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**Failing Every Grade: A Report Card on the (Proposed) New Title IX Regulations**

**INTRODUCTION**

Sexual harassment of students is a serious problem in our nation’s schools, often with devastating consequences. It affects students in primary and secondary schools, as well as students in college. For example, in grades 7-12, 56% of girls and 40% of boys are sexually harassed in any given school year.[[2]](#footnote-2) During college, 62% of women and 61% of men experience sexual harassment.[[3]](#footnote-3) In addition, more than 1 in 5 women and nearly 1 in 18 men are sexually assaulted in college.[[4]](#footnote-4) The consequences of experiencing sexual harassment are hard enough; when schools fail to respond effectively, the impact on students’ education can be ruinous. For example, more than one-third (34.1%) of college students who experience sexual assault drop out of college, which is higher than the overall dropout rate for college students.[[5]](#footnote-5)

Schools can be liable for sexual harassment and assault under Title IX of the Education Amendments of 1972, which prohibits sex discrimination by educational institutions that receive federal funding.[[6]](#footnote-6) For nearly two decades, the Department of Education’s Office for Civil Rights (“OCR”) has used a consistent standard to enforce Title IX’s nondiscrimination mandate, requiring schools to respond promptly and effectively to serious incidents of sexual harassment about which they knew or should have known.[[7]](#footnote-7) This standard stems from OCR’s 2001 *Sexual Harassment Guidance*, which went through public notice-and-comment, and has been enforced in both Democratic and Republican administrations.[[8]](#footnote-8) In response to disturbing data about the prevalence and harm of sexual violence in schools, the Obama administration issued further guidance to ensure that students were better protected.[[9]](#footnote-9) In the fall of 2017, the Trump administration rescinded the Obama administration’s guidance on sexual violence, putting interim guidance in place as it worked to prepare proposed new Title IX rules for public notice- and-comment.[[10]](#footnote-10) Now, through a Notice of Proposed Rulemaking issued last fall, the Trump administration proposes not only to nullify the Obama administration’s guidance, but to eliminate or severely narrow many other longstanding protections for students.[[11]](#footnote-11)

It is unclear when the proposed Title IX regulations will become final. Though it was anticipated that the final regulations would be published in September 2019, I have now heard through several sources that they are likely to be released in December. The final regulations may differ from the proposed regulations in some ways, but this article highlights some of the major changes expected. In addition, to help you navigate this ever-changing landscape, I have attached a chart to this article comparing the former, current, and proposed Title IX rules.

Here’s the big picture on the proposed new Title IX regulations: they place a premium on protecting schools and accused students, with little regard for students who experience sexual harassment and assault. Though not all the proposed changes constitute a “sharp backward turn,” most do.[[12]](#footnote-12) As a practical matter, this means students who experience sexual harassment or assault are far more unlikely to be able to enforce their Title IX rights through OCR or their schools’ grievance procedures. This, in turn, means that private enforcement, through litigation, is likely to play an increasingly important role in protecting survivors’ Title IX rights.

**MAIN CHANGES UNDER PROPOSED TITLE IX REGULATIONS**

The proposed new Title IX regulations include both substantive and procedural changes. This article addresses ten of the main changes. (The attached chart highlights twenty changes.) One of the main problems with the substantive changes is that they rewrite Title IX’s administrative standards, making them match the stricter standards governing private Title IX lawsuits for monetary damages. And one of the main problems with the procedural changes is that they graft criminal law requirements into schools’ internal grievance procedures. Buckle up for a disturbing ride through the proposed new landscape for Title IX enforcement by OCR and schools—and its broader implications for survivors of sexual harassment and assault.

1. **Definition of Sexual Harassment**

Proposed rule § 106.30 grafts the liability standard for monetary damages into the definition of sexual harassment. It defines sexual harassment as “[u]nwelcome 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.”[[13]](#footnote-13) It also requires dismissal of complaints that do not meet this definition.[[14]](#footnote-14) Under this definition, even if a student reports sexual harassment to the “right person,” their school would still be *required* to ignore the student’s Title IX complaint if the harassment hadn’t yet advanced to a point that it was actively harming a student’s education. A school would be required to dismiss such a complaint even if it involved harassment of a minor student by a teacher or other school employee. OCR’s proposed definition conflicts with Title IX’s purpose and precedent, discourages reporting, and excludes many forms of sexual harassment that interfere with equal access to educational opportunities.

