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RE: ACLU Comments in Response to Proposed Rule,
“Nondiscrimination on the Basis of Sex in Education
Programs or Activities Receiving Federal Financial
Assistance,” RIN 1870-AA14.

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INTRODUCTION

The American Civil Liberties Union (ACLU) submits these comments on the U.S. Department of Education’s Proposed Rule entitled “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” published in the Federal Register on November 29, 2018.

For nearly 100 years, the ACLU has been our nation’s guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee to all people in this country. With more than 3 million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual’s rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, gender identity or expression, disability, national origin, or record of arrest or conviction.

The ACLU’s comments are informed by our commitment to the Constitution and its values, and to the civil rights statutes that further those values. Four principles animate our comments:

First, the ACLU values the right to be free from sex-based discrimination, harassment, and violence, a right central to

gender justice. Enforcement of this right is essential given the nation's long history of failing to respond adequately to sexual assault and other forms of gender-based discrimination and violence, and the inequality perpetuated as a result. The Proposed Rule sets the requirements for educational institutions to prevent and remedy sexual assault and harassment that denies or limits education on the basis of sex.

Sexual harassment and assault of students is a pervasive problem. One study, conducted by the Association of American Universities, surveyed 27 campuses and found that over 26 percent of undergraduate women who responded to the survey reported experiencing nonconsensual sexual contact involving physical force or incapacitation, and nearly 62 percent of those responding reported experiencing sexual harassment.¹ The percentages were even higher for transgender students.² Studies also indicate that LGB students,³ students with disabilities,⁴ and students of color⁵ experience sexual violence at heightened rates. Sexual harassment and violence have serious consequences for education and equality, and any Title IX rules must recognize the scope and gravity of the problem.

Second, the ACLU values due process, including the right to a fair process in school disciplinary proceedings and the right to be free from discriminatory and overly punitive discipline practices. Due process requires, at a minimum, notice and a meaningful opportunity to be heard. Where serious educational consequences are at stake, school disciplinary proceedings should provide a fair process for assessing credibility, including cross-examination of adverse witnesses, and a chance to review exculpatory and inculpatory evidence. The Final Rule should be designed to protect fairness to, and the rights to education of, both the respondent and the complainant.

Third, the ACLU is motivated by its commitment to education, which is foundational to our economic life, our democracy, and equality. Addressing discriminatory barriers to education – whether rooted in sex, race, immigration status, or disability – is therefore critical. By the same token, fair process in disciplinary proceedings is particularly important, so that neither accused students

¹ See ASS'N OF AM. UNIVS., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT, at xii–xvi (2017), <https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf>.

² *Id.* at xiii–xvi.

³ *Id.* at xx.

⁴ *Id.*

⁵ Robert W. S. Coulter et al., *Prevalence of Past-Year Sexual Assault Victimization among Undergraduate Students: Exploring Differences by and Intersections of Gender Identity, Sexual Identity, and Race/Ethnicity*, 18 PREVENTION SCI. 726, 728–30 (2017).

nor those who suffer sexual harassment or assault lose access to education because of bias, unjust outcomes, or a lack of opportunity to be heard.⁶

Fourth, the ACLU values consistency in the treatment of discrimination claims. Federal law prohibits educational institutions receiving federal funding from discriminating on the basis of sex, race, national origin, and disability. Absent a compelling reason, the Department should not single out complaints involving sex discrimination or harassment for different standards than complaints involving other forms of discrimination or harassment. The Department's Proposed Rule for responding to sexual harassment under Title IX, however, departs repeatedly from the rules for responding to racial harassment under Title VI, without any explanation for the divergent treatment. There should be no double standard for sex discrimination.⁷

We appreciate that some of these principles can come into conflict. Conventional wisdom all too often pits the interests in due process and equal rights against each other, as though all steps to remedy campus sexual violence will lead to deprivations of fair process for the respondent, and robust fair process protections will necessarily disadvantage or deter complainants. There are, however, important ways in which the goals of due process and equality are shared. Both principles seek to ensure that no student—complainant or respondent—is unjustifiably deprived of access to an education. Moreover, both parties (as well as the schools themselves) benefit from disciplinary procedures that are fair, prompt, equitable, and reliable.

Applying these principles, the ACLU believes the Proposed Rule undermines Title IX by substantially reducing the responsibility of institutions to respond to claims of sexual harassment and assault. The Proposed Rule employs an unduly narrow definition of sexual harassment, allows schools not to investigate incidents that they reasonably should have known about, precludes schools from conducting investigations that would often be necessary to determine whether an incident constitutes sexual harassment, relieves schools of the obligation to investigate most student-on-student harassment or assaults that occur off campus even where they have continuing effects on campus, and allows schools to adopt unreasonable responses to complaints, holding them responsible only if their actions are “deliberately indifferent.” If these provisions were to take effect, institutions would

⁶ While these comments are focused on this Title IX Proposed Rule, the ACLU has also opposed the Department's recent actions to roll back civil rights protections in education for transgender students and students with disabilities, as well as its recent rescission of Title VI guidance on race discrimination in school discipline.

⁷ As a matter of fundamental fairness, the ACLU believes that the procedures applicable to Title IX grievance proceedings ought to apply to all school disciplinary proceedings where similar penalties are at stake. We recognize that the Department only has jurisdiction over school discipline pursuant to civil rights statutes, but recommend that schools adopt consistent procedures for all proceedings involving potentially serious consequences. Students' complaints alleging sex discrimination, including sexual harassment and assault, must not be treated differently than other complaints.

have fewer obligations to investigate claims of sexual harassment than they do when confronted with claims of racial harassment and the Department would hold fewer schools accountable for ensuring that campuses are free from sexual harassment and assault. The Department itself anticipates a 32 percent reduction in investigations due to the requirement that recipients only investigate formal complaints.⁸ In these ways, the Proposed Rule will roll back critical civil rights protections for victims of sexual harassment and assault.

At the same time, the ACLU supports many of the increased procedural protections required by the Proposed Rule for Title IX grievance proceedings, including the right to a live hearing and an opportunity for cross-examination in the university setting, the opportunity to stay Title IX proceedings in the face of an imminent or ongoing criminal investigation or trial, the right of access to evidence from the investigation, and the right to written decisions carefully addressing the evidence. As noted below, we believe some of these provisions should be modified in several respects. Some provisions do not go far enough in protecting fair process rights, and others require amendments to ensure equitable treatment of both respondents and complainants and to conform to procedures governing other forms of harassment or discrimination.

More specifically, the ACLU recommends that the standard of proof for such proceedings should mirror the standard governing virtually all other civil proceedings, requiring proof by a preponderance of the evidence; that the right to cross-examination should be modified to guard against abusive questioning, to afford both students lawyers if they so choose, and to apply only when serious sanctions are possible; that the provision governing concurrent criminal proceedings should be strengthened to further safeguard respondents' rights against compelled self-incrimination; that the provision guaranteeing access to evidence collected by investigation should be clarified to provide that irrelevant and privileged information and communications are not subject to disclosure absent a showing of particularized relevance; and that the appeal provision be clarified to ensure that complainants are entitled to appeal sanctions on the ground that they are insufficient to restore equal access to the recipient's educational programs or activities.

This Comment proceeds in two parts. Part I addresses the elements of the Proposed Rule that limit the obligation of schools to respond to claims of sexual harassment and assault. Part II addresses the aspects of the Proposed Rule that amend the procedural requirements for handling Title IX complaints.⁹

⁸ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462-01, 61,487 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106) [hereinafter, Proposed Rule, 83 Fed. Reg. at ____].

⁹ These comments address only the issues the ACLU finds most critical.

I. THE PROPOSED RULE UNDULY NARROWS RECIPIENTS' RESPONSIBILITY TO REMEDY AND PREVENT SEXUAL HARASSMENT AND ASSAULT.

The Proposed Rule will undermine the central purpose of Title IX by unduly narrowing schools' obligations to students who file complaints of sexual harassment and assault. Title IX was enacted to protect equal access to education free from sex discrimination, which has long been recognized to include sexual harassment and assault. The Proposed Rule would shield schools from responsibility for addressing conduct that may well deprive students of equal access to education on the basis of sex, including sexual orientation and gender identity.

Robust investigations and responses to complaints of sexual harassment and assault are critical to ensuring that complainants can access education. Experiences of sexual harassment and assault are often disruptive to students' educational lives — causing them to drop classes or change majors, transfer schools, avoid particular people or places, stop participating in activities, or even drop out of school altogether — along with a host of other potential effects on students' mental, emotional, and physical health.¹⁰

The Proposed Rule reduces the obligations of schools to respond to complaints in several ways. It defines sexual harassment unduly narrowly, providing that schools need respond only to harassment that is “so severe, pervasive, and objectively offensive that it effectively denies” access to education. This leaves schools free to ignore severe sexual harassment if it is not also pervasive, or pervasive sexual harassment if it is not also severe. And by requiring dismissal without investigation of any complaint that does not on its face meet this demanding standard, the Proposed Rule exceeds the Department's authority and impedes effective investigation of sexual harassment complaints. The Proposed Rule requires schools to respond only when a formal complaint is filed with a narrow set of officials, and not when the school has reason to know of sexual harassment (because, for example, a complaint was made to a faculty member). It provides that schools fully satisfy their Title IX obligations even when they respond unreasonably to complaints of sexual harassment or assault, providing that schools will be found non-compliant only if they act with “deliberate indifference,” or “clearly unreasonably.” And the Proposed Rule provides that schools need not respond at all to most sexual assault or harassment that occurs off campus, even if it occurs between two students and has continuing effects on campus. These proposed changes mean that schools will investigate fewer complaints and the Department will hold fewer schools accountable.

