GEORGE MASON AMERICAN INN OF COURT

LITIGATING TITLE IX CLAIMS

September 25, 2018

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Litigating Title IX Claims
Presented at the George Mason Inn of Court
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I. What is Title IX and How Does it Apply to Students

Title IX of the Education Amendments of 1972 prohibits sex discrimination on campus. It applies to all schools that accept federal funding (i.e. federally backed student loans), not just public schools. It was best known for its impact on athletics. But it has also been applied to sexual harassment and sexual assault on campus. Now if schools fail to properly fight on campus sex based harassment, assaults, or discrimination, then their federal funding is in jeopardy.

The problem that schools are confronting is the balancing act that must be done between holding individuals responsible for assaults and harassment and protecting innocent students and faculty from being wrongfully found "responsible" (i.e. guilty). A finding of responsibility will have a lifelong impact on their educational and employment opportunities. Due process protections are the clearest way to protect the innocent and make sure that the guilty are held accountable, but there is a constant battle over what process is due to accused students.

2011 Dear Colleague Letter – Colleges Become the Sex Police

The 2011 Dear Colleague Letter under Title IX told the more than 7,000 colleges that receive federal money to use the lowest possible standard of proof (preponderance of the evidence) in sexual assault cases. The letter required universities to allow accusers to appeal not guilty findings, a form of double jeopardy. It further told schools to accelerate their adjudications with a 60 day limit. Lastly, it strongly discouraged cross examination of accusers. Proponents of the letter say the letter rearticulated longstanding Title IX requirements such as having a Title IX coordinator, adopting grievance procedures and providing for prompt and equitable relief of complaints which had long since been a violation of women's civil rights.

By way of background, In 2009 and 2010 an extensive investigation by the Center for Public Integrity found that the system by which campus sexual assaults were investigated and adjudicated had been failing for at least a decade, despite action to make campuses safer by Congress (which had passed the Campus Sexual Assault Victims' Bill of Rights in 1992) and federal courts (Title IX has been applied to campus sexual assault cases through decades of court rulings). "Students found 'responsible' for sexual assaults on campus often face little or no punishment from school judicial systems, while their victims' lives are frequently turned upside down." Colleges responded by creating new Title IX offices and drafting individual policies that varied from school to school. Some universities used hearings while others employ a single investigator. In 2014 a question and answer document went into more detail about how colleges should bring their policies and practices into compliance. Further a 2015 letter on the roles and responsibilities of campus title IX coordinators remains in place.

In 2016, current Oklahoma Senator James Lankford, a proponent of campus due process, requested that Education Agency to provide legal basis for the letter which had not been done since its inception. In a single paragraph, then Office for Civil Rights (OCR) head, Catherine Lhamon, maintained the 2011 letter merely "reminded" colleges of a requirement to use the preponderance of the evidence standard which she asserted OCR had previously established in two unpublished letters with individual universities. While a preponderance of the evidence standard was the typical standard for civil rights violations, many critics argue that this was the worst of both worlds: The lowest possible standard coupled with the least protective measures (i.e. no right to counsel, no right to subpoena witnesses, 60 day adjudication process, etc.).

Again in 2016, the Foundation for Individual rights in Education (FIRE), a nonpartisan nonprofit free speech group, put out a recruitment call for plaintiffs to sue DOE over the guidance letter. At least 190 lawsuits against schools had already been filed. Typically, victim's complaints about mishandled Title IX cases have gone to the

Office for Civil rights while complaints from accused men land in civil court. In a ruling involving Brown University last year, a Rhode Island judge noted: "A student is not entitled to a perfect disciplinary process, and it is not the court's role to be an appeals court for Brown's disciplinary decisions." At the time, no circuit courts had weighed in. In September 2017, the Sixth Circuit Court of Appeals did so, finding that the University of Cincinnati violated an accused student's due-process rights by failing to let him put questions to the accuser through the panel.

While the policy has significantly changed, a number of the Title IX officers have stated they would remain committed to sexual assault prevention and response and thus the 2011 school policies and procedures that were implemented under the Obama policy will likely remain in place.

