

**Comments of Concerned Lawyers and Educators in Support of Fundamental  
Fairness for All Parties in Title IX Grievance Proceedings**

**Department of Education  
Notice of Proposed Rulemaking**

**Docket No. ED-2018-OCR-0064, RIN 1870-AA14**

*Nondiscrimination on the Basis of Sex in Education Programs  
or Activities Receiving Federal Financial Assistance*

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## **I. INTRODUCTION**

We appreciate the opportunity to comment on the proposed regulations promulgated by the Department of Education with respect to Title IX proceedings at educational institutions. We are practicing attorneys and educators who have had first-hand experience representing or supporting students involved in Title IX proceedings or litigation. We are also parents and spouses; diverse in race, gender, and sexual orientation; and diverse in political views and affiliations. What we have in common is a commitment to the rights and interests of every individual in the educational community: those who experience sexual harassment or assault, those who are accused, witnesses, and school officials who investigate and decide disciplinary cases. We are guided by several fundamental beliefs regarding the problem of sexual misconduct in the university setting and the proper means of investigating and adjudicating complaints.

First, we fully recognize the problem of sexual assaults and sexual harassment on college campuses. Our comments on the proposed regulations focus as they must on the procedures for adjudicating sexual misconduct complaints, but we must all recognize that there are other steps that can and should be taken to reduce the incidence of such misconduct. Most critical is a need to change the underlying culture and attitudes. After-the-fact disciplinary proceedings, while necessary, cannot adequately protect those who are victimized. Universities should take more aggressive steps to deal with conditions and attitudes that lead to contested sexual assault complaints, including excessive use of alcohol and drugs, and should strive to provide clear rules with respect to consensual sexual conduct.

Second, we are in full agreement with procedures that protect the legitimate interests of complainants, including assurances that complaints will be taken seriously, supportive measures whether or not a formal complaint is filed, full and fair investigations and adjudications by

trained University officials, referral of cases to the police where such action is requested by the complainant and, where appropriate, informal resolutions. At the same time, it is imperative to recognize that when an accused student denies the allegations, the student is entitled to a fair hearing before being subjected to serious, life changing sanctions. These cases are likely to involve highly disputed facts and a “he said/she said” conflict, and are often complicated by the effects of alcohol and drugs.

Third, we strongly resist the notion – expressed by some of those opposed to the proposed regulations – that fair adjudicatory procedures for cases in which an accused student denies the charges are anti-survivor or anti-women. The proposed regulations protect both complainants and respondents. As the Department of Education has stated: “Every survivor of sexual misconduct must be taken seriously. Every student accused of sexual misconduct must know that guilt is not predetermined. These are non-negotiable principles. . . . Any school that refuses to take seriously a student who reports sexual misconduct is one that discriminates. And any school that uses a system biased toward finding a student responsible for sexual misconduct also commits discrimination. . . . Due process is the foundation of any system of justice that seeks a fair outcome. Due process either protects everyone, or it protects no one. The notion that a school must diminish due process rights to better serve the ‘victim’ only creates more victims.”<sup>1</sup>

We recognize that student disciplinary hearings are not criminal trials. Nonetheless, the consequences of these proceedings are far-reaching and permanent, and they should be

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<sup>1</sup> Betsy DeVos, U.S. Sec’y of Educ., Prepared Remarks on Title IX Enforcement (Sept. 7, 2017), <https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement>. We note that although the vast majority of sexual misconduct complaints are by women against men, women also find themselves accused. Under the proposed regulations, the interests of all students should be taken seriously and all should be fairly treated.

conducted with fundamental fairness. The procedural protections set forth in the proposed regulations are consistent with our Nation’s fundamental values and with court precedent requiring that people accused of serious misconduct receive notice, a fair hearing before unbiased decision makers (including the ability to challenge opposing testimony directly), and a presumption of innocence. Basic procedural protections for students should be consistent, and students should not have to sue to obtain them.<sup>2</sup>

For these reasons, we support much of what the Department of Education has proposed. Where we have differences, we offer recommendations for amendments or clarification.

In Section II below, we comment on specific provisions of the proposed regulations, including the conditions that trigger a school’s mandatory duty to respond under Title IX and the specific proposed procedural protections. In Section III, we respond to some of the directed questions posed by the Department.

## **II. COMMENTS AND RECOMMENDATIONS ON SPECIFIC PROVISIONS OF THE PROPOSED REGULATIONS**

### **A. Recipient’s Response to Sexual Harassment, § 106.44**

With respect to the conditions that trigger a school’s mandatory duty to respond under Title IX, we generally agree with the Department’s decision to align its regulations with Title IX standards as construed by the Supreme Court, including the definition of sexual harassment

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<sup>2</sup> The Department noted that since 2011 “over 200 students have filed lawsuits against colleges and universities alleging their school disciplined them for sexual misconduct without providing due process protections.” *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, Notice of Proposed Rulemaking (NPRM), 83 FR 61462-01, 61465. Including both state and federal cases, that number is actually closer to 400. For a representative sampling of articles and court opinions expressing concerns about the erosion of procedural protections, see Foundation for Individual Rights in Education, “Mountain of evidence shows the Department of Education’s prior approach to campus sexual assault was ‘widely criticized’ and ‘failing’” (Nov. 15, 2018), <https://www.thefire.org/mountain-of-evidence-shows-the-department-of-educations-prior-approach-to-campus-sexual-assault-was-widely-criticized-and-failing/>.

(proposed § 106.30) and the requirement that conduct occur within a school’s “education program or activity” (proposed § 106.44(a)), subject to clarifications recommended below. If those clarifications are provided, we do not believe the proposed regulations will unduly restrict the types of conduct schools can adjudicate under Title IX. We note that schools remain free to pursue alternative paths to address conduct that does not fall under Title IX – though, as set forth below, schools should not do so in a way that deprives either party of the rights set forth in the regulations. We also agree with the provisions that give complainants who report sexual harassment within the applicable definition a meaningful choice between a formal Title IX disciplinary process or an alternative dispute resolution, and with the requirement that schools provide supportive, non-punitive individualized services designed to restore or preserve both parties’ access to the school’s education programs and activities. With respect to Section 106.44(c), addressing emergency removal of a respondent, we suggest an important additional protection.