OCR departs from the definition of sexual harassment in the 2001 *Sexual Harassment Guidance*: “unwelcome conduct of a sexual nature.”[[15]](#footnote-15) This definition properly requires schools to respond to harassment before it escalates to a point that students suffer severe harm. OCR’s proposed, narrower definition of sexual harassment forces students to endure repeated and escalating levels of abuse, whether from another student or a school employee, before their schools would be required to investigate and stop the harassment. And, if a student is turned away by their school after reporting sexual harassment, the student is extremely unlikely to report a second time when the harassment escalates. Furthermore, under the proposed definition, schools would no longer have a duty to intervene to *prevent* the more severe and pervasive forms of sexual harassment.

1. **What Triggers a Schools’ Duty to Respond?**

Under the proposed rules, schools would only be responsible for addressing sexual harassment when one of a small subset of school employees actually knew about the harassment. Specifically, under proposed rule § 106.30, schools would not be required to address sexual harassment unless there was “actual knowledge” of the harassment by (i) a Title IX coordinator, (ii) a K-12 teacher (but only for student-on-student harassment, *not* employee-on-student harassment); or (iii) an official who has “the authority to institute corrective measures.”[[16]](#footnote-16)

This is a sharp departure from OCR’s longstanding requirement that schools address student-on-student sexual harassment if almost any school employee either knows or reasonably should have known about it.[[17]](#footnote-17) That longstanding requirement comports with the reality that, when students report sexual harassment, many of them tell employees who don’t have authority to institute corrective measures simply because, when seeking help, they turn to the adults they trust the most. Additionally, students are not typically informed about which employees have authority to address the harassment. The proposed rule is also a sharp departure from OCR’s longstanding requirement that schools address all employee-on-student sexual harassment “whether or not the [school] has ‘notice’ of the harassment.”[[18]](#footnote-18) The 2001 *Sexual Harassment Guidance* recognized the particularly egregious harm suffered when students are preyed upon by adults, as well as students’ vulnerability to pressure from adults to remain silent, and thus acknowledged schools’ heightened responsibility to address harassment by their employees.[[19]](#footnote-19)

OCR’s proposed “see-no-evil” approach would torpedo institutional accountability, making it easy for schools to insulate themselves from knowledge of harassment to avoid any responsibility. The proposed notice requirement is especially unsettling in the K-12 school context. Under OCR’s proposed rules, if a K-12 student told a non-teacher school employee they trust—such as a guidance counselor, teacher’s aide, or athletics coach—that they had been sexually assaulted by another student, the school would have no obligation to address the assault.[[20]](#footnote-20) Similarly, if a K-12 student told a teacher she had been sexually assaulted by another teacher or other school employee, the school would have no obligation to address the assault.[[21]](#footnote-21) This is patently ridiculous—and dangerous. Serious sexual harassment could go unchecked simply because a student did not report their sexual assault to the “right” person under the proposed rules’ narrow definition. This is also true for students in post-secondary schools. If, for example, a college student told their professor or resident advisor that they had been raped by another student, a professor, or another school employee, the college would have no obligation to help them.

Further, the proposed rules in §§ 106.30 and 106.44 would empower serial sexual predators like Larry Nassar at Michigan State University, Richard Strauss at The Ohio State University, George Tyndall at University of Southern California, and Jerry Sandusky at Penn State University. Even if school employees heard repeated complaints or witnessed the sexual abuse themselves, the school would be able to avoid responsibility if no student reported the abuse to the Title IX coordinator or a high-level employee with authority to take corrective action. If a university has no duty to take action on reports to most employees, it is easy for serial sexual predators to continue abusing students for years, even decades. This sends the wrong message to predators, schools, and students alike. It tells predators that they can go undetected for years, schools that they have no duty to act on even the most egregious forms of sexual harassment if one of a small subset of the “right” employees didn’t know about it, and students that their Title IX right to an education free from sexual harassment is meaningless. Title IX requires OCR to enforce students’ civil rights, not put students in harm’s way.

