FACE.

Families Advocating for Campus Equality

HOW TO SUBMIT A COMMENT TO THE DEPARTMENT OF EDUCATION RE PROPOSED TITLE IX REGULATIONS

> The basic premise of notice-and-comment requirements is that even though the Executive Branch employs specialists with deep and specific knowledge, those specialists are not experts in how a given policy may affect a specific market, industry, activity, or person. Comments help make sure that the government is getting it right—or alert it when it's not—by providing information that challenges the government's assumptions where they're inaccurate and to help the government understand what the right assumption would be.[1]

- ***Read the instructions and submit your comment electronically via:*** https://www.regulations.gov/document?D=ED-2018-OCR-0064-0001
- ***It is preferred that you submit any comments or attachments in Microsoft Word format. Though you also can type directly into the Comment box, it is limited to 5000 words.***
- ***Anonymous comments are permitted.***
- ***Do not copy other comments or use form comments as they may be disregarded.***

COMMENT FORMAT EXAMPLE

FIRST: Identify the document on which you are commenting by its docket number, subject heading, Federal Register date, and page number:

Re: Docket No. FR Doc # 2018-25314, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Federal Register Vol. 83, No. 230, November 29, 2018, p. 61462.

To Whom It May Concern,

Thank you for the opportunity to comment on the above-referenced proposed rule, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.

SECOND: Introduce yourself in 1-2 sentences, explaining:

- ***Why you are interested in the regulation.***
- ***Highlight any experience that may distinguish your comment from others.***
- ***Explain on whose behalf you are commenting: your own, another person or organization, or if you are endorsing or joining with another commenter.***

[1] *How to effectively comment on regulations*, August 2018, Brookings Inst., https://www.brookings.edu/wp-content/uploads/2018/08/ES_20180809_RegComments.pdf

I would like to ... ***[raise concerns regarding / inform you of new information regarding / provide supporting evidence for / express my support for]*** … the Department of Education's proposed rules for Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, as published in the Federal Register on November 29, 2018.

THIRD: Identify the issues on which you are commenting (see below for an issue list):

- ***List your recommendations up front.***
- ***If you are commenting on a particular section, word or phrase, state this clearly and provide the relevant section number, page number, and paragraph citation (included with each regulation discussed below) from the official Federal Register PDF of the proposed regulations.***[2]
- ***Please do not feel as though you need to address every issue – it may be more impactful to focus on just 3-5 issues that are relevant to your experience.***

1. ***[Briefly describe first major point]***
2. ***[Briefly describe second major point]***
3. ***etc...***

FOURTH:

- ***Lay out the arguments that support your recommendations.***
- ***For each issue you've identified above, share any personal experiences or examples of a school's unfair and/or inequitable treatment of parties in Title IX sexual misconduct proceedings. Your experiences and other examples are critical to illustrating why the status quo is unacceptable:***

> comments that reflect the perspective of individual persons are valuable to government agencies in several ways: they can show the agency unique situations that it hasn't contemplated in its evaluation of the policy; they can then explain how that unique situation will impact individual behavior in response to the policy change; they can express third person, value-based judgments on the policy that speak to their general opinion of whether the agency is heading in the right direction.[3]

Thank you for the opportunity to submit comments to Notice of Proposed Rulemaking for Docket No. FR Doc # 2018-25314, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.

LAST:

- ***Name, Title (if any), Date, and Contact information.***
- ***Comments may be submitted anonymously.***

[2] The official Federal Register PDF is linked in the upper right hand corner ("View original printed format") of the following link: https://www.regulations.gov/document?D=ED-2018-OCR-0064-0001

[3] How to effectively comment on regulations, August 2018, https://www.brookings.edu/wp-content/uploads/2018/08/ES_20180809_RegComments.pdf

TO ASSIST IN YOUR ANALYSIS, HERE IS A LIST OF ISSUES YOU MAY WISH TO RAISE

PLEASE USE YOUR OWN WORDS; DO NOT COPY THE ISSUES OR DISCUSSION VERBATIM AS THIS MAY RESULT IN YOUR COMMENT BEING DISREGARDED

A. Though the favorable proposed regulations addressed in this section will increase fairness and due process in Title IX proceedings for all involved, please remember these are not final regulations. As a result, it would be advisable to indicate your support for the proposed regulations which you endorse as well, to ensure they remain intact.

1. LIVE HEARINGS:

The proposed rules require institutions of higher education to provide a live hearing. Currently, many schools do not use hearings at all, or use them only in an appeal process after the student has already been found responsible.

Cite: § 106.45(b)(3)(vii), page 61498, column 2;

"For institutions of higher education, the recipient's grievance procedure must provide for a live hearing …"

There have been some erroneous claims that this provision requires a public hearing. Section 106.45(b)(3)(vii) merely calls for a live event where the parties and decision-makers can see and hear each other while questions are asked and answered. And, as discussed below, this section allows parties to request to be in separate rooms, as long as the other party and decision-maker(s) can see and hear that party being questioned.

Cite: § 106.45(b)(3)(vii), cont'd; " … At the request of either party, the recipient must provide for cross-examination to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party answering questions …"

2. CROSS-EXAMINATION:

The proposed rules require cross-examination be permitted at a live hearing, conducted by a party's "advisor." This requirement is consistent with preexisting case law in several jurisdictions in which courts have held that cross-examination must be provided when credibility is at issue.[4]

Currently, many school processes require the advance submission of written questions by the parties to be asked by a school official. FACE has many cases in which some or all of the submitted questions were never asked or were reworded to undermine their effectiveness. Follow-up questions also have frequently been ignored by those charged with asking the other party questions, even though responses to such questions may reveal a witness's faulty memory or even false testimony.