**1. Adoption of Supreme Court Standards for Sexual Harassment, §§ 106.44 and 106.30**

**(a) Recommendation: Clarification of Section 106.30, Definition of Sexual Harassment**

With respect to the Department’s proposed definition of sexual harassment, we suggest the regulations should include a full definition of sexual assault, to clarify what the regulations cover. Consistent with case law, the proposed definition of “sexual harassment” in Section 106.30 has three prongs, and reads as follows:

- (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) [a regulation implementing the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act].

Under the referenced Clery Act regulation, sexual assault includes rape (“[t]he penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim”); fondling (“the touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity”); incest; and statutory rape.<sup>3</sup> We believe addition of this definition to the Title IX regulations will address the concerns of those who have asserted that Title IX grievance procedures should be available for a single alleged instance of sexual assault.

**(b) Recommendation: Clarification of Section 106.44(a),  
Regarding Conduct Within a School’s “Education Program or  
Activity”**

We also believe clarification is needed with respect to proposed Section 106.44(a), which, the Department explains, “reflects the statutory provision that a recipient is only responsible for responding to conduct that occurs within its ‘education program or activity.’”<sup>4</sup> It can be difficult to determine where to draw the line between conduct that does and does not relate to a school’s education program or activity, and many have raised particular concerns about “off-campus” conduct. The Department states that “[w]hether conduct occurs within a recipient’s education program or activity does not necessarily depend on the geographic location of an incident (e.g., on a recipient’s campus versus off of a recipient’s campus),” and cites case

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<sup>3</sup> 34 CFR 668.46(a) and Appendix A thereto.

<sup>4</sup> 83 FR at 61468 (citing 20 U.S.C. 1681(a)).

law developing standards for making this determination.<sup>5</sup> The Department also states that schools may offer supportive measures or other recourse when students report conduct not covered by Title IX (e.g., unwelcome conduct that does not fit the definition of sexual harassment, or is not related to a school's education program or activity).

We believe clearer guidance is needed to ensure that schools are generally consistent in their interpretation of what conduct is covered by Title IX; do not draw arbitrary lines between conduct that is and is not covered by their Title IX grievance procedures; and do not deprive students of the procedural protections of the proposed regulations by handling sexual misconduct complaints under other student conduct processes. Based on these concerns, we offer the following specific recommendations:

First, we believe the Department should offer more guidance to schools concerning what conduct is and is not subject to Title IX jurisdiction. We note, for example, that student housing, even if not owned, operated or overseen by the school, can be part of the educational experience and by extension part of the school's educational program or activity. Many schools have many students living off, but close to, campus, particularly after the first year, and their housing is essentially part of campus life. Other schools have robust off campus fraternities and sororities, which are not officially sanctioned but nonetheless are a significant part of the school's student social life. Based on our experience, a significant number of the complaints that have typically been handled under schools' Title IX policies involve encounters between students at the same school in these off-campus settings, and disciplinary proceedings can impact both parties' access

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<sup>5</sup> *Id.* (“In determining whether a sexual harassment incident occurred within a recipient’s program or activity, courts have examined factors such as whether the conduct occurred in a location or in a context where the recipient owned the premises; exercised oversight, supervision, or discipline; or funded, sponsored, promoted, or endorsed the event or circumstance”; citing examples of relevant cases).



to their school's educational programs or activities. The Department has already acknowledged that purely geographical distinctions such as "off campus" or "on campus" are not necessarily helpful, while at the same time it is properly concerned that the reach of a school's Title IX policy should not be limitless. More guidance is needed to help schools strike the proper balance.

Second, schools should be required to include jurisdictional provisions in their Title IX policies, consistent with the proposed regulations and additional guidance from the Department, so it is clear to students what is and is not subject to those policies. This will allow for transparency and guard against arbitrary decision making in individual cases.

Third, if a complaint alleges conduct that meets the definition of sexual harassment or assault (*see* proposed §106.30) and, if found to be substantiated, could lead to suspension or expulsion of the respondent, it should presumptively be handled through Title IX grievance procedures compliant with the proposed regulations. Similarly, if the complainant is receiving support services under the school's Title IX policy, the complaint should presumptively be handled under that policy. Consistent with the goal of equal treatment for complainants and respondents, *any* proceeding that could result in a respondent's being deprived of access to a school's educational programs or activities should be fundamentally fair to both parties and should provide the procedural protections set forth in the proposed regulations, including the right to an attorney-advisor and a live hearing with advisor-conducted cross examination.

Fourth, if a school decides that a complaint of sexual misconduct does not fall within its Title IX policy and decides to handle the complaint under a process that does not offer the procedural protections required by the proposed regulations, the school should: a) notify the parties of its decision, including an explanation of why it believes the matter does not fall within its Title IX policy; and b) give the parties a meaningful opportunity to object to or challenge the

school's decision, in a manner that does not unnecessarily impede the overall prompt handling of complaints.

**2. Responding to Formal Complaints of Sexual Harassment; Safe Harbors, § 106.44(b)**

We support the proposed language in Section 106.44(b) requiring schools to follow procedures consistent with Section 106.45 (subject to our specific comments on that section below) and requiring formal Title IX proceedings only in response to a formal complaint. We note that the Department's expressed goal is not to limit protections for complainants, but to provide more options, acknowledging that college students are adults and that different resolution processes may be appropriate for different individuals and different situations.<sup>6</sup>

The regulations properly provide protections for students who report sexual harassment but decide not to file a formal complaint, including requirements that the school give the reporting student a written notice of the option to file a formal complaint and provide supportive measures to both parties. Supportive measures are measures "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."<sup>7</sup> The range of options is broad, including "counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures."<sup>8</sup>

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<sup>6</sup> 83 FR at 61462, 61470.

