



PROPOSED ACTION  
MEMORANDUM

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# Addressing Sexual Violence Under Title IX of the Education Amendments of 1972

Department of Education  
November 2020

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# I. Summary

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On May 6, 2020, the U.S. Department of Education (Department) amended its implementing regulations for Title IX of the Education Amendments of 1972 (Title IX).<sup>1</sup> The Department's new regulations (Final Rule) include, *inter alia*, provisions on schools' obligations to address sexual harassment, including sexual violence. The Final Rule addresses the obligations of schools at all educational levels. The Final Rule went into effect on August 14, 2020.<sup>2</sup>

The Final Rule will result in significant harm to students who have been affected by sexual violence. It not only changes the liability standard that schools are held to when responding to allegations of sexual harassment, but also narrows the geographic scope of a school's responsibility and imposes onerous procedural requirements on schools when determining responsibility, regardless of the specific circumstances of a particular school or case.

To address this harm, the incoming administration should:

- (1) Issue a Notice of Proposed Rulemaking to revise and amend the Final Rule that realigns administrative enforcement of Title IX by the Office for Civil Rights (OCR) with its previous practices, reinstates protections for victims of sexual violence, and includes other provisions that improve upon prior enforcement standards

## II. Background and Current State

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Prior to the new regulations, the Department had only issued sub-regulatory guidance to explain a school's obligation to address sexual harassment, including sexual violence, under Title IX.

In September 2017, the Trump administration issued a [Dear Colleague Letter](#) that announced its intention to engage in rulemaking to amend the Department's Title IX regulations, and to promulgate rules interpreting Title IX that would address how schools must respond to sexual harassment. The letter also rescinded the Obama administration's most recent guidance documents on sexual violence, including the [2011 Dear Colleague Letter on Title IX and Sexual Violence](#) ("2011 DCL") and the [2014 Questions and Answers on Title IX and Sexual Violence](#) ("2014 Q&A").<sup>3</sup> Simultaneously, the Department issued a [Q&A on Campus Sexual Misconduct](#) ("2017 Q&A") that provided information about how OCR would assess a school's compliance with Title IX with respect to sexual harassment while it engaged in formal rulemaking.<sup>4</sup>

In November 2018, the Department issued a [Notice of Proposed Rulemaking](#) (NPRM) to amend the Department's Title IX regulations to include, *inter alia*, provisions on a school's obligations to address sexual

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<sup>1</sup> 85 Fed. Reg. 30,026 (May 19, 2020).

<sup>2</sup> *Id.* at 30,028.

<sup>3</sup> In 2001, OCR issued the *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* ("2001 Guidance"), which was published in the Federal Register and subject to notice and comment. 62 Fed. Reg. 66,092 (Nov. 2, 2000). OCR stated in the 2017 Q&A (at 1) that OCR would continue to rely upon the 2001 Guidance in enforcing Title IX, despite contradictions between the 2001 Guidance and the 2017 Q&A. *See infra* n.7.

<sup>4</sup> Several advocacy groups challenged the 2017 Q&A under the Administrative Procedure Act. In November 2019, the district court dismissed the lawsuit, holding that the 2017 Q&A was not a final agency action and thus could not be challenged under the Administrative Procedure Act ("APA"). *SurvJustice Inc., et al. v. DeVos*, No. 18-cv-00535, 2019 WL 5684522 (N.D. Cal. Nov. 1, 2019). Plaintiffs appealed that ruling in December 2019. Notice of Appeal, *Equal Rights Advocates, et al. v. DeVos*, No. 19-17555 (9th Cir. Dec. 23, 2019).

harassment, including sexual violence.<sup>5</sup> The Department received [over 124,000 comments](#) in response to the NPRM. The [Final Rule](#) was published on May 6, 2020, and took effect on August 14, 2020.<sup>6</sup>

The Final Rule imposes requirements on schools at all levels, and deviates significantly from how the Department had previously described OCR's administrative enforcement of Title IX and its implementing regulations in the 2001 Guidance,<sup>7</sup> the 2011 DCL, and the 2014 Q&A.

There are several provisions in the Final Rule that remove important protections for survivors of sexual violence, including:<sup>8</sup>

- **Narrowed definition of sexual harassment**

Previously, the department stated that a teacher or employee engages in *quid pro quo* harassment when they “condition[ ] an educational decision or benefit on the student’s submission to unwelcome sexual conduct.”<sup>9</sup> In addition, the Department had previously stated that “[h]arassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school.”<sup>10</sup> In the Final Rule (34 C.F.R. § 106.30 (definition of sexual harassment)), the Department revised this definition to provide that sexual harassment is conduct on the basis of sex that satisfies one or more of the following.

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in an unwelcome sexual conduct
- (2) Unwelcome conduct, determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school’s education program or activity
- (3) “Sexual assault,” as defined in 20 U.S.C. 1092(f)(6)(A)(v), “dating violence,” as defined in 34 U.S.C. 12291(a)(10), “domestic violence,” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30)

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<sup>5</sup> 83 Fed. Reg. 61,462 (Nov. 29, 2018), amended by 84 Fed. Reg. 409 (Jan. 28, 2019); 84 Fed. Reg. 4,018 (Feb. 14, 2019).

<sup>6</sup> 85 Fed. Reg. at 30,026, 30,028. The Final Rule also addressed remedial and affirmative action and self-evaluation (34 C.F.R. § 106.3), effect of other requirements and preservation of rights (*id.* § 106.6), designation of coordinator, dissemination of policy, and adoption of grievance procedures (*id.* § 106.8), and educational institutions controlled by religious organizations (*id.* § 106.12). This memorandum does not address those provisions.

