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A Summary of Recently Proposed Title IX Rules and Regulations

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SUMMARY OF NOTICE OF PROPOSED RULEMAKING ON TITLE IX REGULATIONS (2022)

The following summary is based on the U.S. Department of Education's (ED) Notice of Proposed Rulemaking dated June 23, 2022, and is specifically targeted at those aspects of the proposed regulations applicable to colleges and universities (often referred to in the proposed regulations as "recipients," also referred to herein as "institutions").

This summary seeks to provide key detail around proposed changes. Accordingly, this summary is organized in a manner that tracks Title IX-related requirements as they often appear in institutional policies and procedures and groups topics in four categories: (1) Policy Standards & Definitions; (2) Institutional Response to Sex Discrimination; (3) Grievance Processes; and (4) Intersection With Laws Not Otherwise Noted. Finally, we summarize the unique differences in the proposed regulations as they may apply to recipient K-12 schools and highlight the key topics on which ED is seeking public commentary.

For practical guidance about what institutions should bear in mind as they consider responding to the proposed regulations and/or preparing for final regulations, Husch Blackwell's Higher Education practice team of Title IX professionals will present a webinar in the coming weeks to keep you informed and up to date.

POLICY STANDARDS & DEFINITIONS

Prohibiting All Forms of Sex Discrimination *§ 106.10*

The proposed regulations include a new "Scope" section, § 106.10, to "clarify the scope of Title IX's prohibition on discrimination on the basis of sex."

The proposed regulations would clarify that, in prohibiting sex discrimination, Title IX prohibits discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. Here, ED cites the Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), as well as President Biden's *Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*.

ED stated in its commentary that the proposed regulations focus on ensuring that recipients prevent and address sex discrimination, "including but not limited to sex-based harassment," in their education programs and activities.

Defining Sex-Based Harassment *§ 106.2*

Under the proposed regulations, the definition of sex-based harassment would be expanded to include harassment based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.

- The commentary explains that "sex stereotypes" means "fixed or generalized expectations regarding a person's aptitudes, behavior, self-presentation, or other attributes based on sex," such as expecting someone to act or dress a certain way based on expectations regarding that person's sex.

The proposed definition of sex-based harassment would continue to apply to sexual assault, *quid pro quo* harassment, and harassment that creates a hostile environment.

Sexual Assault

The definition of sexual assault would continue to incorporate the Clery Act's definition of sexual assault, and also adopts definitions of "dating violence," "domestic violence," and "stalking" from the Violence Against Women Reauthorization Act of 2022.

Quid Pro Quo Harassment

The *quid pro quo* harassment prohibition would also be extended to apply to not only employees, but also to agents or other persons authorized by the institution to provide an aid, benefit, or service under the institution's education program or activity, such as unpaid volunteer coaches for interscholastic athletic teams or an institution's club sports teams, and graduate students teaching their own courses or serving as teaching assistants. Other examples may include supervisors of internships or clinical experiences**;** volunteers who regularly provide aid, benefits, or services under an institution's education program or activity; and board of trustees' members serving as unpaid volunteers.

- In contrast, ED explained in its commentary that this does not apply to students with leadership positions in extracurricular activities, such as a team captain or club president because such students are typically not authorized by an institution to provide aid, benefits, or services under an institution's education program or activity.

Hostile Environment Harassment

The proposed regulations would modify the definition of hostile environment harassment. The current regulations prohibit unwelcome conduct on the basis of sex that is so severe, pervasive, *and* objectively offensive that it denies a person equal access to the institution's education program or activity. The proposed definition departs from the current regulation's adoption of the standard in the case of *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999) (considering whether conduct is so severe, pervasive, *and* objectively offensive that it deprives equal access). In contrast, the proposed regulations

would define the hostile environment category of sex-based harassment as unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from an education program or activity. ED's commentary highlights that the proposed, broader definition is aligned with prior OCR guidance, Title VII case law, and EEOC guidance.

To determine if unwelcome conduct created a hostile environment, the proposed regulations would look to the following non-exhaustive factors:

- Degree to which the conduct affected the complainant's ability to access the institution's education program or activity;
- Type, frequency, and duration of the conduct;
- Parties' ages, roles within the institution's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the alleged unwelcome conduct;
- Location of the conduct, the context in which the conduct occurred, and the control the institution has over the respondent; and
- Other sex-based harassment in the institution's education program or activity.

Addressing Off-Campus Conduct *§ 106.11*

The proposed regulations would retain the requirement that institutions respond to sex discrimination within their education programs or activities. The proposed regulations reiterate that Title IX applies to conduct that occurs in a building owned or controlled by a student organization officially recognized by a postsecondary institution (§ 106.44(a)).

However, they would amend language about institutions' "substantial control" over (1) respondents and (2) the context in which the harassment occurs. First, they would clarify that conduct occurring within an institution's education program and activity includes conduct that occurs off-campus when the respondent represents the institution or is otherwise engaged in conduct under the institution's "disciplinary authority." Second, the proposed regulations would require an institution to respond to a hostile environment based on sex within its education program or activity, "even if the sex-based conduct contributing to the hostile environment occurred outside the institution's education program or activity or outside the United States."

