

BACKGROUND

- **Title IX protects every student's right to educational opportunities and benefits free from sex discrimination.** Every student has the right to attend school without fear of sexual harassment or assault. Every student has the right to attend school without fear of being determined responsible for sexual harassment or assault without due process protections.
- Title IX regulations on the books since the 1970s require schools to have a non-discrimination policy and disseminate that policy to its students and employees, have a grievance process that provides for the "prompt and equitable" resolution of sex discrimination complaints, and designate at least one employee to serve as a Title IX Coordinator to handle complaints of sex discrimination. However, **Title IX regulations have never addressed sexual harassment or assault, specifically, or the need for due process protections in Title IX grievance processes related to sexual harassment.**
- In a 1998 decision (*Gebser*), the U.S. Supreme Court held that *teacher-on-student* sexual harassment could constitute sex discrimination under Title IX, and in a 1999 decision (*Davis*) the Supreme Court held that *student-on-student* sexual harassment could constitute sex discrimination.
- Since the mid-1990s, the Education Department has treated sexual harassment (and sexual assault, referred to together as "sexual harassment") as a form of sex discrimination under Title IX, but has addressed it only through guidance – never through regulation. A result has been unpredictable Title IX sexual harassment systems under which complainants and respondents have been thrust into inconsistent grievance proceedings that often deprive both parties of a fair process. Such systems too often overlook the importance of a school offering supportive measures to a complainant reporting sexual harassment when the reporting complainant does not wish to participate in a grievance process, and ignore the need to avoid punishing an accused person without first reaching a factual determination of responsibility in an impartial proceeding.
- This Administration's regulation of sexual harassment under Title IX is therefore an historic process, for the first time treating the problem of sexual harassment with the gravity it deserves – through **notice and comment rulemaking** so stakeholders and the public can voice their perspectives on this topic that carries such high stakes for survivors, accused persons, and schools. **It is a serious process for a serious subject.** Survivors often struggle or fail to continue their educations due to emotional and physical suffering in the wake of sexual harassment. Persons accused face the prospect of ruined reputations and derailed educational opportunities when punishments are imposed based on allegations without an impartial fact-finding process. Schools have an obligation to protect all their students from sex discrimination by responding supportively to survivors while giving due process protections to respondents.
- As context for what this proposed Title IX regulation does and does not address, it is helpful to keep a few reference points in mind.
 - First, the two principal objectives of Title IX are to prevent federal dollars from flowing to schools that deny students access to educational opportunities on the basis of sex and to provide individuals with effective protections against such discriminatory practices; Title IX is not a prohibition on sexual misconduct or sexual crimes per se.
 - Second, Title IX is directed at schools themselves – not at students or faculty. Title IX does not punish people who commit sexual harassment – it penalizes schools that respond to sexual harassment in a way that amounts to subjecting students to sex discrimination.
 - Third, Congress passed Title IX under its Spending Clause authority, and the Supreme Court has observed (e.g., in *Gebser*) that this means that as part of the "contract" a school enters into by accepting federal funding, the government can only hold schools accountable for things that are within the school's knowledge and control.
 - Fourth, because sexual harassment can constitute sex discrimination under Title IX, the proposed regulation does not attempt to relieve schools of responsibility to address sexual harassment by, for example, permitting schools to discharge their response obligations simply by "calling the

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police.” Instead, complainants retain three independent avenues for pursuing redress for sexual harassment:

- (1) Reporting their experience to their school and receiving supportive measures whether or not they also choose to file a formal complaint asking their school to discipline the alleged perpetrator;
 - (2) Filing a civil lawsuit against the alleged perpetrator; and/or
 - (3) Pursuing criminal prosecution of the alleged perpetrator.
- Overall, the existing regulations prohibiting sex discrimination remain intact and the proposed regulation adds new sections specific to sexual harassment. In broad strokes **the proposed regulation describes three things:**
 - (1) ***What constitutes sexual harassment*** for purposes of rising to the level of a civil rights issue under Title IX;
 - (2) ***What triggers a school's legal obligation to respond*** to incidents or allegations of sexual harassment; and
 - (3) ***How a school must respond.***
 - The proposed regulation **requires schools to respond meaningfully to all sexual harassment reports** of which the school becomes aware without requiring every report to activate the school's grievance process. The regulation **encourages schools to offer students supportive measures** designed to restore or preserve a complainant's access to the school's education program and activities (e.g., no-contact orders, changes in class schedules or dorm room assignments, or counseling) **even when the reporting complainant does not want to file a formal complaint**, empowering complainants with greater control over the type of school response that will best serve their needs.
 - When a formal complaint is filed (either by the complainant or the Title IX Coordinator), the school **must investigate and apply certain due process safeguards** so that whatever a school decides to do with respect to disciplining a respondent and providing remedies to a complainant is based on a fair determination of the facts.
 - Within due process guardrails, the thousands of different K-12 schools, colleges and universities across the country retain pedagogical control over their educational environments. For example, the regulation **does not** demand any particular type of discipline against offenders, **does not** prevent (or require) a school from using affirmative consent in the school's code of conduct, and **does not** prevent a school policy from prohibiting sexual behavior that does not meet the Title IX definition of harassment. The regulation **leaves flexibility** for a school to pursue informal resolutions, designate its own reasonable time frames, conduct investigations through the school's own employees or by outsourcing that function, coordinate with law enforcement as appropriate, and decide whether to offer a school-level appeal.
 - The proposed regulation promotes Title IX policies and procedures that are more transparent, consistent and reliable in their outcomes, recognizing that schools exist to educate their students in a safe, nondiscriminatory environment and premised on Secretary DeVos' commitment that a “better way forward” under Title IX means both ensuring that **every survivor is taken seriously and that every person accused knows responsibility is not predetermined.**
 - The proposed regulation describes the Title IX legal obligations to which the Department will vigorously hold schools, colleges and universities accountable. Identifying the root causes and reducing the prevalence of sexual harassment across our nation's schools and campuses remains within the province of schools, colleges, universities, advocates and experts.

