

CENTER FOR LAW AND EDUCATION

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Kenneth L. Marcus
Assistant Secretary for Civil Rights
U.S. Department of Education
400 Maryland Avenue, SW.
Room ^ 6E310
Washington, DC 20202

Dear Mr. Marcus:

Enclosed are comments submitted by the Center for Law and Education in response to the Notice of Proposed Rulemaking (November 29, 2018), re: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (Fed. Reg. 614622 – 61499). We have attempted to identify areas of concern where we believe that Department guidance and/or clarification may be especially helpful in effectively implementing this important civil rights statute.

The Center for Law and Education (CLE) is a national advocacy organization that works with parents, advocates and educators to help ensure that the right to quality of education becomes a reality for all students, and in particular, students from low-income families and communities. Throughout its history, CLE has been a recognized leader in advancing the rights of students to receive high-quality education and to remain in school to learn. Critical to students remaining in school to learn is respect for their constitutional right to due process and fairness in all aspects of exclusionary proceedings.

CLE opposes sexual harassment in all forms and believes that recipient institutions of higher education and local education agencies have affirmative obligations under Title IX to protect all students on the basis of biological or assigned sex, gender identity or sexual orientation from sex discrimination in programs and activities. CLE believes that recipients must eradicate sexual harassment whether in the context of peer to peer, quid pro quo or hostile environment, and should be intolerant of sexual assault. As representatives of low-income students, who all too frequently have limited or no access to counsel, CLE believes it is similarly critical to ensure fundamental fairness for complainants and respondents whose rights to equal educational opportunities must be protected.

We appreciate this opportunity to comment and would be pleased to discuss with the Department constructive approaches for addressing any of the issues we have flagged.

Yours truly,

Sky Kochenour
Kathleen B. Boundy

§ 106.3 Available Remedies

CLE opposes the so-called clarifications offered by the Department in amending the Heading to 34 C.F.R. 106.3 as well as subsection (a). The current regulation should remain as written including the language requiring the Assistant Secretary to take such remedial action as necessary to overcome the effects of a recipient's discriminating against persons on the basis of sex in an education program or activity.

Rationale

The proposed regulation that changes the heading to 34 CF.R. § 106.3 from **Remedial and Affirmative Action and Self Evaluation** to **Available Remedies** is misleading and inaccurate. As proposed, the amended regulation does not address Available Remedies that presume a finding of discrimination against the recipient has been determined. Instead, as indicated by the existing heading, subsection (a) continues to address Remedial action, subsection (b) addresses Affirmative Action, and subsections (c) and (d) address Self Evaluation activities by the recipient.

The Department indicates the proposed additional language to subsection (a) is intended to clarify that a recipient found to have violated this part shall take any remedial action the Assistant Secretary deems necessary to remedy the violation but such remedy "shall not include assessment of damages against the recipient." This additional language is not warranted and likely will be a source of unnecessary confusion. The Department's Office for Civil Rights does not have the authority under Title IX to assess monetary damages against a recipient found to have discriminated under Title IX. On the other hand, courts have recognized that individuals alleging violation of Title IX have a private cause of action to seek judicial relief from discrimination that may include monetary damages. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 281 (1998) ("Title IX is also enforceable through a private right of action...[and] monetary damages are available in the implied private action.").

§ 106.6 Effect of Other Requirements and Preservation of Rights

No changes.

Rationale

CLE supports the specific additions to 34 C.F.R. § 106.6 through proposed that, in the context of addressing sex discrimination under Title IX, expressly recognize (1) the independent rights of students, teachers, and other employees to exercise free speech under the First Amendment; (2) principles of fundamental fairness found in the due process clauses of the Fifth and Fourteenth Amendments for all students and employees – those making complaints and those accused of misbehavior; and (3) the Department's explicit recognition of the intersection between recipients' affirmative statutory and regulatory responsibilities under Title IX and recipients' obligation to protect student rights to privacy and confidentiality, including the right to prior consent to disclosure of personally identifiable information, under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g and Title VII of the Civil Rights Act of 1964.

§ 106.8 *Designation of Coordinator, Dissemination of Policy, and Adoption of Grievance Procedures*

No changes.

Rationale

CLE supports the Department's explicitly clarifying the independent compliance and investigatory responsibilities of the Title IX coordinator.

§ 106.12(b) *Assurance of Exemption*

CLE opposes the Department's proposed regulation § 106.12(b) that would allow a recipient that may qualify for the religious exemption under Title IX to claim this exemption without seeking *prior* written assurance from the Department. Current regulatory provision 34 C.F.R 106.12(b) should remain unchanged.