While the current regulations require that a complaint of sexual harassment must be dismissed if the conduct did not occur within an institution's education programs and activities or within the U.S., the proposed regulations would require an institution to respond to such sex-based harassment if it is

contributing to a hostile environment within the recipient's education program or activity in the U.S. In the case of sex-based harassment outside the U.S. that may give rise to institutional Title IX obligations, ED's proposed regulations cite an example in which an alleged sexual assault occurs in a study abroad program between two students, and the alleged perpetrator engages in verbal harassment about the incident after the students return to the U.S. Still, Title IX does not apply to sex-based harassment occurring (1) outside an institution's education program or (2) outside the U.S. where the harassment does *not* contribute to a hostile environment in the institution's education program or activity in the U.S.

Retaliation *§§ 106.2*

As with the current regulations, the proposed regulations would prohibit retaliation. However, the proposed regulations add definitions of "retaliation" and "peer retaliation."

The proposed definition for prohibited retaliation would be, "intimidation, threats, coercion, or discrimination against anyone because the person has reported possible sex discrimination, made a sex-discrimination complaint, or participated in any way in an institution's Title IX process." The proposed definition specifies that such conduct would constitute retaliation if it is:

- For the purpose of interfering with any right or privilege secured by Title IX or ED's Title IX regulations; or
- Because the person has reported information, made a complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under the regulations, including:
    - Informal resolution processes under proposed § 106.44(k),
    - Grievance procedures under proposed § 106.45, and if applicable proposed § 106.46, or
    - Any other appropriate steps taken by an institution under proposed § 106.44(f)(6) in response to sex discrimination.

Peer retaliation would be defined as retaliation by one student against another student.

ED proposes to retain the portion of § 106.71(a), which prohibits an institution from using its disciplinary process to interfere with an individual's ability to exercise their rights under Title IX.

Discrimination Based on Pregnancy or Related Conditions *§§ 106.2, 106.40, 106.57*

The proposed regulations include explicit protections for students and employees based on pregnancy or related conditions, including childbirth, termination of pregnancy, or lactation. Institutions would be required to provide reasonable modifications for students, reasonable break time for employees for lactation, and lactation space for students and employees.

The proposed regulations would expand the scope of protections for pregnancy or related conditions by prohibiting institutions from discriminating against a student based on current, potential, or past pregnancy or related conditions. Further, institutions could not discriminate against or exclude from employment applicants on the basis of current, potential, or past pregnancy or related conditions. ED notes that it has included "current, potential, or past pregnancy or related conditions" to attempt to "more fully address sex discrimination facing applicants at various points."

The proposed regulations explain that, when a student tells an institution's employee about the student's pregnancy or related conditions, the employee must provide the student with the Title IX Coordinator's contact information. The Title IX Coordinator would then be responsible for informing the student of the institution's obligations to prohibit sex discrimination and also to provide the student with options for reasonable modifications, access to separate and comparable portions of education programs or activities, allow for a voluntary leave of absence, and ensure there is available lactation space that is clean and private.

Reasonable modifications for pregnancy or related conditions would be required to be provided to students based on their individualized needs, and such modifications may include breaks during class to attend to related health needs, breastfeeding, or expressing breast milk; intermittent absences to attend medical appointments; access to online or other homebound education; changes in schedule or course sequence; time extensions for coursework and rescheduling of tests; counseling; changes in physical space or supplies; elevator access; or other appropriate changes to policies, practices, or procedures.

Additionally, the proposed regulations would require an institution to provide employees with reasonable break time for lactation, as well as a clean and private lactation space.

Parenting *§§ 106.2, 106.21(c),106.37(a)(3), 106.40(a), 106.57(a)(1)*

The proposed regulations define parental status. The current regulations prohibit sex-based discrimination against students and employees on the basis of parental status—including generally (§ 106.40(a) as to students) in admissions and hiring (§106.21(c) as to students, and § 106.57(a) as to employees), as well as in student financial assistance (§ 106.37(a)(3)). The proposed regulations would clarify that the definition of parental status includes adoptive parents, stepparents, foster parents, and legal custodians or guardians, as well as someone who is actively seeking such custody, guardianship, visitation, or adoption of a person.

Discrimination Based on Sexual Orientation, Gender Identity, and Sex Characteristics *§§ 106.10, 106.31(a)(2), 106.41(b)(2)*

The proposed regulations would prohibit all forms of sex discrimination, including discrimination based on sexual orientation, gender identity, and sex characteristics. The proposed regulations acknowledge that there are limited circumstances in which Title IX or the regulations permit different treatment or separation on the basis of sex (for example, toilet, locker room, and shower facilities); the proposed

regulations clarify that, under these limited circumstances, such different treatment could not be conducted in a manner that subjects a person to more than *de minimis* harm.