1. **Location of Covered Conduct**

Proposed rule § 106.44 (a) would *require* schools to ignore all complaints of off-campus or online sexual harassment that happens outside of a school-sponsored program—even if the student is forced to see their harasser on campus every day and the harassment directly impacts their education as a result.[[22]](#footnote-22) Under this rule, a school is only responsible for addressing conduct that occurs within its “education program or activity.”[[23]](#footnote-23) This limits a school’s responsibility to conduct that occurs on campus; during an official function that the school promoted or sponsored; or at some off-campus operations, such as fraternities.[[24]](#footnote-24)

For almost two decades, OCR has required schools to address sexual harassment if it is “sufficiently serious to deny or limit a student’s ability to participate in or benefit from the education program,”[[25]](#footnote-25) regardless of where it occurs.[[26]](#footnote-26) The proposed rules would not only scrap OCR’s longstanding interpretation of Title IX, but would offer students less protection than they could get through filing a lawsuit in court. Recognizing that when a person is assaulted, “the effect of such abusive conduct on a victim does not necessarily end with a cessation of the abusive conduct,” courts have found that “the possibility of further encounters between a rape victim and her attacker could create an environment sufficiently hostile” to be actionable under Title IX. [[27]](#footnote-27)

Proposed rule § 106.44 (a) ignores the reality that sexual harassment that happens off campus and outside of a school activity is no less traumatic than on-campus harassment.[[28]](#footnote-28) The proposed rules are especially problematic for students in colleges and universities. Almost 9 in 10 college students live off campus, and much of student life takes place outside of official school-sponsored activities. If a student is assaulted off-campus by a professor, the college would be required to ignore their complaint, even if they have to continue taking the professor’s class and are too afraid to attend. If a college student is raped at an off-campus party, the college would be prohibited from taking action, even if the student saw their rapist every day in the dining hall, gym, or residence hall. Similarly, the proposed rules would pose particular risks to students at community colleges and vocational schools. Since none of these students live on campus, if they are harassed by faculty or other students, it is especially likely to occur off campus.

1. **Liability Standard**

Proposed rule § 106.44(a) would eliminate a school’s responsibility to act “reasonably” and “take immediate and effective corrective action” to resolve sexual harassment complaints;[[29]](#footnote-29) instead, it would require schools to respond in a manner that is not “deliberately indifferent.”[[30]](#footnote-30) A school’s response to sexual harassment would be deliberately indifferent only if it was “clearly unreasonable in light of the known circumstances.”[[31]](#footnote-31) Section 106.44(b) of the proposed regulations creates rigid tests for—and “safe harbors” from—finding deliberate indifference. As long as a school follows the procedures specified in §§ 106.44(b) and 106.45 of the proposed rules, the school’s response to harassment complaints cannot be challenged. For example, if a school follows grievance procedures consistent with the proposed regulations, then its response to a formal complaint is not deliberately indifferent and does not otherwise constitute discrimination under Title IX.[[32]](#footnote-32) In addition, for institutions of higher education, a school is not deliberately indifferent when, in response to an informal complaint, it provides supportive measures designed to restore or preserve equal educational access.[[33]](#footnote-33)

This rule would have the untenable effect of encouraging schools to go through the motions—elevating form over substance—instead of taking meaningful action to ensure survivors get the support they need to continue their education, free from further harassment. In fact, the procedures and investigation tactics that schools sometimes follow to show they “did something” in response to a student’s report of sexual harassment often perpetuate sex discrimination and re-traumatize survivors of sexual assault.[[34]](#footnote-34) The practical effects of the proposed rules would shield schools from any accountability under Title IX, even if a school mishandles a sexual harassment complaint, fails to provide effective support for survivors, or wrongly determines against the weight of the evidence that a named harasser is not responsible for sexual assault.