Rationale

This proposed change is inconsistent with Title IX that narrowly authorizes a "religious exemption" to a recipient institution "which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization." The change proposed by the Department would authorize delayed notification or notice to the Assistant Secretary even after an investigatory complaint has been opened against the same recipient institution that seeks a religious exemption. The delayed process would deny state and federal administrators with oversight responsibility over the recipient key information about the recipient's obligations, and deprive recipient's students, employees, and other stakeholders of a clear understanding of their rights and protections under Title IX, as well as their responsibilities as students, faculty and other employees of the recipient institution.

§ 106.30 *Definitions – Actual Knowledge*

After "...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," **ADD:** "or any other individual whom the recipient affirmatively identifies as having the ability to confer actual knowledge upon the recipient,".

After "...or to a teacher" **ADD:** " , principal, assistant principal, coach, guidance counselor, nurse, aide, paraprofessional, or other school professional assigned authority or responsibility for K-12 children".

After "...in the elementary and secondary context with regard to student-on-student harassment" **ADD:** "or sexual harassment by an adult."

DELETE: "The mere ability or obligation to report sexual harassment does not qualify an employee, even if that employee is an official, as one who has authority to institute corrective measures on behalf of the recipient." and

ADD: "A recipient will be determined to have actual knowledge if an individual providing services to children in the elementary and secondary context has notice of sexual harassment or

allegations of sexual harassment with regard to student-on-student sexual harassment or sexual harassment by an adult regardless of that individual's authority to institute corrective measures on behalf of the recipient.”

ADD: “A recipient must publicly post on its website and through other appropriate mediums – in an accessible format for individuals with disabilities and limited English proficiency – the names and positions, email addresses, and telephone contact information of (1) the recipient’s Title IX Coordinator; (2) those individuals who have authority to take corrective action on behalf of the recipient; and (3) any other individuals whom the recipient has identified as having the ability to confer actual knowledge upon the recipient. A recipient must identify personnel who are accessible to students whose first language is not English, who use an alternative mode of communication, or who need other accommodations.

Rationale

CLE is concerned that the Department’s definition of actual knowledge is too restrictive. The Department’s proposal to restrict such imputation of actual knowledge to the Title IX Coordinator, officials of the recipient who have authority to institute corrective measures on behalf of the recipient, or to “teachers” in the elementary and secondary context pertaining only to “student-on-student harassment” unduly limits the scope of Title IX and is inconsistent with Title IX’s purpose.

A recipient has an affirmative obligation to provide complainants with an accessible avenue through which to notify the recipient of alleged sexual harassment by a respondent. In the context of higher education, the Department’s proposed rule limits those who can impute actual knowledge to the recipient to the Title IX Coordinator and only to those officials of the recipient who have authority to institute corrective measures on behalf of the recipient.

In regard specifically to elementary and secondary education, given that a significant fraction of a recipient’s employees in elementary and secondary education occupy a role other than “teacher,” CLE proposes identifying “principals, assistant principals, coaches, guidance counselors, nurses, aides, paraprofessionals, or other school personnel assigned authority and responsibility for K-12 children” who shall be determined to have “actual knowledge” and a responsibility to respond upon notice of peer-to-peer sexual harassment. Increasing the number of persons who are identified as having “actual knowledge” at the elementary and secondary school level will help ensure that instances of inappropriate sexual behaviors that may warrant investigation as possible peer-to-peer sexual harassment will be identified and addressed, and not ignored as someone else’s responsibility at the expense of a frightened, embarrassed, or conflicted child. CLE also proposes clarifying that, in addition to student-on-student sexual harassment, notice to school personnel with authority and responsibility for K-12 children of alleged or actual sexual harassment of a student by an adult will confer actual knowledge upon a recipient.

CLE urges that the Department mandate each recipient institution and local educational agency to be transparent in sharing by publicly posting on its website and through other appropriate mediums – in an accessible format for individuals with disabilities and limited English proficiency – the names and positions, email addresses, and telephone contact information of any

individuals (inclusive of the Title IX Coordinator and officials with corrective authority) whom a complainant providing notice of alleged sexual harassment shall confer actual knowledge upon the recipient.

Finally, a recipient must identify personnel who are accessible to students whose first language is not English, who use an alternative mode of communication, or who need other accommodations.