<sup>7</sup> It is unclear from the preamble to the Final Rule whether the Department rescinded the 2001 Guidance and the 2017 Q&A when it issued the Final Rule. Since the Final Rule’s publication, the Department has published a notice of rescission of outdated documents in the Federal Register, and did not include the 2001 Guidance. U.S. Dep’t of Educ., *Notice of Rescission of Outdated Guidance*, 85 Fed. Reg. 54,148 (Aug. 31, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-08-31/pdf/2020-19144.pdf>. However, OCR has included the 2001 Guidance on the list of rescinded policy guidance that it has published on its website. OCR, *Rescinded Policy Guidance* (last modified Sept. 11, 2020), <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/respolicy.html>.

<sup>8</sup> The Final Rule is the subject of four lawsuits, any one of which could result in injunctive relief. The first was filed by the ACLU and challenged the Department’s decision to require schools to treat reports of harassment based on sex differently than it treats reports of harassment based on race, national origin, or disability. *See* Complaint for Declaratory and Injunctive Relief, *Know Your IX v. DeVos*, No. 20-cv-01224 (D. Md. May 14, 2020), <https://www.aclu.org/know-your-ix-v-devos>. The second was filed by 18 state attorneys general and challenges, under the APA, the definition of sexual harassment, the Final Rule’s scope of Title IX’s geographic coverage, the formal complaint process and investigation requirements, and the elimination of confidentiality provisions in the investigation process. *See* Complaint for Declaratory and Injunctive Relief, *Pennsylvania v. DeVos*, No. 20-cv-01468 (D.D.C. June 4, 2020), <https://www.titleixforall.com/wp-content/uploads/2020/06/Commonwealth-of-Penn.-v.-Devos.pdf>. The district court denied the plaintiffs’ motion to preliminarily enjoin implementation of the rule, or, in the alternative, to stay the effective date pending judicial review. *Pennsylvania v. DeVos*, Civil Action No. 1:20-cv-01468 (CJN), 2020 WL 4673413 (D.D.C. Aug. 12, 2020). The third lawsuit was filed by the New York Attorney General (who is not a party to the *Pennsylvania v. DeVos* lawsuit) and also challenged, under the APA, the Final Rule’s definitions and requirements, prescriptive grievance process, conflict with the autonomy of New York schools, and inconsistency with Title IX’s broad anti-discrimination mandate and other federal laws, and aspects of the rulemaking process. *See* Complaint for Declaratory and Injunctive Relief, *New York v. U.S. Dep’t of Educ.*, No. 20-cv-4260 (S.D.N.Y. June 4, 2020), [https://ag.ny.gov/sites/default/files/01\\_-\\_complaint\\_-\\_2020.06.04.pdf](https://ag.ny.gov/sites/default/files/01_-_complaint_-_2020.06.04.pdf). The district court in this case also denied plaintiffs’ motion to preliminarily enjoin implementation of the rule, or, in the alternative, to stay the effective date pending judicial review. *New York v. U.S. Dep’t of Educ.*, No. 20-CV-4260 (JGK), 2020 WL 4581595 (S.D.N.Y. Aug. 9, 2020). The fourth lawsuit was filed by the National Women’s Law Center and others on behalf of four organizations that represent student survivors of sexual harassment and assault, and challenged the Final Rule under the APA and the Equal Protection Clause. Complaint for Declaratory and Injunctive Relief, *Victim Rights Law Ctr. v. DeVos*, No. 20-11104 (D. Mass. June 10, 2020), <https://nwlc-ci49tixgw5lbab.stackpathdns.com/wp-content/uploads/2020/06/20-11104-Complaint.pdf>.

<sup>9</sup> 2001 Guidance at 5.

<sup>10</sup> OCR, Dear Colleague Letter: Harassment and Bullying at 2 (“2010 DCL on Harassment and Bullying”) (2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

- **Narrowed scope of liability for schools**<sup>11</sup>

The Final Rule makes several changes to narrow the liability standard for schools, including:

- **Narrowed scope of notice.** The Final Rule changes OCR’s practice of requiring a school to address sexual harassment of which it had actual or constructive notice.<sup>12</sup> The department’s longstanding interpretation of Title IX and its implementing regulations has been that a school has an obligation to address sexual harassment “if a responsible school employee actually knew or, in the exercise of reasonable care, should have known about the harassment.”<sup>13</sup> A “responsible employee” is one “who has the authority to take action to redress sexual violence; who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX coordinator or other appropriate school designee; or whom a student could reasonably believe has this authority or duty.” 2014 Q&A at 15. In the Final Rule, the department narrowed the school’s responsibilities considerably. Under the Final Rule, a school is only required to respond to harassment of which it has “actual knowledge.” A school has “actual knowledge” of sexual harassment if notice has been given 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 any employee of an elementary and secondary school.”<sup>14</sup> 34 C.F.R. § 106.30 (definition of actual knowledge).
- **Heightened liability standard for schools (deliberate indifference standard).** Previously, the Department had interpreted Title IX to require schools to respond “promptly and effectively” to sexual harassment, *i.e.*, to “take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.” 2001 Guidance at 9; 2011 DCL at 4. The Department enforced these standards in administrative investigations without regard to a school’s reasonableness or good faith. The Final Rule adopts the “deliberate indifference” standard that courts use to assess a school’s liability under Title IX in private litigation for money damages. Under the Final Rule, “[a] recipient with actual knowledge of sexual harassment in an education program or activity . . . must respond promptly in a manner that is not deliberately indifferent.”<sup>15</sup> 34 C.F.R. § 106.44(a). “A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.” *Id.* The Department adopted this heightened standard for liability. despite the fact that the Supreme Court has recognized the distinction between