The proposed regulations also provide that, when an institution adopts a policy or engages in a practice that prevents a person from participating consistent with the person's gender identity and that policy or practice is not explicitly allowed under Title IX, then the institution subjects the person to more than *de minimis* harm.

Notably, the proposed regulations do not discuss student eligibility to participate on male or female athletics teams. In the commentary, ED states that it will issue a separate notice of proposed rulemaking for amendments to § 106.41 to address what criteria, if any, institutions may use to establish student eligibility to participate on a particular male or female athletics team.

FERPA

Both the current and proposed regulations state that obligations to comply with Title IX are not obviated or alleviated by FERPA. Citing its prior rulemaking, ED restated that, where there is a direct conflict between the requirements of FERPA and the requirements of Title IX, the requirements of Title IX should "override any conflicting FERPA provisions."

However, ED's commentary also acknowledges that there are some aspects of the proposed regulations under which institutions may nonetheless have to comply with FERPA obligations, such as to honor the exercise of rights by parents, guardians or other authorized legal representatives. Areas where disclosures may need to be made despite FERPA include disclosure of certain supportive measures; providing notice of a complaint to a respondent; sharing descriptions of relevant evidence; allowing access to an investigative report or relevant and not otherwise impermissible evidence; and providing notice of the determination of a sex discrimination complaint.

- For example, institutions would be required to maintain as confidential any supportive measures they provide but can provide information about supportive measures to people other than the complainant or respondent, as necessary.

Other Definitions Related to Complaints §106.2

While the current regulations define "complainant" as "an individual who is alleged to be the victim of conduct that could constitute sexual harassment," the proposed regulations would revise this definition to state that a complainant is:

- A student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX; or

- A person other than a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX and who was participating or attempting to

participate in the institution's education program or activity *when the alleged sex discrimination occurred*.

- The commentary explains that the third-party participation requirement does not apply to a student, employee, or those persons authorized to act on behalf of a complainant, respondent, or other person.

- ED's commentary also explains that potential third-party complainants may include "a prospective student, a visiting student-athlete, or a guest speaker" who meets the participation requirement.

"Complaints" would be defined to include complaints of any type of sex discrimination, and complaints would no longer be required to be made via a written request and may instead be made orally.

The proposed regulations include a definition for "relevant" (as it relates to questions and evidence) which does not appear in the current regulations. Specifically, they provide that "[q]uestions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred."

"Respondent" would be modified slightly to include someone who is alleged to have violated an institution's sex discrimination prohibition.

INSTITUTIONAL RESPONSE TO SEX DISCRIMINATION

Actual Knowledge and Institutional Response Obligations *§ 106.44(a)*

In an effort to clarify institutions' obligations to respond to sex discrimination, particularly in the absence of a formal complaint, proposed § 106.44(a) would require an institution to take prompt and effective action to end any sex discrimination in its education program or activity, prevent its recurrence, and remedy its effects. While ED did not define the term "prompt" in the proposed regulations, it explained in the commentary that an unreasonable delay to end sex discrimination would not meet Title IX's obligation.

ED further explained that this proposed requirement of prompt and effective action would not compel officials to know of and respond effectively to sex discrimination that has not yet occurred; but would impose an obligation to take reasonable steps to ensure that institutions learning of sex discrimination in their programs and activities end it and prevent its recurrence. ED emphasized that this effort must be effective and further cautioned that, when an institution's response does not end discrimination and prevent its recurrence, the institution must reevaluate its response and take additional steps to end sex discrimination in its education program or activity.

Monitoring Barriers to Reporting *§ 106.44(b)*

At § 106.44(b), the proposed regulations would add an obligation for an institution to require its Title IX Coordinator to monitor barriers to reporting conduct that may constitute sex discrimination; and that the institution must take steps reasonably calculated to address identified barriers. In developing this new requirement, ED cited public commentary relating to underreporting of sex discrimination, including failure of institutions to:

- Communicate promptly;
- Investigate reports;
- Address violations of contact restrictions; and
- Respond effectively to retaliation.

ED reasoned that by requiring monitoring for reporting barriers and steps reasonably calculated to address those barriers, institutions would be better positioned to address conditions in their educational environments that might chill reporting of sex discrimination.

Although the proposed regulations would not mandate specific methods for monitoring, ED acknowledged a number of possible methods such as: (1) regular campus climate surveys, (2) targeted feedback from students and employees who have reported or made complaints about sex discrimination, (3) public awareness events for purposes of receiving feedback from student and employee attendees, and (4) publicizing and monitoring an email address designated for anonymous feedback about reporting barriers.