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[4] *Doe v. Baum (University of Michigan)* ____ F.3d ____ (6th Cir. 2018); *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 401–02 (6th Cir. 2017); *Doe v. University of Southern California (USC))* ____ Cal.App.5th ____, 2018 (2nd Appl. Dist., Div. 7 2018) p. 31 (using the original court-filed opinion on December 11, 2018) (decision-maker must be able to see witness respond to questions); *Doe v. Claremont McKenna College (CMC)* ____ Cal.App.5th ____, 2018 DJDAR 7883 (2nd Appl. Dist. 2018), pp. 26-27 (using the original court-filed opinion on August 8, 2018); *Doe v. Univ. of Michigan*, No.2:18-cv-11776-AJT-EAS, Docket 30, (S.D.MI. July 6, 2018); *Doe v. Alger (James Madison University)*, 228 F. Supp. 3d 713, 730 (W.D. Va. 2016); *Lee v. The University of New Mexico,* Case 1:17-cv-01230-JB-LF, pp. 2-3 (D. NM. 2018).

Consequently, written questions are never an effective substitute for live cross-examination; [5] *credibility can only be determined when questions are asked in the presence of parties and decision-makers who are able to listen and observe a witness's demeanor, and when immediate follow-up questions are permitted.*

Cite: § 106.45(b)(3)(vii), page 61498, columns 2-3;

"At the hearing, the decision-maker must permit each party to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility"

Appropriately, section 106. 45(b)(3)(vii) requires that any questions to parties be asked by the parties' advisors. This should not minimize, and may improve the effectiveness of questioning, and will diminish the likelihood of the parties' emotions from interfering with the desired outcome:

Cite: § 106.45(b)(3)(vii), cont'd;

" … Such cross-examination at a hearing must be conducted by the party's advisor of choice, notwithstanding the discretion of the recipient under paragraph (b)(3)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings. If a party does not have an advisor present at the hearing, the recipient must provide that party an advisor aligned with that party to conduct cross-examination …. "

The section additionally obligates the decision-maker to explain any decision to exclude a question. This provision may reveal biased decision-making where, for example, questions concerning a complainant's post-event inconsistent behavior or statements are deemed "irrelevant" based on unscientific victim trauma myths.[6] *However, the provision and the proposed regulations as a whole do little to preclude use of these myths:*

Cite: § 106.45(b)(3)(vii), cont'd;

" … The decision-maker must explain to the party's advisor asking cross-examination questions any decision to exclude questions as not relevant …"

Under this section, the decision-maker would not be able to consider the testimony of any party or witness who refused to be questioned. Presumably this also would apply to the complainant's failure to appear, but it is not clear whether this would prevent the disciplinary process from proceeding without the complainant's statements: [7]

Cite: § 106.45(b)(3)(vii), cont'd;

" …If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility;"

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[5] *Doe v. Univ. of Notre Dame,* 2017 U.S. Dist. LEXIS 69645, p. 25 (N.D. Ind. May 8, 2017) (using original court filed version on May 8, 2017), vacated by request of the parties after settlement in *Doe v. Univ. of Notre Dame*, 2017 WL 7661416 (N.D.IN. Dec. 27, 2017)(" That all questions must be proposed in writing and are asked of witnesses only at the discretion of the Hearing Panel does not permit a robust inquiry in support of a party's position. The stilted method does not allow for immediate follow-up questions based on a witness's answers, and stifles John's presentation of his defense to the allegations.")

[6] See discussion of these policies in section C.1., *infra*.

[7] *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 401–02 (6th Cir. 2017): "Given the parties' competing claims, and the lack of corroborative evidence to support or refute Roe's allegations, the present case left the ARC panel with 'a choice between believing an accuser and an accused.' Yet, the panel resolved this 'problem of credibility' without assessing Roe's credibility. In fact, it decided plaintiff's fate without seeing or hearing from Roe at all. That is disturbing and, in this case, a denial of due process." (citations omitted).

Section 106. 45(b)(3)(vii) allows the parties to request to be in separate rooms for cross-examination, but the other party and the decision-maker(s) must be able to see and hear the party being questioned.

Cite: § 106.45(b)(3)(vii), cont'd; " … At the request of either party, the recipient must provide for cross-examination to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party answering questions …"

The proposed regulations restrict questions about a complainant's sexual history with someone other than the respondent, unless they seek to prove that someone else was the guilty actor, or to establish consent. The latter often arises when there is evidence of a motivation to lie or cover up the complainant's willing engagement in the alleged interaction, such as, for example, when a religious parent, boyfriend or friend discovers the interaction.

Cite: § 106.45(b)(3)(vii), cont'd; " … All cross-examination must exclude evidence of the complainant's sexual behavior or predisposition, unless such evidence about the complainant's sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent …"

Generally these restrictions seem reasonable. Victims' advocates and other groups' hysteria over the possibility an advisor might inappropriately interrogate a complainant seem overblown and based on their assumption that campus officials are merely passive observers. As to whether questioning will "re-traumatize victims," how do we know the complainant is a victim without questioning the allegations and, in any event, how fair it is to potentially ruin a respondent's life based on allegations the complainant is unwilling or unable to answer questions about?

3. SINGLE INVESTIGATOR:

A "single investigator model," in which one official investigates and determines or recommends a finding regarding responsibility, or participates in subsequent decision-making, is prohibited by the proposed section 106.45(b)(4)(i), due to the obvious likelihood of confirmation bias, and the impossibility of effective cross-examination. This rule is consistent with several recent court decisions.[8]

Cite: § 106.45(b)(4)(i), page 61499, column 1;

"The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility."