Moreover, OCR’s rigid tests for (and “safe harbors” from) finding deliberate indifference are even more stringent than the deliberate indifference standard that courts apply to Title IX claims for monetary damages. A “minimalist response” such as “investigating and absolutely nothing more . . . is not within the contemplation of a reasonable response.”[[35]](#footnote-35) Nor may a school hide behind limited, ineffective actions to suggest it is not deliberately indifferent.[[36]](#footnote-36)

1. **Investigative Model**

Proposed rule § 106.45(b)(4) would prohibit schools from using the “single investigator” model, instead requiring the decision-maker to be someone other than the Title IX Coordinator or investigators.[[37]](#footnote-37) At many schools, especially smaller school districts and colleges with a limited pool of employees, sexual misconduct complaints are often handled by a single investigator who conducts the interviews, writes a report, and issues findings on whether school policies were violated. This would no longer be allowed, even though it has never before been prohibited and was specifically permitted under OCR’s 2017 interim guidance.[[38]](#footnote-38)

1. **Access to Evidence**

Proposed rule § 106.45(b)(3)(viii) requires that both parties be able 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.”[[39]](#footnote-39) Because the proposed rules identify some circumstances where the respondent may be able to rely on the complainant’s “sexual behavior or disposition”—namely, when such evidence “is offered to prove someone other than the respondent committed the conduct alleged” or “is offered to prove consent”—it appears that everything the investigator learns about the complainant’s sexual history, regardless of whether it is relied on in the investigatory report, is “directly related” to the allegations and must be made available to the respondent and their advisor of choice.[[40]](#footnote-40) The proposed rule’s “directly related” language also suggests that respondents and their advisors are entitled to review irrelevant personal information about the complainant (and witnesses), such as from private medical records or rumors noted by the investigator but never verified, even if the information does not involve sexual history.

Even worse, the “inspect and review” provision poses a significant risk of widespread disclosure of highly personal, possibly inaccurate, information when combined with proposed rule § 106.45(b)(3)(iii), which prohibits a school from restricting “the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.”[[41]](#footnote-41) Whether a party releases information to retaliate or for other reasons, creating a system that empowers one party to learn and disseminate personal information about another (by word or mouth or the internet) will likely deter many people from filing complaints.

The proposed rules increase the parties’ access to information far beyond the current or former guidance. Under the current interim guidance, the parties must have equal access to any information, including the investigative report, to be used during informal or formal disciplinary meetings and hearings.[[42]](#footnote-42) Under the former guidance, the parties were required to have an equal opportunity to present relevant witnesses and evidence, as well as similar and timely access to any information to be used at a hearing.[[43]](#footnote-43)

1. **Cross-Examination & Hearings**

Pursuant to proposed rule § 106.45(b)(3)(vii), institutions of higher education must conduct a “live hearing,” and must permit each party to cross examine one another through the party’s “advisor of choice,” who may be an attorney (or, possibly, an angry parent or close friend of the party).[[44]](#footnote-44) Although the cross examination must be done at a live hearing, if requested by any party, it must be done by video feed (or similar technology) with the parties located in separate rooms.[[45]](#footnote-45) This proposal conflicts with the longstanding majority rule that cross-examination is not required in school conduct proceedings. It also risks re-traumatizing victims of sexual harassment and assault or deterring them from coming forward in the first place.

For elementary and secondary schools, live hearings are permitted but not required.[[46]](#footnote-46) Regardless of whether there is a hearing, the decision-maker in these schools must ask each party and witness relevant questions and follow-up questions that the other party requests.[[47]](#footnote-47) If no hearing is held, the school must provide each party the opportunity to submit written questions, answers, and follow-up.[[48]](#footnote-48) Allowing K-12 schools to subject young students to live cross-examination is particularly troubling. In my experience, K-12 schools are far less equipped than institutions of higher education to conduct fair and equitable hearings. Moreover, the risk of retraumatizing K-12 students at a botched live hearing is exceeding high.

1. **Evidentiary Standard & Presumption of Non-Responsibility**

Applying criminal law principles to school disciplinary proceedings, OCR proposes two interrelated rules that would make it much more difficult for survivors of sexual harassment and assault to hold their harassers accountable and continue their education in a safe environment.