The big takeaway from the 2011 DCL was that it *required* schools to use a preponderance of evidence standard in evaluating Title IX claims. Prior to the 2011 DCL, for example, schools used a clear and convincing standard of proof, which, of course, is typically seen as fairer to respondents in Title IX cases. Here is the conservative line on that and other implications of the 2011 DCL. It also discouraged the use of cross examination. https://www.thefire.org/why-the-office-for-civil-rights-april-dear-colleague-letter-was-2011s-biggest-fire-fight/. The 2016 DCL did not displace the 2011 DCL; the 2011 guidance has been withdrawn by the current administration, pending new Title IX rules that are expected to be made public sometime this month or next. In the interim, schools have the option of selecting either the preponderance or clear and convincing evidentiary standards.

In 2014, the 2011 DCL was supplemented by a guidance document titled *Questions and Answers on Title IX and Sexual Violence.* That document

2016 Dear Colleague Letter

In 2016 the Department of Educations issued another Dear Colleague Letter. This time it summarized school's duties towards transgender

students. Schools who received federal funding were instructed to provide a safe and nondiscriminatory environment for these students and to treat them consistently with their gender identity.

- Sex-segregated facilities
- Participation in activities consistent with gender identity, not their biological sex
- Protect the privacy of these students
- Amend or correct school records based on gender identity

The letter also provided guidance to these schools on how to evaluate whether covered entities were complying with legal obligations. The letter was withdrawn in 2017 by Secretary DeVos but it remains the culture of many colleges and Title IX offices in schools throughout the country.

2017 Interim Guidance

On September 22, 2017, Secretary DeVos rescinded the 2011 DCL and the 2014 *Questions and Answers* document. It was announced that further regulations on the issue would follow and would include a notice and comment period. The goal of the interim guidelines is to "continue to confront these horrific crimes and behaviors head-on," in addition to ensuring that complainants and the accused are provided a process that "must be fair and impartial, giving everyone more confidence in its outcomes." *Department of Education Issues Interim Guidance on Campus Sexual Misconduct,* Sept. 22, 2017.

The interim guidelines allow schools to set their own evidentiary standard, whether it be preponderance of the evidence or clear and convincing evidence. It also allows the schools more flexibility in an appeals, i.e. it is again possible for a school to only allow the accused to appeal. Finally, informal resolutions (i.e. settlements) are again allowed.

A Preview of Coming Attractions: New Proposed Regulations

On August 29, 2018, the *New York Times* reported on a leaked copy of the new proposed regulations. Once those regulations are officially promulgated, a notice and comment period will begin. The Department of Education has said that the *Times* report was premature and speculative.

Highlights from the proposed rules include:

- Allowing schools to choose the evidentiary standard, but requiring that it be uniformly applied to all civil rights allegations;
- Allowing schools the discretion to determine their own appeals process;
- Allows for mediation in Title IX disputes;
- Allows both parties access to evidence obtained during the investigation, even if the investigator does not plan on including it in a report;
- Provides for cross-examination (either directly or indirectly);
- A uniform definition of sexual harassment, specifically: "unwelcome conduct on the basis of sex that is so severe, pervasive and objectively offensive that it denies a person access to the school's education program or activity." The Obama-era policy left the definition to the discretion of schools and was broader in its definition. The new language is based on Supreme Court case law;
- DOE will only hold schools legally responsible for complaints that are formally made and that school officials have actual knowledge of occurring. This is different from the previous Bush-era policy that held schools responsible for allegations that a school knows about or reasonably should have known about;
- A deliberate indifference standard would be used to determine if the school took adequate steps to address allegations;
- Schools must investigate episodes that took place as part of their programs or on their campuses;
- Schools can provide supportive measures to victims that forgo filing a formal complaint;
- All investigations must be objective and impartial. Just as sweeping sexual harassment or assault under the rug can be the

basis for a DOE enforcement action, so would the railroading of a student or staff member accused of such an offense.
- There must be a presumption of innocence.

Department of Education Enforcement Actions

When the Department of Education's Office of Civil Rights (OCR) enforces Title IX on covered entities (i.e. schools that receive federal funding). Anyone who believes that an educational institution that receives federal financial assistance has discriminated against someone based on race, color, national origin, sex, disability or age may file a complaint with OCR.

Complaints must be filed within 180 days of the alleged discrimination. If the complainant, however, files an internal grievance with the school, then the complaint must be filed within 60 days of the competition of the grievance process.

Evaluation of Complaints

OCR evaluates the complaints to determine:

- Whether OCR has jurisdiction over the complaint;
- Whether the complaint was timely;
- Whether the complaint contains information to proceed to investigation;
- Whether more information is needed. In this case it will provide; and complainant 14 days to respond.