<sup>7</sup> § 106.30.

<sup>8</sup> 83 FR at 61469.

The Department states, based on “feedback from many stakeholders,” that “often the most effective measures a recipient can take to support its students in the aftermath of an alleged incident of sexual harassment are outside the grievance process and involve working with the affected individuals to provide reasonable supportive measures that increase the likelihood that they will be able to continue their education in a safe, supportive environment.”<sup>9</sup> We generally agree with that observation.

The essential point, we submit, is that misconduct is on a spectrum, and the facts are often nuanced. Many cases involve encounters between young people who are sexually inexperienced, are engaged in the casual hook-up culture prevalent on campuses, or both. Often both parties have consumed alcohol and/or drugs, further diminishing their ability to make clear decisions, communicate effectively, or remember what happened. In some cases, the parties barely know each other and misread each other’s signals; in others, they have been in a relationship and make assumptions based on past patterns. In some cases, the parties agree the encounter began as consensual, but disagree as to whether and when consent was no longer given.

All of which is to say that not every case requires an adversarial proceeding. For some cases, a constructive, non-punitive approach, in which schools take steps to resolve the specific concern and prevent recurrence of troublesome behavior while still ensuring that both parties can pursue their education, may be preferable and can avoid the disruption and potential long-term effects for both parties that result from a formal proceeding. Informal resolution processes are equally, if not more, appropriate when a complainant reports conduct that does not fit the Title

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<sup>9</sup> 83 FR at 61470.

IX definition, for example, conduct that is unwelcome but not necessarily severe and pervasive and does not constitute assault.<sup>10</sup>

### **3. Additional Rules Governing Recipients' Responses to Sexual Harassment, § 106.44(c)**

The Department proposes adding Section 106.44(c), allowing emergency removal of a respondent if the school “undertakes an individualized safety and risk analysis, determines that an immediate threat to the health or safety of students or employees justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.” We acknowledge that sometimes immediate action may be appropriate, but the procedural protections added for respondents are critical.

*Recommendation:* We recommend the regulations should also require schools to explain the basis for the decision. Schools should limit interim restrictions on a respondent’s activity as a student to those that are the least restrictive in assuring the health and safety of other students or

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<sup>10</sup> For thoughtful commentaries on behaviors and patterns that can lead to contested sexual assault complaints, see, for example, *Open Letter from Members of the Penn Law School Faculty, Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities*, Wall St. J. Online (Feb. 18, 2015), [http://online.wsj.com/public/resources/documents/2015\\_0218\\_upenn.pdf](http://online.wsj.com/public/resources/documents/2015_0218_upenn.pdf); Zimmerman, J., *We’re casual about sex and serious about consent. But is it working?* (Oct. 13, 2015), [https://www.washingtonpost.com/news/in-theory/wp/2015/10/13/were-casual-about-sex-and-serious-about-consent-but-is-it-working/?utm\\_term=.8e744b0025b0](https://www.washingtonpost.com/news/in-theory/wp/2015/10/13/were-casual-about-sex-and-serious-about-consent-but-is-it-working/?utm_term=.8e744b0025b0). The Penn Open Letter asks how universities can help to “change the culture and attitudes that lead to sexual assaults. . . . After-the-fact disciplinary proceedings, while useful, cannot by themselves adequately protect our students. Universities must take more steps to deal with excessive use of alcohol and drugs, substances that all too often fuel the conditions that lead to contested sexual assault complaints. . . . These cases are likely to involve highly disputed facts, and the ‘he said/she said’ conflict is often complicated by the effects of alcohol and drugs.” Zimmerman addresses the tension between the prevalence of casual sex with standards requiring affirmative consent, and concludes: “if we want to protect our students, not just their colleges, we will have to begin a deeper dialogue about the meaning of sex itself. Who wants to have sex, and why? And who really benefits from a ‘friends-with-benefits’ system? When we separate physical intimacy from the emotional kind, we provide a fertile soil for sexual miscommunication and, yes, sexual coercion. For the past several years, we’ve tried to be casual about sex but serious about consent. And it’s not working.”

employees, and should make an effort to avoid disruptions to a respondent's coursework or to activities in which the respondent must participate in order to retain financial aid.

**B. Grievance Procedures for Formal Complaints of Sexual Harassment, § 106.45**

With respect to the procedural protections required for formal Title IX grievance proceedings (proposed Section 106.45), we support the Department's approach, which is aligned with basic principles of justice and with the rulings of courts mandating meaningful procedural protections in campus adjudications.<sup>11</sup> We comment first on the Department's general statement that Title IX protects both parties, and then on specific protections the Department proposes, using the headings included in the Notice of Proposed Rulemaking (NPRM).

**1. Section 106.45(a)**

Proposed Section 106.45(a) properly states that a school's treatment of either a complainant or a respondent in connection with a sexual harassment complaint may constitute discrimination on the basis of sex. As the Department states: "Deliberate indifference to a complainant's allegations of sexual harassment may violate Title IX by separating the student from his or her education on the basis of sex; likewise, a respondent can be unjustifiably separated from his or her education on the basis of sex, in violation of Title IX, if the recipient does not investigate and adjudicate using fair procedures before imposing discipline. Fair procedures benefit all parties by creating trust in both the grievance process itself and the outcomes of the process."<sup>12</sup>

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<sup>11</sup> See, for example, cases cited in above-referenced article, <https://www.thefire.org/mountain-of-evidence-shows-the-department-of-educations-prior-approach-to-campus-sexual-assault-was-widely-criticized-and-failing/>. FIRE's summary of cases through November 2018 is attached in an Appendix to this comment.

<sup>12</sup> 83 FR at 61472.