[8] *John Doe v. University of Michigan, et al*., Case No. 18-1177, *p. 7 (E.D. Mich. July 6, 2018) ("private questioning through the investigator," deprived the accused student "of a live hearing and the opportunity to face his accuser."); *Doe v. Penn. State Univ.*, No. 4:18-cv-164, Docket 27 (M.D.Pa. 2018) (court found it insufficient that the investigator had "filtered," "paraphrased," and then "directed some questions from Mr. Doe to Ms. Roe during the interviews," because it was "unclear whether any of Mr. Doe's questions went unasked or unanswered, and unclear whether (or how) those questions were rephrased."); *Doe v. Brandeis Univ*., 177 F. Supp. 3d 561, 573 (D. Mass. 2016) ("obvious" the "dangers of combining in a single individual the power to investigate, prosecute, and convict, with little effective power of review"); *Doe v. Claremont McKenna College* ____ Cal.App.5th ____, 2018 DJDAR 7883 (2nd Appl. Dist. 2018), pp. 26-27 (*all* decision makers "must make credibility determinations, and not simply approve the credibility determinations of the one Committee member who was also the investigator."); *Doe v. Miami University,* 882 F.3d 579, 601, 605 (6th Cir. Feb. 9, 2018) (court found "legitimate concerns" raised by the investigator's "alleged dominance on the three-person [decision making] panel," because "she was the only one of the three with conflicting roles.")

Under the single investigator model, though the investigator can ask questions posed by an opposing party in writing,[9] *there is no opportunity for either party to know what initial or follow-up questions were actually asked by the investigator, the manner in which those questions were asked, or whether and how the other party responded.*[10]

4. ACCESS TO EVIDENCE:

The regulations would require students be informed of and permitted to access all evidence collected by the school "directly related to the allegations," whether or not it will be relied upon in the school's investigation or adjudication. Presumably this would include evidence that is both inculpatory or exculpatory:

Cite: § 106.45(b)(2)(i)(B), pages 61498, column 1;

" … The written notice must also inform the parties that they may request to inspect and review evidence under paragraph (b)(3)(viii) of this section …."

Cite: § 106.45(b)(3)(viii), page 61498, column 3;

"Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation ..."

Presently, parties are frequently denied or given very limited access to evidence and witness statements, including their accuser's statement(s).

It is important to note that section 106.45(b)(3)(viii) also requires disclosure of evidence on which the school may not rely. This is significant because schools have frequently ignored or improperly characterized evidence as "irrelevant."

Cite: § 106.45(b)(3)(viii). cont'd;

" … including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility …"

However, it is not clear if the use of "relevant" to describe evidence that should be included in the investigation report under subsection (ix), is equivalent to subsection (viii)'s reference to evidence "directly related to the allegations raised in a formal complaint" and/or "evidence upon which the recipient does not intend to rely." [11] *If these two subsections address different categories of*

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[9] There are "hybrid" models, such as in most public universities in California, where the appeals allows a hearing in certain circumstances, but this is only following the responsibility finding.

[10] *John Doe v. University of Michigan, et al.*, Case No. 18-1177, *p. 7 (E.D. Mich. July 6, 2018).

[11] These two subsections of § 106.45(b)(3) read:

(viii) Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format, such as a file sharing platform, that restricts the parties and advisors from downloading or copying the evidence, and the parties shall have at least ten days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject herein to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and

(ix) Create an investigative report that fairly summarizes relevant evidence and, at least ten days prior to a hearing (if a hearing is required under this section) or other time of determination regarding responsibility, provide a copy of the report to the parties for their review and written response.

evidence, then the investigative report may not include all evidence collected or made available to the parties:

Cite: § 106.45(b)(3)(ix) page 61498, column 3, through page 61499, column 1;

" … (ix) Create an investigative report that fairly summarizes relevant evidence and, at least ten days prior to a hearing (if a hearing is required under this section) or other time of determination regarding responsibility, provide a copy of the report to the parties for their review and written response."

It seems as though the last sentence of subsection (viii)'s reference to "all such evidence subject herein to the parties' inspection and review" that must be made available at the hearing, refers back to the subsection's first sentence reference to all evidence collected that is "directly related to the allegations;" either way, this needs to be clarified:

Cite: § 106.45(b)(3)(viii). cont'd;

"Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation … The recipient must make all such evidence subject herein to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination …"

Finally, the proposed rules require that access to the evidence be via an online source that does not allow copying or downloading - this should be adequate, though copies might be preferred in some instances.[12]

Cite: § 106.45(b)(3)(viii). cont'd;

" … Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format, such as a file sharing platform, that restricts the parties and advisors from downloading or copying the evidence, and the parties shall have at least ten days to submit a written response, which the investigator will consider prior to completion of the investigative report. …"

5. ADVISORS:

The proposed rules require that "advisors" be permitted to attend all meetings.

Cite: § 106.45(b)(3)(iv), page 61498, columns 1-2;

"Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, and not limit the choice of advisor or presence for either the complainant or responded in any meeting or grievance proceeding …"

It is not clear whether the rules anticipate advisors actively assisting those whom they represent, other than in the context of cross-examination. Often referred to as "potted plants," advocates in the past have been unable to advise parties or speak on their behalf during proceedings. Under section 106.45(b)(3)(iv), will the advocate be permitted to converse with or actively assist the student during the various proceedings? Perhaps not, as the proposed section allows a school to "establish restrictions" on the advocate's participation:

[12] This is a change from the draft regulations leaked earlier this year. The reason for the change is victim advocates' concerns that accused students would publicize private information. This is interesting because we have most frequently encountered accusers who distribute or publicize confidential information about the accused.