§ 106.30 Definitions – Sexual Harassment

DELETE: subsection (1) in its entirety and **ADD/REPLACE WITH:** “An individual providing services that are a part of the recipient’s regular business:

- (i) Conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct; or
- (ii) Creating an intimidating, hostile, or offensive environment within the recipient’s educational program or activity.

Examples of individuals providing services that are part of the recipient’s regular business include professors, administrators, non-administrative staff (cafeteria workers, library attendants, maintenance staff, etc.), teaching assistants, research assistants, coaches, student advisors, and, in the elementary and secondary context, parent volunteers.”

At subsection (2) after “that it effectively denies a person equal access to the recipient’s education program or activity” **ADD:** “. A single instance of unwelcome conduct on the basis of sex can be so severe, pervasive, and objectively offense that it effectively denies a person equal access to the recipient’s education program or activity. In addition, conduct that may not be severe in an isolated instance can be severe when that conduct is pervasive.”

Rationale

CLE rejects the term ‘employee’ in subsection (1) as too limited. An “employee” is generally understood to include persons receiving salary and wages from an employer, and not to include independent contractors, research and teaching assistants receiving credit or fellowships in lieu of wages, resident assistants who receive board in lieu of services, classroom volunteers/tutors, interns, or college/graduate students engaged in practice teaching in elementary and secondary schools. *See* Katie Johnson, “Brandeis and its teaching assistants agree on a union contract,” *Boston Globe*, August 27, 2018, <https://www.bostonglobe.com/business/2018/08/27/brandeis-and-its-teaching-assistants-agree-tentative-union-contract/OFYssAcZfus8oJ8J8j4b1K/story.html> (“Graduate students at Brandeis University have reached a contract agreement with the administration, positioning them to be the first group of teaching assistants at a private higher-ed institution in New England – and only the second in the country – with a collective bargaining agreement.”).

CLE is particularly concerned that a limited definition of “employee” will lead to confusion about the nature and scope of Title IX’s protections, and inconsistent, illogical application of Title IX in response to allegations of quid pro quo sexual harassment, which is premised on an imbalance of power between an individual providing services that are a part of the recipient’s regular business and a student. Accordingly, CLE urges the Department to amend subsection (1) to define sexual harassment to mean “an individual providing services that are a part of the

recipient's regular business conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct." Examples of individuals providing services that are part of the recipient's regular business include professors, administrators, non-administrative staff (cafeteria workers, library attendants, maintenance staff, etc.) teaching assistants, research assistants, coaches, student advisors, and, in the elementary and secondary context, parent volunteers.

Because CLE believes the Department should not limit subsection (1) to quid pro quo sexual harassment, CLE proposes making clear that sexual harassment also includes "an individual providing services that are a part of the recipient's regular business creating an intimidating, hostile, or offensive environment within the recipient's educational program or activity."

Finally, at subsection (2), the regulations should expressly state that a single instance of sexual harassment can be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity. CLE also urges the Department to acknowledge that the character of conduct as severe and pervasive does not always entail two separate inquiries. In other words, conduct that may not be considered severe in an isolated instance can, in fact, qualify as severe when that conduct is pervasive.

§ 106.44(a) Recipient's Response to Sexual Harassment - General

DELETE: subsection (a) *General* in its entirety and **ADD/REPLACE WITH:** "(a) *Affirmative Obligations*. A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States must take immediate action to eliminate the harassment, prevent its reoccurrence, and address its effects."

Rationale

CLE believes that no civil rights statute should rely upon a standard of indifference. Rather, a recipient, upon receiving actual knowledge of sexual harassment in its education program or activity must be held to have an *affirmative obligation* to eliminate the sexual harassment, prevent its reoccurrence, and address its adverse effects.

§ 106.44(b)(1) Recipient's Response to Sexual Harassment – Specific Circumstances

After "A recipient must follow procedures consistent with § 106.45 in response to a formal complaint." **DELETE:** "If the recipient follows procedures..." and all that follows through "...and does not otherwise constitute discrimination under Title IX."

Rationale

CLE rejects the provisions allowing for the recipient to achieve a "safe harbor" as described in § 106.44(b)(1) [i.e., not deliberately indifferent], for as written, they will deprive a complainant of redress under Title IX in instances where a recipient complies with the procedures in § 106.45 but fails to take affirmative steps to remove all evidence of sexual harassment and therefore engages in conduct that discriminates against a complainant on the basis of sex. CLE urges the Department to remove the safe harbor in § 106.44(b)(1) due to the discriminatory effect the safe harbor might have on complainants who are subject to continued sexual harassment by a respondent during the formal complaint process.