Complaint Dismissal *§ 106.45(d)*

ED's commentary stated that, in most cases, whether alleged conduct could constitute sex discrimination will not be clear and will require an institution to take additional steps under its grievance procedures. At the same time, ED confirmed that, when it is clear from the allegations alone that the conduct alleged, even if proven, would not constitute sex discrimination, an institution should have the discretion to dismiss the complaint and avoid conducting an unnecessary investigation. For that reason, the proposed regulations would revise § 106.45(b)(3) to permit, but not require, an institution to dismiss a complaint or allegations in a complaint in certain circumstances, specifically:

- When the institution is unable to identify the respondent after taking reasonable steps to do so;
- The respondent is not participating in the institution's education program or activity or not employed;
- The complainant voluntarily withdraws a complaint or all of the allegations in the complaint and the recipient determines that without the complainant's withdrawn allegations, the conduct that remains in the complaint, even if proven, would not constitute sex discrimination; and

- After making reasonable efforts to clarify the allegations with the complainant, the institution determines that the conduct alleged, even if proven, would not constitute sex discrimination under Title IX.

The proposed regulations would eliminate current requirements that a complainant notify the Title IX Coordinator of a withdrawal in writing, and that an institution dismiss a complaint when the conduct alleged did not occur in the institution's education program or activity or against a person in the U.S.

Under proposed § 106.45(d)(4), a dismissed complaint would nonetheless require institutions to offer, at a minimum:

- Supportive measures to the complainant;
- Supportive measures to the respondent, where applicable; and
- Other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the institution's education program or activity.

The proposed regulations would also clarify § 106.45(d)(2), requiring, upon dismissal, an institution to promptly notify the complainant of the dismissal and the reasons for it, as well as the respondent, if they have already been notified of the allegations.

Appeal of Dismissal

The proposed regulations incorporate the current requirements granting parties a right to appeal dismissals. These require the institution to notify all parties that a dismissal may be appealed and require the institution to:

- Notify the parties when an appeal is filed and implement appeal procedures equally for the parties;
- Ensure that the appellate decisionmaker for the appeal did not take part in an investigation of the allegations or dismissal of the complaint;
- Ensure that the decisionmaker for the appeal has been trained as set out in proposed § 106.8(d)(2);
- Provide the parties a reasonable and equivalent opportunity to make a statement in support of, or challenging, the outcome; and
- Notify all parties of the result of the appeal and the rationale for the result.

Finally, in ED's commentary relating to complaint dismissals and recognizing that dismissed allegations could be pursued by institutions through other mechanisms, ED highlighted that an institution "has always been and would continue to be free to use other available procedures...."

Consolidation of Complaints *§ 106.45(e)*

The proposed regulations would retain the current requirements relating to consolidation of complaints arising from the same facts and circumstances against more than one respondent, or by more than one complainant against one or more respondents, or by one party against another party. The one substantive change is that the proposed regulation would expand the scope of complaints that can be consolidated beyond sex-based harassment claims to include any complaint of sex discrimination, provided the allegations of sex discrimination arise out of the same facts or circumstances.

Title IX Coordinator *§ 106.8*

Oversight Authority/Designees

Proposed § 106.8(a)(1) would maintain the requirement that an institution designate and authorize at least one employee as the "Title IX Coordinator" to coordinate its efforts to comply with the institution's Title IX obligations. In proposed § 106.8(a)(2), ED adds that the Title IX Coordinator may assign one or more designees to carry out some of the institution's responsibilities but requires that the Title IX Coordinator retain ultimate oversight over those responsibilities.

Posting Contact Information *§ 106.8(a)-(c)*

ED proposes restructuring §106.8's current requirements for providing contact information for an institution's Title IX Coordinator and specific instructions for how to report sex discrimination to the Title IX Coordinator. ED's proposed regulations would require institutions to place information in their notices of nondiscrimination on how to make a report of possible sex discrimination under Title IX, how to make a complaint of sex discrimination, and how to locate the institution's grievance procedures.

Ensuring Institutions Learn of Possible Sex Discrimination *§ 106.8(d)(4)*

Proposed § 106.8(d)(4) would require the Title IX Coordinator and any designees to be trained on all topics required under proposed § 106.8(d)(1)-(3), as well as their specific responsibilities, the institution's recordkeeping system and the recordkeeping requirements in proposed § 106.8(f), and any other training necessary to coordinate the institution's compliance with Title IX.

Respecting Complainant Autonomy *§§ 106.2, 106.8(d), 106.44(a)–(e)*

The proposed regulations provide that an institution should honor a complainant's request not to proceed with an investigation when doing so is consistent with the institution's obligation to ensure it operates its education program or activity free from sex discrimination. To that end, the proposed regulations would add a definition of and requirements for "confidential employees" to support complainant autonomy. §§ 106.2 and 106.44(d).

ED's proposed definition of "confidential employee" would include three categories:

- Employees whose communications are privileged under federal or state law associated with their role or duties for the institution;
- Employees whom the institution has designated as a confidential resource for the purpose of providing services to individuals in connection with sex discrimination; and
- Employees of postsecondary institutions who conduct human subjects research studies that have been approved by the institution's Institutional Review Board and that are designed to gather information about sex discrimination.