In these respects, the Proposed Rule creates a double standard for sex discrimination claims. Under the proposed rule, schools would have less

¹⁰ See Dana Bolger, *Gender Violence Costs: Schools' Financial Obligations under Title IX*, 125 YALE L.J. 2106, 2109–10 (2016).

responsibility to respond to claims of sexual harassment under Title IX than to claims of racial harassment under Title VI, and students alleging sexual harassment would have to meet higher standards under Title IX than employees alleging sexual harassment in the workplace must meet under Title VII. These disparities lack justification, particularly as “Title IX was patterned after Title VI,”¹¹ Title IX’s drafters “explicitly assumed that it would be interpreted and applied as Title VI had been,”¹² and the courts rely on Title VII when analyzing Title IX’s substantive reach.¹³

The Department justifies three of its heightened standards—narrowing the definition of “sexual harassment,” requiring that schools respond only where they have actual notice of complaints, and limiting findings of non-compliance to instances where schools are “deliberately indifferent”—by pointing to two Supreme Court decisions, *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), and *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998). But those cases set forth standards of liability for private individuals suing schools for monetary damages for violating Title IX.¹⁴ The Department acknowledges that it is not required to import the standards for private damages actions to the distinct context of administrative enforcement.¹⁵ Indeed, the Department has long recognized that different standards should apply to administrative enforcement.¹⁶

¹¹ *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694 (1979).

¹² *Id.* at 695 (1979) (“Except for the substitution of the word ‘sex’ in Title IX to replace the words ‘race, color, or national origin’ in Title VI, the two statutes use identical language to describe the benefited class. Both statutes provide the same administrative mechanism for terminating federal financial support for institutions engaged in prohibited discrimination.”); *see also Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998) (“[Title IX] was modeled after Title VI of the Civil Rights Act of 1964, which is parallel to Title IX except that it prohibits race discrimination, not sex discrimination, and applies in all programs receiving federal funds, not only in education programs.”) (internal citations omitted); 117 CONG. REC. 30408 (1971) (statement of Sponsor Sen. Bayh) (“The same [enforcement] procedure that was set up and has operated with great success under the 1964 Civil Rights Act, and the regulations thereunder would be equally applicable to discrimination [prohibited by Title IX].”).

¹³ *See, e.g., Franklin v. Gwinnett*, 503 U.S. 60, 75 (1992) (citing a substantive rule from a Supreme Court case on sexual harassment under Title VII and stating “the same rule should apply” when a student is sexually harassed).

¹⁴ *See Gebser*, 524 U.S. at 286; *see also Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 639 (1999) (“Here, however, we are asked to do more than define the scope of the behavior that Title IX proscribes. We must determine whether a district’s failure to respond to student-on-student harassment in its schools can support a private suit for money damages.”).

¹⁵ Proposed Rule, 83 Fed. Reg. at 61,466 (stating that the Department “could have chosen to regulate in a somewhat different manner than the Supreme Court”).

¹⁶ *See* U.S. Dep’t of Educ., Office of Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html> (“The *Gebser* Court recognized and contrasted lawsuits for money damages with the incremental nature of administrative enforcement of Title IX. In *Gebser*, the Court was concerned with the possibility of a money damages award against a school for harassment about which it had not known. In contrast, the process of administrative enforcement requires enforcement agencies such as OCR to make schools aware of

While private suits impose damages after the fact, administrative enforcement is more measured; the Department does not issue final determinations of non-compliance or impose sanctions without first providing schools with the opportunity to achieve voluntary compliance with Title IX.¹⁷ Further, while private lawsuits for monetary damages are intended to remedy past harms by making victims whole, the Department’s enforcement actions aim to prevent future harms by ensuring schools maintain safe and equitable learning environments. Thus, the standards for private damages suits need not, and should not, govern recipients’ responsibilities vis-a-vis administrative enforcement by the Department.

1. The Proposed Rule’s Definition of Sexual Harassment is Inappropriately Narrow, and Its Limit on Investigations Is Unfounded.

§§ 106.30, 106.45(b)(3)

Proposed Rule § 106.30 defines sexual harassment as: “(1) [a]n employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct; (2) [u]nwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity; or (3) [s]exual assault, as defined in 34 C.F.R. § 668.46(a).”¹⁸ Additionally, Proposed Rule § 106.45(b)(3) states, “If the conduct alleged by the complainant would not constitute sexual harassment as defined in section 106.30 even if proved . . . , the recipient *must* dismiss the formal complaint with regard to that conduct” without any investigation.¹⁹

Subsection (2) of this definition, which describes what is commonly known as “hostile environment” sexual harassment, is unduly restrictive in two respects.

First, the proposed definition limits harassment to unwelcome conduct that is “severe, pervasive, *and* objectively offensive.” (Emphasis added.) That standard impermissibly excludes conduct that should trigger an obligation to respond. It

potential Title IX violations and to seek voluntary corrective action before pursuing fund termination or other enforcement mechanisms.”); *see also* Brief for the United States as Amicus Curiae, *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999) (No. 97-843).

¹⁷ 20 U.S.C. § 1682 (1972) (“[N]o such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.”).

¹⁸ Proposed Rule, 83 Fed. Reg. at 61,496. Sexual assault, defined in subsection (3) by reference to the Clery Act, includes “[a]n offense that meets the definition of rape, fondling, incest, or statutory rape . . .” 34 C.F.R. § 668.46 (2015).

¹⁹ *Id.* at 61,498 (emphasis added); *see also id.* at 61,475 (“[P]roposed paragraph (b)(3) would require recipients to dismiss a formal complaint or an allegation within a complaint without conducting an investigation if the alleged conduct, taken as true, is not sexual harassment as defined in the proposed regulations or if the conduct did not occur within the recipient’s program or activity.”).

¹⁹ *Id.* at 61,496 (emphasis added).

could mean, for example, that a school could view complaints involving a threat of rape – severe but not pervasive – or repeated harassing comments or conduct – pervasive but not severe – beyond its obligation to investigate under Title IX.²⁰ Moreover, if recipients are required (and indeed, permitted) to investigate only “severe, pervasive, and objectively offensive” complaints of sexual harassment, they will not respond to less extreme complaints until the harassment escalates and students suffer severe harm.

Second, the definition reaches only conduct that “effectively denies” access to education. It does not include conduct that may *limit* a student’s ability to participate in a recipient’s education on the basis of sex, but not deny access altogether. But Title IX includes a guarantee that “[no] person in the United States shall, on the basis of sex . . . , be excluded from participation in, be denied the benefits of, or be *subjected to* discrimination under any education program or activity receiving Federal financial assistance”²¹ And Title IX implementing regulations have always recognized that recipients violate Title IX when they “[d]eny any person any . . . aid, benefit, or service” or “limit any person in the enjoyment of any right, privilege, advantage, or opportunity.”²²

The Proposed Rule’s definition creates a double standard, treating sexual harassment under Title IX less seriously than racial harassment under Title VI. The Proposed Rule imposes a substantially reduced obligation on schools to investigate sexual harassment complaints than the Department imposes for students claiming racial harassment in violation of Title VI. The Department defines racial and national origin harassment as “unwelcome conduct based on a student’s actual or perceived race or national origin.”²³ It states, “Title VI requires an educational institution to respond to racial or national origin harassment that is sufficiently serious to deny or *limit* a student’s ability to participate in or benefit from the recipient’s education programs and activities (i.e. creates a hostile environment).”²⁴ Thus, racial harassment, unlike sexual harassment, need not be

²⁰ See, e.g., *Hawkins v. Sarasota Cty. Sch. Bd.*, 322 F.3d 1279, 1281 (11th Cir. 2003) (affirming the district court’s dismissal of a complaint for failure to allege “severe, pervasive, and objectively offensive conduct,” despite allegations that male student repeatedly harassed three female students by chasing them to touch their chests, jumping on one female student to rub his body on hers, and telling them he wanted to “suck [the girls’] breasts till the milk came out” and wanted the girls to “suck the juice from his penis”).

²¹ 20 U.S.C. § 1681 (emphasis added).

²² 34 C.F.R. § 106.31(b).

²³ U.S. Dep’t of Educ., Office of Civil Rights, *Frequently Asked Questions on Race and National Origin Discrimination* (Sept. 25, 2018), <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/race-origin.html> [hereinafter U.S. Dep’t of Educ., *FAQ on Racial Harassment*].

²⁴ *Id.*; see also U.S. Dep’t of Educ., Office of Civil Rights, *Investigative Guidance on Racial Incidents and Harassment Against Students* (Mar. 10, 1994), <https://www2.ed.gov/about/offices/list/ocr/docs/race394.html> (defining a racially hostile environment as “harassing conduct (e.g., physical, verbal, graphic, or written) that is sufficiently severe, pervasive or persistent so as to *interfere with or limit* the ability of an individual to participate in or benefit from the services,

“severe, pervasive, and objectively offensive” nor must it effectively deny access to education in order to trigger an obligation to investigate. The disparity between the Department’s definitions of sexual harassment and racial harassment lacks justification.