Consider the following scenario: A complainant files a formal complaint against a respondent for sexual harassment and the recipient responds consistent with the provisions of § 106.45. However, during the time which the recipient is investigating the complaint, the complainant is too frightened to attend class because the respondent continues to send the complainant sexually suggestive pictures and follows the complainant home every night. The recipient is informed of the respondent's continued actions and their effect on the complainant during the course of investigating the formal complaint but chooses not to take steps to restore the complainant's access to the recipient's education program because the respondent has not completed its investigatory report and will not be conducting a hearing until the following week. In this example, the recipient's inaction in the name of process has the effect of discriminating against the complainant on the basis of sex. However, as written, § 106.44(b)(1) would arguably exempt the recipient's actions from liability under Title IX because the recipient complied with the provisions of § 106.45.

§ 106.44(b)(2) *Recipient's Response to Sexual Harassment – Specific Circumstances*
DELETE: subsection (2) in its entirety and **ADD/REPLACE WITH:** “When a recipient has actual knowledge regarding reports by more than one complainant of conduct by the same respondent that could constitute sexual harassment, the Title IX Coordinator must promptly file a formal complaint with the prior written consent of the complainant(s).”

Rationale

CLE cannot support any civil rights statute relying upon the standard of indifference, let alone deliberate indifference. The Department's use of the deliberate indifference standard in an administrative proceeding to enforce a civil rights statute that does not authorize awarding monetary damages against a recipient is wholly inappropriate.

CLE proposes clarifying that the “multiple” complaints necessary to trigger a response from the recipient under § 106.44(b)(2) comports with the numerical definition of “multiple” (i.e. more than one). As unaddressed sexual harassment can have devastating consequences for the complainant, CLE proposes adding a prompt timeframe within which a Title IX Coordinator must file a formal complaint.

A complainant may choose whether or not to file a ‘formal’ complaint, and a recipient may not file a formal complaint on behalf of the complainant without the complainant's prior written consent.

§ 106.44(b)(3) *Recipient's Response to Sexual Harassment – Specific Circumstances*
DELETE: subsection (3) in its entirety and **REPLACE WITH:** “A recipient that fails to offer and, if accepted, implement supportive measures designed to effectively restore or preserve the complainant's access to the recipient's education program or activity discriminates on the basis of sex. At the time supportive measures are offered, the recipient must inform the complainant in writing of the complainant's right to file a formal complaint at that time or a later date, consistent with other provisions of this part.

Rationale

CLE cannot support any civil rights statute relying upon the standard of indifference, let alone deliberate indifference. The Department’s use of the deliberate indifference standard in an administrative proceeding enforcing a civil rights statute that does not authorize the assessment of monetary damages against a recipient is wholly inappropriate. A recipient that fails to offer, and if accepted implement supportive measures discriminated against a complainant on the basis of sex.

§ 106.44(b)(4) *Recipient’s Response to Sexual Harassment – Specific Circumstances*

DELETE: subsection (4) in its entirety and **REPLACE WITH:** “A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States that fails to take immediate action to eliminate the harassment, prevent its reoccurrence, and address its effects discriminates on the basis of sex.”

Rationale

CLE cannot support any civil rights statute relying upon the standard of indifference, let alone deliberate indifference. The Department’s use of the deliberate indifference standard in an administrative proceeding enforcing a civil rights statute that does not authorize the assessment of monetary damages against a recipient is wholly inappropriate. A recipient, upon receiving actual knowledge of sexual harassment in its education program or activity has an *affirmative obligation* to eliminate the harassment, prevent its reoccurrence, and address its effects. A recipient who fails to eliminate the harassment, prevent its reoccurrence, and address its effects discriminates on the basis of sex.

§ 106.44(c) *Recipient’s Response to Sexual Harassment – Specific Circumstances*

After “...with notice and an opportunity to challenge the decision immediately following the removal.” **ADD:** “During the period of removal from a recipient’s education program or activity, a recipient must provide a respondent with alternative access to the respondent’s academic classes, work, and responsibilities. A recipient that does not provide a respondent with alternative access to the respondent’s academic classes, work, and responsibilities during the period of removal discriminates against the respondent on the basis of sex.”