Cite: § 106.45(b)(3)(iv), cont'd;

"… however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties."[13]

We recommend the section be clarified to allow, at a minimum, the advisor to communicate with the student he/she is assisting during all proceedings.

6. DEFINITIONS:

The rules provide three definitions of "sexual harassment," that we consider to be reasonable. These definitions should preclude the necessity of schools acting as the "sex police." [14] *The proposed rules encompass (1) quid pro quo and (2) serious forms of sexual harassment, as well as (3) any criminal sexual assault.*

Cite: § 106.30,[15] page 61496, column 3;

"*Sexual harassment* means:

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

(2) Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or

(3) Sexual assault, as defined in 34 CFR 668.46(a)."[16]

Subsection (1) appropriately sanctions any case of sexual harassment where there is a power differential between the parties that results in some type of coercion. Though some uninformed commentators and advocates have claimed the rules would not cover rape, subsection (3) clearly sanctions all criminal sexual conduct.

Subsection (2) has proven to be the most controversial of the definitions, limiting itself to unwelcome sexual conduct that is "severe, pervasive, and objectively offensive." This definition comes straight from the pages of the Supreme Court's defcision in Davis v. Monroe, of conduct for which schools are liable for not responding to under Title IX:

> We consider here whether a private damages action may lie against the school board in cases of student-on-student harassment. We conclude that it may, but only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities. Moreover, we conclude that such an action will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit. [17]

Over the years victims' advocates have argued this standard should apply only to private causes of action against schools, and not OCR enforcement efforts, but it seems illogical to subject schools to two separate standards of reponsibilty concerning the same conduct. Nevertheless, under the Obama administration OCR guidance changed the "and" in "severe, pervasive, and objectively offensive" to an "or" for enforcement purposes. This and other OCR guidance resulted in over enforcement and spurred articles such as "The Sex Bureaucracy" by Harvard Law professors

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[13] The exception to this is when the advocate is conducting cross-examination (see § 106.45 (b)(3)(vii)).

[14] For the last several years schools have been treating under the category of "sexual misconduct," uncomfortable or regretted sex, or similar allegations that don't involve sex and are one-time occurrences.

[15] Though this entire section is new since the leaked draft of the regulations, its content was taken from a different section in that earlier draft.

[16] 34 CFR 668.46(a) describes criminal conduct.

[17] *Davis v. Monroe County Bd. of Ed.*, 526 US 629, 633 (1999).

Jeannie Suk (later Gerson) and Jacob Gerson,[18]*and even the Association of Title IX Administrators' 2017 White Paper "Due Process and the Sex Police."*[19]

7. FORMAL COMPLANT:

To begin a Title IX disciplinary process, the proposed rules require a formal, signed complaint filed with an appropriate school official. This provision hopefully will minimize the chances of Title IX officials begining a process when the alleged victim claims not to have been assaulted or does not wish to engage in an adversarial process.[20]

Cite: § 106.30, page 61496, column 2;

"*Actual knowledge* means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to a teacher in the elementary and secondary context with regard to student-on-student harassment."

Cite: § 106.30, page 61496, column 3;

"*Formal complaint* means a document … signed by a complainant or by the Title IX Coordinator alleging sexual harassment against a respondent about conduct within its education program or activity and requesting initiation of the recipient's grievance procedures consistent with § 106.45."

8. BIAS AND CONFLICTS OF INTEREST:

The proposed rules require all officials involved in the process to be free of bias or conflict of interest. This will be difficult to enforce, as Title IX officials and other school personnel involved in these processes often are a self-selected group likely to include victims' advocates, self-identified victims, and those associated with women's studies.

Cite: § 106.45(b)(1)(iii), page 61497, column 3;

"Require that any individual designated by a recipient as a coordinator, investigator, or decision-maker not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent…"

9. EQUITABLE TREATMENT:

According to the proposed rules, parties must be treated equitably and without discrimination on the basis of sex. This clarifies that unfair treatment may also constitute discrimination against a respondent. As in #8 above, this is a favorable provision that will be difficult to enforce.

Cite: § 106.45(a), page 61497, column 2;

"A recipient's treatment of a complainant in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX. A recipient's treatment of the respondent may also constitute discrimination on the basis of sex under title IX."[21]

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[18] Gerson and Suk, *The Sex Bureaucracy*, California Law Review, Vol. 104, Iss. 4 (2016), https://scholarship.law.berkeley.edu/californialawreview/vol104/iss4/2/.

[19] ATIXA, 2017 Whitepaper: *Due Process and the Sex Police*, ("Some pockets in higher education have twisted the 2011 Office for Civil Rights (OCR) Dear Colleague Letter (DCL)1 and Title IX into a license to subvert due process and to become the sex police. *The ATIXA Playbook* and this Whitepaper push back strongly against both of those trends in terms of best practices.") https://www.ncherm.org/wp-content/uploads/2017/04/TNG-Whitepaper-Final-Electronic-Version.pdf.

[20] We have seen such cases at University of Southern California and Grant Neal at Colorado State University, Boulder (https://www.thecollegefix.com/athlete-accused-rape-colorado-state-not-sex-partner-getting-paid-drop-lawsuit/).

[21] "Title" is not capitalized in the official version – we assume this is an error.

The rule directs that parties be provided equal opportunities to present witnesses and evidence.