Informal Resolution *§ 106.44(k)*

In the commentary to ED's proposed regulations, it restates its position that informal resolution "empowers the parties by offering alternative conflict resolution systems that may serve their unique needs and provides greater flexibility to institutions in serving their educational communities." Proposed § 106.45(j) would retain the institution's discretion to offer the parties an alternative option for resolving a complaint of sex discrimination, in lieu of resolving the complaint through the institution's formal grievance procedures. ED's proposed regulations indicate that it would be up to each institution to determine whether an informal resolution process is good fit for the facts and circumstances of a particular complaint.

The proposed regulations would require procedural protections for parties for facilitating informal resolution, including:

- Requiring the Title IX Coordinator to notify, in writing, the parties to any sex discrimination complaint about any available and appropriate informal resolution process. (§ 106.44(f)(2)(ii)).

- Proposed § 106.44(k) would set out the requirements an institution would have to follow if it chooses to offer an informal resolution process.
    - Informal resolution is not allowed in cases where an employee is alleged to have discriminated against a student on the basis of sex.
    - The institution may choose not to offer informal resolution where there is a risk of future harm to others.
    - The parties must not be pressured into entering an informal resolution or to agree to compromise any other rights including their right to an investigation and adjudication of the complaint.
    - The institution must provide parties to an informal resolution process a notice that includes various information about the allegations, process, and their rights.
    - If the institution begins an informal resolution process and later initiates or resumes its grievance procedures, and if applicable § 106.46, the institution or a party must not access, consider, disclose, or otherwise use information, including records, obtained solely through an informal resolution process as part of the investigation or determination of the outcome of the complaint. However, the proposed regulations

indicate that, if the institution resumes its grievance procedures, the informal resolution facilitator could serve as a witness for purposes other than providing information obtained solely through the informal resolution process.

- Potential terms that may be included in an informal resolution agreement include but are not limited to: (i) restrictions on contact; and (ii) restrictions on the respondent's participation in one or more of the institution's programs or activities or attendance at specific events, including restrictions the institution could have imposed as remedies or disciplinary sanctions had the institution determined that sex discrimination occurred under the institution's grievance procedures.
- The facilitator for the informal resolution process must not be the same person as the investigator or the decisionmaker in the institution's grievance procedures; must not have a conflict of interest or bias; and must receive training under § 106.8(d)(3).
- Even where parties are offered an informal resolution process, as necessary, the Title IX Coordinator must take steps to prevent continuing or recurring sex discrimination.

In sexual harassment cases involving postsecondary students, if a postsecondary institution offers or provides an informal resolution process, the postsecondary institution must inform the parties ***in writing*** of the offer and of their rights and responsibilities in the informal resolution process; and it must provide the information required under proposed § 106.44(k)(3) in writing. (§ 106.46(j)).

Notably, neither remedies nor disciplinary sanctions would be available under informal resolution in proposed § 106.44(k), because there would be no final determination that sex discrimination occurred in the informal resolution process. However, the respondent may agree to terms of a voluntary agreement that would otherwise constitute remedies or disciplinary sanctions had the institution determined that sex discrimination occurred under the institution's grievance procedures.

Supportive Measures *§ 106.44(g)*

Proposed § 106.44(g) requires institutions to offer supportive measures to a complainant and respondent upon being notified of conduct that may constitute sex discrimination.

The proposed regulations retain the current definition of "supportive measures" as "non-disciplinary, non-punitive, individualized measures, offered as appropriate, as reasonably available, without unreasonably burdening a party, and without fee or charge to the complainant or respondent." The proposed regulation clarifies that supportive measures may be offered to restore or preserve a party's access to education program or activities, or to provide support during a grievance or informal process. ED's proposed regulations would also:

- Expressly require a Title IX Coordinator to offer, as appropriate, supportive measures to complainant or respondent upon being notified of any conduct that may constitute sex discrimination under Title IX.

- Retain an institution's obligation not to disclose information about supportive measure other than to the complainant or respondent except as necessary to provide a supportive measure.
- Clarify that supportive measures can include temporary measures that burden a respondent during the pendency of a grievance procedures, but only when such measures are imposed for non-punitive and non-disciplinary reasons and are designed to protect the safety of the complainant or the institution's educational environment.
- Add provisions to guide the coordination of supportive measures, including the requirement that temporarily burdensome measures may be imposed only if the respondent is given the opportunity to seek modification or reversal of them.

Disciplinary Sanctions & Remedies § 106.2

The proposed regulations define "disciplinary sanctions**"** in § 106.2 as consequences imposed on a respondent following a determination that the respondent violated the institution's prohibition on sex discrimination. As in the current regulations, the proposed regulatory definition recognizes that an institution must follow grievance procedures consistent with regulatory requirements before imposing disciplinary sanctions on a respondent.

The proposed regulations include a definition of **"**remedies" in § 106.2 to clarify that remedies are measures provided to a complainant or any other person the institution identifies as having had equal access to the institution's education program or activity limited or denied by sex discrimination. The proposed definition would also clarify that remedies are designed to restore or preserve access to the institution's education program or activity after an institution determines that sex discrimination occurred.