First, under proposed § 106.45(b)(1)(iv), schools would be required to presume that the reported harassment did not occur until the investigation was complete and the school made a finding of responsibility.[[49]](#footnote-49) Second, under proposed § 106.45(b)(4)(i), schools would no longer be required to use the “preponderance of the evidence” standard in Title IX investigations to decide whether sexual harassment occurred.[[50]](#footnote-50) Instead, schools could use the more demanding “clear and convincing evidence” standard, while allowing all other student misconduct cases to be governed by the “preponderance of the evidence” standard, even if they carry the same maximum penalties.[[51]](#footnote-51) Even worse, proposed rule § 106.45(b)(4)(i) affirmatively *forbids* a school from using the preponderance standard *unless* the school uses that standard for all other student misconduct cases that carry the same potential maximum sanction *and* for all cases against employees.[[52]](#footnote-52) In other words, schools only have “flexibility” to choose a *higher* standard of proof, and only respondents—not complainants—have the right to be treated the same as students involved in other school disciplinary proceedings that don’t involve sexual harassment.

Together, these two proposed rules put a whole hand on the scale for respondents, making the process far more difficult for complainants.

1. **Informal Resolution and Mediation**

The proposed rules give schools more flexibility to use mediation and other informal resolution procedures than previous guidance. Pursuant to proposed rule § 106.45(b)(6), at any time before reaching a determination of responsibility, and provided that both parties voluntarily consent in writing, a school may facilitate an informal resolution process—including mediation—that doesn’t involve a full investigation and adjudication.[[53]](#footnote-53) Previous OCR guidance had permitted informal resolution procedures under certain circumstances, when the parties voluntarily agreed, but stated that mediation was not appropriate, even on a voluntary basis, in cases involving sexual assault allegations.[[54]](#footnote-54)

1. **Supportive Measures**

Regardless of whether a formal complaint is filed, proposed rule § 106.30 permits schools to provide free “supportive measures” to complainants or respondents in order to “restore or preserve access to the [school’s] education program or activity, without unreasonably burdening the other party.”[[55]](#footnote-55) These services must be “non-disciplinary” and “non-punitive,” and the proposed rule provides specific examples, including counseling, deadline extensions, no-contact orders, housing changes, campus escort services, leaves of absence, increased security, and changes in class schedules.[[56]](#footnote-56)

Under this rule, even if a student suffered harassment on campus that was “severe, pervasive, and objectively offensive,” their school could deny the student the “supportive measures” they need to stay in school. This is because the rules permit schools to deny a request for supportive measures on the ground that those measures are disciplinary, punitive, or unreasonably burdensome to the respondent. For example, a school may claim it cannot transfer respondents to another class or dorm because it would “unreasonably burden” the respondents, thereby forcing survivors to change all of their class and housing assignments to avoid their harassers.[[57]](#footnote-57) In addition, schools may interpret this proposed rule to prohibit issuing a *one-way* no-contact order against a respondent and to require complainants to agree to a *mutual* no-contact order, which implies that survivors are at least partially responsible for their own assault.[[58]](#footnote-58)

Another problem with the proposed rules is that “supportive measures” for complainants are incentivized, but not required, for institutions of higher education (and are neither incentivized nor required for elementary and secondary schools). Proposed rule § 106.44(b)(3) creates a safe harbor for institutions of higher education: if no formal complaint is filed and the school provides supportive measures to a complainant, then the school’s response cannot be deemed a Title IX violation.[[59]](#footnote-59) This is intended to incentivize institutions of higher education to offer supportive measures to students who may not want to file a formal complaint.[[60]](#footnote-60) However, OCR does not explain why the proposed rules don’t mandate appropriate supportive measures for all individuals who report sexual harassment, as OCR required in its 2014 guidance.[[61]](#footnote-61)

**CONCLUSION**

Taken together, the proposed rules are united by an overarching theme: the biggest problem with sexual assault in colleges and universities is the need to better protect schools and accused students, not the students who experience sexual assault. The proposed rules do not just roll back two decades of OCR guidance on sexual harassment and assault. They severely narrow Title IX’s substantive protections from sexual harassment and assault. And they impose new grievance procedures that improperly inject criminal law requirements into schools’ internal processes, tilting the scales toward accused students instead of complying with Title IX’s requirement of “equitable” procedures for addressing sex discrimination.