Cite: § 106.45(b)(3)(ii), page 61498, column 1;

"Provide equal opportunity for the parties to present witnesses and other inculpatory and exculpatory evidence;"

The rule should clarify that equitable treatment includes not presuming men are the aggressor in all sexual encounters, or relying on unscientific victim trauma theories to excuse a complainant's statements or conduct inconsistent with having been sexually assaulted.[22]

Cite: § 106.45(b)(1)(i), page 61497, columns 2-3;

"Treat complainants and respondents equitably. An equitable resolution for a complainant must include remedies where a finding of responsibility for sexual harassment has been made against the respondent; such remedies must be designed to restore or preserve access to the recipient's education program or activity. An equitable resolution for a respondent must include due process protections before any disciplinary sanctions are imposed"[23]

10. DELIBERATE INDIFFERENCE:

A school is not in violation of the proposed regulations for not responding to an allegation unless the school's actions were "deliberately indifferent." Section 106.44 explains when a school may be deliberately indifferent, and provides "safe harbors" for schools.

Cite: § 106.44(a), page 61497, column 1;

"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 respond in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances."

Cite: § 106.44(b)(1)-(2), page 61497, column 1;

This section lists specific circumstances under which the school will be considered not to be deliberately indifferent, such as if the school (1) follows the procedures in § 106.45, or (2) implements appropriate remedies when there are multiple complainants.

See also, § 106.44(b)(3), page 61497, column 1;

"… a recipient is not deliberately indifferent when in the absence of a formal complaint the recipient offers and implements supportive measures designed to effectively restore or preserve the complainant's access to the recipient's education program or activity."

11. ACTUAL KNOWLEDGE:

[22] See discussion of these policies in section C.1., *infra*. "Trauma-informed" theories such as the "neurobiology of trauma" claim that any inconsistent statements or behavior by a complainant are creates "counterintuitive behavior" which is "typical" of someone having suffered trauma. This behavior is then treated as evidence of trauma. These theories also include such alleged reactions as freezing during an assault, which has been proven only to apply in life threatening situations and based on experiments primarily with animals. This alleged constellation of "trauma" symptoms, even if it were based on neuroscience, are hardly relevant to typical, non-criminal allegations of sexual misconduct on campuses.

[23] In a couple sections, the official version of the proposed regulations added the word "protections" following "due process." Presumably this and the lower case "due process" are an attempt to convey that the regulations are not referring to actual "Due Process" owed by government entities, but general due process-like procedures. If this is the intent, this should be clarified to provide that it is meant to impose on private schools similar obligations as those imposed by the Constitution on public schools.

According to the proposed rules, a school must have "actual knowledge" of allegations to require its response under the proposed regulations. This provision eliminates the school's responsibility for knowledge possessed by, for example, school employees or resident advisors without the "authority to institute corrective measures."

Cite: § 106.30, page 61496, column 2;

"*Actual knowledge* means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to a teacher in the elementary and secondary context with regard to student-on-student harassment … Imputation of knowledge based solely on respondeat superior or constructive notice is insufficient to constitute actual knowledge."

12. SUPPORT MEASURES:

The proposed regulations allow supportive measures to be provided to both parties. This is important because accused students are often abandoned and/or isolated from friends and have little or no support while experiencing significant trauma and academic difficulties after being notified of a complaint.

Cite: § 106.30, pages 61496, column 3, and page 61497, column 1;

"*Supportive measures* means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve access to the recipient's education program or activity, without unreasonably burdening the other party; protect the safety of all parties and the recipient's educational environment; and deter sexual harassment."

Importantly, the proposed regulations state that a school "is not deliberately indifferent" if it "offers and implements" support measures on behalf of a complainant even when a formal complaint has not been filed, or when the alleged conduct is not proscribed by these definitions.

Cite: § 106.44(b)(3), page 61497, column 1;

"For institutions of higher education, a recipient is not deliberately indifferent when in the absence of a formal complaint the recipient offers and implements supportive measures designed to effectively restore or preserve the complainant's access to the recipient's education program or activity. At the time supportive measures are offered, the recipient must in writing inform the complainant of the right to file a formal complaint at that time or a later date, consistent with other provisions of this part."

13. PRESUMPTION OF INNOCENCE:

The proposed rules address in two sections the need for accused students to be presumed innocent. Students have been forced to prove they obtained consent, while "believe the victim" and "trauma-informed policies, such as those discussed in section C.1. below, have resulted in a presumption of their guilt.

Cite: § 106.45(b)(1)(iv), page 61497, column 3;

"Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process"

Cite: § 106.45(b)(2)(i)(B), page 61498, column 1;

" … The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process…."

Though this is a favorable provision, it will also be difficult to enforce.

14. NOTICES:

The proposed rules require a school to provide written notices to parties at every stage in the process, including detailed notice of allegations before interviewing a respondent. This precludes the not infrequent practice of investigators interrogating students before they are aware of the allegations against them.

Cite: § 106.45(b)(2)(i)(B), page 61948, column 1;

"Notice of the allegations constituting a potential violation of the recipient's code of conduct, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the specific section of the recipient's code of conduct allegedly violated, the conduct allegedly constituting sexual harassment under this part and under the recipient's code of conduct, and the date and location of the alleged incident, if known … The written notice must also inform the parties that they may request to inspect and review evidence under paragraph (b)(3)(viii) of this section and inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

Cite: § 106.45(b)(2)(ii), page 61498, column 1;

"*Ongoing notice requirement.* If, in the course of an investigation, the recipient decides to investigate allegations not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must provide notice of the additional allegations to the parties, if known."

Cite: § 106.45(b)(3)(v), page 61498, column 2;

"Provide to the 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;"

15. EVIDENCE COLLECTION:

The school must, under the proposed rules, bear the burden of collecting evidence and proving the allegations. This is important not just for the burden of proof, but also with respect to collecting evidence, because some school's collection of evidence has been selective, and witnesses for accused students have not been interviewed.