- Proposed § 106.45(k)(2) would require an institution's grievance procedures to either describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that an institution may impose after it determines that sex-based harassment occurred.

Record Keeping *§ 106.8(f)(1)*

Proposed § 106.8(f)(1) would impose a new requirement that would obligate institutions to maintain, for a period of seven years:

- For each complaint, records documenting the informal resolution process, or the grievance procedures, and the resulting outcome;

- For each incident of conduct that may constitute sex discrimination under Title IX of which the Title IX Coordinator was notified, records documenting the actions the institution took to meet its obligations under proposed § 106.44 (equitable treatment of parties, notification and initiation of

grievance procedures or informal resolution processes, offering supportive measures, ensuring no continuing or recurring sex discrimination);

- All materials used to provide training to:
    - employees,
    - investigators, decisionmakers, and other persons who are responsible for implementing the institution's grievance procedures or have the authority to modify or terminate supportive measures,
    - facilitators of an informal resolution process, and
    - Title IX Coordinators and designees.

Under proposed § 106.8(d), an institution would be required to ***post***:

- Training materials on its website or, if it does not maintain a website, make these training materials publicly available upon request; and
- All records documenting the actions the institution took to meet its obligations under proposed §§ 106.40 and 106.57.

The proposed regulations would also remove the recordkeeping requirement for records described in current § 106.45(b)(10)(ii) (relating to an institution demonstrating its compliance with the deliberate indifference standard).

Proposed § 106.8(f)(2) covers records related to supportive measures and would require an institution to maintain records of the actions the institution took to meet its obligations under § 106.44.

The proposed regulations would require institutions to maintain all records documenting the actions the institution took to meet its obligations under proposed §§ 106.40 and 106.57 regarding students and employees who are pregnant or experiencing pregnancy-related conditions.

GRIEVANCE PROCESS

Also in the proposed regulations are several material changes to the requirements for institutional grievance processes. These changes are reflected in proposed §§ 106.45 - 106.46.

Scope *§ 106.45*

Section 106.45 would expand application of the grievance process requirements to all forms of sex discrimination, not just sexual harassment. Very generally, § 106.45 would provide institutions with more

substantive flexibility than the current regulations with regard to the content and administration of their grievance procedures when applying them to this broader swath of prohibited conduct.

As described below, § 106.46 would include additional requirements for sexual harassment complaints involving students at postsecondary institutions and generally preserves more of the procedural requirements of the current regulations.

Complaints *§§ 106.45(a)(2) and 106.46(b)*

Proposed § 106.45(a)(2) provides that three different persons may make complaints of sexual discrimination or harassment:

- A complainant (the person who is the subject of the alleged discrimination),
- An individual with the requisite legal authority on behalf of a complainant under § 106.6(g) (i.e., parents, guardians, or other legal representatives), or
- The Title IX Coordinator.

In addition, any other student, employee, or third-party may make a complaint of sex discrimination involving any individual, although this third-party complaint option does not extend to allegations of sexual harassment and is only available to a third party who is a participant or attempted participant in the institution's educational programs or activities at the time of the alleged discrimination.

Notably, the proposed regulations would eliminate the concept of a written "formal complaint."

Additional requirements would apply specifically to sexual harassment complaints involving postsecondary students. The proposed § 106.46 would provide for fact-specific considerations of whether the complainant or respondent are students or employees of the institution (or both). These considerations include, at a minimum, the nature of the parties' primary relationship with the institution and whether the alleged harassment occurred when a party was performing employment-related work.

Privacy Protections for Parties and Witnesses *§ 106.45(b)(5)*

Proposed § 106.45(b)(5) provides that an institution must take "reasonable steps" to protect privacy of the parties and witnesses. This language moves away from the current regulations which forbid virtually any non-retaliatory restrictions on a party's ability to discuss the complaint allegations or gather evidence. The proposed regulations would allow parties to gather information and confide in a family member or advisor, for example, but would not protect retaliatory dissemination of information or other disclosures that compromise the fairness of the process.

Notice Provisions *§ 106.46(c)*

Section 106.46(c) would retain the material components of the written notice of complaint requirements under the current regulations. The proposed regulations would also retain the requirement that the notice be updated to reflect additional allegations added to the scope of the investigation that were not included in the initial notice.

Furthermore, § 106.46(c)(3) would allow for a reasonable extension of time to provide notice if there are legitimate concerns for a party's physical or emotional safety based on individualized considerations, and not mere speculation.

Both proposed §§ 106.45(c) and 106.46(c) would require a statement in the notice that retaliation is prohibited. However, written notice is not required for complaints of sex discrimination or sexual harassment that do not involve students and notice in these complaints need not include the mandatory references in § 106.46(c).

Relevance *§ 106.45(f)(2)-(3)*

The proposed regulations would limit a party's right to present evidence and witnesses to the "relevance" standard. Moreover, institutions would be obligated to review all evidence gathered in the investigation, determine whether evidence is relevant, and determine whether even relevant evidence is impermissible under applicable standards for privileged information, treatment records, or sexual history information, for example.