Under the Proposed Rule’s narrow definition, moreover, students would be forced to endure more extreme sexual harassment at school than employees must endure in the workplace. Under Title VII, sexual harassment is actionable when it is “sufficiently severe *or* pervasive to *alter* the conditions of the victim’s employment”²⁵ Thus, a school would be required by Title VII to take action if a teacher lodged a complaint about severe or pervasive sexual harassment yet would be required to dismiss a Title IX complaint filed by a student about identical conduct. Again, the Department offers no explanation for this result.

These problems with the overly narrow definition of sexual harassment are exacerbated by subsection 106.45(b)(3), which provides that schools not only need not, but *must* not, investigate complaints that do not on their face meet these standards. It states that recipients “must dismiss” formal complaints or allegations within a complaint without conducting an investigation if the conduct as alleged does not satisfy the Rule’s definition. As the Department explains, “proposed paragraph (b)(3) would *require* recipients to dismiss a formal complaint or an allegation within a complaint *without conducting an investigation* if the alleged conduct, taken as true, is not sexual harassment as defined in the proposed regulations or if the conduct did not occur within the recipient’s program or activity.”²⁶

There are two fundamental problems with this dictate. First, the Department has no authority to forbid schools from investigating matters that affect their institutions. Title IX affords the Department authority to *require* schools to respond to sexual harassment. But the Department cannot *preclude* schools from investigating conduct simply because it does not rise to the level of sexual harassment that triggers an obligation under Title IX. If a student alleges sexual conduct, for example, that violates the school’s own internal rules, surely the school has authority to investigate—whether or not the incident amounts to sexual harassment under Title IX.²⁷

activities or privileges provided by a recipient”) (emphasis added) [hereinafter U.S. Dep’t of Educ., *1994 Racial Harassment Guidance*].

²⁵ *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986) (internal quotations and brackets omitted) (emphasis added); see also U.S. Equal Emp’t Opportunity Comm’n, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 18, 1999), <https://www.eeoc.gov/policy/docs/harassment.html>.

²⁶ Proposed Rule, 83 Fed. Reg. at 61,475 (emphasis added).

²⁷ Indeed, because the Proposed Rule provides that the recipient’s treatment of the respondent may constitute discrimination on the basis of sex, the Proposed Rule also creates a risk that, should a university investigate a claim that does not meet the definition established by the Proposed Rule, the respondent could assert that the university had violated Title IX regulations by doing so.

Second, an investigation will often be necessary to determine whether an alleged incident rises to the level of sexual harassment that requires a formal response under Title IX. An investigation may, for example, reveal conduct that on its face did not appear to be pervasive was in fact pervasive, or was more severe than initially appeared. A rule that forecloses recipients from investigating less extreme complaints until the harassment escalates and students suffer severe harm is contrary to the purpose of Title IX.

Therefore, the ACLU makes three recommendations.

First, in place of Proposed Rule § 106.30(2), the Department should require recipients to respond to sexual harassment defined as “unwelcome conduct of a sexual nature that is sufficiently severe or pervasive to deny or limit a student’s ability to participate in or benefit from the school’s program based on sex.” This standard would match definitions of harassment under Title VI and Title VII.²⁸

Second, the ACLU urges the Department to modify Proposed Rule § 106.45(b)(3) to make clear that recipients must investigate all non-frivolous complaints of sexual harassment, as defined in the paragraph above²⁹— even if they do not immediately appear to meet the revised definition—and that recipients are permitted to investigate conduct that may violate their own school policies regardless of whether it amounts to sexual harassment as defined in the Proposed Rule.

Third, as to Proposed Rule § 106.30(3), which defines “sexual assault,” the ACLU recommends that it include dating violence, domestic violence, and stalking as defined in the Clery Act regulation, 34 C.F.R. § 668.46(a), when committed on the basis of sex. These forms of conduct should also trigger a school’s obligation to

Proposed Rule § 106.45(a). For example, a school that investigates an off-campus rape, or any other incident that does not clearly fall within the Department’s definition, violates the Proposed Rule. *See infra* Section I.4.A a school that fails to investigate an on-campus rape, or any other incident of sexual harassment covered by the Department’s definition, violates the Proposed Rule only if its failure is ‘clearly unreasonable.’ *See infra* Section I.3. Faced with this discrepancy, schools may lean against investigating close cases.

²⁸ Any definition of sexual harassment must, of course, respect First Amendment constraints. Although speech that creates a “hostile or offensive environment” based on sex may be protected under the First Amendment, that protection sometimes gives way to the government’s compelling interest in ensuring equal access to education. *See DeJohn v. Temple Univ.*, 537 F.3d 301, 320 (3d Cir. 2008). The “severe or pervasive” standard reflects that the government may proscribe some protected speech in the educational context in order to vindicate its interest in ensuring equal access to education, even if that speech might be protected in other settings. The standard also reflects that, even in the educational context, the government may not prohibit or punish core protected expression, such as political speech. *Id.*

²⁹ *See, e.g.*, U.S. Dep’t of Educ., *FAQ on Racial Harassment*, *supra* note 23 (“When an educational institution knows or reasonably should know of *possible* racial or national origin harassment, it must take immediate and appropriate steps to investigate or otherwise determine what occurred.”) (emphasis added).

respond where they rise to the level of denying or limiting a student’s ability to participate in or benefit from an educational program or activity.

2. The Proposed Rule Should Require Schools to Respond to All Complaints of Which They Actually Knew or Reasonably Should Have Known.

§§ 106.44(a), 106.30, 106.45

Proposed Rule § 106.44(a) provides that recipients can be found responsible for failing to adequately respond to sexual harassment and assault only when they have “actual knowledge” of the harassment and assault.³⁰ Proposed Rule § 106.30 defines “actual knowledge” as “notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to a teacher in the elementary and secondary context with regard to student-on-student harassment.”³¹ And Proposed Rule § 106.45 only requires recipients to launch investigations and institute grievance proceedings in response to “formal complaints.”³²

The Proposed Rule’s definition, if adopted, would dramatically limit recipients’ obligations to respond to claims of sexual harassment and assault, and would again create a different and unjustifiably higher standard for claims of sexual harassment and assault under Title IX than for claims of discrimination under Title VI and Title VII.

Under Title VI, “[w]hen an educational institution *knows or reasonably should know* of possible racial or national origin harassment, it must take immediate and appropriate steps to investigate or otherwise determine what occurred.”³³ The Department’s 1994 Investigative Guidance on Racial Incidents and Harassment Against Students states, “A recipient is charged with constructive notice of a hostile environment if, upon reasonably diligent inquiry in the exercise of reasonable care, it should have known of the discrimination.”³⁴ Here, again, the Department offers no justification for applying different standards under Title IX and Title VI.

Similarly, under Title VII, employers are “responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) *knows or should have known* of the conduct, unless it can show that it took immediate and appropriate corrective action.”³⁵ Under these conflicting

³⁰ Proposed Rule, 83 Fed. Reg. at 61,466.

³¹ *Id.*

³² *Id.* at 61,471–72.

³³ U.S. Dep’t of Educ., *FAQ on Racial Harassment*, *supra* note 23 (emphasis added).

³⁴ U.S. Dep’t of Educ., *1994 Racial Harassment Guidance*, *supra* note 24.

³⁵ 29 C.F.R. § 1604.11(d) (describing the standard that applies for coworker-on-coworker harassment) (emphasis added).

standards, a school would be responsible under Title VII for failing to address sexual harassment of a teacher by a teacher about which it reasonably should have known, but would not be responsible under Title IX for failing to address sexual harassment of a student by a teacher in identical circumstances. Thus, constructive notice is sufficient to require a response to sexual harassment in employment, as well as to racial harassment in education, but *not* to sexual harassment in education.

The “actual notice” standard that the Proposed Rule adopts would frustrate the purpose of Title IX. In both the K-12 context and higher education context, schools would not be responsible for failing to address complaints of sexual harassment and assault made to non-teacher employees such as campus security guards, guidance counselors, or athletics coaches. Additionally, in the higher education context, colleges and universities would not be responsible for failing to address complaints of sexual harassment and assault made to professors. But many students disclose sexual harassment and assault to employees who do not have the authority to institute corrective measures, both because students seek help from the adults they know and trust the most, and because students may not be informed about which employees have authority to address the conduct.

In addition, while in the K-12 context actual knowledge is more readily imputed, it is still unduly narrow. The Proposed Rule states that reporting to teachers of peer-on-peer harassment constitutes actual knowledge. It makes no such provision for reports to teachers of employee-on-student harassment. This means a school would be held responsible if a seventh grader told a teacher that she was sexually assaulted by a classmate, but not if a seventh grader told her English teacher that she was sexually assaulted by her math teacher. This differentiation lacks any justification.