Cite: § 106.45(b)(3)(i), page 61498, column 1;

"Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties;"

Unfortunately, though this affirmative obligation to gather "sufficient" evidence is an improvement, due to its vagueness it is not likely to have much impact on the way schools collect or categorize evidence. However, the school must describe its efforts to collect evidence in its written findings, which might encourage more effort at collecting evidence:

Cite: § 106.45(b)(4)(ii)(B), page 61499, column 1;

"A description of the procedural steps taken from the receipt of the complaint through the determination, including any … methods used to gather other evidence …"

Under the proposed, schools also would be precluded from denying a student the opportunity to collect evidence or speak with potential witnesses, a practice referred to as a "gag order." [24]

Cite: § 106.45(b)(3)(iii), page 61498, column 1;

"Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;"

This should resolve the problem many students have experienced in which the court in Doe v. Alger said "compounded by the fact that Doe was not permitted to contact the roommate under JMU's policies and procedures, a prohibition about which he was repeatedly advised and threatened with severe consequences for violating." [25]

16. EVIDENCE EVALUATION:

The proposed rules require schools to objectively evaluate both inculpatory and exculpatory evidence. This has been an enormous issue due to self-selected groups like victim advocates who often staff Title IX offices, as well as "believe the victim" and "trauma-informed" policies which presume guilt, as discussed previously.[26]

Cite: § 106.45(b)(1)(ii), page 61497, column 3;

"Require an objective evaluation of all relevant evidence – including both Inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;"

However, the proposed regulations provide no standards or definitions to evaluate whether evidence is "relevant," reliable, or "reasonable" to rely upon, and as we have seen, this determination can be impacted by victim trauma myths that ignore the context of the parties' relationship. However, a couple courts have recognized the importance of the context of the parties' relationship determining motivation in these cases, and have criticized the school's refusal to consider such evidence.[27]

17. INFORMAL RESOLUTION:

The proposed regulations permit mediation or similar processes as an option for resolving Title IX disputes. Any form of informal resolution was forbidden by previous guidance, on the assumption that it would be too traumatic for "victims."

The vast majority of Title IX allegations over the past several years have involved regretted drunken hook-ups, retribution for the end of, or refusal to engage in a relationship, and as an excuse for why the accuser had sex, cheated on a partner, is failing classes, or violated religious beliefs. Because these are educational environments, it is more appropriate to respond to these non-criminal allegations with education and discussion, rather than the immediate commencement of an adversarial process.

Cite: § 106.45(b)(6), page 61499, columns 2-3;

"*Informal resolution.* At any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as

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[24] Section 106.45(b)(3)(iii). This is an important change and one which may be easily enforceable because it is an expressly *prohibited* act, rather than an *affirmative* obligation.
[25] *Doe v. Alger (James Madison University)*, 228 F. Supp. 3d 713, 731 (W.D. Va. 2016).
[26] See discussion of these policies in section C.1., *infra*.
[27] *Doe v. Univ. of Notre Dame,* 2017 U.S. Dist. LEXIS 69645, at p. 23 (original court filed version on May 8, 2017) ("In a disciplinary matter concerning behavior in a long-term existing relationship, context matters, and the motive of the complainant (as it relates to credibility) bears more scrutiny than in some other cases.")

mediation, that does not involve a full investigation and adjudication, provided that the recipient—

(i) Provides to the parties a written notice disclosing—

(A) The allegations;

(B) The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, if any; and

(C) Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared; and

(ii) Obtains the parties' voluntary, written consent to the informal resolution process.

18. TRAINING MATERIALS:

Students would be entitled to access Title IX training materials under the proposed regulations.

Cite: § 106.45(b)(7)(D), page 61499, column 3;

"(i) A recipient must create, make available to the complainant and respondent, and maintain for a period of three years records of— ….

(D) All materials used to train coordinators, investigators, and decision-makers with regard to sexual harassment."

19. RECORDS:

The proposed rules would require all records of the Title IX disciplinary process to be retained and accessible to the parties for three years. This is a very helpful provision, as many families have had the same experience as the student in Doe v. Alger, where the school official permitted the accused student to review the file, but told him that he could not "make or receive copies of any file materials, [but] he could take notes ..."[28]

Cite: § 106.45(b)(7), page 61499, column 3;

"(i) A recipient must create, make available to the complainant and respondent, and maintain for a period of three years records of—

(A) Each sexual harassment investigation including any determination regarding responsibility, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve access to the recipient's education program or activity;

(B) Any appeal and the result therefrom;

(C) Informal resolution, if any; and

(D) All materials used to train coordinators, investigators, and decision-makers with regard to sexual harassment.

(ii) A recipient must create and maintain for a period of three years records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not clearly unreasonable, and document that it has taken measures designed to restore or preserve access to the recipient's educational program or activity. The documentation

[28] *Doe v. Alger (James Madison University)*, 175 F.Supp.3d 646, 651 (W.D. VA. 2016). The court did not specifically hold the conditions under which the student was forced to review evidence were inadequate, but in a subsequent decision found "there were significant anomalies in the appeal process that show, especially when viewed collectively, that Doe was denied a meaningful opportunity to be heard during the appeal." *Doe v. Alger*, 228 F. Supp. 3d at p. 731. In January of this year, a federal magistrate recommended an award of $850,000 in attorney's fees on behalf of the accused student. *Doe v. Alger (James Madison University),* Civil Action No. 5:15-cv-35, (W.D. VA. 2018) (using originally filed opinion January 31, 2018.)

of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken."

This section also requires schools to "create" records concerning the disciplinary process, though schools could comply simply by creating a list of steps taken, except for the requirement that schools "document the basis for its conclusion that its response was not clearly unreasonable, and document that it has taken measures designed to restore or preserve access to the recipient's educational program or activity."