SUMMARY OF PROPOSED TITLE IX REGULATIONS

Proposed Section 34 CFR 106.44(e)(1)

Defining Sexual Harassment. Sexual harassment can mean a wide variety of things in common parlance. The proposed regulation defines sexual harassment *actionable under Title IX* to mean any of three types of behavior:

- (1) A school employee conditioning an educational benefit or service upon a person's participation in unwelcome sexual conduct (often called **quid pro quo harassment**); or
 - (2) Unwelcome conduct on the basis of sex that is so **severe, pervasive and objectively offensive** that it effectively denies a person equal access to the school's education program or activity, or
 - (3) **Sexual assault** as that crime is defined in the Clery Act regulations.
- Taking all three parts together, this definition is intended to ensure that only objectively serious behavior that, if left unaddressed by the school would jeopardize a student's access to education, is actionable under Title IX.
 - The second prong of this definition is imported directly from the Supreme Court's *Davis* decision and promotes protection of free speech and academic freedom in a way that the more expansive and subjective definition of harassment used in Department guidance has not. At the same time, quid pro quo harassment and sexual assault would constitute sexual harassment without also meeting the *Davis* definition because even a single instance of such serious conduct may jeopardize equal access to education.
 - It is important to note that including criminal sexual assault as a form of sexual harassment is not intended to imply that schools should become criminal courts putting alleged rapists on trial; rather, it is recognizing that sexual assault is an extreme form of unwelcome sexual conduct such that if a school ignores a sexual assault, the school might be subjecting its students to sex discrimination. In other words, schools are not supposed to replace the criminal justice system and prosecute sexual assault, but just because a type of serious sexual harassment is also a crime does not excuse a school from addressing it as discrimination under Title IX.

Proposed Section 34 CFR 106.44(a)

What Triggers A School's Obligation To Respond. The proposed regulation creates a Title IX framework in which a school's obligation to respond is triggered only when certain conditions are met.

- *First*, the school itself must have **actual knowledge** of sexual harassment (or allegations) because the Supreme Court has held that under Congress' Spending Clause authority a school can only be held liable for conduct of which it knows and has control. Under the proposed regulation, **reporting sexual harassment to a Title IX Coordinator will always give the school actual knowledge**. In K-12 schools, reporting student-on-student harassment to any teacher at that school gives the school actual knowledge. For all schools, colleges and universities, the test for whether reporting to any other school employee gives the school actual knowledge is whether the person given notice of the report is "an official with authority to take corrective action," a standard imported directly from Supreme Court case law (e.g., *Gebser*). See also Proposed Section 34 CFR 106.44(e)(6).
- *Second*, the alleged harassment **must involve conduct that occurred within the school's own program or activity** because Title IX by its own text applies to discrimination occurring "under any education program or activity" receiving federal funds. It is important to note that this **does not create an artificial bright-line between harassment occurring "on campus" versus "off campus."** Geography does not necessarily determine whether the harassment is under the school's program or activity; rather, situations are fact-specific and schools should look to factors such as whether the harassment occurred at a location or under circumstances where the school owned the premises, exercised oversight, supervision or discipline over the location or

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participants, or funded, sponsored, promoted or endorsed the event or circumstance where the harassment occurred.

- *Third*, the alleged harassment must have been perpetrated against a person “in the United States” (affecting, for example, **study abroad programs**); this is a necessary condition because the text of the Title IX statute limits protections to “person[s] in the United States.”