The ACLU recommends that the Department modify the notice standard so that a recipient’s responsibilities are triggered if it knows, *or reasonably should have known*, about the harassment. A recipient “reasonably should have known” about the harassment if any faculty or staff member knows of the incident or would have known of the incident upon reasonably diligent inquiry in the exercise of reasonable care. This would ensure consistency across Title IX, Title VI, and Title VII.

At the same time, the Rule should ensure that schools can designate a set of staff members who are exempt from mandatory reporting, such as mental health counselors, specified residential advisors, and clergy. This exemption is necessary so that students can seek confidential advice and support from designated staff without triggering formal grievance proceedings. Schools should clearly communicate to students which staff are and are not mandatory reporters.

3. The Proposed Rule Inappropriately Allows Schools to Adopt Unreasonable Responses to Sexual Assault and Harassment.

§ 106.44(a)

Proposed Rule § 106.44(a) provides that recipients will be found responsible for failing to respond adequately to sexual harassment and assault in violation of Title IX only when they respond in a manner that is “clearly unreasonable in light of the known circumstances.”³⁶ This standard, also described as “deliberate indifference,” unduly limits schools’ responsibility to provide an educational environment free from discrimination and harassment, and is inconsistent with the standard the Department imposes under Title VI.

Under the “clearly unreasonable” or “deliberate indifference” standard, recipients could act unreasonably and still avoid Department of Education scrutiny under Title IX. Recipients could avoid Department oversight by launching perfunctory investigations or instituting remedies that failed to adequately address an ongoing hostile environment, so long as their actions were not “clearly unreasonable.”³⁷ While the ACLU recognizes the need to afford universities discretion in how they respond, a “reasonableness” standard affords sufficient discretion without undermining Title IX’s purpose.

The Department has never used a deliberate indifference standard when evaluating recipients’ responses to racial harassment under Title VI. The Department states that under Title VI, a recipient “must take prompt and effective steps *reasonably calculated* to end the harassment, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.”³⁸ The Department used a similar standard in its 1994 Investigative Guidance on Racial Incidents and Harassment Against Students.³⁹

³⁶ Proposed Rule, 83 Fed. Reg. at 61,467–70.

³⁷ See, e.g., *Rost v. Steamboat Springs Re-2 Sch. Dist.*, 511 F.3d 1114, 1121–24 (10th Cir. 2008) (holding that the school district was not deliberately indifferent when it deferred to law enforcement and failed to launch any independent investigation or impose any disciplinary measures in response to allegations that four male students repeatedly sexually harassed a female student with learning disabilities including forcing her to perform oral sex); *Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380, 387–89 (5th Cir. 2000) (holding the defendant’s actions were not “clearly unreasonable” when the principal took no action beyond having a single, undocumented conversation with a third-grade teacher about allegation that he had sexually abused a student despite the fact that the conversation was “ineffective in preventing [the teacher] from sexually abusing [additional] students”); *Wills v. Brown*, 184 F.3d 20, 41–42 (1st Cir. 1999) (holding university’s response was not clearly unreasonable when it recommended that a visiting professor remain on the faculty and receive a raise despite multiple complaints that he had sexually harassed and assaulted students).

³⁸ U.S. Dep’t of Educ., *FAQ on Racial Harassment*, *supra* note 23 (emphasis added).

³⁹ U.S. Dep’t of Educ., *1994 Racial Harassment Guidance*, *supra* note 24 (“Once a recipient has notice of a racially hostile environment, the recipient has a legal duty to take reasonable steps to eliminate it. Thus, if OCR finds that the recipient took responsive action, OCR will evaluate the appropriateness of the responsive action by examining reasonableness, timeliness, and effectiveness. The appropriate response to a racially hostile environment must be tailored to redress fully the

In its 2001 Sexual Harassment Guidance, the Department similarly required recipients to take “prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again.”⁴⁰ Under this standard, a recipient would be found in violation of Title IX if its response to a complaint of sexual harassment was “unreasonable,” even if it was not “clearly” so.

The ACLU recommends that the Department maintain the standard from its 2001 Guidance. This standard would ensure that schools have flexibility and discretion when responding to complaints of sexual harassment. As the 2001 Guidance recognized, “What constitutes a reasonable response to information about possible sexual harassment will differ depending upon the circumstances.”⁴¹ The fact that the Department would have responded differently would not be a basis for a finding of noncompliance unless the Department found further that the school’s response was unreasonable. But under this standard, unlike a deliberate indifference standard, the Department would be permitted to hold recipients accountable when they failed to launch meaningful investigations or take necessary remedial action.

4. The Proposed Rule Should Require Schools to Address Off-Campus Harassment When It Has the Effect of Limiting or Denying Access to Education on Campus.

§§ 106.30, 106.45(b)(3)

Proposed Rule § 106.45(b)(3) limits the definition of sexual harassment in section 106.30 to conduct that occurred “within the recipient’s program or activity” and states that “the recipient *must* dismiss the formal complaint” if the conduct occurred outside these bounds.⁴²

This provision erroneously makes recipients’ responsibility contingent on where the harassment occurred, rather than on its effect on the educational environment. Sexual harassment or assault can have the same effect on access to education whether it occurs in a dorm room or an off-campus apartment. A school’s obligations should be based on the effect an incident has on campus, not where it happened. While the Proposed Rule recognizes that some off-campus locations meet its standard, such as school-sponsored fraternities, it would improperly exclude

specific problems experienced at the institution as a result of the harassment. In addition, the responsive action must be reasonably calculated to prevent recurrence and ensure that participants are not restricted in their participation or benefits as a result of a racially hostile environment created by students or non-employees.”).

⁴⁰ U.S. Dep’t of Educ., Office of Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>.

⁴¹ *Id.*

⁴² Proposed Rule, 83 Fed. Reg. at 61,498 (emphasis added).

many other incidents of sexual harassment and assault that create a hostile educational environment.⁴³

The vast majority of college students live off campus—approximately 87 percent⁴⁴—and many college sexual assaults occur at off-campus parties.⁴⁵ Limiting schools’ obligations to address such conduct will frustrate the purpose of Title IX. Recipients have an obligation to ensure that students are not limited in or prevented from learning because of sex discrimination, including sexual harassment and assault, regardless of where it occurred.

Again, the problems with this provision are compounded by the Proposed Rule’s requirement that recipients “*must* dismiss,” without investigation, claims involving conduct that occurs outside the recipient’s program or activity.⁴⁶ In other words, the Proposed Rule would *require* a recipient to dismiss a claim of a rape at an off-campus party without an investigation. However, an investigation may be necessary to determine if the conduct created a hostile environment on campus in violation of Title IX.⁴⁷ Further, as noted above, the Department lacks authority to forbid schools from investigating student or employee conduct that may violate the schools’ own disciplinary code.⁴⁸

The ACLU recommends that the Department strike the language in section 106.45(b)(3) limiting the definition of sexual harassment to incidents that occurred “within the recipient’s program or activity.” The ACLU recommends the Department adopt the following language instead:

Where a recipient has authority over the respondent (e.g., a student or employee of the recipient), the recipient must take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again, regardless of where the incident took place, where the incident may deny or limit access to the recipient’s programs or activities.

⁴³ *Id.*

⁴⁴ Rochelle Sharpe, *How Much Does Living Off-Campus Cost? Who Knows?*, N.Y. TIMES (Aug. 5, 2016), <https://www.nytimes.com/2016/08/07/education/edlife/how-much-does-living-off-campus-cost-who-knows.html>.

⁴⁵ United Educators, *Facts from United Educators’ Report on Confronting Campus Sexual Assault: An Examination of Higher Education Claims* (Jan. 2015), https://www.ue.org/sexual_assault_claims_study.

⁴⁶ Proposed Rule, 83 Fed. Reg. at 61,498 (emphasis added); *see also id.* at 61,475 (“[P]roposed paragraph (b)(3) would *require* recipients to dismiss a formal complaint or an allegation within a complaint *without conducting an investigation* if the alleged conduct . . . did not occur within the recipient’s program or activity.”) (emphasis added).

⁴⁷ *See supra* Section I.1 (discussing the importance of investigations for determining whether an alleged incident requires a formal response under Title IX).

⁴⁸ *Id.*

Where a recipient lacks authority over the alleged perpetrator (e.g., not a student or employee of the recipient), the recipient must provide reasonable accommodations and other supportive measures to a complainant, including, where appropriate, barring the alleged perpetrator from campus.⁴⁹

5. The Proposed Rule Should Be Modified to Encourage Interim Measures That Are Proportional to the Alleged Harm and Reasonably Necessary to Preserve Access to Education.

§§ 106.30, 106.44(c)

The Proposed Rule provides for supportive and emergency measures recipients may take to ensure access to education and safety before or in the absence of a final determination with respect to Title IX complaints. Section 106.30 defines “supportive measures” as “non-disciplinary, non-punitive individualized services offered . . . to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.”⁵⁰ The Proposed Rule states,

Such measures are designed to restore or preserve access to the recipient’s education program or activity, without unreasonably burdening the other party; protect the safety of all parties and the recipient’s educational environment; and deter sexual harassment. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.⁵¹

In section 106.44(c), the Proposed Rule separately provides for “emergency removal” where “the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the health or safety of students or employees justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.”⁵²

⁴⁹ This standard comports with Title VII requirements that employers respond to the harassing conduct of non-employees such as customers. *See* 29 C.F.R. § 1604.11(e) (“An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action.”); *see also Freeman v. Dal-Tile Corp.*, 750 F.3d 413, 424 (4th Cir. 2014) (reversing grant of summary judgment for employer where the employer had knowledge of the third-party harassment of the plaintiff yet failed to protect the plaintiff by restricting the third-party’s access to the premises).