What will happen when the proposed rules are finalized? It will be much harder for students who experience sexual harassment or assault to enforce their Title IX rights through OCR or their schools’ grievance procedures. Survivors who aren’t silenced by this are more likely to turn to litigation as a solution. However, schools will likely try to use the new regulations—such as the safe harbor provisions and any school or OCR findings that comply with the regulations—to defend against Title IX liability.

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2. Catherine Hill & Holly Kearl, *Crossing the Line: Sexual Harassment at School*, AAUW 11 (2011), available at <https://www.aauw.org/research/crossing-the-line>. [↑](#footnote-ref-2)
3. Catherine Hill & Elena Silva, *Drawing the Line: Sexual Harassment on Campus*, AAUW 17, 19 (2005), available at <https://history.aauw.org/aauw-research/2006-drawing-the-line> (noting differences in the types of sexual harassment and reactions to it). [↑](#footnote-ref-3)
4. David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, Association of American Universities 13-14 (Sept. 2015) [hereinafter *AAU Campus Climate Survey*], available at <https://www.aau.edu/key-issues/aau-climate-survey-sexual-assault-and-sexual-misconduct-2015>. [↑](#footnote-ref-4)
5. Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18 J.C. Student Retention: Res., Theory & Prac. 234, 244 (2015), available at<https://doi.org/10.1177/1521025115584750>. [↑](#footnote-ref-5)
6. 20 U.S.C. § 1681(a) (2012). [↑](#footnote-ref-6)
7. Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. Dep’t Educ., 9, 12-13 (Jan. 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [hereinafter *Sexual Harassment Guidance*]. [↑](#footnote-ref-7)
8. These standards have been reaffirmed time and time again, in 2006 by the Bush administration, in 2010, 2011, and 2014 in guidance documents issued by the Obama administration, and even in the 2017 guidance document issued by the Trump administration. *See* Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Stephanie Monroe*, U.S. Dep’t Educ. (Jan. 25, 2006), <https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html>; Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali*, U.S. Dep’t Educ. (Oct. 26, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf> [hereinafter *Bullying DCL*]; Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali*, U.S. Dep’t Educ. (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [hereinafter *Sexual Violence DCL*]; Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, U.S. Dep’t Educ.(Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [hereinafter *2014 Q&A*]; Office for Civil Rights, Q*&A on Campus Sexual Misconduct*, U.S. Dep’t Educ. (Sept. 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> [hereinafter *2017 Q&A*]. [↑](#footnote-ref-8)
9. *See, e.g., Sexual Violence DCL*, *supra* note 8; *2014 Q&A*, *supra* note 8. [↑](#footnote-ref-9)
10. Office for Civil Rights, *Dear Colleague Letter from Acting Assistant Secretary for Civil Rights Candice Jackson*, U.S. Dep’t Educ. (Sep. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf> (rescinding *Sexual Violence DCL* and *2014 Q&A*); *2017 Q&A*, *supra* note 8 (establishing interim guidance). [↑](#footnote-ref-10)
11. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*,83 Fed. Reg. 61,462-61,499 (Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106), <https://www.govinfo.gov/content/pkg/FR-2018-11-29/pdf/2018-25314.pdf> [hereinafter *Proposed Rules*]. [↑](#footnote-ref-11)