Rationale

CLE supports the Department’s recognition that emergency removal does not modify any rights under the IDEA, Section 504, or the ADA. As emergency removal is not premised on a finding of responsibility and occurs *ex parte*, the recipient must provide a respondent with alternative access to the respondent’s academic classes, work, and responsibilities during the period of removal. For that reason, a recipient that does not provide a respondent with alternative access to the respondent’s academic classes, work, and responsibilities during the period of removal discriminates against the respondent on the basis of sex.

§ 106.45(a) *Discrimination on the Basis of Sex*

After “A recipient’s treatment of the respondent may also constitute discrimination on the basis of sex under Title IX.” **ADD:** “Discrimination on the basis of sex includes a recipient’s discriminatory treatment of a complainant and/or respondent on the actual or perceived basis of biological or assigned sex, gender identity, or sexual orientation.”

Rationale

Consistent with (1) prior Department interpretation and enforcement, (2) *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), and, in their wake, the numerous courts that have recognized that Title VII prohibits sex discrimination against transgendered individuals, and (3) emerging court decisions interpreting Title IX to prohibit discrimination on the basis of gender identity, the Department should clearly indicate that § 106.45(a) prohibits a recipient from discriminating against a complainant and/or respondent on the actual or perceived basis of biological or assigned sex, gender identity, or sexual orientation.

§ 106.45(b)(1)(i) *Grievance Procedures – Basic Requirements for Grievance Procedures*

CLE proposes to strengthen the affirmative obligations of the recipient to ensure broad equitable remedies for a complainant based on fair process for both a complainant and respondent.

After “...such remedies must **DELETE**: “be designed to”. After “...restore or preserve” **ADD**: “equal.” After “...access to the recipient’s education and program” **DELETE**: “.” and **ADD**: “, and include a broad range of equitable remedies, including counseling, supportive services, staff and student training.”

After “...An equitable resolution for a respondent must include” **ADD**: “an option for finding no responsibility; and an equitable resolution for either party must be predicated upon the recipient’s providing due process protections to both parties consistent with this part”. **DELETE**: “before any disciplinary sanctions are imposed;”.

Rationale

CLE’s proposed language ensures that the remedies a recipient chooses to implement must *not only be designed* to restore or preserve the complainant’s equal access to the recipient’s education program or activity, but *must* effectively restore such access to the complainant. With respect to the respondent, the regulation should expressly recognize that a possible equitable resolution includes a finding of ‘no responsibility. Moreover, any equitable resolution reached by the recipient and applicable either to the complainant or respondent must be predicated upon both parties receiving their due process protections.

§ 106.45(b)(1)(ii) *Grievance Procedures – Basic Requirements for Grievance Procedures*

No changes.

Rationale

CLE supports the Department’s proposed requirement that the recipient objectively evaluate all relevant evidence, including both inculpatory and exculpatory evidence, and that credibility determinations may not be based on a person’s status as a complainant, respondent, or witness.

§ 106.45(b)(1)(iii) *Grievance Procedures – Basic Requirements for Grievance Procedures*

No changes.

Rationale

CLE supports the Department's proposed changes regarding conflicts of interest, bias, training, and the avoidance of stereotyping.

§ 106.45(b)(1)(iv) *Grievance Procedures – Basic Requirements for Grievance Procedures*

After "...conclusion of the grievance process" **ADD**: ". A recipient must conduct the grievance process in an impartial manner and the recipient's determination regarding responsibility must be impartial;"

Rationale

CLE supports the presumption that a respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process. In addition, to comply with principles of due process, a recipient must both conduct the grievance process in an impartial manner *and* the recipient's determination regarding responsibility must be impartial. While related, CLE believes it important to highlight how impartiality can effect both the recipient's conduct during the grievance process and the quality and character of the recipient's ultimate decision.

§ 106.45(b)(1)(v) *Grievance Procedures – Basic Requirements for Grievance Procedures*

After "...assistance or accommodation of disabilities" **DELETE**: ";" and **ADD**: ". A recipient shall offer and implement supportive measures to the complainant consistent with 34 C.F.R. § 106.44 [as amended by CLE's proposed language] in the event of any such delay or extension granted."

Rationale

Consistent with the intent of supportive measures in restoring a complainant's equal access to the recipient's education program or activity, and to mitigate additional harm or unintended consequences, CLE's language would impose an affirmative obligation on recipient to offer the complainant supportive measures consistent with 34 C.F.R. § 106.44 [as amended by CLE's proposed language] in the event of the temporary delay of the grievance process or the limited extension of timeframes for good cause.