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<sup>11</sup> In the preamble to the Final Rule, the Department acknowledged that it changed the liability standard for Title IX in a way that leaves it inconsistent with the liability standards for the other civil rights laws that OCR enforces, *i.e.*, discrimination based on race, color, and national origin (Title VI of the Civil Rights Act of 1964) and disability (Title II of the Americans with Disabilities Act of 1990 and Section 504 of the Rehabilitation Act of 1973). As it contended, “[t]he Department respectfully disagrees that establishing different requirements under Title IX than other non-discrimination laws will send the wrong message. Sex discrimination and the handling of sex discrimination claims differ in some important ways from other types of discrimination, such as discrimination on the basis of race. For example, a person may be criminally charged with some forms of sexual harassment such as sexual assault.” 85 Fed. Reg. at 30,450.

<sup>12</sup> 2001 Guidance at 10 (requiring schools to address sexual harassment if any employee “knew, or in the exercise of reasonable care should have known about the harassment”).

<sup>13</sup> *Id.* See also 2017 Q&A at 1–2.

<sup>14</sup> The Final Rule clarifies that “[i]mputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. The Final Rule also provides that the “actual knowledge” standard “is not met when the only official of the recipient with actual knowledge is also the respondent.” 34 C.F.R. § 106.30 (definition of actual knowledge). In addition, in the preamble to the Final Rule, the Department explained that a school may be charged with actual knowledge when the sexual harassment is “so pervasive” that some employee “should have known” about it (*e.g.*, sexualized graffiti scrawled across lockers that meets the definition of sexual harassment in § 106.30), it is highly likely that at least one employee did know about it and the school is charged with actual knowledge.” 85 Fed. Reg. at 30,041.

<sup>15</sup> In the preamble to the Final Rule, the Department responded to comments that the Final Rule should require assurances that “the school will take steps to prevent recurrence of harassment, correct its discriminatory effects, and prevent any retaliation against the complainant because the effects of harassment can go beyond the complainant and the respondent.” *Id.* at 30,392. The Department responded that it “does not believe such assurances are necessary given the recipient’s ongoing and continuous duty to not be deliberately indifferent.” *Id.* Rather, “[t]he Department believes the existing requirements under the final regulations are sufficient to promote prevention of recurrence of harassment and restore equal access to education.” *Id.*

OCR's administrative enforcement and private litigation for money damages, and the Department's authority to "promulgate and enforce requirements that effectuate [Title IX's] nondiscrimination mandate,' even in circumstances that would not give rise to a claim for money damages." 2001 Guidance at ii (quoting *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 292 (1989)).

- **Narrowed scope of obligations for off-campus conduct.** In the 2011 DCL (at 4), the Department explained that "[s]chools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school's education program or activity . . . [b]ecause students often experience the continuing effects of off-campus sexual harassment in the educational setting." The Department further clarified in the 2014 Q&A (at 29–30), that "[u]nder Title IX, a school must process all complaints of sexual violence, regardless of where the conduct occurred, to determine whether the conduct occurred in the context of an education program or activity or had continuing effects on campus or in an off-campus education program or activity." In contrast, the Final Rule significantly narrows the scope of a recipient's obligation to respond to sexual harassment by limiting it to sexual harassment that occurred in the recipient's education program or activity. Under the Final Rule, a recipient's obligation is limited to responding "promptly in a manner that is not deliberately indifferent" to sexual harassment of which it has "actual knowledge" and which occurred "in an education program or activity." 34 C.F.R. § 106.44(a). The Final Rule states that "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. *Id.*<sup>16</sup>

Schools must dismiss a formal complaint "[i]f the conduct alleged . . . would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity."<sup>17</sup> *Id.* § 106.45(b)(3)(i). The Final Rule also requires that "Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on . . . the scope of the recipient's education program or activity." *Id.* § 106.45(b)(1)(iii). *See also* 85 Fed. Reg. at 30,198.<sup>18</sup>

#### ▪ **Barriers in the process to file a complaint**

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<sup>16</sup> In the preamble to the Final Rule, the Department also clarified that the Final Rule does not exempt a school from responding to allegations of harassment that occur electronically or online and "[t]hese final regulations apply to sexual harassment perpetrated through use of cell phones or the internet if sexual harassment occurred in the recipient's education program or activity." *Id.* at 30,202. Indeed, a recipient's education program or activity may "include computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, the recipient." *Id.* The Department also explained that under the Final Rule, "the factual circumstances of online harassment must be analyzed to determine if it occurred in an education program or activity." *Id.* The Department went on to explain that, for example, "a student using a personal device to perpetrate online sexual harassment during class time may constitute a circumstance over which the recipient exercises substantial control." *Id.*

<sup>17</sup> The Department explained that the Final Rule "return[s] to the Department's approach in the 2001 Guidance, which mirrors the Supreme Court's approach to 'education program or activity' as a jurisdictional condition that promotes a recipient's obligation under Title IX to provide education programs or activities free from sex discrimination." *Id.* at 30,201. The 2001 Guidance stated, "Title IX protects students in connection with all of the academic, educational, extra-curricular, athletic, and other programs of the school, whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere." 2001 Guidance at 1–2. However, under the 2001 Guidance, schools were required to look at "all relevant circumstances, i.e., 'the constellation of surrounding circumstances, expectations, and relationships'" to evaluate the severity and pervasiveness of the conduct, and to determine whether a hostile environment had been created. *Id.* at 5–7.