B. Though the following issues are addressed in the proposed Title IX regulations, we recommend they be revised and/or clarified by OCR:

1. *STANDARD OF EVIDENCE*

The proposed rules allow schools to choose whether they use clear and convincing as an alternative standard of evidence to preponderance. We believe the standard of evidence should be clear and convincing whenever suspension and/or expulsion are potential sanctions, due to the seriousness of repercussions.

A higher standard also is necessary to impress upon decision-makers that evidence of responsibility must meet a specific threshold when determining guilt. This is particularly important because victim-focused decision-makers consider a "not responsible" finding equivalent to finding the complainant is a liar. Moving the goal post more toward a presumption of innocence conveys to decision-makers that this is not a zero-sum game, but a threshold of proof which must be reached.

With any standard of evidence, we should support the proposed rules requirement that the same standard be used for disciplinary actions involving students, as that applied to faculty. This caveat is more likely to have an impact on schools' choice of a standard.

Cite: § 106.45(b)(4)(i), page 61499, column 1;

"The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply either the preponderance of the evidence standard or the clear and convincing evidence standard, although the recipient may employ the preponderance of the evidence standard only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. The recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty."

2. *APPEALS*

In the proposed rules schools are permitted to allow appeals by both parties. This is a change from the earlier leaked draft of the rules that sanctioned schools' decisions to allow just a respondent to appeal.

Cite: § 106.45(b)(1)(viii), page 61497, column 3;

"Include the procedures and permissible bases for the complainant and respondent to appeal if the recipient offers an appeal …"

Cite: § 106.45(b)(5), page 61499, column 2:

"A recipient may choose to offer an appeal. If a recipient offers an appeal, it must allow both parties to appeal."

However, the complainant cannot appeal to request a different sanction, such as expulsion.

Cite: § 106.45(b)(5), page 61499, column 2;

" … In cases where there has been a finding of responsibility, although a complainant may appeal on the ground that the remedies are not designed to restore or preserve the complainant's access to the recipient's education program or activity, a complainant is not entitled to a particular sanction against the respondent."

Though OCR is unlikely to revert to allowing respondent-only appeals, it is certainly worth the effort to convey your objections.

The difficulty with permitting appeals at all is that, unless there is a separate hearing for the appeal process, allowing a different official or panel to revisit and possibly change the decision of the original decision-makers, seems to negate or undermine the impact of requiring a hearing with live testimony to assess credibility in the first instance. In what way is the appeal official or panel better positioned to determine the credibility of either party than the decision-makers?

Of course this cuts both ways; the decision to find a student responsible is also likely to have been impacted by credibility determinations, so logically this argument would preclude appeals by a respondent as well.

This might be resolved if the rules were to limit the grounds on which appeals could be filed. However, because the proposed rules leave it up to schools to decide what are "the procedures and permissible bases for the complainant and respondent to appeal," there is no assurance that credibility determinations will not be reconsidered on appeal.

3. EMERGENCY REMOVALS

There need to be more restrictions on emergency removals to prevent schools from abusing this option. Perhaps clarification can be provided on what an adequate "safety and risk analysis" entails.

Cite: § 106.44(c), page 61497, column 2;

"Nothing in this section precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an intermediate threat to the health or safety of students or employees justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision shall not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or Title II of the Americans with Disabilities Act.

C. The following issues are not addressed in the published proposed regulations, but raise very important questions:

1. VICTIM-CENTERED POLICIES

The proposed regulations do not adequately address the content of training materials:

Cite: § 106.45(b)(1)(iii), page 61497, column 3;

"Any materials used to train coordinators, investigators, or decision-makers may not rely on sex stereotypes and must promote impartial investigations and adjudications of sexual harassment;"

Cite: § 106.45(b)(1)(ii), page 61497, column 3;

"Require … and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;"

Campus decision-makers are regularly instructed to ensure "victims of sexual violence are believed and that they're seen as credible," [29] *and to be "very, very cautious in accepting a man's claim that he has been wrongly accused of abuse or violence."* [30]

According to the victims' rights campaign Start by Believing, "[w]e should believe, as a matter of default, what an accuser says" because "the costs of wrongly disbelieving a survivor far outweigh the costs of calling someone a rapist." [31] *This message glibly minimizes the impact of false accusations, and erroneous findings of guilt.*

These theories have crept their way into the investigation and adjudication stages of campus disciplinary processes. Though such policies are intended to minimize victim re-traumatization and encourage reporting of sexual offenses,[32] *the result is the accused student is no longer presumed innocent.*[33]

Such theories, that victims lie, falsify details, or behave inconsistently as a way of coping with trauma, have only one purpose, and that is to discredit any defense based upon an a complainant's inconsistent behavior or statements. According to the Foundation for Individual Rights in Education, "An investigator who is trying to anticipate and counter defense strategies in the course of his/her investigation is not acting as a neutral fact-finder." [34]

Courts have not looked favorably on these theories. in a 2017 decision later affirmed by the California Court of Appeal, a superior court judge found that the school's administrative process failed to comply with the law because "the [disciplinary committee] improperly permitted [the Title IX investigator] to base his evaluation on what [he] understood to be the 'trauma-informed' approach." [35] *In Doe v. University of Mississippi, the court found the school's training materials created "an assumption … that an assault occurred":* [36]

> (1) the training material… "advise[s] the panel members that 'victims' sometimes withhold facts and lie about details, question if they've truly been victimized, and 'lie about anything that casts doubt on their account of the event,'" and (3) it explains that "when Complainants withhold exculpatory details or lie to an investigator or the hearing panel, the lies should be considered a side effect of an assault." [37]

The assumption that an complainant is truthful and his/her recollections accurate is particularly concerning in campus sexual misconduct proceedings. The reality that memories are easily

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[29] For example, the *Start by Believing* is a public awareness campaign designed by End Violence Against Women International to change the way the public "responds to rape and sexual assault in our communities." http://www.startbybelieving.org.