Timeframes and Extensions §§ *106.45(b)(4) and 106.46(e)(5)*

Section 106.45(b)(4) would require institutions to establish timeframes in their policies for the "major stages" of the process (such as investigation, determination, and appeal) rather than a timeframe for the overall process that is required by the current regulations.

The proposed regulations would also substitute a "case-by-case" standard for the existing "good cause" standard for extensions of time and preserves the existing written notification requirements.

Evidence Review *§§ 106.45(e)-(f)*

For sexual harassment complaints involving postsecondary students, the proposed regulations would require that all parties be provided with access to the same relevant (and not otherwise impermissible) evidence, or access to the same written report prior to the determination of whether sex-based harassment occurred. However, institutions would be given discretion to determine whether parties should be permitted to respond to the evidence before or during the hearing, or both.

For all other complaints, the "evidence review" process would be paired down significantly. All that would be required is an oral or written "description" of the relevant (and permissible) evidence and the

opportunity to respond. Direct access to the evidence file by the parties would no longer be required in this category of complaints.

Advisors *§§ 106.45 and 106.46(e)(2)*

The right to an advisor would be preserved in sexual harassment complaints involving postsecondary students, but that is not the case for complaints of sexual harassment that do not involve students or sex discrimination complaints.

Moreover, § 106.46(e)(2) would allow postsecondary institutions to limit how advisors can participate in the grievance procedures, so long as the limitations are applied equally and that an advisor's presence is not prohibited altogether. Furthermore, in grievance procedures when one party is a postsecondary student and another party is not, institutions would be required to offer non-student parties the same rights to an advisor.

Standard of Proof *§ 106.45(h)(1)*

The proposed regulations would also require that the determination must be based on an evaluation of the "persuasiveness" of the relevant evidence and mandate the preponderance of the evidence standard "unless the recipient uses the clear and convincing evidence standard of proof in all other comparable proceedings, including proceedings relating to other discrimination complaints, in which case the recipient may elect to use that standard of proof in determining whether sex discrimination occurred."

Expert Witnesses *§ 106.46(e)*

The proposed regulations would require equal opportunity for parties to present expert witnesses, although institutions can determine if they will allow expert testimony at all, disallow all expert testimony, or require the use of institutions' own experts in lieu of the parties' experts. While the same standards of permissibility must apply, this does not require an institution to determine that both parties' expert testimony is permissible.

Credibility Assessments *§ 106.46(f)(1)*

Generally, institutions would be required to provide for a "a process that enables the decisionmaker to adequately assess the credibility of the parties and witnesses to the extent credibility is both in dispute and relevant" to the allegations. Institutions may, but are not required to, accomplish this by adoption of processes similar to those used in sexual harassment cases involving postsecondary students.

For sexual harassment cases involving postsecondary students, the proposed regulations would require institutions to develop a process for assessing credibility that could be satisfied by either "advisor-conducted questioning at a live hearing" or having the "decisionmaker ask their questions and the parties' questions of any party and witnesses during individual meetings." An institution would not be permitted to have a grievance procedure where the questions and answers would be provided in writing.

Hearings and Determinations *§§ 106.45 and 106.46*

There is no requirement for a live hearing in the proposed regulations and use of the single-investigator model would be allowed under § 106.45(b)(2). Moreover, while the decisionmaker would be required to notify the parties of the determination and provide information about the appeal process, notice of the determination need not be in writing or include any specific details in sex discrimination complaints or sexual harassment complaints that do not involve postsecondary students.

However, postsecondary institutions would be required to provide a written determination of whether sex-based harassment occurred in cases involving postsecondary students. An institution's written determination letter must include: the alleged sex-based harassment, information about the institution's policies, the decisionmaker's evaluation and decision on whether sex-based harassment occurred, disciplinary sanctions, other remedies that will be provided to the complainant, other students identified to be experiencing the effects of the specific sex-based harassment (to the extent possible), and information about the appeals process.

Moreover, in such cases live hearings would be permitted, but not required. If an institution chooses to hold a live hearing, it can "occur with the parties located in separate rooms with technology enabling the decisionmaker and parties to simultaneously to see and hear the party or witness answering questions" at either the institution's discretion or at a party's request.

In live hearings, the proposed regulations would require decisionmakers to determine the relevance of advisor-conducted questioning prior to a party answering. The decisionmaker should not permit questions that are "vague or ambiguous, or harassing of the party being questioned." The proposed regulations would also require that "if a party does not respond to questions related to their credibility, the decisionmaker must not rely on any statement of that party that supports that party's position."

Appeals *§ 106.46(i)*

Section 106.46(i) would largely preserve current regulations but include a clarification that an appeal must be offered at the dismissal of any complaint or of specific allegations within a complaint. The required grounds of appeal are consistent with current regulations and would include a procedural irregularity that would change the determination in the matter; new evidence that would change the outcome of the matter and was not reasonably available at the time; and conflict of interest by the Title IX Coordinator, investigator, or decisionmaker that would change the outcome of the matter.