In certain circumstances, OCR will dismiss the complaint. The bases for dismissal are:

- OCR does not have legal authority/jurisdicition to investigate the complaint;
- The complaint fails to state a violation of one of the laws OCR enforces;
- The complaint was not filed timely and a waiver will not be granted;

- The complaint is speculative, conclusory, or incoherent, or lacks sufficient detail to infer discrimination and complainant fails to provide information OCR requests within 14 days;
- The allegations resolved by the complaint have been resolved
- Complaint has been investigated by another Federal, state, or local civil rights agency or through a recipient's internal grievance procedures;
- The same or similar allegations based on the operative facts has been filed by the complainant against the same recipient in state or Federal court;
- The complaint is a continuation of a pattern of complaints against multiple recipients that places an unreasonable burden on OCR's resources.

Investigations

If OCR decides to proceed with an investigation, it notifies the complaintant and recipient (i.e. the school). It then follows the following process:

- OCR may review documentary evidence submitted by both parties
- OCR may conduct interviews with the complainant, recipient's personnel and other witnesses
- OCR may conduct site visits
- At conclusion OCR will determine as to each allegation whether
- There is insufficient evidence to support a conclusion that the recipient failed to comply with the law, or
- A preponderance of the evidence supports a conclusion that the recipient failed to comply with the law
- OCR's determination will be explained in a letter of findings sent to complainant and recipient

Facilitated Resolution

OCR staff can facilitate a settlement between the complainant and the school. OCR does not approve or sign the agreement in this case. If the school does not comply then the complainant can file another complaint.

Enforcement

If the OCR determines that a school is noncompliant, then it will contact the recipient and attempt to negotiate a voluntary resolution agreement. If they can come to terms than it will be reduced to writing, it will specify the specific remedial measures, and it will be signed by the parties. OCR will monitor the recipient to ensure that the remedial measures have been implemented.

If the parties cannot negotiate a voluntary resolution, then OCR will issue a Letter of Impending Enforcement Action to the parties. OCR can then initiate an enforcement proceeding to suspend, terminate, or refuse to grant Federal financial assistance to the recipient. It can also refer the case to the DOJ.

II. On Campus Investigations and Adjudications

Every school has their own policies and procedures for investigating Title IX complaints. Attached you can find four case studies from Montana State University, University of Kentucky, James Madison University, University of Cincinnati, University of Connecticut, and Claremont McKenna College. These schools show the breadth of different procedures that are used by schools.

What Process is Due to Students Accused of Title IX Violations?

Title IX proceedings against students at public institutions have different requirements than proceedings at private institutions. Generally, students at public institutions have, at the very least, the right to notice and a hearing of some sort. Private school may not have due process rights, but the proceedings still cannot discriminate against them based on their sex. The result is that there is a hodgepodge of different systems to adjudicate these proceedings.

Types of Investigations and Adjudications

Most schools assign an investigator after a Title IX complaint has been made. Once that investigator interviews witnesses, generally he or she will draft a report. That report might either be forwarded to further adjudication by a hearing officer or a hearing panel or that report might be the final adjudication of facts. This is the difference between the hearing model and the single investigator model.

Hearing Model

Every hearing model is different, but many hearings follow the following processes:

- One or multiple hearing officers
- The investigator is present to present the report of the investigation
- Both the complainant and the respondent can attend and present testimony and other evidence
- The rules of evidence do not apply and much of the evidence is often hearsay
- Parties can have an advisor, often an attorney, with them but the advisor can only speak to the party, he or she cannot address the hearing panel
- Many schools allow some degree of cross-examination. Some schools put heavy restrictions on the questions that can be asked and who asks the questions. Many schools require that the questions be posed to the hearing panel who will re-phrase them and ask the witness or other party. Some require the parties to submit written questions in advance.

Single Investigator Model

There is no hearing. The investigator interviews witnesses and forms a report. That report is final and the findings of fact often cannot be challenged, even on appeal under a heightened standard. Obviously, there are no opportunities from cross-examination or the presentation of evidence in this model.

Appeals

Appeals are nearly universal, but the standard differs from school to school. Under the 2011 DCL, an accused student would be allowed to appeal if he or she was found responsible and a complainant would be allowed to appeal if there was a finding of no responsibility. The Department of Education now allows schools to decide whether both parties are entitled to appeal. Appeals are often very limited in scope and can be limited to procedural irregularities and/or newly discovered evidence. Often the factual findings cannot be overturned, even under an abuse of discretion standard.