⁵⁰ Proposed Rule, 83 Fed. Reg. at 61,469.

⁵¹ *Id.*

⁵² *Id.* at 61,471.

Interim measures can be critical for complainants' ability to continue their education immediately following an incident of sexual harassment or assault in the absence of a final determination. Of sexual assault survivors who participated in a Relationship and Sexual Violence program, over 34 percent subsequently dropped out of college, a significantly higher rate than the average university dropout rate.⁵³ Recipients must do what they can to remedy a hostile environment in the interim, before reaching a final determination with respect to the alleged conduct.

The two distinct sections on supportive measures and emergency removal could, however, lead to confusion among recipients about what steps they can take to protect a complainant's safety and access to education prior to or in the absence of a final determination regarding responsibility. In particular, the Proposed Rule is not clear about what constitutes an "immediate threat to the health or safety of students" that would justify emergency removal from campus, and it does not consider preserving access to education as a potential rationale for removal as it does for other interim measures. The Proposed Rule is also not clear about what standards a recipient should employ to determine the "reasonableness" of supportive measures that would impose a disproportionate burden on the respondent. For example, although the Proposed Rule lists mutual restrictions on contact as a permissible supportive measure, it is unclear when, if ever, recipients can impose one-sided no contact orders as a supportive measure.

The ACLU recommends that the Department replace the sections on supportive measures and emergency removal with a single section on interim measures. The section should explain that recipients may impose interim measures that burden the respondent—such as no-contact orders or removal from campus—when those burdens are proportional to the alleged harm and are the least burdensome alternative that will protect the interests in (1) restoring or preserving access to the recipient's education program or activity, (2) protecting the physical and mental health or safety of students in the recipient's educational environment, or (3) deterring sexual harassment.⁵⁴ The section should also mandate notice and an opportunity to be heard regarding interim measures that burden the respondent or complainant.

To address these concerns, the ACLU recommends that the Final Rule state:

Interim measures, which are implemented before a final determination with respect to the alleged conduct, must be non-punitive measures that are reasonably necessary to restore or preserve access to the recipient's education program or activity, protect the physical and

⁵³ Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18(2) J.C. STUDENT RETENTION: RES., THEORY & PRAC. 234, 244 (2015), <https://doi.org/10.1177/1521025115584750>.

⁵⁴ The Department recognizes that these interests justify supportive measures. *See* Proposed Rule, 83 Fed. Reg. at 61,471.

mental health or safety of students in the recipient's educational environment, and/or deter sexual harassment.

Interim measures may include, but are not limited to: counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, no-contact orders, changes in work or housing locations, voluntary leaves of absence, directions to stay away from certain areas of campus, suspension, increased security and monitoring of certain areas of the campus.

Interim no-contact orders must not be imposed in a retaliatory manner. No-contact orders may be one-sided or mutual. However, recipients should not default to mutual no-contact orders and should instead carefully consider the individual circumstances of the situation, including the burden placed on the complainant by issuing a mutual no contact order. After a finding of responsibility is made against the respondent, schools may not impose mutual no contact orders.

Interim measures must be proportional to the nature of the alleged harm and reasonably necessary to further the interests noted above without unreasonably burdening either party. Suspension or removal should be reserved for extraordinary circumstances. To the extent feasible, interim measures should be kept confidential.

Where the recipient imposes interim measures, the recipient must provide notice and an opportunity to be heard about whether less burdensome or different interim measures would be adequate to protect the interests in preserving or restoring access to education. Whenever possible, the recipient must provide the students with notice and an opportunity to be heard prior to imposing the interim measures. Under exigent circumstances, the recipient may provide the parties with notice and an opportunity to be heard promptly after imposing the interim measures.

6. The Proposed Rule's Provision on Informal Resolution Should Be Modified to Ensure Participation is Not Coerced, and Students Maintain the Right to Access a Formal Process.

§ 106.45(b)(6)

Proposed Rule § 106.45(b)(6) provides that “the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication,” and outlines a notice requirement regarding the allegations, nature of the informal resolution process, and the consequences.⁵⁵ The

⁵⁵ Proposed Rule, 83 Fed. Reg. at 61,479.

Proposed Rule also states that if there are “circumstances under which [the informal resolution process] precludes the parties from resuming a formal complaint arising from the same allegations,” the parties must be notified of these circumstances.⁵⁶

The ACLU supports schools having an option for resolving complaints informally. To be truly voluntary, however, both parties must have the right to withdraw from the informal process at any time. The ACLU recommends adopting the following language to ensure implementation of informal procedures is fair, impartial, and fully voluntary:

Informal resolution should only be entered into where there is voluntary, informed written consent from both parties. Informal resolution must be affirmatively opted into by both parties in order to be truly voluntary. Under no circumstances should a decision to enter into an informal resolution process preclude a complainant or respondent from withdrawing and resuming the formal process. Each party must be advised of their rights without the other party present, including that they have a right to withdraw from the informal resolution process at any time, and that the complainant has a right to pursue a formal complaint. The facilitator during the informal resolution process must be a trained and neutral third party.

7. The Department Should Ensure That Students Have Notice When Recipients Seek Religious Exemptions from Title IX.

§ 106.12

Title IX creates an exemption for educational institutions “controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization.”⁵⁷ The Proposed Rule provides that “an educational institution *may*—but is not required to—seek assurance of its religious exemption by submitting a written request for such an assurance to the Assistant Secretary.”⁵⁸ It further provides that “if an institution has not sought assurance of its exemption, the institution may still invoke its religious exemption during the course of any investigation pursued against the institution by the Department.”⁵⁹

Students and prospective students should know what protections the law provides against discrimination. The rules now in place fail to protect that interest fully, and the Proposed Rule would only diminish the already insufficient protections. The Department offers no justification for allowing religious institutions to conceal from current and prospective students the exemptions they

⁵⁶ *Id.*

⁵⁷ 20 U.S.C. § 1681(a)(3).

⁵⁸ Proposed Rule, 83 Fed. Reg. at 61,482 (emphasis added).

⁵⁹ *Id.*

assert. In the absence of any notice, students will reasonably assume that all educational institutions receiving federal funding are bound by Title IX.

Existing rules require schools to advise students and prospective students of the institutions' obligation not to discriminate based on sex.⁶⁰ The existing rules thus value students' understanding of the protections the law affords. There is, however, today no express requirement that students be told when those protections do not apply as a result of exemptions claimed by schools controlled by religious organizations. Knowledge of protections and exemptions permits students to assess whether the school will be safe for them and when a complaint of discrimination is appropriate. This information is important to all students and prospective students, but especially to those who might suffer sex discrimination in an institution covered by Title IX, including women, LGBTQ students, pregnant or parenting students, and students seeking birth control or other reproductive health services.

In addition, while the rules have provided for nearly four decades that institutions asserting an exemption notify the Department, there is no provision requiring the Department to publish that information. There is thus no way to assess how the statute is enforced or to contest whether the exemptions are being properly claimed.

The ACLU therefore recommends that the Department strike the proposed revision that removes the requirement that institutions advise the Department of any exemption they claim. Further, the Final Rule should require both that the Department publish annually the list of institutions that have been granted exemptions, and that institutions notify students of any exemptions as part of alerting students to the scope of the school's responsibility under Title IX.

II. THE PROPOSED RULE PROVIDES IMPORTANT PROCEDURAL PROTECTIONS IN TITLE IX DISCIPLINARY PROCEEDINGS, BUT SHOULD BE MODIFIED TO FURTHER FAIR PROCESS AND EQUITY AND TO AVOID ABUSE.

The ACLU has long been committed to ensuring fair process in school disciplinary proceedings, including proceedings under Title IX,⁶¹ and commends the Department's efforts to guarantee fair process in Title IX grievance proceedings. Similar fair process procedures should apply in all school grievance procedures involving student-on-student conduct, such as harassment on the basis of race. The Proposed Rule provides several important protections to the process, including live hearings, the right of cross-examination, access to evidence, and the requirements for reasoned, written judgments. These are essential to ensure that respondents

⁶⁰ 34 C.F.R. § 106.9(a).

⁶¹ See, e.g., ACLU, *Re: Campus Sexual Assault: The Role of Title IX* (June 2, 2014), https://www.aclu.org/sites/default/files/field_document/aclu_statement_for_roundtable_on_campus_sexual_assault_and_the_role_of_title_ix_on_letterhead_final_6.2.14.pdf.

have a meaningful opportunity to defend themselves, and to ensure fairness for both parties.

As detailed below, the ACLU nonetheless recommends several changes to improve these provisions and to ensure equity and deter abuse. In particular, we recommend a preponderance of the evidence standard for Title IX hearings, the standard that applies in virtually all civil proceedings, including Title IX cases in court. We support live hearings and cross-examination in higher education where serious sanctions are possible, and we urge the Department to require universities to provide counsel for both parties for the hearing if either party requests counsel. We suggest that the provision permitting delay of proceedings where there are imminent criminal proceedings should be strengthened to require such delay, accompanied by proportional, fair, and effective interim measures where necessary to preserve access to education. We support access to evidence of the investigation, but recommend that the Final Rule make clear that privileged and other sensitive evidence should not be disclosed absent a showing of particularized relevance. And the ACLU supports appeal rights for both sides, but recommends a clarification in the scope of the appeal.