This provision is an essential corrective to the view that Title IX allows (or should even be interpreted to require) procedures that are biased in favor of “victims.”<sup>13</sup> In contested proceedings, there are often plausible competing narratives and a lack of disinterested witnesses. The regulations do not give an advantage to either complainants or respondents. Rather, they provide a web of protections for both sides, and are formulated to ensure as fair and unbiased a result as possible. The unfortunate truth that victims of sexual misconduct have been marginalized or ignored does not justify convicting an accused without a fair hearing.<sup>14</sup>

The solution, in our view, is to take every accusation seriously *and* to give both the accuser and accused a full and fair hearing before impartial decisionmakers. In the Department’s words: “When presented with an allegation of sexual harassment the recipient must respond in a manner that is not deliberately indifferent, but to evaluate what constitutes an appropriate

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<sup>13</sup> Schools routinely make this argument in Title IX litigation, and some courts have accepted it. *See, e.g., Doe v. University of Oregon*, No. 6:17-CV-01103-AA, 2018 WL 1474531, \*15 (D. Or. Mar. 26, 2018) (suggesting that bias against a male accused student would not violate Title IX if it “stemmed from a purely ‘pro-victim’ orientation,” and that it would be lawful if a university, “in an attempt to change historical patterns of giving little credence to sexual assault allegations, has adopted a presumption that purported victims of sexual misconduct are telling the truth”; citing other cases).

<sup>14</sup> We share the concern that many women have been subjected to unwelcome conduct or pressure. We must also note, however, that the claim that one in five women is sexually assaulted in college, a claim that has long been the basis for advocacy efforts, school disciplinary procedures, and government policy decisions, is based on anonymous surveys, not scientific studies, and has been seriously challenged. *See* [https://www.washingtonpost.com/news/fact-checker/wp/2014/12/17/one-in-five-women-in-college-sexually-assaulted-an-update/?utm\\_term=.7f211e30541e](https://www.washingtonpost.com/news/fact-checker/wp/2014/12/17/one-in-five-women-in-college-sexually-assaulted-an-update/?utm_term=.7f211e30541e); <https://www.washingtonexaminer.com/no-1-in-5-women-have-not-been-raped-on-college-campuses>; [http://www.slate.com/articles/double\\_x/doublex/2015/09/aa\\_u\\_campus\\_sexual\\_assault\\_survey\\_w\\_hy\\_such\\_surveys\\_don\\_t\\_paint\\_an\\_accurate.html](http://www.slate.com/articles/double_x/doublex/2015/09/aa_u_campus_sexual_assault_survey_w_hy_such_surveys_don_t_paint_an_accurate.html). The Bureau of Justice Statistics’ National Crime Victimization Survey reports a much lower rate of sexual assault: 6.1 per 1000 female students from 1995 to 2013, with the rate trending downwards. <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf>. Of course, even one sexual assault is too many. The essential point here, however, is that regardless of the extent of sexual assault on campuses, the regulations are designed to ensure fairness and reliability of the fact-finding process in individual cases.

response, the recipient must first reach factual determinations about the allegations at issue. This requires the recipient to employ a grievance process that rests on fundamental notions of fairness and due process protections so that findings of responsibility rest on facts and evidence.”<sup>15</sup> Or, in a court’s words, “[w]hether someone is a ‘victim’ is a conclusion to be reached at the end of a fair process, not an assumption to be made at the beginning. Each case must be decided on its own merits, according to its own facts. If a college student is to be marked for life as a sexual predator, it is reasonable to require that he be provided a fair opportunity to defend himself and an impartial arbiter to make that decision.”<sup>16</sup>

## **2. General Requirements for Grievance Procedures, § 106.45(b)(1)**

The procedures specified in proposed Section 106.45(b)(1) are common sense measures to ensure an equitable proceeding, and we support them, including provisions requiring:

- An investigation of the allegations and an objective evaluation of all relevant evidence, both inculpatory and exculpatory, ensuring that credibility determinations are not based on a person’s status as a complainant, respondent, or witness.
- That school officials involved in Title IX proceedings must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.
- That a school must train its officials on the definition of sexual harassment and how to conduct an investigation and grievance process in a way that protects student safety, ensures due process, and promotes accountability.

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<sup>15</sup> 83 FR at 61472.

<sup>16</sup> *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 573 (D. Mass. 2016).

- That training materials must promote impartial proceedings and must not rely on sex stereotypes. We believe, however, that this requirement needs clarification, and address that in response to the Department’s directed question on training.
- That a respondent must be presumed not responsible until a final decision is made.
- That complaints must be resolved in a timely way, but schools should consider that good grounds for delay may exist (for example, if a respondent is subject to criminal proceedings, or if crucial evidence is not available or has not been collected, or if either party has not had enough time to prepare).
- That both parties must be given complete and correct information about the process, including the standard that applies, the potential sanctions, any appeal rights, and the supportive measures available.

**3. Notice and Investigation, § 106.45(b)(2)-(3)**

Likewise, we support the provisions in proposed §§ 106.45(b)(2)-(3), with a few recommended modifications:

- When a formal complaint is filed, the school must give the parties written and timely notice of its grievance procedures and of the allegations, and the school must also notify the parties if it later decides to investigate additional allegations.
- Formal complaints must be investigated.
- A school must dismiss a formal complaint if the alleged conduct does not constitute sexual harassment. *Recommendation:* As noted above, if a school decides to provide recourse or support for other conduct, it should make supportive measures available to both parties, and any proceeding that could result in a respondent’s being deprived of



access to a school’s educational programs or activities should provide the procedural protections set forth in the proposed regulations.