<sup>18</sup> The preamble to the Final Rule addressed a school's obligation to respond to sexual harassment that is alleged to have occurred outside of a school's education program or activity. The Department explained that "[i]n situations involving some allegations of conduct that occurred in an education program or activity, and some allegations of conduct that did not," "nothing in the final regulations precludes the recipient from choosing to also address allegations of conduct outside the recipient's education program or activity" under another provision of the recipient's code of conduct. 85 Fed. Reg. at 30,198. In addition, the Department stated that "complainants can request supportive measures or an investigation into allegations of conduct that do not meet Title IX jurisdictional conditions, under a recipient's own code of conduct." *Id.* at 30,200.

The Final Rule makes several changes to the complaint process, many of which make it more difficult to file a complaint. Changes include:

- **Narrowing who may file a complaint.** In the 2011 DCL (at 4), the Department recognized that complaints may be filed by “a harassed student, his or her parent, or a third party.” The Department made clear that Title IX “protects third parties from sexual harassment or violence in a school’s education program or activity,” *e.g.*, “a high school student participating in a college’s recruitment program, a visiting student athlete, and a visitor in a school’s on-campus residence hall.” *Id.* at 4 n.11. OCR advised that a school “should inform and obtain consent from the complainant (or the complainant’s parents [if appropriate]) before beginning an investigation,” but it also stated that “[r]egardless of whether a harassed student, his or her parent, or a third party files a complaint under the school’s grievance procedures or otherwise requests action on the student’s behalf, a school that knows, or reasonably should know, about possible harassment must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation.” *Id.* In contrast, under the Final Rule, the school is required to follow its grievance process (including investigation) only in response to a “formal complaint.” *See* 34 C.F.R. § 106.44(b). A “formal complaint” is defined as “a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment by a respondent and requesting that the recipient investigate the allegation of sexual harassment.” *Id.* § 106.30 (definition of formal complaint). A “complainant” is defined as “an individual who is alleged to be the victim of conduct that could constitute sexual harassment.” *Id.* § 106.30 (definition of complainant). “At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.” *Id.* § 106.30 (definition of formal complaint). The Final Rule recognizes “any legal right of a parent or guardian to act on behalf of a ‘complainant,’ ‘respondent,’ ‘party,’ or other individual . . . including but not limited to filing a formal complaint,” subject to the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, and its implementing regulations, 34 C.F.R. Part 99. 34 C.F.R. § 106.6(g); *see also id.* § 106.6(e). The Department explained in the preamble to the Final Rule that the Title IX Coordinator’s authority to file a complaint is necessary “if a non-deliberately indifferent response to actual knowledge of sexual harassment necessitates investigating allegations.” 85 Fed. Reg. at 30,128.
- **Lack of confidentiality when seeking more than supportive measures.** The 2011 DCL (at 5) stated that a complainant may wish to keep their name and other identifiable information confidential. *See also* 2014 Q&A at 18–21. In such a situation, “the school should evaluate that request in the context of its responsibility to provide a safe and nondiscriminatory environment for all students.” The Final Rule does not address this possibility. Rather, the preamble to the Final Rule states that “the final regulations require identification of the parties after a formal complaint has triggered a grievance process, in a way that the 2001 Guidance did not” because “[t]he Department does not believe that anonymity during a grievance process can lead to fair, reliable outcomes.” 85 Fed. Reg. at 30,286–87. Thus, a complainant who seeks more than supportive measures would be required to sign a formal complaint and the complainant’s identity would be shared with the respondent under the school’s grievance procedures. *See* 34 C.F.R. § 106.30 (definition of formal complaint); *id.* § 106.45(b)(2)(B).
- **Heightened standard of proof**  
The Final Rule allows schools to use a more restrictive standard and requires schools to use the same standard of evidence for all formal complaints of sexual harassment. The 2011 DCL (at 11) stated that schools must use the “preponderance of the evidence” standard when resolving allegations of

discrimination (including harassment) under Title IX, explaining that the Supreme Court has used this standard in deciding cases under Title VII of the Civil Rights Act of 1964, the OCR has used this standard in resolving complaints of discrimination under Title IX, and the OCR's Case Processing Manual also requires noncompliance determinations under all of the civil rights laws that it enforces to be supported by a preponderance of the evidence.<sup>19</sup> In contrast, the Final Rule deviates from this interpretation and allows a school to use a more restrictive standard of proof (*i.e.*, the "clear and convincing evidence" standard). The Final Rule requires that a school's grievance procedures "[s]tate whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard." 34 C.F.R. § 106.45(b)(1)(vii). The Final Rule requires that schools "apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment." *Id.*

▪ **Delaying the grievance process due to concurrent law enforcement activity**

Sexual violence may also be the subject of a criminal investigation or criminal proceeding by law enforcement. The Department previously stated in its 2011 DCL (at 10) that "[s]chools should not wait for the conclusion of a criminal investigation or criminal proceeding to begin their own Title IX investigation," nor should a concurrent investigation "prevent a school from notifying complainants of their Title IX rights and the school's grievance procedures, or taking interim steps to ensure the safety and well-being of the complainant and the school community while the law enforcement agency's fact-gathering is in progress." See also 2014 Q&A at 27–28. The Final Rule states that although a grievance process must include "reasonably prompt time frames for conclusion of the grievance process," it may be subject to a "temporary delay" or "limited extension of time frames" for "good cause," including "concurrent law enforcement activity." 34 C.F.R. § 106.45(b)(1)(v).