Although the Due Process Clause applies only to *public* universities, colleges, and schools, the principles of due process and fundamental fairness should govern all Title IX grievance proceedings, just as they should govern other student-on-student grievance proceedings, regardless of whether the recipient is a public or private entity. A fair Title IX process is necessary not only to protect the interests of complainants and respondents, but also to promote the fairness and legitimacy of the recipient's investigatory process, hearings, and outcomes.

It is also important to emphasize that Title IX grievance proceedings are school disciplinary proceedings, not criminal prosecutions. Our comments thus draw on the procedures and principles governing civil litigation, which more closely approximate a Title IX grievance proceeding. Finally, while these comments pertain to the Department's Proposed Rule under Title IX, the ACLU believes that the Department should adopt consistent procedures for all civil rights claims under its purview. In addition, schools should adopt consistent procedures for all disciplinary proceedings where similar penalties are at stake, whether or not they involve civil rights claims.

1. The Proposed Rule Should Require Recipients to Use a Preponderance of the Evidence Standard.

§ 106.45(b)(4)(1)

Proposed Rule § 106.45(b)(4)(1) states that, to determine responsibility in a Title IX grievance proceeding, "the recipient must apply either the preponderance of the evidence standard or the clear and convincing evidence standard, although the recipient may employ the preponderance of the evidence standard only if the

recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction.”⁶² The Proposed Rule further states that “[t]he recipient must also apply the same standard of evidence for complaints against students as it does for complaints against faculty.”⁶³

By authorizing recipients to impose a clear and convincing evidence standard instead of a preponderance standard, the Proposed Rule frustrates the purpose of Title IX. Under that standard, even where it is more likely than not that the respondent sexually harassed or assaulted a complainant, the school would have no obligation to provide a remedy. The preponderance standard is the appropriate standard of proof to apply for complaints involving peer-on-peer harassment or disputes, including Title IX grievance proceedings, for two reasons.

First, it “is the burden of proof in most civil trials” and requires the factfinder to determine that the complaint is more likely true than false.⁶⁴ The preponderance standard is used in civil litigation involving discrimination under Title IX, as well as under Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment and Title VI, which prohibits discrimination on the basis of race in federally-funded programs. Indeed, we are aware of no other circumstance in which discrimination claims are subjected to a “clear and convincing” standard. The Department has not adequately explained why it has departed from the norm for adjudicating discrimination claims.

Second, the preponderance standard makes sense because it treats the complainant and the respondent equitably. That is why it is used in civil litigation, where there is no *ex ante* reason to favor one side over the other. A “clear and convincing” standard tips the scales against the complainant. In Title IX grievance or disciplinary proceedings, both the complainant and the respondent have a significant interest in access to education. Serious disciplinary sanctions will undoubtedly affect a respondent’s access to education. And, as the Department acknowledges, a school’s failure to address sexual harassment or assault will affect the complainant’s access to education.⁶⁵ For that reason, Proposed Rule § 106.45(b)(1)(i) obliges schools to “[t]reat complainants and respondents equitably.”⁶⁶ A preponderance standard provides the most equitable approach for resolving the complainant’s and respondent’s equal interests in access to education.⁶⁷

⁶² Proposed Rule, 83 Fed. Reg. at 61,499.

⁶³ *Id.*

⁶⁴ *Preponderance of the Evidence*, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁶⁵ Proposed Rule, 83 Fed. Reg. at 61,473 (“[B]ecause the complainant’s access to the recipient’s education program or activity can be limited by sexual harassment, an equitable grievance procedure will provide relief from any sexual harassment found under the procedures required in the proposed regulations and restore access to the complainant accordingly.”).

⁶⁶ *Id.* at 61,497.

⁶⁷ Some argued that when grievance proceedings lacked other procedural safeguards, a “clear and convincing” standard was a safeguard against unjust results. But the proper way to deal with inadequate procedures is to remedy those procedural deficiencies. The Proposed Rule, with the

This principle was reflected in practice even before the Department issued its 2011 guidance: A 2002 survey of institutions of higher education found that 80 percent of schools with written policies addressing the standard of proof for sexual assault cases employed the preponderance of the evidence standard.⁶⁸ Proposed Rule § 106.45(b)(4)(1) deviates from this principle by allowing recipients to adopt either a preponderance of the evidence or a clear and convincing standard.

Moreover, the Proposed Rule allows recipients to treat Title IX sexual harassment complaints less equitably than other complaints involving peer-on-peer harassment. It allows recipients to adopt a clear and convincing evidence standard for complaints regarding sexual harassment under Title IX, while employing the less stringent preponderance of the evidence standard for all other disciplinary proceedings, *even if* other disciplinary proceedings carry an equal or greater maximum disciplinary sanction. At the same time, it allows recipients to adopt a preponderance standard “*only if* the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction.”⁶⁹ The Proposed Rule thus affirmatively authorizes schools to adopt a double standard in only one direction, imposing a higher burden on sexual harassment than any other disciplinary or grievance claims.

The Proposed Rule also unjustifiably ties the standards for student-on-student harassment claims to the standard that applies to disciplinary proceedings for faculty and staff. But employees are differently situated than students, and often have protections against workplace discipline or termination that have been contractually negotiated or collectively bargained. There is no reason that such procedures should govern proceedings for peer-on-peer harassment. Yet the Proposed Rule requires recipients to “apply the same standard of evidence for complaints against students as it does for complaints against faculty.”⁷⁰ The appropriate standard for equitably resolving peer harassment complaints should not depend on extrinsic factors related to faculty bargaining power. In the absence of any justification for linking these procedures, it appears to be an effort by the Department to require a “clear and convincing” standard.

ACLU’s recommended modifications, would provide important additional protections. See Elizabeth Bartholet et al., *Fairness For All Students Under Title IX*, at 3–6 (Aug. 21, 2017) (recommending that schools “[u]se a preponderance of the evidence standard *only if* all other requirements for equal fairness are met”), <https://dash.harvard.edu/bitstream/handle/1/33789434/Fairness%20for%20All%20Students.pdf> (emphasis added).

⁶⁸ Heather M. Karjane et al., *Campus Sexual Assault: How America’s Institutions of Higher Education Respond* 120 (Oct. 2002), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf>.

⁶⁹ Proposed Rule, 83 Fed. Reg. at 61,499 (emphasis added).

⁷⁰ *Id.*

The ACLU therefore recommends that the Department modify Proposed Rule § 106.45(b)(4)(1) to state that recipients shall apply the preponderance of the evidence standard to Title IX grievance proceedings.⁷¹

2. The Proposed Rule’s Provision for Live Hearings and Cross-Examination in the University Setting Should Be Modified to Ensure Effective Cross-Examination and Equity and to Avoid Abuse.

§ 106.45(b)(3)(vii)

Proposed Rule § 106.45(b)(3)(vii) states in relevant part: “For institutions of higher education, the recipient’s grievance procedure must provide for a live hearing. At the hearing, the decision-maker must permit each party to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at a hearing must be conducted by the party’s advisor of choice, notwithstanding the discretion of the recipient under section 106.45(b)(3)(iv) to otherwise restrict the extent to which advisors may participate in the proceedings.”⁷²

The ACLU supports the requirement of a live hearing and an opportunity for cross-examination in higher education to assess credibility where serious sanctions such as expulsion, suspension, or notation on a student’s permanent school record are possible.⁷³ These are critical safeguards.

The ACLU urges the Department, however, to modify section 106.45(b)(3)(vii) in several respects to address concerns about effectiveness, equity, and abuse. First, to guard against abusive questioning in the formal hearing process, we urge the Department to modify the Proposed Rule to provide that the decision-maker—or at least one decision-maker in the case of a panel—be a lawyer appropriately trained to adjudicate Title IX disputes. Second, to ensure effective questioning and equity,

⁷¹ Whether a “preponderance” or “clear and convincing” standard of proof applies, respondents cannot be held responsible or punished absent a determination that the standard of proof has been met. Under either standard, if the evidence is in equipoise, the respondent prevails. In light of that, the adoption of a presumption of nonresponsibility, as set forth in Proposed Rule § 106.45 (b)(1)(iv), is unnecessary and potentially confusing. The presumption of nonresponsibility is a concept that appears nowhere else in the law and may be confused with the presumption of innocence, a concept associated with the criminal process, where a defendant is presumed innocent until proven guilty “beyond a reasonable doubt.” That presumption does not apply in civil proceedings. Proposed Rule § 106.45(b)(1)(iv) should therefore be stricken or clarified to state that a respondent may not be disciplined or held responsible absent a finding that the applicable standard of proof has been satisfied.

⁷² Proposed Rule, 83 Fed. Reg. at 61,474. The Proposed Rule also provides: “At the request of either party, the recipient must provide for cross-examination to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party answering questions.” The ACLU believes this is an important protection and urges that it remain in the Final Rule.