Proposed Section 34 CFR 106.44(a)-(b)

How A School Must Respond. Schools must treat seriously all reports of sexual harassment (that meet the definition of harassment and the conditions of actual knowledge and jurisdiction discussed above), whether or not the complainant files a formal complaint. The proposed regulation adopts the rationale used by the Supreme Court to hold a school liable under Title IX only when the school knows of sexual harassment allegations and responds in a way that is “**deliberately indifferent.**” The proposed regulation tracks the Supreme Court’s *Davis* decision explaining that “deliberately indifferent” means “**clearly unreasonable in light of the known circumstances.**”

- The Supreme Court’s rationale for adopting this standard is persuasive: a school must “do something” when faced with allegations that a student is suffering sexual harassment, so that no sexual harassment can be swept under a rug even when institutional reputational and financial interests incentivize a school to do so. At the same time, the federal government should not second-guess a school’s response to every sexual harassment situation in a manner that improperly pressures schools to take particular disciplinary actions against offenders or unreasonably holds schools accountable for unpredictable actions of perpetrators.
- The proposed regulation requires a school to **respond meaningfully to every report** of sexual harassment (of which the school has actual knowledge and that concerns conduct within the school’s program or activity). A school must, however, activate its grievance process to potentially punish a perpetrator when a formal complaint is filed. Every school must have a Title IX Coordinator standing by to intake both reports and formal complaints, and to coordinate effective implementation of supportive measures. A formal complaint can be filed by a complainant or by the Title IX Coordinator. *See also* Proposed Sections 34 CFR 106.44(e)(2)-(5).
- A school must investigate every formal complaint (unless the alleged conduct does not meet the definition of sexual harassment, or did not occur within the school’s own program or activity). If a school follows grievance procedures consistent with the proposed regulation then the school has a **safe harbor** against a finding of deliberate indifference with respect to the school’s response to the formal complaint. *See also* Proposed Section 34 CFR 106.44(b)(1).
- Where no formal complaint is filed and thus the school does not have to investigate, the school must still “do something,” and the most natural “something” is to **offer the complainant supportive measures**. Colleges and universities that respect the wish of a complainant to not file a formal complaint, yet offer the complainant supportive measures, get a **safe harbor** against a finding of deliberate indifference. The same safe harbor is not offered to K-12 schools in recognition that elementary and secondary schools need to protect younger students in ways that may more often require the Title IX Coordinator to file a formal complaint even when a young victim does not want to file. Either way, schools, colleges and universities are incentivized to offer supportive measures with or without a formal investigation. *See also* Proposed Section 34 CFR 106.44(b)(3).
 - The proposed regulation **describes supportive measures** as non-disciplinary and non-punitive individualized services offered as appropriate, as reasonably available and without fee or charge, to protect the safety of all parties and deter sexual harassment. Where a complainant reports a sexual harassment incident but does not wish to file a formal complaint, supportive measures provide a go-to response for a school to demonstrate it is responding to the reported incident in a manner that is not clearly unreasonable, without punishing the alleged perpetrator absent a determination of responsibility. Supportive measures are available to both complainants and respondents to preserve each party’s equal access to their education pending the outcome of the investigation. *See also* Proposed Section 34 CFR 106.44(e)(4).

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- To address possible serial predator or repeat offender situations, the proposed regulation requires the Title IX Coordinator to file a formal complaint to investigate a possible pattern of harassment (even where no reporting complainant wants to file a formal complaint). Where the school then follows its grievance procedures, the school has a **safe harbor** against a finding of deliberate indifference. See *also* Proposed Section 34 CFR 106.44(b)(2).

Proposed Section 34 CFR 106.45(a)-(b)(1)

Schools must have grievance procedures to handle each formal complaint of sexual harassment (that meets the definition of harassment and the conditions of actual knowledge and jurisdiction discussed above). School grievance procedures must contain certain protections for the parties including:

- A **presumption of innocence** for the respondent throughout the grievance process;
- The school must **objectively evaluate all relevant evidence** including inculpatory and exculpatory evidence;
- All Title IX Coordinators, investigators and decision-makers **must not have conflicts of interest or bias** for or against complainants or respondents;
- **Training materials** for Title IX Coordinators, investigators and decision-makers must foster impartial determinations without relying on sex stereotypes;
- **Reasonably prompt timeframes** for the grievance process, where extensions of timeframes are allowed for good cause;
- A respondent cannot face discipline without due process protections;
- Where a respondent is found responsible the complainant must be given **remedies designed to restore or preserve equal access to education** (these remedies may be similar to supportive measures in place during the investigation).