- Schools bear the responsibility for gathering evidence “sufficient to make a determination,” and must provide the parties an equal opportunity to present witnesses and evidence, timely notice of meetings or hearings, and equal access to evidence obtained in the investigation.
- The parties should be permitted to discuss the allegations with potential witnesses and to gather and present relevant evidence. *Recommendation:* At the same time, schools should be required to advise both parties that harassment or retaliation will be subject to sanctions.
- Institutions of higher education must provide for a live hearing and allow advisors to the parties to cross examine the other party and witnesses. While this requirement has provoked particular opposition, it is consistent with recent court rulings. Cross examination has long been recognized as the most powerful way to determine the truth or falsity of testimony and is critical to a fair determination. Cross examination allows the parties to make a searching inquiry to uncover facts that may have been omitted, confused, or overstated. Just as important, it allows the decision makers to observe and judge the credibility of the parties and witnesses, and therefore serves schools’ interest “in securing accurate resolutions of student complaints.”<sup>17</sup> The current system in place in many schools, where parties can submit written questions, school officials will decide

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<sup>17</sup> *Doe v. Pennsylvania State Univ.*, No. 4:18-CV-00164, 2018 WL 3995685 (M.D. Pa. Aug. 21, 2018) (a school’s educational mission is “frustrated if it allows dangerous students to remain on its campuses” and “equally stymied” if it “ejects innocent students who would otherwise benefit from, and contribute to, its academic environment.”)

what questions to ask, and decision makers may never even see the parties in person, is not an adequate substitute. Questioning should take place in real time, in the presence of the decision makers. Schools should adopt measures to prevent irrelevant, unfair, or badgering questions and ensure respectful treatment of parties and witnesses. The decision maker must explain any decision to exclude questions.

*Recommendations:*

- We generally support the provision that decision makers may not rely on the statements of a party or witness who refuses cross examination. If a Title IX proceeding continues while a criminal investigation is pending, however, a respondent's right to avoid self-incrimination must be protected. In that situation, respondents should be permitted to limit their participation or testimony, no adverse inference should be drawn based on such limits, and respondents' presumption of innocence should remain intact.
- We seek further clarifying language in § 106.45(b)(3)(vi)-(vii), which require exclusion of evidence of the complainant's sexual behavior or predisposition unless such evidence "is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or . . . concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent." The proposed regulations should also include a third factor: consistent with Federal Rule of Evidence 412, on which those subsections are based, the regulation should allow evidence of conduct in other situations in which the "probative value [of the evidence] substantially outweighs the danger of harm to any victim and of unfair prejudice to any party." Rule 412(b)(2). For

example, we have seen cases in which the parties had a consensual encounter; complainant made a complaint only after her boyfriend learned of the encounter; and the school excluded evidence designed to show that she made the complaint to preserve her relationship with her boyfriend. This type of evidence should be allowed and considered, and would be under the additional factor.

**4. Standard of Evidence, § 106.45(b)(4)(i)**

We address this issue in response to the Department's Directed Question 6, below.

**5. Additional Requirements for Grievance Procedures, § 106.45(b)(4)-(7)**

We agree with the provisions of proposed Section 106.45(b)(4) stating that a decision maker cannot also serve as the Title IX Coordinator or investigator (thereby prohibiting the "single investigator" model), and requiring a detailed written determination regarding responsibility. *Recommendation:* We suggest the regulations specifically require that any determination of responsibility include a written evaluation of the evidence produced at the hearing.

Consistent with our observations in Section II(A)(2) above, we agree with the provisions of Section 106.45(b)(6) allowing a school to facilitate an informal resolution process that does not involve a full investigation and adjudication, so long as it provides a comprehensive written notice to the parties and obtains their voluntary consent. As the Department stated: "Informal resolution options may lead to more favorable outcomes for everyone involved, depending upon factors such as the age, developmental level, and other capabilities of the parties; the knowledge, skills, and experience level of those facilitating or conducting the informal resolution process; the severity of the misconduct alleged; and likelihood of recurrence of the misconduct."<sup>18</sup>

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<sup>18</sup> 83 FR at 61479.

We agree with the provisions of Section 106.45(b)(7) requiring schools to make available to both parties, and retain for three years, records of grievance proceedings and “[a]ll materials used to train coordinators, investigators, and decision-makers with regard to sexual harassment.” As the Department states, these provisions “would benefit complainants and respondents by empowering them to more effectively hold their recipient schools and institutions accountable for Title IX compliance by ensuring the existence of records that could be used during an investigation by the Department or in private litigation.”<sup>19</sup> *Recommendation:* We ask the Department to clarify the record retention period by adding the following italicized language: “A recipient must create, make available to the complainant and respondent, and maintain for a period of three years *from the date the disciplinary proceeding, including any appeals, is completed . . .*” We also ask the Department to require schools to make their training materials publicly available, to ensure students understand their policies and processes, rather than simply making those materials available to specific parties after a disciplinary proceeding is complete.

### **III. RESPONSES TO DIRECTED QUESTIONS**

#### **A. Question 3, Employees**

The Department has asked for comments on the applicability of the proposed regulations to school employees. We believe the protections set forth in the proposed regulations should apply equally to school employees.

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<sup>19</sup> 83 FR at 61479-80.

## B. Question 4, Training

The Department has asked whether its proposed regulations are adequate to ensure that school officials participating in Title IX proceedings “receive training on the definition of sexual harassment, and on how to conduct an investigation and grievance process, including hearings, that protect the safety of students, ensures due process for all parties, and promotes accountability.”<sup>20</sup> We agree with the provisions requiring that training promote impartial proceedings and avoid sex stereotypes. However, we believe these provisions should be more specific, particularly in view of the prevalence of “trauma informed” training materials. As used in many schools, the “trauma informed” approach does not give officials the investigative tools to explore impartially what happened, including whether, for example, the evidence supports a finding of miscommunication as opposed to misconduct. It is important that training not create “presumptions” that the alleged conduct occurred or that a complainant’s account of the incident must be true. As in all cases, investigators and fact-finders must consider weaknesses and contradictions in the testimony of all witnesses, including the complainant. The respondent is entitled to an adjudicatory process that starts with a presumption of innocence, and the standard of evidence must be satisfied as to all essential elements of the charge.<sup>21</sup>

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<sup>20</sup> 83 FR at 61483.