Many schools also allow further appeals to a governing board (such as a Board of Regents or Board of Visitors).

III. Litigating Title IX Cases

If a complainant or respondent is unhappy with the results of the school-based adjudication process, then litigation may follow. The complaints are often based on Title IX itself, which has an implied private right of action,[1] a § 1983 claim, alleging violations of due process or the first amendment (in harassment cases), or other tort and contract theories.

Title IX

There are various theories of liability that might be applicable under Title IX. These claims can be brought against public institutions and private institutions that accept any federal funding (which is almost every private university in America). The basis for a Title IX claim include:

- Erroneous outcome
- Selective Enforcement

[1] *See Davis Next Friend LaShonda D. v. Monroe Cty. Bd. Of Educ.,* 526 U.S. 629, 639 (1999).

In any Title IX count, gender discrimination must be a motivating factor in the decision to discipline. *Yusuf v. Vassar College,* 35 F.3d 709, 715 (1994).

Erroneous Outcome

Students suing under a selective enforcement theory must allege sufficient facts to plausibly show:

- That the school reached the wrong outcome.
- That gender bias was a motivating factor in the erroneous finding.

See Yusaf, 35 F.3d at 715; see also Doe v. Miami Univ. of Ohio, 882 F.3d 579 (6th Cir 2018). "Simply put, Doe must plead sufficient facts to create an inference that he was wrongfully accused and that he was wrongfully adjudicated guilty and disciplined, in part because of his gender." *Doe v. Marymount Univ.*, 297 F. Supp. 3d 573, 584 (E.D. Va. 2018).

Selective Enforcement

In a selective enforcement action, a plaintiff must show that the action was initiated because of gender or that the punishment was unduly harsh because of gender. *Yusuf,* 35 F.3d at 715.

Due Process

Due process claims are generally brought under § 1983, and therefore are only applicable against a public institution. There are a great number of issues at play in due process cases and this area of the law is developing rapidly.

Liberty or Property Interest

For procedural due process to apply, the plaintiff must have a protected liberty or property interest. The Supreme Court has held that primary and secondary school students have such an interest. *Paul v.*

Davis, 424 U.S. 693 (1976). It has not addressed whether colleges and universities have similar obligations, however. Circuit courts have held that such an interest applies. *See, e.g., Flaim v. Medical College of Ohio,* 418 F.3d 629, 633 (6th Cir. 2005).

What Process is Due?

The question of what process is due to a student in a specific scenario is fact dependent. The basic framework, however, was defined in *Goss v. Lopez,* 419 U.S. 565 (1975). A student who is disciplined for less than 10 days is entitled to notice and an opportunity to be heard. *Id.* Longer suspensions or expulsions may require more formal proceedings. *Id.*

Due Process Issues

- Was the investigator or adjudicator impartial?
- Was there an opportunity for meaningful cross-examination?
- What sort of notice did the accused student receive for the charges against him or her?
- Was the single investigator system used? Recent cases suggest that this system fails a due process analysis. *Doe v. University of Michigan,* 2:18-cv-11776 (E.D. Mich. 2018); *Doe v. Baum,* Case No. 17-2213 (6th Cir, 2018).

First Amendment

In harassment cases the first amendment might be applicable. Specifically, look to the school's harassment policy to see if it is overbroad or vague. Also, if the investigator was biased against a student's viewpoint or religion, then the adjudication may violate the first amendment. *See Masterpiece Cakeshop v. Colo. Civil Rights Comm'n,* 138 S. Ct. 1719, 1731 (2018).

Contract

In suits against private and public institutions, plaintiffs often bring contract actions, especially when the school failed to follow its

own policies. This tactic was recently rejected by Judge Ellis based on Virginia contract law in the *Marymount* case. "Under Virginia law, a University's student conduct policies are not binding, enforceable contracts; rather, they are behavior guidelines that may be unilaterally revised by [the school] at any time." *Doe v. Marymount Univ.*, 297 F. Supp. 3d 573, 587-88 (E.D. Va. 2018). Likewise, an implied contract is not created by the payment of tuition that would prohibit a college from expelling a student for arbitrary and capricious reasons. *Id.*

Common Law of Associations

Under this theory, a public or private university cannot expel a student for arbitrary or capricious reasons. The *Marymount* decision also rejects this theory, but does discuss a Virginia Supreme Court case that held that corporations cannot expel a shareholder for arbitrary or capricious reasons. *Gottlieb v. Econ.. Stores Inc.,* 199 Va. 848 (1958). The *Marymount* court said that there was nothing in that case, however, that suggests that the Supreme Court of Virginia would be likely to apply that decision in university disciplinary proceedings.