Proposed Section 34 CFR 106.45(b)(2)-(b)(3)

Upon the filing of a formal complaint the school must give **written notice** to the parties containing sufficient details to permit a party to prepare for any initial interview and proceed with a **factual investigation**. When investigating, the school must:

- Ensure the **burden of proof** and burden of gathering evidence rest on the school, not on the parties;
- Provide **equal opportunity for both parties** to present witnesses and evidence;
- Not restrict the ability of either party to discuss the allegations or gather relevant evidence (e.g., **no “gag orders”**);
- Provide the parties with the same opportunity to be accompanied at all phases of the grievance process by an **advisor of the party's choice** (who may be an attorney);
- Give **written notice** of any interview, meeting, or hearing at which a party is invited or expected to participate;
- Provide **equal access to review all the evidence** that the school investigator has collected, including the investigative report, giving each party equal opportunity to respond to that evidence before a determination is made;
- For K-12 schools, a hearing is optional but the parties must be allowed to submit written questions to challenge each other's credibility before the decision-maker makes a determination.
- For colleges and universities, a final determination must be made at a live hearing, and **cross-examination must be allowed (with rape shield protections against asking about a complainant's sexual history) and must be conducted by each party's advisor (i.e., no personal confrontation allowed)**.

Proposed Section 34 CFR 106.45(b)(4)

- After investigation, a **written determination** must be sent to both parties explaining for each allegation whether the respondent is responsible or not responsible including the facts and evidence on which the conclusion is based. The determination must be made by a decision-maker who is not the same person as the Title IX Coordinator or investigator (this requirement would thus **prohibit Title IX systems in K-12 schools and colleges and universities from using a “single-investigator” or “investigator-only” model**). The determination must be made

by applying **either the preponderance of the evidence standard or the clear and convincing evidence standard**; however, a school can use the lower preponderance standard only if it uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. Further, schools must use the same standard of evidence in cases against student respondents that it uses in cases against employee respondents, including faculty.

- Where a finding of responsibility is made against the respondent, the written determination must describe what **remedies the school will provide to the survivor** to restore or preserve equal access to the school's education program or activity, and any sanctions imposed on the respondent.

Proposed Section 34 CFR 106.45(b)(5)

Under the proposed regulation, if a school chooses to offer any appeal, it **must allow both parties to appeal**. The appeal decision-maker cannot be the same person who served as the Title IX Coordinator, investigator or decision-maker and must be free from bias or conflicts of interest. Appeals must be resolved within reasonable time frames. Each party must have the opportunity to submit written arguments for or against the outcome. While a complainant has no right to demand a particular disciplinary sanction against a respondent who was found responsible the complainant can challenge on appeal the adequacy of the remedies designed to ensure the complainant's equal access to education. Such remedies, unlike supportive measures, can burden a respondent who was found responsible, e.g., a no-contact order requiring the respondent to leave a common area where the complainant arrived first.

Proposed Section 34 CFR 106.45(b)(6)

As long as the process is voluntary for all parties after being fully informed and written consent is provided by both parties, a **school may facilitate informal resolution** of a sexual harassment complaint. This could include mediation, restorative justice, or other models of alternative dispute resolution.

Proposed Section 34 CFR 106.45(b)(7)

Schools must create and maintain **records documenting every Title IX sexual harassment investigation** and determination of responsibility, including any informal resolution or appeal, and all materials used to train their Title IX Coordinators, investigators and decision-makers. **Parties may request copies of these records pertaining to their own case**. Schools must further keep records regarding the school's response to every *report* of sexual harassment of which it becomes aware even if no formal complaint was filed, including documentation of supportive measures offered and implemented for the complainant. The school's documentation must include the facts on which it bases its conclusion that it was not deliberately indifferent to the allegation of sexual harassment. This will assist parties in holding their schools accountable and assist the Department in enforcing Title IX.

Proposed Section 34 CFR 106.3

The proposed regulation clarifies that the Department will not assess damages against a school as a remedy for a violation of these regulations. This recognizes that the Department is not a court of law equipped to assess damages to compensate a victim for harms such as emotional distress and will focus enforcement efforts on securing equitable relief to bring schools into compliance with Title IX.

Proposed Section 34 CFR 106.6

The proposed regulation expressly states that nothing in these regulations requires any school to restrict rights that are protected under the First Amendment, the Due Process Clauses or any other constitutional provision, and that employees' rights under Title VII are unaffected.

Proposed Section 34 CFR 106.12

The current regulation requires faith-based institutions to submit a statement to the Assistant Secretary in order to claim the religious exemption contained in the Title IX statute. The proposed regulation dispenses with that requirement and states that an institution that qualifies for the religious exemption can raise that exemption in response to a Department investigation, with or without previously submitting a statement to the Assistant Secretary. The Title IX statutory religious exemption is rooted in First Amendment rights and the Department believes it should not burden that constitutional protection.