There are also several aspects of the Final Rule that improved the Title IX enforcement process, including:

▪ **Supportive measures**

The Final Rule (34 C.F.R. § 106.44(a)) specifies that the school's mandatory response, regardless of whether a formal complaint is filed, must include contacting the complainant to discuss the availability of, and to offer, supportive measures. Supportive measures "are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment." *Id.* § 106.30 (definition of supportive measures). Examples of supportive measures 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." 85 Fed. Reg. at 30,401.

▪ **More specific requirements for the grievance process**

The Department's Title IX regulations simply require schools to "adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints" that allege a violation of Title IX or its implementing regulations. 34 C.F.R. § 106.8(c). The Final Rule added a much greater level of detail regarding the grievance process that schools must use to address formal complaints of sexual harassment, including with respect to:

- Basic requirements for grievance process (*id.* § 106.45(b)(1))
- Notice of allegations (*id.* § 106.45(b)(2))

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<sup>19</sup> OCR, Case Processing Manual § 303 (August 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

- Dismissal of a formal complaint (*id.* § 106.45(b)(3))
- Consolidation of formal complaints (*id.* § 106.45(b)(4))
- Investigation of a formal complaint (*id.* § 106.45(b)(5))
- Hearings (*id.* § 106.45(b)(6))
- Determination regarding responsibility (*id.* § 106.45(b)(7))
- Appeals (*id.* § 106.45(b)(8))
- Informal resolution (*id.* § 106.45(b)(9))
- Recordkeeping (*id.* § 106.45(b)(10))

Although it is helpful for schools to have more detailed information regarding the requirements for a grievance process, as discussed below, many of the specific obligations created by the Final Rule likely require additional consideration, including:

▪ **Tailored investigations**

The 2011 DCL (at 5) states that an investigation must be “prompt, thorough, and impartial,” but also recognizes the need to tailor investigations based on “the nature of the allegations, the age of the student or students involved (particularly in elementary and secondary schools), the size and the administrative structure of the school, and other factors.” *See also* 2014 Q&A at 24–25. In the Final Rule, the Department acknowledges only that investigations conducted by elementary or secondary schools may not require a live hearing. 34 C.F.R. § 106.45(b)(6)(ii).

▪ **Single-investigator model**

Many institutions, particularly smaller institutions, have relied on a “single-investigator model” to resolve complaints of sexual harassment. Under the “single-investigator model,” one employee investigates a complaint of harassment and makes factual findings regarding the allegations. The Department prohibited this practice in the Final Rule, placing additional burdens and costs on smaller institutions that may not have the resources to increase staffing. The Final Rule states, “[t]he decision-maker(s) . . . cannot be the same person(s) as the Title IX Coordinator or the investigator(s).”<sup>20</sup> *Id.* § 106.45(b)(7)(i).

▪ **Right to an advisor**

The Department previously did not require schools to allow parties to be accompanied by a lawyer or other advisor, and instead stated that if a school chose “to allow the parties to have their lawyers participate in proceedings, it must do so equally for both parties.” *See* 2011 DCL at 12. The Final Rule requires schools to provide the parties with the same opportunities to be “accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney.” 34 C.F.R. § 106.45(b)(5)(iv). The Final Rule allows schools to “establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.” *Id.*

▪ **Requiring live hearings**

The 2014 Q&A (at 25) stated that “[an] investigation *may* include a hearing to determine whether the conduct occurred, but Title IX does not necessarily require a hearing” (emphasis added). In contrast, the Final Rule maintains the status quo at the elementary and secondary level, but requires that institutions of higher education hold a live hearing at which “the decision-maker(s) must permit each

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<sup>20</sup> The Department explained in the Final Rule that “we do not see the propriety in crafting different sets of procedural requirements under Title IX for recipients based on their size, the number of Title IX complaints they typically receive on an annual basis, or the potential severity of the punishment the respondent may receive if determined to be responsible for the alleged sexual harassment.” 85 Fed. Reg. at 30,371.



party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.” 34 C.F.R. § 106.45(b)(6)(i); *see also id.* § 106.45(b)(6)(ii).

- **Requiring cross-examination**

Previously, the Department did “not require that a school allow cross-examination of witnesses, including the parties, if they testify at the hearing,” but required that any opportunity to do so be given equally to both parties. 2014 Q&A at 31; *see also* 2017 Q&A at 5. In addition, the Department “strongly discourage[d] a school from allowing the parties to personally question or cross-examine each other,” and instead suggested that a school allow the parties to submit questions to “a trained third party (e.g., the hearing panel) to ask the questions on their behalf.” 2014 Q&A at 31. In contrast, the Final Rule states that at the elementary and secondary level, regardless of whether a live hearing is required, after the recipient has sent the investigative report to the parties and before reaching a determination regarding responsibility, each party must have the opportunity to submit written questions and limited follow-up questions based on the responses. 34 C.F.R. § 106.45(b)(6)(ii). Live hearings are required at the postsecondary level, including cross-examination by each party’s advisor.<sup>21</sup> *Id.* § 106.45(b)(6)(i). At the postsecondary level, cross-examination “must be conducted directly, orally, and in real time by the party’s advisor or choice and never by a party personally.” *Id.* The Final Rule states, “[i]f a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility.” *Id.* In addition, “the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.” *Id.*

- **Sharing evidence**

The 2011 DCL (at 11) provided that both parties “must be afforded similar and timely access to any information that will be used at the hearing.” The Final Rule requires a school to provide to both parties “any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint” regardless of whether the school intends to rely on that evidence in making its determination. 34 C.F.R. § 106.45(b)(5)(vi). The Final Rule also prohibits recipients from “requir[ing], allow[ing], rely[ing] upon, or otherwise us[ing] questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege,” *Id.* § 106.45(b)(1)(x).