12. *See* Joanna L. Grossman & Deborah L. Blake, *A Sharp Backward Turn: Department of Education Proposes to Undermine Protections for Students Against Sexual Harassment and Assault*, Part One, Verdict (Nov. 27, 2018), available at <https://verdict.justia.com/2018/11/27/a-sharp-backward-turn-department-of-education-proposes-to-undermine-protections-for-students-against-sexual-harassment-and-assault>. [↑](#footnote-ref-12)
13. *Proposed Rules*, *supra* note 11,at 61496 (§ 106.30). [↑](#footnote-ref-13)
14. *Id*. at 61498 (§ 106.45(b)(3)). [↑](#footnote-ref-14)
15. *Sexual Harassment Guidance*, *supra* note 7, at 2. [↑](#footnote-ref-15)
16. *Proposed Rules*, *supra* note 11, at 61496 (§ 106.30). [↑](#footnote-ref-16)
17. *Sexual Harassment Guidance*, *supra* note 7, at 13-14. [↑](#footnote-ref-17)
18. *Id*. at 10. [↑](#footnote-ref-18)
19. *Id*. at 10-11. [↑](#footnote-ref-19)
20. *See Proposed Rules*, *supra* note 11, at 61496 (§ 106.30). [↑](#footnote-ref-20)
21. *See id.* [↑](#footnote-ref-21)
22. *See id.* at 61,468, 61,497 (§ 106.44 (a) & preamble). [↑](#footnote-ref-22)
23. *Id*. [↑](#footnote-ref-23)
24. *Id*. at 61,468 (preamble). [↑](#footnote-ref-24)
25. *Sexual Harassment Guidance*, *supra* note 7, at 22. [↑](#footnote-ref-25)
26. *See, e.g.,* *2017 Q&A*, *supra* note 8, at 1 n.3 ( (“Schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities”); *2014 Q&A*, *supra* note 8, at 29 (“a school must process all complaints of sexual violence, regardless of where the conduct occurred”); *Sexual Violence DCL*, *supra* note 8, at 4 (“Schools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school’s education program or activity”). [↑](#footnote-ref-26)
27. *Kinsman v. Fla. State Univ. Bd. of Trustees*, No. 4:15CV235-MW/CAS, 2015 WL 11110848, at \*4 (N.D. Fla. Aug. 12, 2015) (quoting Kelly v. Yale Univ., No. CIV.A. 3:01-CV 1591, 2003 WL 1563424, at \*4 (D. Conn. Mar.26, 2003) (internal quotations omitted); *see also Kollaritsch v. Michigan State Univ. Bd. of Trs.*, 298 F. Supp. 3d 1089, 1102 (W.D. Mich. 2017) (finding deliberate indifference in part because the university “did not put in place any accommodations to prevent [the plaintiff] from encountering her harasser” and failed to “provide any interim safety measures after [the plaintiff] reported the violations of the no-contact order”); *Doe v. Derby Bd. of Educ.*, 451 F. Supp. 2d 438, 445 (D. Conn. 2006) (constant potential for interaction with assailant deprived Doe of school’s educational opportunities and benefits and therefore supported an actionable Title IX claim). [↑](#footnote-ref-27)
28. OCR admitted in a leaked draft of the proposed rules that 41% of college sexual assaults occur off campus. *See* Letter from Anne C. Agnew to Paula Stannard et al., *HHS Review: Department of Education Regulation – Noon September 10*, U.S. Dep’t of Health & Human Services, 79 n.21 (Sept. 5, 2018), available at<https://atixa.org/wordpress/wp-content/uploads/2018/09/Draft-OCR-regulations-September-2018.pdf>. [↑](#footnote-ref-28)
29. *Sexual Harassment Guidance*, *supra* note 7, at 13-15. [↑](#footnote-ref-29)
30. *Proposed Rules*, *supra* note 11, at 61,497 (§ 106.44(a)). [↑](#footnote-ref-30)
31. *Id*. at 61,497 (§ 106.44(a) & (b)(4)). [↑](#footnote-ref-31)
32. *Id.* at 61,497 (§ 106.44(b)(1)). [↑](#footnote-ref-32)
33. *Id*. at 61,497 (§ 106.44(b)(3)). [↑](#footnote-ref-33)