§ 106.45(b)(1)(vi) *Grievance Procedures – Basic Requirements for Grievance Procedures*

No changes.

Rationale

CLE agrees that full and proper notice to all students, faculty, and other personnel is critical to the effective implementation of Title IX. Therefore, a recipient's grievance procedures must describe the range of possible sanctions and remedies that the recipient may implement following any determination of responsibility as consistent with due process.

§ 106.45(b)(1)(vii) *Grievance Procedures – Basic Requirements for Grievance Procedures*

No changes.

Rationale

CLE agrees that a recipient's grievance procedures shall be required to describe the standard of evidence to be used to determine responsibility as consistent with due process.

§ 106.45(b)(1)(viii) *Grievance Procedures – Basic Requirements for Grievance Procedures*

After "...if the recipient offers an appeal" **ADD:** ". If a recipient offers an appeal, the complainant and respondent may only appeal consistent with (A) and (B) below:

- (A) In instances where the recipient determines the respondent to be responsible for the alleged conduct and institutes a remedy designed to restore a complainant's equal access to the recipient's education program or activity, the complainant may appeal the remedy as inadequate to restore the complainant's equal access to the recipient's education program or activity, to prevent its reoccurrence, and address its adverse effects, including social and emotional impact of sexual harassment on the complainant and others who may have been adversely affected by the sexual harassment.
- (B) In instances where the recipient determines the respondent to be responsible for the alleged conduct, the respondent can appeal the recipient's determination of responsibility".

Rationale

Consistent with the intent of Title IX, in instances where a recipient determines the respondent to be responsible for the alleged conduct and institutes a remedy designed to restore the complainant's access to the recipient's education program or activity, a complainant should be able to appeal the adequacy and efficacy of the remedy in restoring the complainant's equal access to the recipient's education program or activity. Similarly, a respondent should be able to appeal a recipient's finding of responsibility. Conversely, it would seem that a respondent should have a right to rely on a recipient's determination of no responsibility, and a complainant should not be able to appeal in this instance; allowing a complainant to appeal a recipient's determination of no responsibility subjects the respondent to "administrative" double jeopardy and contravenes principles of basic fairness. This is especially troublesome for students from low-income families with little or no access to free legal counsel.

§ 106.45(b)(1)(ix) *Grievance Procedures – Basic Requirements for Grievance Procedures*

No changes.

Rationale

CLE agrees that a recipient's grievance procedures must describe the range of supportive measures available to complainants and respondents.

§ 106.45(b)(2)(i)(B) *Notice of Allegations – Notice upon Receipt of Formal Complaint*

After "...The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility."

Rationale

CLE agrees that extensive notice must be included when a complainant files a formal complaint; this is consistent with the due process principles the Supreme Court enumerated in *Goss v. Lopez*, 419 U.S. 565 (1975) and *Mathews v. Eldridge*, 424 U.S. 319 (1976). Given that a finding

of responsibility can have grievous consequences on a respondent's educational and economic future, *see e.g. Doe v. Baum*, 903 F.3d 575, 582 (6th Cir. 2018) ("Being labeled a sex offender by a university has both an immediate and lasting impact on a student's life."), it is critical that a respondent have notice of the charges against him, the evidence supporting those charges, and the ability to inspect such evidence with sufficient time to prepare a response. These due process protections are of equal importance to the complainant and are critical for the recipient to show that it is taking seriously its response to the alleged conduct. CLE also supports inclusion in the notice of a presumption against responsibility for the respondent.

§ 106.45(b)(2)(ii) Notice of Allegations – Ongoing Notice Requirement

After "...the recipient must provide notice of the additional allegations to the parties, if known."

ADD: "Any such notice of additional allegations must be consistent with 34 C.F.R. § 106.45(b)(2)(i)."

Rationale

CLE supports an ongoing notice requirement. However, in the event a recipient learns of additional allegations previously not subject to the notice requirements of 34 C.F.R. § 106.45(b)(2)(i), the Department should clarify that the recipient must provide both parties with notice of the additional allegations consistent with 34 C.F.R. § 106.45(b)(2)(i) to comply with due process. Such a clarification will ensure both parties have adequate time and information to respond to all allegations, regardless of when in the formal complaint process the additional allegations may arise.

§ 106.45(b)(3) Investigations of a Formal Complaint

Clarify that *the results of a recipient's investigation* trigger a recipient to dismiss a complaint under § 106.30 if the investigation shows that the alleged conduct would not constitute sexual harassment as defined in § 106.30 even proved. Clarify that a recipient cannot dismiss a complainant's formal complaint on the basis of the quality of the pleading alone.