⁷³ The ACLU agrees with the Department that live hearing and cross-examination should not be required at the K-12 level.

the Final Rule should require recipients to provide a lawyer to either party upon request. Third, to ensure fairness, the Final Rule should provide that the representative of the complainant or the respondent cannot be someone who exercises academic or professional authority over the other party. Finally, the Final Rule should make clear that the requirements of live hearing and cross-examination apply only where the potential sanctions are serious—including expulsion, suspension, or a permanent notation on the student’s record. The rationale for these positions follows.

Due process requires the government to provide notice and an opportunity to be heard before depriving someone of their life, liberty, or property interests.⁷⁴ The Supreme Court has applied this fundamental requirement of due process to suspension or expulsion from public schools.⁷⁵ In *Goss v Lopez*, the Court held that a public school student facing suspension must be afforded a hearing, “an explanation of the evidence the authorities have and an opportunity to present his side of the story.”⁷⁶ *Goss* does not explicitly state that hearings at the public school level must have live testimony, and private universities are not bound by the constitutional requirements of due process in any event. But in the college or university setting, where the participants are usually adults, live hearings provide the most transparent mechanism for ensuring all parties have the opportunity to submit, review, contest, and rebut evidence to be considered by the factfinder in reaching its determination.⁷⁷ Such a process is essential to student disciplinary proceedings where two students’ interests are at stake and the possible sanctions are serious.

The Proposed Rule also appropriately guarantees a right of cross-examination in the university setting. Cross-examination is an essential pillar of fair process. Although the Supreme Court has not required cross-examination in the school discipline context, in other contexts the Court has held, “where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”⁷⁸ In cases that turn exclusively or largely on witness testimony, as is often the case in peer-on-peer grievances, cross-examination is especially critical to resolve factual disputes between the parties, and to give each side the opportunity to test the credibility of adverse witnesses.⁷⁹

⁷⁴ *Goldberg v. Kelly*, 397 U.S. 254 (1970).

⁷⁵ *Goss v. Lopez*, 419 U.S. 565, 581 (1975).

⁷⁶ *Id.*

⁷⁷ See AM. BAR ASS’N, ABA CRIMINAL JUSTICE SECTION TASK FORCE ON COLLEGE DUE PROCESS RIGHTS AND VICTIM PROTECTIONS: RECOMMENDATIONS FOR COLLEGES AND UNIVERSITIES IN RESOLVING ALLEGATIONS OF CAMPUS SEXUAL MISCONDUCT 3 (2017) (expressing a preference for the “adjudicatory model,” defined as “a hearing in which both parties are entitled to be present, evidence is presented, and the decision-maker(s) determine(s) whether a violation of school policy has occurred”).

⁷⁸ *Goldberg*, 397 U.S. at 269.

⁷⁹ See AM. BAR ASS’N, *supra* note 77, at 9 n.63 (citing *Doe v. Brandeis Univ.*, No. 15-11557-FDS, 2016 WL 1274533, at *35 (D. Mass. Mar. 31, 2016)).

The right will be valuable for complainants and respondents, and serves the goal of reaching legitimate and fair results.

While the ACLU supports live hearings and cross-examination in the university context, it believes the cross-examination right would be substantially improved if section 106.45(b)(3)(vii) were modified in several respects to further ensure equity and to prevent abuse.

First, to ensure fair proceedings and guard against abuse, the ACLU recommends that the Final Rule require that the decision-maker—or at least one in the case of a panel—be a lawyer and require that all decision-makers be trained in conducting Title IX hearings, including the appropriate scope and limits of cross-examination.⁸⁰ Under the Proposed Rule, cross-examination would be conducted by the complainant’s and respondent’s advisor of choice. The cross-examination would thus often be conducted by non-lawyers, individuals who may share some personal connection to the party (e.g., a family relative, friend, or mentor), and individuals who have little or no understanding of cross-examination. Unlike lawyers, these advisors would not be bound by the rules of professional conduct. Modification of the Proposed Rule is necessary to avoid the real risk that the chosen advisor will conduct a cross-examination that is ineffectual, abusive, or not conducive to facilitating an accurate factual determination by the factfinder.

Second, to ensure students have access to competent representation without regard to financial circumstance, the Rule should provide that a recipient must provide a lawyer to either party upon request for the live hearing. A proceeding in which one side is represented by a lawyer and the other by a non-lawyer representative creates too much risk of unfairness.

Third, the Final Rule should provide that a student’s representative in the hearing cannot be a person who exercises academic or professional authority over the other student, and must agree to a code of conduct prohibiting hostile, abusive, and irrelevant questioning of witnesses.

⁸⁰ The ACLU suggests that the Department look to the standards adopted by Columbia and Harvard for guidance as to appropriate training. Columbia provides that “[a]ll panelists receive relevant training at least once a year. In addition to training on how the adjudicatory process works, the training will include specific instruction on how to evaluate evidence impartially and how to approach students about sensitive issues that may arise in the context of alleged gender-based misconduct.” COLUM. UNIV., GENDER-BASED MISCONDUCT POLICY AND PROCEDURES FOR STUDENTS 29 (2017), <http://studentconduct.columbia.edu/documents/GBMPolicyandProceduresforStudents2017-18.pdf>. Harvard provides that “[a]ll panelists shall be trained in evaluating conduct under the Policy and these procedures, including applicable confidentiality requirements, have relevant expertise and experience, be impartial, unbiased, and independent of the community (i.e., not current students, faculty, administrators, or staff of Harvard University), will disclose any real or reasonably perceived conflicts of interest or recuse themselves in a particular case, as appropriate, and to the extent feasible reflect the value of diversity in all its forms and meet such other criteria as the Title IX Committee . . . may from time to time establish.” HARV. LAW SCH., HLS SEXUAL HARASSMENT RESOURCES AND PROCEDURES FOR STUDENTS 9–10 (2014), <https://hls.harvard.edu/content/uploads/2015/07/HLSTitleIXProcedures150629.pdf>.

Fourth, the requirement of a live hearing and cross-examination should be limited to proceedings where the potential sanctions are serious, including expulsion, suspension, or a permanent notation on the student's record. The Final Rule should make clear that these protections need not be provided if the recipient rules out serious sanctions at the outset.

Finally, the ACLU recommends modifications to the provision stating that a recipient must not rely on any prior statement of a party or witness who does not submit to cross-examination. The Proposed Rule provides: "If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility."⁸¹ While it is generally appropriate for a recipient to disregard statements made by a party or witness who does not submit to cross-examination, that rule should not apply when a party has previously made a statement against their interest. No party should be able to avoid introduction of their own prior statements against interest by declining to testify at the hearing. Thus, the Final Rule should include an exception for prior statements against interest when offered by the opposing party or the recipient.⁸²

3. The Provision on Delays Due to Concurrent Criminal Proceedings Should Be Strengthened to Safeguard the Respondent's Ability to Defend Against Criminal Prosecution and the Complainant's Access to Interim Measures.

§ 106.45(b)(1)(iv)

Proposed Rule § 106.45(b)(1)(v) states that a recipient must resolve Title IX grievance complaints and appeals within a reasonably prompt timeframe, but "allows for the temporary delay of the grievance process or the limited extension of timeframes for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of the parties or witnesses, concurrent law enforcement activity, or the need for language assistance or accommodation of disabilities."⁸³ This is an important safeguard but does not go far enough to protect respondents' and complainants' rights.

The Proposed Rule *allows* recipients to delay proceedings due to concurrent law enforcement activity. The ACLU believes that more protections are needed to ensure that a Title IX grievance proceeding does not jeopardize a respondent's defense against criminal prosecution. Thus, the Proposed Rule should *require* recipients to delay proceedings when a respondent so requests in the face of imminent criminal investigation or prosecution. And in the rare instance where a respondent agrees to proceed with the grievance procedure while facing a criminal

⁸¹ Proposed Rule, 83 Fed. Reg. at 61,498.

⁸² See FED. R. EVID. 804(b)(3).

⁸³ Proposed Rule, 83 Fed. Reg. at 61,497.

investigation or prosecution, the Department should prohibit recipients from drawing adverse inferences based on the respondent's silence during the Title IX grievance proceeding.

At the same time, to ensure that recipients adequately address the needs of complainants during any such delays, recipients should be required to implement interim measures necessary and appropriate to protect a complainant's access to education while grievance proceedings are delayed.⁸⁴ The rationale for these recommendations follows.

Delay protects against self-incrimination. In some cases, a law enforcement investigation or criminal prosecution may arise before or during Title IX grievance proceedings. The Fifth Amendment to the U.S. Constitution states that no person "shall be compelled in any criminal case to be a witness against himself," and courts have long recognized that suspects and defendants have a right to remain silent during law enforcement investigations and criminal proceedings.⁸⁵ In addition, in criminal prosecutions, no adverse inferences may be drawn from a defendant's refusal to testify.⁸⁶

But adverse inferences may be drawn from a person's invocation of their Fifth Amendment right to remain silent during administrative proceedings, so long as the government does not directly punish the refusal to testify.⁸⁷ Moreover, testimony elicited in administrative proceedings may be introduced in subsequent criminal proceedings.⁸⁸

This puts a student who faces the prospect of parallel Title IX and criminal proceedings "on the horns of a legal dilemma: if he mounts a full defense at the disciplinary hearing without the assistance of counsel and testifies on his own behalf, he might jeopardize his defense in the criminal case; if he fails to fully defend himself or chooses not to testify at all, he risks loss of the college degree . . . and his reputation will be seriously blemished."⁸⁹ Respondents who face parallel Title IX and criminal proceedings will thus often be forced to prioritize their defense in one proceeding (usually the criminal proceeding) to the detriment of their defense in the other. To avoid similar problems, civil proceedings that overlap with criminal proceedings are often stayed pending the outcome of the criminal trial.⁹⁰

⁸⁴ See *supra* Section I.5 (discussing interim measures).