- **Requiring appeals**

The Department previously did not require schools to provide appeals of findings or remedies. Instead, the Department “recommend[ed] that schools provide an appeals process,” and stated that if a school offers an appeal, then “it must do so for both parties.” 2011 DCL at 12. In the Final Rule, the Department states that “[a] recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient’s dismissal of a formal complaint or any allegations therein” based on several reasons, including, a “[p]rocedural irregularity that affected the outcome of the matter,” “[n]ew evidence that was not reasonably available at the time the determination regarding the responsibility or dismissal was made, that could affect the outcome of the matter,” or “[t]he Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias.” 34 C.F.R. § 106.45(b)(8)(i). The Final Rule also specifies procedural requirements for appeals. *Id.* § 106.45(b)(8)(iii).

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<sup>21</sup> The Final Rule provides that “[a]t the request of either party, the recipient must provide for the live hearing to occur with the parties in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions.” 34 C.F.R. § 106.45(b)(6)(i). In addition, postsecondary recipients are required to “create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.” *Id.*

- **Allowing informal resolution**

Under prior administrations, the Department has advised schools that “in cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis.” 2011 DCL at 8. *See also* 2001 Guidance at 21 (“In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis.”). In contrast, the Final Rule allows schools to facilitate an informal resolution process for resolving a complaint of peer sexual harassment under certain conditions. 34 C.F.R. § 106.45(b)(9). The Final Rule clarifies that schools “may not require as a condition of enrollment or continuing enrollment . . . waiver of the right to an investigation and adjudication of formal complaints of sexual harassment,” and “may not require parties to participate in an informal resolution process . . . and may not offer an informal resolution process unless a formal complaint is filed.” *Id.* Under the Final Rule, an informal resolution process may not be offered or used “to resolve allegations that an employee sexually harassed a student.” *Id.* § 106.45(b)(9)(iii). *See also* 85 Fed. Reg. at 30,446. However, the process can be used for allegations against students at any educational level, including at the elementary and secondary (“ESE”) level. *Id.* at 30,486.

### III. Justification for Proposed Action

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As illustrated above, the Final Rule departs significantly from the Department’s previous standards for enforcing Title IX with respect to sexual harassment, including sexual violence. The changes announced in the Final Rule dramatically weaken protections for survivors of sexual assault in a myriad of ways. The Department justifies the Rule by citing the need to align its standards for investigations and administrative enforcement with private litigation seeking money damages from institutions, as well as the desire to “achieve important policy objectives that arise in the context of a school’s response to reports, allegations, or incidents of sexual harassment in a school’s education program or activity.”<sup>22</sup> As the Supreme Court noted more than twenty years ago, however, private litigation is markedly different from administrative enforcement, and the Department has authority to enforce administrative requirements that would not otherwise give rise to a recovery in damages in private litigation. *Gebser*, 524 U.S. at 292. *See also* 2001 Guidance at iii.

Issuing a new NPRM is preferable to rescinding the Final Rule and reinstating previous sub-regulatory guidance because: (1) the notice-and-comment rulemaking process gives the public the opportunity to express their views on this important issue, (2) regulations impose legal obligations on recipients whereas sub-regulatory guidance does not, and (3) regulations are afforded a higher level of judicial deference than sub-regulatory deference, and may only be rescinded through notice-and-comment rulemaking procedures.

### IV. Proposed Actions

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<sup>22</sup> The policy objectives specified by the Department include “respect for freedom of speech and academic freedom, respect for complainants’ autonomy, protection for complainants’ equal educational access while respecting the decisions of State and local educators to determine appropriate supportive measures, remedies, and disciplinary sanctions, consistency with constitutional due process and fundamental fairness, and clear legal obligations that enable robust administrative enforcement of Title IX violations.” 85 Fed. Reg. at 30,035. In addition, the Department explained that its previous guidance documents “failed to adequately address the unique challenges presented by sexual harassment incidents in a school’s education program or activity.” *Id.* The Department stated that aligning its standards for investigations and administrative enforcement with private litigation seeking money damages from institutions “provide[s] recipients with flexibility, subject to the legal requirements in these final regulations, to respond to a greater range of misconduct, operate on a condition of constructive notice, or respond under a strict liability standard” if the recipient chooses, or is required by State or other laws, to adopt the standards previously articulated by the Department in policy guidance. *Id.* at 30,035–36.

Upon taking office, to address the harm to students caused by the Trump administration's Final Rule, the next administration should:

- (1) Issue a new Notice of Proposed Rulemaking (new NPRM) to reverse the Trump administration's actions; reinstate, but in a regulation, previous standards for OCR investigations and administrative enforcement that are necessary to satisfy Title IX; and include other provisions that improve upon prior enforcement standards<sup>23</sup>**

As the Department noted in the preamble to the Final Rule, schools, prior to the issuance of the Final Rule, relied on OCR guidance documents to understand their obligations for responding to incidents of sexual harassment.<sup>24</sup> However, guidance documents do not have the force of regulations, which are legally binding on recipients; thus the Department should revise the regulations implemented pursuant to the Final Rule, rather than rescind the Final Rule and reinstate past sub-regulatory guidance, or issue new, standalone sub-regulatory guidance.