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

Questions and Answers on Title IX and Sexual Violence[1]

Title IX of the Education Amendments of 1972 ("Title IX")[2] is a federal civil rights law that prohibits discrimination on the basis of sex in federally funded education programs and activities. All public and private elementary and secondary schools, school districts, colleges, and universities receiving any federal financial assistance (hereinafter "schools", "recipients", or "recipient institutions") must comply with Title IX.[3]

On April 4, 2011, the Office for Civil Rights (OCR) in the U.S. Department of Education issued a Dear Colleague Letter on student-on-student sexual harassment and sexual violence ("DCL").[4] The DCL explains a school's responsibility to respond promptly and effectively to sexual violence against students in accordance with the requirements of Title IX.[5] Specifically, the DCL:

- Provides guidance on the unique concerns that arise in sexual violence cases, such as a school's independent responsibility under Title IX to investigate (apart from any separate criminal investigation by local police) and address sexual violence.

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[1] The Department has determined that this document is a "significant guidance document" under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), *available at* www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf. The Office for Civil Rights (OCR) issues this and other policy guidance to provide recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations that we enforce. OCR's legal authority is based on those laws and regulations. This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations. If you are interested in commenting on this guidance, please send an e-mail with your comments to OCR@ed.gov, or write to the following address: Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, SW, Washington, D.C. 20202.

[2] 20 U.S.C. § 1681 *et seq*.

[3] Throughout this document the term "schools" refers to recipients of federal financial assistance that operate educational programs or activities. For Title IX purposes, at the elementary and secondary school level, the recipient generally is the school district; and at the postsecondary level, the recipient is the individual institution of higher education. An educational institution that is controlled by a religious organization is exempt from Title IX to the extent that the law's requirements conflict with the organization's religious tenets. 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12(a). For application of this provision to a specific institution, please contact the appropriate OCR regional office.

[4] Available at http://www.ed.gov/ocr/letters/colleague-201104.html.

[5] Although this document and the DCL focus on sexual violence, the legal principles generally also apply to other forms of sexual harassment.

- Provides guidance and examples about key Title IX requirements and how they relate to sexual violence, such as the requirements to publish a policy against sex discrimination, designate a Title IX coordinator, and adopt and publish grievance procedures.

- Discusses proactive efforts schools can take to prevent sexual violence.

- Discusses the interplay between Title IX, the Family Educational Rights and Privacy Act ("FERPA"),[6] and the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act ("Clery Act")[7] as it relates to a complainant's right to know the outcome of his or her complaint, including relevant sanctions imposed on the perpetrator.

- Provides examples of remedies and enforcement strategies that schools and OCR may use to respond to sexual violence.

The DCL supplements OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, issued in 2001 (*2001 Guidance*).[8] The *2001 Guidance* discusses in detail the Title IX requirements related to sexual harassment of students by school employees, other students, or third parties. The DCL and the *2001 Guidance* remain in full force and we recommend reading these Questions and Answers in conjunction with these documents.

In responding to requests for technical assistance, OCR has determined that elementary and secondary schools and postsecondary institutions would benefit from additional guidance concerning their obligations under Title IX to address sexual violence as a form of sexual harassment. The following questions and answers further clarify the legal requirements and guidance articulated in the DCL and the *2001 Guidance* and include examples of proactive efforts schools can take to prevent sexual violence and remedies schools may use to end such conduct, prevent its recurrence, and address its effects. In order to gain a complete understanding of these legal requirements and recommendations, this document should be read in full.

Authorized by

/s/

Catherine E. Lhamon
Assistant Secretary for Civil Rights

April 29, 2014

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[6] 20 U.S.C. §1232g; 34 C.F.R. Part 99.
[7] 20 U.S.C. §1092(f).
[8] Available at http://www.ed.gov/ocr/docs/shguide.html.

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Questions and Answers on Title IX and Sexual Violence

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A. A School's Obligation to Respond to Sexual Violence

A-1. What is sexual violence?