[30] Young, Cathy, "Harvard Liberals Hate New Campus Sex Laws," *The Daily Beast*, October 19, 2014, http://www.thedailybeast.com/articles/2014/10/19/harvard-liberals-hate-new-campus-sex-laws.html.

[31] *Start by Believing,* http://www.startbybelieving.org.

[32] MacDonald, Heather, "The Campus Rape Myth," *City Journal*, Winter 2008, ("'believe unconditionally' in sexual-assault charges") http://www.city-journal.org/2008/18_1_campus_rape.html.

[33] Kaminer, Wendy, '"Believe The Victim"? Maybe — But Protect The Rights Of The Accused, Too,' *WBUR Boston*, February 4, 2014, http://cognoscenti.wbur.org/2014/02/04/campus-sexual-assault-wendy-kaminer.

[34] Samantha Harris, "University of Texas 'Blueprint' for Campus Police Raises Fairness Concerns," *Foundation for Individual Rights in Education*, March 11, 2016. https://www.thefire.org/university-of-texas-blueprint-for-campus-police-raises-fairness-concerns/.

[35] *Doe v. Regents of Univ. of California,* "Notice of Order Awarding Attorneys' Fees," April 18, 2018, at p. 3, citing "Order of 11/15/17" at p. 26.

[36] *Doe v. University of Mississippi*, Civil Action No. 3:16-CV-63-DPJ-FKB, p. 20 (D. S.D. Miss., N.D. July 24, 2018) (using the original court filed version July 24, 2018.)

[37] *Id.*

contaminated by peer influence, social barometers, ideology, and attitudes[38] *is especially relevant to campuses, where powerful ideology infuses not only the disciplinary process, but the entire campus belief system, and is unchecked by the fear of reprisal for critical expression.*

Complainants may come to believe false memories; "exposure to false or misleading post event information can lead to confidently held false memories of having witnessed events that were never actually experienced." [39] *In Doe v. Brandeis University, District Court Judge F. Dennis Saylor observed "[h]unman memories are transient, and subject to substantial modifications and degradation over time," and that they are also,*

> readily susceptible to such factors as hindsight bias (that is, the influence of one's current perceptions, knowledge, and state of mind) and suggestibility (that is, the influence of suggestion, express and implicit, by others). … It is possible that his sexual assault training had a suggestive effect on his memory, causing him to subconsciously reinterpret his memories.[40]

That this effect is exacerbated by "the passage of time," common with campus allegations, "increases the chance that eyewitnesses will adopt misinformation and that their memories will be altered" [41]

Despite absolutely no scientific research to support its applications in such situations, the entire constellation of theoretical traumatic rape victim behaviors endorsed by victims' advocates is used as a measuring stick for the alleged "trauma" suffered by complainants in response to a broad range of lesser misconduct on campus.

The dictates of section 106.45(b)(1)(ii) and subsection (b)(1)(iii) are not sufficient to stem the tide of increasingly common victim trauma and behavioral theories used on today's campuses. It is very important that OCR do more to ensure training is unbiased and does not rely on presumptions about behavior based on sex, or whether a party is the complainant or respondent.

The use of "trauma-informed" or "believe the victim" policies must be restricted to the interview process; they should never be used in investigations or adjudications, because they compromise objectivity, create presumptions of guilt, and result in the exclusion of otherwise relevant evidence.

2. JURISDICTION

The school's obligation to address allegations of sexual misconduct on any property over which the school has control or supervisory authority must be clarified – these are practical considerations. For example, does the school's responsibility to respond include study abroad programs where students come from different schools?

We recommend the school's obligations to respond only include such programs that do not include students from other schools, due to the difficulty of interviewing witnesses and collecting evidence.

The same practical considerations apply to off campus facilities: does the school have control over the property? Can it access and collect evidence? And, are the parties and witnesses students?

Cite: § 106.45(b)(3), page 61498, column 1;

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[38] Robert A. Nash and James Ost, *False and Distorted Memories* (Current Issues in Memory) (2017), at p. 55 (citations omitted).
[39] I*d.*, at p. 72 (citations omitted).
[40] *Doe v. Brandeis University*, 177 F. Supp. 3d at p. 609.
[41] Henry Otgaar and Mark L. Howe (2017-10-02). *Finding the Truth in the Courtroom: Dealing with Deception, Lies, and Memories* (p. 13). Oxford University Press. Kindle Edition (emotionally valanced material is more likely to give rise to false memories than neutral material.)

"… If the conduct alleged by the complainant would not constitute sexual harassment as defined in § 106.30 even if proved or did not occur within the recipient's program or activity, the recipient must dismiss the formal complaint with regard to that conduct."

3. EXPUNGEMENT OF RECORDS

OCR must allow schools to expunge records of students found responsible under withdrawn or disapproved policies, without penalizing schools that choose to do so. This is very important – perhaps OCR could sanction this practice so schools are not penalized for reconsidering closed cases?

4. ONLINE CONDUCT

Is online conduct covered by the proposed regulations?

5. FALSE ALLEGATIONS

The proposed regulations are silent on consequences for false allegations, apparently leaving it up to schools to decide whether to sanction persons making such allegations.

Cite: § 106.45(b)(2)(i)(B), page 61, column;

" … The written notice must also inform the parties that they may request to inspect and review evidence under paragraph (b)(3)(viii) of this section and inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process."

OCR should consider a provision requiring any party in a disciplinary action to produce relevant Text, Facebook or other messages and evidence upon request.

Questions? Please contact:

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