In order to ensure that a new NPRM can be issued as soon as possible, the Department should immediately convene a public hearing to allow students, parents, schools, and other interested stakeholders and advocacy groups to provide feedback on the Final Rule and what provisions should be revised, amended, or rescinded. Although directed questions can be included in an NPRM to solicit feedback, there is no guarantee that the Department will receive any comments in response to those questions. Once the rulemaking process begins, the Department's ability to communicate with outside groups will be limited.

A transition team should also begin drafting a new NPRM as soon as possible to ensure that it can be issued quickly by the new administration. Because the Final Rule will have already been in effect for five months in January 2020, the new administration must carefully consider how promulgating a new set of regulations would impact, and possibly burden, students and schools. Although much of the foundation for a new NPRM should be based on past sub-regulatory guidance, which laid out OCR's method of administrative enforcement (specifically, the 2001 Guidance, the 2011 DCL, and the 2014 Q&A), the Department should also consider which, if any, provisions of the Final Rule can be preserved.

The new NPRM should propose to rescind the following provisions of the Final Rule, and propose replacing them with the previous standards:

- **Liability standard**
  - **Notice.** The Department should reinstate the requirement that schools must address sexual harassment of which they had actual or constructive notice, and make clear that the actual notice requirement implemented by the Final Rule is reserved for courts to assess a school's liability under Title IX in private litigation for money damages.
  - **Deliberate indifference.** The Department should rescind the "deliberate indifference" standard and reinstate the requirement that schools respond "promptly and effectively" to sexual harassment, *i.e.*, "take immediate action to eliminate the harassment, prevent its recurrence, and address its effects."<sup>25</sup>
  - **Off-campus conduct.** The Department should clarify in the new NPRM that, consistent with its prior interpretation, the obligation of a school to respond to sexual harassment includes incidents that occurred off school grounds, and outside a school's education

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<sup>23</sup> OCR should also consider promulgating parallel regulations under the other civil rights laws that it enforces to ensure consistency across the statutes.

<sup>24</sup> *Id.* at 30,029–30.

<sup>25</sup> 2001 Guidance at 9.

program or activity, if the continuing effect of the harassment is experienced at school and effectively denies a student equal access to an education program or activity.

▪ **Grievance process**

- **Standard of proof.** The new NPRM should require that all schools must use the preponderance-of-the-evidence standard when resolving allegations of peer harassment under Title IX, consistent with the 2011 DCL (at 1). The Final Rule's requirement that a school must apply the same standard of proof for resolving all formal complaints of sexual harassment may prevent a school from choosing to apply the preponderance-of-the-evidence standard to claims of peer harassment because of restrictions in employee collective bargaining agreements. The preamble to the new NPRM should explain that the Supreme Court uses the preponderance-of-the-evidence standard in deciding cases under Title VII of the Civil Rights Act of 1964; OCR uses this standard in resolving complaints of discrimination under Title IX; and OCR's Case Processing Manual requires noncompliance determinations under all of the civil rights laws that it enforces to be supported by a preponderance of the evidence.<sup>26</sup>
- *Concurrent law enforcement activity.* The Department should clearly state in the new NPRM that a school's obligation to address sexual harassment under Title IX cannot be delayed because of concurrent law enforcement activity. 34 C.F.R. § 106.45(b)(1)(v).

The Department should gather feedback on the following provisions to determine if they should be revised, amended, or rescinded.

▪ **Definition of sexual harassment**

The Department should consider whether it should preserve the definition of sexual harassment that is included in the Final Rule, or reinstate the principle that a hostile environment is created when conduct is "sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school."<sup>27</sup> The Final Rule's definition of sexual harassment includes *quid pro quo* harassment, the statutory definitions for various forms of sexual violence conduct, and "[u]nwelcome conduct determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a person equal access to the school's education program or activity."<sup>28</sup> 34 C.F.R. § 106.30 (definition of sexual harassment). If the Department chooses to preserve the definition articulated in the Final Rule, then it should clarify what constitutes an effective denial of equal access to an education program or activity, and how it compares to the "hostile environment" standard.

▪ **Liability standard**

- **Obligation to all students, not just the parties.** The Final Rule only addresses a school's obligation to the complainant and to the respondent. The Department should consider adding a provision regarding a school's obligation to provide a safe and nondiscriminatory environment for all students, including the responsibility to institute measures, short of disciplinary actions, that would prevent the recurrence of harassment (*e.g.*, training for members of the school community).

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<sup>26</sup> See *supra* n.19.

<sup>27</sup> 2010 DCL on Harassment and Bullying at 2.

<sup>28</sup> OCR explained in the preamble to the Final Rule that it revised the definition of sexual harassment to be consistent with Supreme Court precedent. See 85 Fed. Reg. at 30,036. However, OCR had previously stated in the 2001 Guidance (at v-vi) that though the exact wording of its definition of sexual harassment differed from the wording used by the Supreme Court, the definitions were "consistent."