⁸⁵ See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

⁸⁶ *Carter v. Kentucky*, 450 U.S. 288 (1981).

⁸⁷ *Baxter v. Palmigiano*, 425 U.S. 308 (1976).

⁸⁸ See, e.g., *Gabrilowitz v. Newman*, 582 F.2d 100 (1st Cir. 1978); *Watson v. Cty. of Riverdale*, 976 F. Supp. 951 (C.D. Cal. 1997); *Hart v. Ferris State Coll.*, 557 F. Supp. 1379 (W.D. Mich. 1983).

⁸⁹ *Gabrilowitz v. Newman*, 582 F.2d 100, 103 (1st Cir. 1978). The dilemma persists even if the student has legal counsel at the disciplinary proceeding.

⁹⁰ Kimberly J. Winbush, *Annotation, Pendency of Criminal Prosecution as Ground for Continuance or Postponement of Civil Action to which Government is not Party Involving Facts or Transactions upon which Prosecution is Predicated—Federal Cases*, 34 A.L.R. Fed. 2d 85, § 2 (2009)

The Department recognizes these concerns in its Proposed Rule by allowing recipients to delay Title IX grievance proceedings due to concurrent law enforcement activity. The ACLU recommends that the Proposed Rule be strengthened, however, to make clear that where there is an imminent law enforcement investigation or criminal prosecution, and a respondent requests a delay, the recipient *shall* grant an appropriate delay of grievance proceedings. The Rule should also clarify that a recipient may not refer a complaint to law enforcement for the purpose of delaying the recipient's own Title IX investigation.

The Department should further provide that, when a respondent requests a delay of Title IX grievance proceedings, a recipient *shall* implement any interim measures pursuant to Proposed Rule §§ 106.30, 106.45(b)(1)(viii), necessary to protect the complainant's access to education.

In cases where the respondent chooses to go forward with the grievance proceeding in the face of an imminent law enforcement investigation or criminal prosecution, the Department should make clear that recipients may not draw adverse inferences from a party's silence during Title IX grievance proceedings.⁹¹

The ACLU therefore recommends that the Department amend section 106.45(b)(1)(v) in relevant part to state that:

(i) a recipient shall not draw adverse inferences from a party's silence during Title IX grievance proceedings; (ii) where there is an imminent law enforcement investigation or criminal prosecution, a respondent may request and a recipient shall grant an appropriate delay of grievance proceedings; (iii) when a respondent requests such a delay of Title IX grievance proceedings, a recipient shall implement interim measures as necessary to protect the complainant's access to education; and (iv) a recipient may not refer a complaint to law enforcement for the purpose of delaying the recipient's own Title IX investigation.

(collecting cases) ("Parties facing parallel civil and criminal proceedings are in an unenviable position, primarily since the scope of civil discovery is so much broader than that in the criminal realm, and thus a party's defense of civil claims may threaten the Fifth Amendment privilege against self-incrimination, particularly vis-à-vis testimony that would impact the criminal proceedings. Accordingly, courts have held that the pendency of parallel or related criminal proceedings may provide a basis for postponing the civil proceeding under certain conditions, after the weighing of competing interests.").

⁹¹ See HARV. LAW SCH., *Sexual Harassment Resources & Procedures for Students* § 2.5 (2014), <https://hls.harvard.edu/content/uploads/2015/07/HLSTitleIXProcedures150629.pdf>.

4. **The Provision for Access to Evidence Not Used in the Proceeding Should Make Clear That Irrelevant and Privileged Information is Not Subject to Disclosure.**

§ 106.45(b)(3)(viii)

As the Department recognizes in the Notice of Proposed Rulemaking, “[t]o maintain a transparent process, the parties need a complete understanding of the evidence obtained by the recipient and how a determination regarding responsibility is made.”⁹² Thus, Proposed Rule § 106.45(b)(3)(viii) “would require recipients to provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including evidence upon which the recipient does not intend to rely in making a determination regarding responsibility.”⁹³

The Proposed Rule appropriately reflects that transparency regarding both evidence and procedure is a necessary component of any fair adjudicative proceeding. However, the ACLU suggests that the Proposed Rule be modified to make clear that the right of access does not extend to evidence that is irrelevant or that would ordinarily be protected against disclosure in litigation (e.g., due to claims of privilege).

The ACLU agrees that the parties should enjoy broad access to any evidence in the recipient’s possession that bears on the complaint under review. However, just as discovery requests in civil litigation are limited “to any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case,”⁹⁴ access to information that is irrelevant or privileged must be protected from disclosure in Title IX grievance proceedings. Such evidence would include, but is not limited to, medical records, therapy notes, prior sexual history, and other communications ordinarily protected against disclosure, such as communications covered by the attorney-client, doctor-patient, priest-penitent, and other applicable legal privileges, except where there is a showing of particularized relevance.⁹⁵

⁹² Proposed Rule, 83 Fed. Reg. at 61,476.

⁹³ *Id.*

⁹⁴ FED. R. CIV. P. 26(b)(1).

⁹⁵ The language of the Proposed Rule governing sexual history should be similarly narrowed. It currently provides: “With or without a hearing, all questioning must exclude evidence of the complainant’s sexual behavior or predisposition, unless such evidence about the complainant’s sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant’s sexual behavior with respect to the respondent and is offered to prove consent.” Proposed Rule, 83 Fed. Reg. at 61,498. All questioning as to prior sexual history should be barred absent a showing of particularized relevance. Even disclosure of evidence concerning a prior sexual relationship between the respondent and the complainant, without a showing of particularized evidence, infringes the rights of the complainant.

The ACLU accordingly recommends that the Department supplement the Proposed Rule to make clear that recipients must not provide the parties with access to information that is either irrelevant or privileged under applicable law.

5. The Proposed Rule Should Be Clarified To Avoid Confusion and Ensure Equal Appellate Rights.

§ 106.45(b)(5)

Proposed Rule § 106.45(b)(5) provides that a recipient may offer an appeal, but that “[i]f a recipient offers an appeal, it must offer an appeal to both parties.”⁹⁶ The ACLU agrees with this principle. As the Department recognizes, for both complainants and respondents, the outcome of a Title IX grievance “represents high-stakes, potentially life-altering consequences deserving of an accurate outcome.”⁹⁷ Allowing both complainants and respondents to appeal a recipient’s initial determination regarding a Title IX grievance appropriately “reflect[s] that each party has an important stake in the reliability of the outcome.”⁹⁸

The Proposed Rule further states that “[i]n cases where there has been a finding of responsibility, although a complainant may appeal on the ground that the remedies are not designed to restore or preserve the complainant’s access to the recipient’s education program or activity, a complainant is not entitled to a particular sanction against the respondent.”⁹⁹ The latter qualification properly reflects the Supreme Court’s holding that Title IX does not confer on complainants a statutory “right to make particular remedial demands” of recipients.¹⁰⁰ As long as a recipient restores or preserves equal access to education, it has discretion about which remedy or sanction to provide. To avoid any confusion, the ACLU recommends that the Department specify that while complainants are not entitled to particular sanctions, they are entitled to argue that the particular sanctions imposed are insufficient “to restore or preserve the complainant’s access to the recipient’s education program or activity.” Some might otherwise read the Proposed Rule as drawing a distinction between “remedies” and “sanctions,” and as prohibiting a complainant from arguing that the sanctions imposed are insufficient.¹⁰¹

The ACLU accordingly recommends that the Department revise the Proposed Rule to state: “In cases where there has been a finding of responsibility, although complainant is not entitled to a particular remedy or sanction against the

⁹⁶ Proposed Rule, 83 Fed. Reg. at 61,478.

⁹⁷ *Id.* at 61,479.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Davis v. Monroe Cty. Sch. Bd.*, 526 U.S. 629, 648 (1999).

¹⁰¹ See AM. BAR ASS’N, *supra* note 77 at 3 (recommending that grounds for appeal should include “the imposition of a sanction disproportionate to the findings in the case (that is, too lenient or too severe)”; Elizabeth Bartholet et al, *supra* note 67 at 5–6 (arguing that recipients must “[a]llow appeals on any grounds, rather than limit them narrowly”).

respondent, the complainant may appeal on the ground that the remedies or sanctions are not designed to restore or preserve the complainant's access to the recipient's education program or activity."

CONCLUSION

For the reasons stated above, the ACLU objects to the Rule as proposed, and recommends that the Department modify the Rule consistent with these comments. If you have any questions, please contact Michael Garvey at mgarvey@aclu.org or 202-675-2310.

Sincerely,



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