<sup>21</sup> We have seen cases in which officials were trained to assume sexual misconduct occurred, accept a complainant’s accusations and perception of events, consider a complainant’s inability to recall crucial events and changing stories as evidence that an assault occurred, and presume the accused’s guilt. These forms of “trauma-informed” techniques have been criticized on the ground that they are based on bad science, allow authority figures to encourage alleged victims to create exaggerated or false memories, and unjustly undermine the accused’s ability to defend against allegations. *See, e.g.,* Yoffe, E., *The Bad Science Behind Campus Response to Sexual Assault*, The Atlantic (Sept. 8, 2017), <https://www.theatlantic.com/education/archive/2017/09/the-bad-science-behind-campus-response-to-sexual-assault/539211/> (“Assertions about how trauma physiologically impedes the ability to resist or coherently remember assault have greatly undermined defense against assault allegations. But science offers little support for these claims.”) *See also Doe v. The Trustees of*

We also recommend that the Department specify that training or other materials for students and employees adhere to the same basic standards that apply to training of Title IX staff, to ensure that students and employees understand the definition of sexual harassment, the requirement that determinations be made after a thorough and fair investigation and hearing, and the processes and supportive measures available to them. Consistent with the presumption of a respondent's innocence, schools should refrain from blanket statements, in training materials or otherwise, that complainants must be believed.

**C. Question 5, Individuals with Disabilities**

The Department seeks comment on whether the proposed regulations adequately take into account the needs of students and employees with disabilities. We are concerned that schools do not properly consider those needs. An accused student faced with a disciplinary process may not understand the potential impact of a disability on how the process will unfold, the accommodations that would ensure a fair process, or the need to request accommodations. Responses a school takes as incriminating could be due to the student's disability or how the student was interrogated. We have seen cases in which schools were aware of student disabilities and provided academic accommodations, but did not consider the need for accommodations in the disciplinary context. We propose that the Department consult people or organizations with expertise in these matters to shape appropriate regulatory provisions.

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*the Univ. of Pennsylvania*, 270 F. Supp. 3d 799, 817 (E.D. Pa. 2017) (training materials promoting assumptions that sexual misconduct accusations are true supported a claim that the university did not train its officials to fulfill their responsibilities under university policy and Title IX).

#### **D. Question 6, Standard of Evidence**

The Department seeks comment on “(1) whether it is desirable to require a uniform standard of evidence for all Title IX cases rather than leave the option to schools to choose a standard, and if so then what standard is most appropriate; and (2) if schools retain the option to select the standard they wish to apply, whether it is appropriate to require schools to use the same standard in Title IX cases that they apply to other cases in which a similar disciplinary sanction may be imposed.”<sup>22</sup>

On the first point, we recommend adoption of a uniform “clear and convincing evidence” standard. As a court recently held, the preponderance of the evidence standard is not sufficient to protect against unreliable determinations for serious charges that carry the potential for life-long consequences.<sup>23</sup> The appropriate standard for these cases is “clear and convincing evidence,” which is defined in standard federal jury instructions as “evidence that produces in your mind a firm belief or conviction as to the matter at issue.”<sup>24</sup>

Although it is true that the preponderance standard is usually applied in civil litigation, civil litigation carries significant additional procedural protections for accused persons, including independent judges who preside over the proceedings, active participation by counsel, rules of evidence, comprehensive discovery, and the right to a jury trial. While the Department’s new procedural protections will fill some of the gap, they do not fill it entirely. Moreover, the same factors that led to unjust results under the old system may lead to unjust results even if schools

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<sup>22</sup> 83 FR at 61483.

<sup>23</sup> *Lee v. Univ. of New Mexico*, No. 1:17-cv-01230-JB-LF (D.N.M. Sept. 20, 2018); *see also Doe v. Univ. of Mississippi*, No. 3:16-CV-63-DPJ-FKB, 2018 WL 3570229, \*11 (S.D. Miss. July 24, 2018) (allowing student to pursue claims against university based in part on its application of a preponderance standard to resolve a sexual assault complaint).

<sup>24</sup> 3 Fed. Jury Prac. & Instr. § 104:02 (6th ed.).

adopt fairer procedures on paper. These factors include widespread pressure to resolve grievances against accused students, and proceedings handled by officials steeped in the belief that accusations must be believed.

On the second point, we agree that if the Department chooses not to require application of a clear and convincing standard, it should provide that a college may “employ the preponderance of the evidence standard only if [it] uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction,” and “must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.”<sup>25</sup> The Department should also define what “preponderance” means, along the following lines:

Preponderance of the evidence means that the conclusion is supported by evidence that is persuasive, relevant, and substantial (we reject the trope that preponderance can mean 50 percent likely to have occurred “plus a feather”). Moreover, this standard is adequate only when procedures are transparent and fair.<sup>26</sup>

#### **E. Question 7, “Directly Related to the Allegations” Language**

The Department seeks comment on the proposal, in Section 106.45(b)(3)(viii), to require schools to give parties “an equal opportunity to inspect and review any evidence directly related to the allegations obtained as part of the investigation, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility.” We believe this language gives schools too much leeway, particularly against a history of restricting the information shared with respondents. We recommend the Department require schools to

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<sup>25</sup> § 106.45(b)(4).

<sup>26</sup> This definition was recommended in a November 14, 2018 report by a working group appointed by then-California Governor Jerry Brown. *See* <http://www.irc.edu/policies/titleix/Documents/Recommendations-from-Post-SB-169-Working-Group.pdf> (citation omitted). The members were Wendy Brown, Class of 1936 First Chair, Political Science, UC Berkeley; Justice Carlos R. Moreno (Ret.); and Lara Stemple, Assistant Dean, UCLA School of Law.



produce all evidence they gather in the investigation. If schools wish to withhold evidence, they should be required to provide a written notice summarizing the general content of what they are withholding and their justification for withholding it, and should give the parties a reasonable opportunity to challenge their determinations. Of course, just because evidence has been shared with the parties does not mean it is admissible at the hearing; that is an issue of relevance and prejudice to be decided by the panel adjudicating the complaint.