- **Supportive measures.** The new NPRM should preserve the requirement that a school must contact the complainant to discuss the availability of and to offer supportive measures regardless of whether a formal complaint is filed. 34 C.F.R. § 106.44(a); *id.* § 106.30 (definition of formal complaint). However, the OCR should consider whether the new NPRM should require schools to monitor the effectiveness of supportive measures provided.
- **Complaint process**
- **ESE level.** The Department should gather feedback on whether the formal complaint process is suitable for students at the ESE level, or whether it should revise the requirements so that they are better tailored to this age group.
  - **Confidentiality.** The Department should collect information regarding whether the Final Rule’s requirements for disclosure of a complainant’s identity would deter potential complainants from reporting incidents or filing a formal complaint, particularly in the context of domestic violence and dating violence, and possibly leave incidents of sexual violence uninvestigated and unaddressed.
  - **Complainant.** The Department should consider whether to preserve the Final Rule’s requirement that formal complaints, which lead to an investigation and possible disciplinary measures, can only be filed by the “individual who is alleged to be the victim of conduct that could constitute sexual harassment,” their parent, their guardian, or the Title IX Coordinator. 34 C.F.R. § 106.30 (definition of complainant). The Department should also consider whether to preserve the Final Rule’s requirement that the complainant “must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint was filed.” *Id.* (definition of formal complaint)
- **Grievance process**
- **Tailored investigations.** The Department should consider whether it should give schools the flexibility to tailor investigations based on the factors that were outlined in previous guidance, including “the nature of the allegations, the age of the student or students involved (particularly in elementary and secondary schools), the size and the administrative structure of the school, and other factors.” 2011 DCL at 5. *See also* 2014 Q&A at 24–25.
  - **Right to an advisor.** The Department should consider whether to revise the Final Rule’s requirement that schools must allow parties to be accompanied by a lawyer or other advisor who can accompany the parties “to any related meeting or proceeding.” *Id.* § 106.45(b)(5)(iv).
  - **Single-investigator model.** The Department should solicit feedback on the single-investigator model, and whether the Final Rule’s prohibition on allowing single-investigator models at schools of all sizes and educational levels should be preserved. The Department should continue to monitor case law addressing whether the single-investigator model is consistent with due process and basic fairness protections.<sup>29</sup>

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<sup>29</sup> The Third Circuit recently held that a male college student had alleged a plausible claim that “at least as it has been implemented here, the single-investigator model violated the fairness that [the school] promises students accused of sexual misconduct.” *Doe v. Univ. of the Sciences*, 961 F.3d 203, 216 (3d Cir. 2020).

- **Requiring live hearings.** The Final Rule requires a postsecondary institution to conduct live hearings as part of its grievance processes. *Id.* § 106.45(b)(6)(i). The Department should conduct a legal analysis to determine whether this requirement should be preserved to be consistent with federal appellate case law;<sup>30</sup> and gather feedback on the costs, burdens, and benefits of this requirement and possible alternatives.
  - **Requiring cross-examination.** The Final Rule requires schools at the ESE level to provide each party with the opportunity to submit written questions and limited follow-up questions based on the responses. *Id.* § 106.45(b)(6)(ii). At the postsecondary level, the Final Rule requires schools to allow a party's advisor to conduct a cross-examination. *Id.* § 106.45(b)(6)(i). As with the requirement for live hearings at the postsecondary level, OCR should conduct a legal analysis to determine whether this requirement should be preserved to be consistent with federal appellate case law;<sup>31</sup> and gather feedback on the costs, burdens, and benefits of this requirement and possible alternatives (e.g., cross examination by the decisionmaker(s)).
  - **Sharing evidence.** The Department should solicit feedback on the Final Rule's requirement that the school provide to both parties "any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint," regardless of whether the school intends to rely on that evidence in making its determination. 34 C.F.R. § 106.45(b)(5)(vi). Although the Final Rule prohibits recipients from "requir[ing], allow[ing], rely[ing] upon, or otherwise us[ing] questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege," *id.* § 106.45(b)(1)(x), OCR should examine whether this protection is sufficient to ensure that irrelevant, and potentially damaging, information is not shared.
  - **Requiring appeals.** The Department previously did not require schools to provide appeals of findings or remedies, but the Final Rule requires schools to offer appeals under various circumstances. *Id.* § 106.45(b)(8). The Department should collect feedback to determine whether this provision should be preserved.
  - **Allowing informal resolution.** The Final Rule specifies the conditions under which complaints of sexual harassment may be resolved through informal resolution. *Id.* § 106.45(b)(9). The Department should gather feedback on whether this approach adequately protects survivors of sexual assault and the due process rights of respondents, and whether this is appropriate at all levels of education.
- **Other issues**
- The Department should also consider several other issues with respect to a new NPRM, including: (a) transcript notations, (b) requiring a school to disclose a determination of responsibility made pursuant to a formal grievance process to a respondent's new school, and (c) whether schools should be required to make its Title IX training materials public (*Id.* § 106.45(b)(10)(i)(D)).

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<sup>30</sup> See, e.g., *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018) ("[I]f a student is accused of misconduct, the university must hold some sort of hearing before imposing a sanction as serious as expulsion or suspension."); *Univ. of the Sciences*, 961 F.3d at 215–16 ("basic fairness" required the school to provide plaintiff with "a real, live, and adversarial hearing").

<sup>31</sup> Compare *Baum*, 903 F.3d at 581 ("[I]f credibility is in dispute and material to the outcome, due process requires cross-examination."); [I]f a student is accused of misconduct, the university must hold some sort of hearing before imposing a sanction as serious as expulsion or suspension."); *Univ. of the Sciences*, 961 F.3d at 215–16 ("basic fairness" required the school to provide plaintiff with the opportunity to cross-examine his accusers) with *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d. 56, 69 (1st Cir. 2019) (holding that the university provided due process when its hearing board examined the complainant "in a manner reasonably calculated to expose any relevant flaws in her claim").