34. *See* American Bar Association, *ABA Criminal Justice Section Task Force On College Due Process Rights and Victim Protections: Recommendations for Colleges and Universities in Resolving Allegations of Campus Sexual Misconduct* 9 & n.69 (June 2017) (recognizing certain procedures can put victims through unnecessary trauma and cause a “secondary victimization”), [https://www.americanbar.org/content/dam/aba/publications/‌criminaljustice/2017/ABA-Due-Process-Task-Force-Recommendations-and-Report.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/%E2%80%8Ccriminaljustice/2017/ABA-Due-Process-Task-Force-Recommendations-and-Report.authcheckdam.pdf). [↑](#footnote-ref-34)
35. *Vance v. Spencer Cty. Pub. Sch. Dist.*, 231 F.3d 253, 260 (6th Cir. 2000). [↑](#footnote-ref-35)
36. *See Leader v. Harvard Univ. Bd. of Overseers*, No. CV 16-10254-DJC, 2017 WL 1064160, at \*4 (D. Mass. Mar. 17, 2017) (“[Our] precedent does not appear to suggest that as long as a university acts in some way in response to reported sexual harassment, it has satisfied its burden under the deliberate indifference standard.”); *Brodeur v. Claremont Sch. Dist*., 626 F. Supp. 2d 195, 210 (D.N.H. 2009) (holding that some aspects of a response could be “so lax, so misdirected, or so poorly executed” as to amount to deliberate indifference); *Doe v. Forest Hills Sch. Dist.*, No. 1:13-CV-428, 2015 WL 9906260, at \*11 (W.D. Mich. Mar. 31, 2015) (“a school cannot conduct a sub-par investigation and then claim that it did not know about harassment because its investigation did not turn up proof beyond peradventure to support the charges”). [↑](#footnote-ref-36)
37. *Proposed Rules*, *supra* note 11, at 61,497 (§ 106.45 (b)(4)). [↑](#footnote-ref-37)
38. *2017 Q&A*, *supra* note 8, at 6. [↑](#footnote-ref-38)
39. *Proposed Rules*, *supra* note 11, at 61,498 (§ 106.45 (b)(3)(viii)). [↑](#footnote-ref-39)
40. *Id*. at 61,498 (§ 106.45 (b)(3)(vi) & (vii)). [↑](#footnote-ref-40)
41. *Id*. at 61,498 (§ 106.45 (b)(3)(iii)). [↑](#footnote-ref-41)
42. *2017 Q&A*, *supra* note 8, at 4. [↑](#footnote-ref-42)
43. *Sexual Violence DCL*, *supra* note 8, at 11. [↑](#footnote-ref-43)
44. *Proposed Rules*, *supra* note 11, at 61,498 (§ 106.45(b)(3)(vii)). [↑](#footnote-ref-44)
45. *Id*. [↑](#footnote-ref-45)
46. *Id*. at 61,498 (§ 106.45(b)(3)(vi)). [↑](#footnote-ref-46)
47. *Id*. [↑](#footnote-ref-47)
48. *Id*. [↑](#footnote-ref-48)
49. *Id.* at 61,497 (§ 106.45(b)(1)(iv)). [↑](#footnote-ref-49)
50. *Id*. at 61,499 (§ 106.45(b)(4)(i)). [↑](#footnote-ref-50)
51. *Id*. [↑](#footnote-ref-51)
52. *Id*. [↑](#footnote-ref-52)
53. *Id*. at 61,499 (§ 106.45(b)(6)). [↑](#footnote-ref-53)
54. *Sexual Violence DCL*, *supra* note 8, at 8. [↑](#footnote-ref-54)
55. *Proposed Rules*, *supra* note 11, at 61,496 (§ 106.30). [↑](#footnote-ref-55)
56. *Id*. [↑](#footnote-ref-56)
57. In contrast, pursuant to the 2001 *Sexual Harassment Guidance*, *supra* note 7, at 16,OCR advised schools to design supportive measures to minimize the burden on the harassed student. [↑](#footnote-ref-57)
58. Experts have recognized for decades that *mutual* no-contact orders are harmful to victims, because abusers often manipulate their victims into violating the mutual order. *See* Joan Zorza, *What Is Wrong with Mutual Orders of Protection?* 4 Domestic Violence Rep. 67 (1999). [↑](#footnote-ref-58)
59. *Proposed Rules*, *supra* note 11, at 61,496 (§ 106.44(b)(3)). [↑](#footnote-ref-59)
60. *Id.* at 61,470. OCR doesn’t provide a good rationale for not similarly incentivizing K-12 schools to offer supportive measures to students. [↑](#footnote-ref-60)
61. *2014 Q&A*, *supra* note 8, at 32 (schools *required* to take steps to ensure equal access to education, including interim measures). [↑](#footnote-ref-61)