Answer: Sexual violence, as that term is used in this document and prior OCR guidance, refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent (*e.g.*, due to the student's age or use of drugs or alcohol, or because an intellectual or other disability prevents the student from having the capacity to give consent). A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, sexual abuse, and sexual coercion. Sexual violence can be carried out by school employees, other students, or third parties. All such acts of sexual violence are forms of sex discrimination prohibited by Title IX.

A-2. How does Title IX apply to student-on-student sexual violence?

Answer: Under Title IX, federally funded schools must ensure that students of all ages are not denied or limited in their ability to participate in or benefit from the school's educational programs or activities on the basis of sex. A school violates a student's rights under Title IX regarding student-on-student sexual violence when the following conditions are met: (1) the alleged conduct is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's educational program, *i.e.* creates a hostile environment; and (2) the school, upon notice, fails to take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.[9]

A-3. How does OCR determine if a hostile environment has been created?

Answer: As discussed more fully in OCR's *2001 Guidance*, OCR considers a variety of related factors to determine if a hostile environment has been created; and also considers the conduct in question from both a subjective and an objective perspective. Specifically, OCR's standards require that the conduct be evaluated from the perspective of a reasonable person in the alleged victim's position, considering all the circumstances. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the conduct is physical. Indeed, a single or isolated incident of sexual violence may create a hostile environment.

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[9] This is the standard for administrative enforcement of Title IX and in court cases where plaintiffs are seeking injunctive relief. *See 2001 Guidance* at ii-v, 12-13. The standard in private lawsuits for monetary damages is actual knowledge and deliberate indifference. *See Davis v. Monroe Cnty Bd. of Educ.*, 526 U.S. 629, 643 (1999).

A-4. When does OCR consider a school to have notice of student-on-student sexual violence?

Answer: OCR deems a school to have notice of student-on-student sexual violence if a responsible employee knew, or in the exercise of reasonable care should have known, about the sexual violence. See question D-2 regarding who is a responsible employee.

A school can receive notice of sexual violence in many different ways. Some examples of notice include: a student may have filed a grievance with or otherwise informed the school's Title IX coordinator; a student, parent, friend, or other individual may have reported an incident to a teacher, principal, campus law enforcement, staff in the office of student affairs, or other responsible employee; or a teacher or dean may have witnessed the sexual violence.

The school may also receive notice about sexual violence in an indirect manner, from sources such as a member of the local community, social networking sites, or the media. In some situations, if the school knows of incidents of sexual violence, the exercise of reasonable care should trigger an investigation that would lead to the discovery of additional incidents. For example, if school officials receive a credible report that a student has perpetrated several acts of sexual violence against different students, that pattern of conduct should trigger an inquiry as to whether other students have been subjected to sexual violence by that student. In other cases, the pervasiveness of the sexual violence may be widespread, openly practiced, or well-known among students or employees. In those cases, OCR may conclude that the school should have known of the hostile environment. In other words, if the school would have found out about the sexual violence had it made a proper inquiry, knowledge of the sexual violence will be imputed to the school even if the school failed to make an inquiry. A school's failure to take prompt and effective corrective action in such cases (as described in questions G-1 to G-3 and H-1 to H-3) would violate Title IX even if the student did not use the school's grievance procedures or otherwise inform the school of the sexual violence.

A-5. What are a school's basic responsibilities to address student-on-student sexual violence?

Answer: When a school knows or reasonably should know of possible sexual violence, it must take immediate and appropriate steps to investigate or otherwise determine what occurred (subject to the confidentiality provisions discussed in Section E). If an investigation reveals that sexual violence created a hostile environment, the school must then take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its

effects. But a school should not wait to take steps to protect its students until students have already been deprived of educational opportunities.

Title IX requires a school to protect the complainant and ensure his or her safety as necessary, including taking interim steps before the final outcome of any investigation.[10] The school should take these steps promptly once it has notice of a sexual violence allegation and should provide the complainant with periodic updates on the status of the investigation. If the school determines that the sexual violence occurred, the school must continue to take these steps to protect the complainant and ensure his or her safety, as necessary. The school should also ensure that the complainant is aware of any available resources, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance, and the right to report a crime to campus or local law enforcement. For additional information on interim measures, see questions G-1 to G-3.