Rationale

For a multitude of reasons (e.g., complainant may not initially understand all the facts he/she needs to state to meet the definition of sexual harassment, complainant fills out the formal complaint in English when English is not his/her native language, complainant typically utilizes alternative modes of communication, etc.) a complainant may present a formal complaint that, on its face, would not constitute sexual harassment as defined in § 106.30 even if proved. A deficiency in the complaint should not defeat the complainant's action, as the recipient has an obligation to begin investigating once a formal complaint is filed. Accordingly, it is not the conduct the complainant pleads in the formal complaint that triggers a recipient to dismiss a complaint under § 106.30, but rather the results of a recipient's investigation.

Proposed Regulation § 106.45(b)(3)(i)-(iii) Investigations of a Formal Complaint

No changes.

Rationale

CLE agrees that inclusion of § 106.45(b)(3)(i)-(iii) are consistent with due process. Given the resources available to the recipient and the recipient's role as investigator and decision-maker,

the recipient is the appropriate party to bear the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility. In addition, principles of basic fairness dictate that both parties must have equal opportunity to present witnesses and other inculpatory and exculpatory evidence.

Proposed Regulation § 106.45(b)(3)(iv) *Investigations of a Formal Complaint*

After "...to be accompanied to any related meeting or proceeding by the advisor of their choice,"
ADD: "including an attorney,".

Rationale

While the proposed regulations indicate that the recipient "not limit the choice of advisor," CLE believes that, given the gravity of each side's interest and the regular practice of recipients' excluding attorneys from grievance proceedings, the regulations should explicitly state that both parties have the right to be accompanied by an attorney to any related meeting or proceeding.

Proposed Regulation § 106.45(b)(3)(v) *Investigations of a Formal Complaint*

No changes.

Rationale

Support. Consistent with principles of due process, the recipient must provide each party whose participation is invited or expected written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with a party, with sufficient time for the party to prepare to participate.

Proposed Regulation § 106.45(b)(3)(vi) *Investigations of a Formal Complaint*

After "For recipients that are elementary and secondary schools, the recipient's grievance procedures" **ADD:** "addressing an allegation of peer-to-peer harassment,"
DELETE: "may" **ADD/REPLACE:** "shall require a live hearing."

Rationale

Consistent with *Goss v. Lopez* 419 U.S. 565 (1975) and *Mathews v. Eldridge*, 419 U.S. 565 (1975), a student must be provided a due process hearing before being subjected to any exclusion from recipient's educational program or activity. Such hearing shall be consistent with the requirements in subsection (vii) below. As with any due process hearing the recipient must afford the parties due process rights to reduce the risk of error and mitigate harm from loss of a student's property and liberty interests.

Proposed Regulation § 106.45(b)(3)(vii) *Investigations of a Formal Complaint*

No changes.

Rationale

CLE supports the requirement of a live hearing and inclusion of cross-examination in the formal grievance process as necessary to the recipient's providing both parties due process consistent with *Goss v. Lopez*, 419 U.S. 565 (1975) and *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See also Doe v. Baum*, 903 F.3d 575, 584 (6th Cir. 2018) ("If credibility is in dispute and material to

the outcome, due process requires cross-examination.”). Many, if not most, sexual harassment cases under Title IX’s formal grievance process will rely on witness and party statements. As the 6th Circuit aptly noted in *Baum*, “[c]ross-examination is essential in cases like [these] because it does *more* than uncover inconsistencies – it takes aim at credibility like no other procedural device. Without the back-and-forth of adversarial questioning, the accused cannot probe the witness’s story to test the [witness’s] memory, intelligence, or potential ulterior motives. Nor can the fact-finder observe the witness’s demeanor under that questioning.” (emphasis in original) (internal quotations and citations omitted). Given both parties significant interests in a fair formal grievance process, a recipient’s determination of responsibility that relies on credibility disputes but does not provide for cross-examination is fundamentally unfair and inconsistent with the requirements of due process.

CLE agrees with that at the request of either party, the recipient shall provide for cross-examination to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party answering questions as sensitive to avoiding either party occurring additional trauma. Similarly, CLE supports excluding questions and evidence concerning the complainant’s sexual behavior as irrelevant except in specific, narrow circumstances.