Identification of Supportive Measures, Sanctions, and Remedies *§ 106.45(k)*

While current regulations require institutions to describe the range of potential sanctions and remedies, or list of such items, as well as describe the range of supportive measures, proposed § 106.45(k) would retain this requirement and clarifies that a description of the "range" of these items is sufficient, leaving institutions with the flexibility to impose creative sanctions, as appropriate when that is determined

appropriate. This provision would apply only in the context of sexual harassment complaints, not other forms of sex discrimination complaints.

INTERSECTION WITH OTHER LAWS NOT PREVIOUSLY NOTED

Students with Disabilities

The proposed regulations include a definition of a "student with a disability" as an individual with a disability who would be covered by Section 504 of the Rehabilitation Act (or a child with a disability as defined by the Individuals with Disabilities Education Act) (§ 106.2). Proposed §§ 106.8(e) and 106.44(g)(7) include provisions that require an institution to consider the requirements of federal disability laws when implementing Title IX regulations. ED's commentary recognizes that when a student with a disability experiences sex-based harassment, supportive measures may need to be tailored in a way to address the harassment's effects in relation to the student's disability and cautions that the need for such tailoring may not be obvious to a Title IX Coordinator. ED further notes that when a student with a disability is found responsible for sex-based harassment, tailoring of disciplinary sanctions may be necessary. In such circumstances, and when appropriate, Title IX Coordinators for postsecondary institutions may consult with the individual or office that the institution has designated to provide support to students with disabilities.

Free Speech

ED's commentary recognizes that all students, employees, and third parties retain their First Amendment rights and asserts that the proposed regulations will not infringe on those rights. Further, ED emphasizes that when sex-based harassment allegations arise, First Amendment protections must be considered where issues of speech, expression, and academic freedom are involved and that institutions should "formulate, interpret, and apply its rules in a manner that respects the legal rights of students and employees." However, ED notes that the age of students involved and the location or forum where opinions are expressed may shape individual rights under the First Amendment and, as a result, an institution's ability to take action based on speech or expression.

ELEMENTARY & SECONDARY SCHOOL SPECIFIC PROVISIONS

The proposed regulations distinguish elementary schools from secondary schools. (§ 106.2). The proposed regulations would expand the concept of "parents or legal guardians" to include "other authorized legal representatives of elementary school and secondary school students." (§ 106.6(g)). Additionally, the proposed regulations would require schools to provide parents or legal guardians of elementary and secondary school students with a notice of discrimination, in addition to contact information of the designated Title IX Coordinator. § 106.8(c)(1).

The proposed regulations would also require that if a complainant or respondent is an elementary or secondary student with a disability, the Title IX Coordinator *must* consult with that student's

Individualized Education Program (IEP) team or group of persons knowledgeable about the student under Section 504 (Section 504 team). § 106.8(e). This team's discussion should include addressing the placement, special education, and related services that are appropriate for that student. Moreover, an elementary school or secondary school would be obligated to require all non-confidential employees to notify the Title IX Coordinator when an employee has information about conduct that may constitute sex-based discrimination. § 106.44(c)(1).

The proposed regulations would not require an elementary or secondary school to provide an informal resolution process, nor would it specify the allowable informal resolution options. § 106.44(k). Similarly, elementary and secondary schools would not be required to provide notice of allegations in writing; ED's commentary explains that this could limit their ability to respond promptly to an incident when it occurs. § 106.45(c). Likewise, the proposed regulations would not require elementary and secondary schools to provide a written determination of complaints. (§ 106.45(h)(2)). Finally, elementary and secondary schools would have the discretion to decide whether to offer a right to appeal. (§ 106.45(h)(2)).

KEY TOPICS FOR PUBLIC COMMENTARY

While welcoming comments on all aspects of the proposed regulations, ED highlights several specific areas of interest:

- **FERPA.** The interaction between the proposed regulations and FERPA, and any challenges institutions may face as a result of the two laws intersecting, as well as steps ED could take to address those challenges in the Title IX regulations.

- **Subgroups.** Whether and how the proposed grievance procedures should apply differently to subgroups of complainants or respondents, such as students or employees, or students with varying educational levels.

- **Single Investigator Model.** Institutions' experiences using a single investigator model to investigate sex-based harassment claims.

- **Standard of Proof**

    - Steps that institutions using the clear and convincing standard have used to ensure equitable treatment for parties;

    - Whether different standards of proof should be used for employee-on-employee sex discrimination complaints; and

    - Whether ED should mandate only one standard of proof for sex discrimination complaints.

- **Additional Requirements.** Whether there are additional requirements that should be included or removed to assist institutions in providing an educational environment free from sex-based discrimination.

Comments to the proposed regulations may be submitted 60-days from the date of official publication in the Federal Register (anticipated Tuesday, June 28, 2022).

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