claims & Filings	7 years after discharge of debtor, payment of claim, or discharge of trustee or receiver
Dissolution	7 years after entry of final judgment or dismissal of action, or date at which settlement agreement is no longer effective, except when minor children are involved and then at the young attaining majority plus three years
Real Estate Transactions	Subject to guidelines and tax needs; otherwise 7 years after settlement date, judgment, termination of sale, foreclosure, or other completion of matter; Retain surveys and legal descriptions not of record
Leases	7 years after termination of lease
Original Wills	Return to client after signing and conclusion of matter or file with local court of proper jurisdiction
Criminal Cases	7 years after date of acquittal or length of incarceration

- California has been interpreted to require records retention for five years.[140]
- North Carline requires a six year retention.[141]

[139] https://www.wsba.org/docs/default-source/wsbf-documents/table-of-dates-for-fileretention.pdf?sfvrsn=4d0d05f1_4.
[140] Retaining the Client File after Representation Ends, ORANGE CNTY. BAR ASS'N (Apr. 2014), http://www.ocbar.org/All-News/News-View/ArticleId/1240/April-2014-Retaining-the-Client-File-Afterthe-Representation-Ends
[141] NORTH CAROLINA STATE BAR, DISPOSING OF CLIENT FILES, https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-209/.

To avoid any confusion that may lead to the unintentional destruction of files before the statute of limitations in a Title IX claim, the Department should implement a consistent rule across the country that requires file retention for the length of the longest Title IX statue of limitations. Across the United States, statutes of limitations in Title IX claims range from one year to six years. The following statute of limitations highlight the range:

- Maine: 6 years. *Nelson v. University of Me. Sys.*, 914 F. Supp. 643 (D. Me. 1996)
- Ohio: 2 years. *Giffin v. Case Western Reserve Univ.*, 181 F.3d 100 (6th Cir. 1999)
- California: 1 year. *Stanley v. Trs. of the Cal. State Univ.*, 433 F.3d 1129 (9th Cir. 2006)
- Kansas: 2 years. *Clark v. Blue Valley Unified Sch. Dist. No. 229*, 2013 U.S. Dist. LEXIS (D. Kan. 2013)
- Missouri: 5 year., *Walker v. Barrett*, 650 F.3d 1198 (8th Cir. 2011)
- Florida: 4 years. *Porter v. Duval County Sch. Bd.*, No. 3:09-cv-285-J-32MCR, 2010 U.S. Dist. LEXIS 29399 (M.D. Fla. March 26, 2010).

Clearly, record retention standards vary greatly by location and profession. Traditional higher education students range in attendance from two to seven years and may return to school for additional education. Students can transfer between schools, sometimes transferring credits and sometimes not. Minors have limited rights, with extended abilities to report for most crimes. OAESV recommends that files should be retained at least for as long as the student is at the institution and extend to a reasonably possible time period covering the possibility that the student may return for a graduate degree. Employees should also not be forgotten, and should have enough time to obtain their records to be able to file inside and outside the educational institution.