§ 106.45(b)(3)(viii) *Investigations of a Formal Complaint*

After “...provide a copy of the report to the parties for their review and written response.” **ADD:** “The recipient will incorporate each party’s written response into the investigative report. After incorporating each party’s written response, and prior to any hearing, the recipient will provide a copy of the investigative report to the decisionmaker.”

Rationale

CLE agrees that a recipient shall create an investigate report and provide the report to the complainant and respondent for their respective written responses. While each party may reference information contained within the report at the live hearing, if offered, the proposed regulations are silent as to whether the decisionmaker is also entitled to receive the investigative report. In order to ensure the decisionmaker has access to all relevant information, CLE proposes adding language requiring the recipient to provide the decisionmaker with a copy of the investigative report after the recipient has solicited and incorporated both parties’ written responses.

§ 106.45(b)(4)(i) *Determination Regarding Responsibility*

After “...To reach this determination, the recipient must apply” **DELETE:** “...either the preponderance of the evidence standard...” and all that follows through “but carry the same maximum disciplinary sanction.” and **REPLACE WITH:** “the clear and convincing evidence standard.”

Rationale

Given that a finding of responsibility can have grievous consequences on a respondent’s educational and economic future, *see e.g. Doe v. Baum*, 903 F.3d 575, 582 (6th Cir. 2018) (“Being labeled a sex offender by a university has both an immediate and lasting impact on a student’s life.”), a respondent has a significant interest in avoiding an *erroneous finding* of

responsibility. Accordingly, it is critical that a recipient employ a standard of proof and procedural safeguards sufficient to protect against a recipient erroneously depriving a respondent of his/her property and/or liberty interests. *See Goss v. Lopez*, 419 U.S. 565 (1975); *Mathews v. Eldridge*, 424 U.S. 319 (1976). CLE believes that the preponderance of the evidence standard (i.e. “more likely than not;” “50.01% likely”) is insufficient to protect against such error even with the additional safeguards of § 106.45, and that any determination a recipient makes regarding a respondent’s responsibility under § 106.45 must be made using the clear and convincing evidence standard.

Furthermore, allowing a recipient to choose to implement the preponderance of the evidence standard only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum penalty will encourage recipient to cease using the clear and convincing evidence standard for such other disciplinary offenses. A shift away from the clear and convincing evidence standard in long-term disciplinary exclusion proceedings will likely lead to an increase in suspensions and expulsions.

§ 106.45(b)(5) Appeals

DELETE “although” After “[A] complainant may appeal on the ground that the remedies are **DELETE**: designed to “ **ADD**: “inadequate to restore the complainant’s equal access to the recipient’s education program or activity, to prevent its reoccurrence, and address its adverse effects, including social and emotional impact of sexual harassment on the complainant and others who may have been adversely affected by the sexual harassment.”

ADD: “[A]” before “complainant is not entitled to a particular sanction against the respondent.”

ADD: “In instances where the recipient determines the respondent to be responsible for the alleged conduct, the respondent can appeal the recipient’s determination of responsibility.”

Rationale

Consistent with the intent of Title IX, in instances where a recipient determines the respondent to be responsible for the alleged conduct and institutes a remedy designed to restore the complainant’s access to the recipient’s education program or activity, a complainant should be able to appeal the adequacy and efficacy of the remedy. Similarly, a respondent should be able to appeal a recipient’s finding of responsibility. Conversely, a respondent should be able to rely on a recipient’s determination of no responsibility, and a complainant should not be able to appeal in this instance; allowing a complainant to appeal a recipient’s determination of no responsibility subjects the respondent to “administrative” double jeopardy and contravenes principles of basic fairness.

§§ 106.45(b)(5)(i)-(v) Appeals

No changes.

Rationale

CLE supports proposed §§ 106.45(b)(5)(i)-(v) as consistent with due process.

§ 106.45(b)(6) Informal Resolution

No changes.

Rationale

Given the unique nature and circumstances surrounding each complainant and formal complaint, CLE supports proposed § 106.45(b)(6)(ii) to allow for the recipient's informal resolution of a complaint if the recipient obtains the voluntary, written consent to the informal resolution process and otherwise complies with the notice provisions of § 106.45(b)(6)(i).

§ 106.45(b)(7)(ii) *Recordkeeping*

After "...and document that it has taken measures designed to restore or preserve access to the recipient's educational program or activity." **DELETE:** "The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken."

Rationale

CLE proposes removing the provision of § 106.45(b)(7)(ii) allowing recipients to add *post hoc* alterations and justifications to the record of a formal complaint as inconsistent with principles of basic fairness.