\* \* \*

In conclusion, we believe that *both* accusing and accused students have a right to be heard. *Neither* has a right to be automatically believed. The Department's proposed reforms are not anti-survivor and are not designed to protect people who commit misconduct. They are an effort to make sure decisions are made after a process that is fundamentally fair to both parties. Consistent standards to ensure a fair process will benefit everyone.

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## APPENDIX

Following is an excerpt from an article by the Foundation for Individual Rights in Education, “Mountain of evidence shows the Department of Education’s prior approach to campus sexual assault was ‘widely criticized’ and ‘failing’” (Nov. 15, 2018), <https://www.thefire.org/mountain-of-evidence-shows-the-department-of-educations-prior-approach-to-campus-sexual-assault-was-widely-criticized-and-failing/>.

[S]ince 2011, approximately 117 federal courts, as well as a number of state courts, have raised concerns about the lack of meaningful procedural protections in campus adjudications. A number of those judges have put their concerns in particularly clear terms:

- [Doe v. Regents of the University of California](#), No. B283229 (Cal. Ct. App. Oct. 9, 2018) (“It is ironic that an institution of higher learning, where American history and government are taught, should stray so far from the principles that underlie our democracy.”).
- [Lee v. University of New Mexico](#), No. 17-cv-01230 (D.N.M. Sept. 20, 2018) (“[P]reponderance of the evidence is not the proper standard for disciplinary investigations such as the one that led to Lee’s expulsion, given the significant consequences of having a permanent notation such as the one UNM placed on Lee’s transcript.”).
- [Doe v. Baum](#), 903 F.3d 575 (6th Cir. 2018) (“[I]f a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder.”).
- [Doe v. University of Michigan](#), 325 F. Supp. 3d 821 (E.D. Mich. 2018) (“Without a live proceeding, the risk of an erroneous deprivation of Plaintiff’s interest in his reputation, education, and employment is significant.”).
- [Doe v. Trustees of Boston College](#), 892 F.3d 67 (1st Cir. 2018) (holding that it is “reasonable for a student to expect that a basic fairness guarantee excludes having an associate Dean of Students request Board members to give special treatment to the prime alternative culprit in a case in which the key defense is that someone other than the accused student committed the alleged sexual assault”).
- [Doe v. Marymount University](#), 297 F. Supp. 3d 573 (E.D. Va. 2018) (“[C]olleges and universities should treat sexual assault investigations and adjudications with a degree of caution commensurate with the serious consequences that accompany an adjudication of guilt in a sexual assault case. If colleges and university do not treat sexual assault investigations and adjudications with the seriousness they deserve, the institutions may well run afoul of Title IX.”).
- [Doe v. University of Notre Dame](#), 2017 U.S. Dist. LEXIS 69645 (N.D. Ind. May 8, 2017) (in response to university’s argument that lawyers were not required because

its disciplinary process was educational, not punitive, judge wrote: “This testimony is not credible. Being thrown out of school, not being permitted to graduate and forfeiting a semester’s worth of tuition is ‘punishment’ in any reasonable sense of that term.”).

- [Doe v. Brandeis University](#), 177 F. Supp. 3d 561 (D. Mass. 2016) (“Brandeis appears to have substantially impaired, if not eliminated, an accused student’s right to a fair and impartial process. ... If a college student is to be marked for life as a sexual predator, it is reasonable to require that he be provided a fair opportunity to defend himself and an impartial arbiter to make that decision.”).
- [Doe v. Columbia University](#), 831 F.3d 46 (2d Cir. 2016) (“A covered university that adopts, even temporarily, a policy of bias favoring one sex over the other in a disciplinary dispute, doing so in order to avoid liability or bad publicity, has practiced sex discrimination ...”).
- *See also* Doe v. Miami Univ., 882 F.3d 579 (6th Cir. 2018); Doe v. Univ. of Cincinnati, 872 F.3d 393 (6th Cir. 2017); Doe v. Columbia Univ., 831 F.3d 46 (2d Cir. 2016); Rossley v. Drake Univ., No. 4:16-cv-00623 (S.D. Iowa Oct. 12, 2018); Doe v. Univ. of So. Miss., No. 2:18-cv-00153 (S.D. Miss. Sept. 26, 2018); Doe v. Syracuse Univ., 2018 U.S. Dist. LEXIS 157586 (N.D.N.Y. Sept. 16, 2018); Doe v. Brown Univ., 2018 U.S. Dist. LEXIS 144967 (D.R.I. Aug. 27, 2018); Doe v. Pa. St. Univ., 2018 U.S. Dist. LEXIS 141423 (M.D. Pa. Aug. 21, 2018); Doe v. Geo. Wash. Univ., 2018 U.S. Dist. LEXIS 136882 (D.D.C. Aug. 14, 2018); Rowles v. Curators of the Univ. of Miss., No. 2:17-cv-04250 (W.D. Mo. July 16, 2018); Doe v. Univ. of Miss., 2018 U.S. Dist. LEXIS 123181 (S.D. Miss. July 14, 2018); Doe v. Johnson & Wales Univ., No. 1:18-cv-00106 (D.R.I. May 14, 2018); Doe v. DiStefano, 2018 U.S. Dist. LEXIS 76268 (D. Colo. May 7, 2018); Werner v. Albright Coll., No. 5:17-cv-05402 (E.D. Pa. May 2, 2018); Doe v. Ohio St. Univ., 2018 U.S. Dist. LEXIS 68364 (S.D. Ohio Apr. 24, 2018); Roe v. Adams-Gaston, No. 2:17-cv-00945 (S.D. Ohio Apr. 17, 2018); Elmore v. Bellarmine Univ., 2018 U.S. Dist. LEXIS 52564 (W.D. Ky. Mar. 29, 2018); Doe v. Univ. of Or., 2018 U.S. Dist. LEXIS 49431 (D. Or. Mar. 26, 2018); Doe v. Marymount Univ., 297 F. Supp. 3d 573 (E.D. Va. 2018); Schaumleffel v. Muskingum Univ., 2018 U.S. Dist. LEXIS 36350 (S.D. Ohio Mar. 6, 2018); Gischel v. Univ. of Cincinnati, 302 F. Supp. 3d 961 (S.D. Ohio 2018); Powell v. St. Joseph’s Univ., 2018 U.S. Dist. LEXIS 27145 (E.D. Pa. February 16, 2018); Doe v. Rider Univ., 2018 U.S. Dist. LEXIS 7592 (D.N.J. Jan. 17, 2018); Doe v. Pa. St. Univ., 2018 U.S. Dist. LEXIS 3184 (M.D. Pa. Jan. 8, 2018); Saravanan v. Drexel Univ., 2017 U.S. Dist. LEXIS 193925 (E.D. Pa. Nov. 24, 2017); Painter v. Adams, 2017 U.S. Dist. LEXIS 171565 (W.D.N.C. Oct. 17, 2017); Doe v. Univ. of Chicago, 2017 U.S. Dist. LEXIS 153355 (N.D. Ill. Sept. 20, 2017); Rolph v. Hobart & William Smith Colls., 271 F. Supp. 3d 386 (W.D.N.Y. Sept. 20, 2017); Doe v. Case Western Reserve Univ., 2017 U.S. Dist. LEXIS 142002

(N.D. Ohio Sept. 1, 2017); *Doe v. Trs. of the Univ. of Pa.*, 270 F. Supp. 3d 799, 817 (E.D. Pa. 2017); *Gulyas v. Appalachian St. Univ.*, 2017 U.S. Dist. LEXIS 137868 (W.D.N.C. Aug. 28, 2017); *Nokes v. Miami Univ.*, 2017 U.S. Dist. LEXIS 136880 (S.D. Ohio Aug. 25, 2017); *Mancini v. Rollins Coll.*, 2017 U.S. Dist. LEXIS 113160 (M.D. Fl. July 20, 2017); *Tsuruta v. Augustana Univ.*, No. 4:15-cv-04150 (D.S.D. June 16, 2017); *Doe v. Univ. of Notre Dame*, 2017 U.S. Dist. LEXIS 69645 (N.D. Ind. May 8, 2017); *Doe v. Williams Coll.*, No. 3:16-cv-30184 (D. Mass. Apr. 28, 2017); *Doe v. Amherst Coll.*, 238 F. Supp. 3d 195 (D. Mass. 2017); *Doe v. Ohio St. Univ.*, 239 F. Supp. 3d 1048 (S.D. Ohio 2017); *Neal v. Colo. St. Univ. – Pueblo*, 2017 U.S. Dist. LEXIS 22196 (D. Colo. Feb. 16, 2017); *Doe v. Lynn Univ.*, 2017 U.S. Dist. LEXIS 7528 (S.D. Fl. Jan. 19, 2017); *Doe v. W. New England Univ.*, 228 F. Supp. 3d 154 (D. Mass. 2017); *Doe v. Alger*, 228 F. Supp. 3d 713 (W.D. Va. 2016); *Collick v. William Paterson Univ.*, 2016 U.S. Dist. LEXIS 160359 (D.N.J. Nov. 17, 2016); *Doe v. Brown Univ.*, 210 F. Supp. 3d 310 (D.R.I. Sept. 28, 2016); *Ritter v. Okla. City Univ.*, 2016 U.S. Dist. LEXIS 95813 (W.D. Okla. July 22, 2016); *Doe v. Weill Cornell Med. Coll. of Cornell Univ.*, No. 1:16-cv-03531 (S.D.N.Y. May 20, 2016); *Doe v. Bd. of Regents of the Univ. Sys. Of Ga.*, No. 15-cv-04079 (N.D. Ga. April 19, 2016); *Doe v. George Mason Univ.*, No. 1:15-cv-00209 (E.D. Va. Feb. 25, 2016); *Prasad v. Cornell Univ.*, 2016 U.S. Dist. LEXIS 161297 (N.D.N.Y. Feb. 24, 2016); *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561 (D. Mass. 2016); *Doe v. Brown Univ.*, 166 F. Supp. 3d 177 (D.R.I. 2016); *Marshall v. Indiana Univ.*, 170 F. Supp. 3d 1201 (S.D. Ind. 2016); *Doe v. Pa. St. Univ.*, No. 4:15-cv-02072 (M.D. Pa. Oct. 28, 2015); *Sterrett v. Cowan*, 2015 U.S. Dist. LEXIS 181951 (E.D. Mich. Sept. 30, 2015); *Doe v. Middlebury Coll.*, 2015 U.S. Dist. LEXIS 124540 (D. Vt. Sept. 16, 2015); *Doe v. Salisbury Univ.*, 123 F. Supp. 3d 748 (D. Md. August 21, 2015); *Doe v. Washington and Lee Univ.*, 2015 U.S. Dist. LEXIS 102426 (W.D. Va. Aug. 5, 2015); *Tanyi v. Appalachian St. Univ.*, 2015 U.S. Dist. LEXIS 95577 (W.D.N.C. July 22, 2015); *Doe v. Salisbury Univ.*, 107 F. Supp. 3d 481 (D. Md. 2015); *King v. DePauw Univ.*, 2014 U.S. Dist. LEXIS 117075 (S.D. Ind. August 22, 2014); *Benning v. Corp. of Marlboro Coll.*, 2014 U.S. Dist. LEXIS 107013 (D. Vt. Aug. 5, 2014); *Harris v. St. Joseph’s Univ.*, 2014 U.S. Dist. LEXIS 65452 (E.D. Pa. May 13, 2014); *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746 (S.D. Ohio 2014); *Doe v. Geo. Wash. Univ.*, No. 1:11-cv-00696 (April 8, 2011).