If a school delays responding to allegations of sexual violence or responds inappropriately, the school's own inaction may subject the student to a hostile environment. If it does, the school will also be required to remedy the effects of the sexual violence that could reasonably have been prevented had the school responded promptly and appropriately. For example, if a school's ignoring of a student's complaints of sexual assault by a fellow student results in the complaining student having to remain in classes with the other student for several weeks and the complaining student's grades suffer because he or she was unable to concentrate in these classes, the school may need to permit the complaining student to retake the classes without an academic or financial penalty (in addition to any other remedies) in order to address the effects of the sexual violence.

A-6. Does Title IX cover employee-on-student sexual violence, such as sexual abuse of children?

Answer: Yes. Although this document and the DCL focus on student-on-student sexual violence, Title IX also protects students from other forms of sexual harassment (including sexual violence and sexual abuse), such as sexual harassment carried out by school employees. Sexual harassment by school employees can include unwelcome sexual advances; requests for sexual favors; and other verbal, nonverbal, or physical conduct of a sexual nature, including but not limited to sexual activity. Title IX's prohibition against

[10] Throughout this document, unless otherwise noted, the term "complainant" refers to the student who allegedly experienced the sexual violence.

sexual harassment generally does not extend to legitimate nonsexual touching or other nonsexual conduct. But in some circumstances, nonsexual conduct may take on sexual connotations and rise to the level of sexual harassment. For example, a teacher repeatedly hugging and putting his or her arms around students under inappropriate circumstances could create a hostile environment. Early signs of inappropriate behavior with a child can be the key to identifying and preventing sexual abuse by school personnel.

A school's Title IX obligations regarding sexual harassment by employees can, in some instances, be greater than those described in this document and the DCL. Recipients should refer to OCR's *2001 Guidance* for further information about Title IX obligations regarding harassment of students by school employees. In addition, many state and local laws have mandatory reporting requirements for schools working with minors. Recipients should be careful to satisfy their state and local legal obligations in addition to their Title IX obligations, including training to ensure that school employees are aware of their obligations under such state and local laws and the consequences for failing to satisfy those obligations.

With respect to sexual activity in particular, OCR will always view as unwelcome and nonconsensual sexual activity between an adult school employee and an elementary school student or any student below the legal age of consent in his or her state. In cases involving a student who meets the legal age of consent in his or her state, there will still be a strong presumption that sexual activity between an adult school employee and a student is unwelcome and nonconsensual. When a school is on notice that a school employee has sexually harassed a student, it is responsible for taking prompt and effective steps reasonably calculated to end the sexual harassment, eliminate the hostile environment, prevent its recurrence, and remedy its effects. Indeed, even if a school was not on notice, the school is nonetheless responsible for remedying any effects of the sexual harassment on the student, as well as for ending the sexual harassment and preventing its recurrence, when the employee engaged in the sexual activity in the context of the employee's provision of aid, benefits, or services to students (*e.g.*, teaching, counseling, supervising, advising, or transporting students).

A school should take steps to protect its students from sexual abuse by its employees. It is therefore imperative for a school to develop policies prohibiting inappropriate conduct by school personnel and procedures for identifying and responding to such conduct. For example, this could include implementing codes of conduct, which might address what is commonly known as grooming – a desensitization strategy common in adult educator sexual misconduct. Such policies and procedures can ensure that students, parents, and

school personnel have clear guidelines on what are appropriate and inappropriate interactions between adults and students in a school setting or in school-sponsored activities. Additionally, a school should provide training for administrators, teachers, staff, parents, and age-appropriate classroom information for students to ensure that everyone understands what types of conduct are prohibited and knows how to respond when problems arise.[11]

B. Students Protected by Title IX

B-1. Does Title IX protect all students from sexual violence?

Answer: Yes. Title IX protects all students at recipient institutions from sex discrimination, including sexual violence. Any student can experience sexual violence: from elementary to professional school students; male and female students; straight, gay, lesbian, bisexual and transgender students; part-time and full-time students; students with and without disabilities; and students of different races and national origins.

B-2. How should a school handle sexual violence complaints in which the complainant and the alleged perpetrator are members of the same sex?

Answer: A school's obligation to respond appropriately to sexual violence complaints is the same irrespective of the sex or sexes of the parties involved. Title IX protects all students from sexual violence, regardless of the sex of the alleged perpetrator or complainant, including when they are members of the same sex. A school must investigate and resolve allegations of sexual violence involving parties of the same sex using the same procedures and standards that it uses in all complaints involving sexual violence.

Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and OCR accepts such complaints for investigation. Similarly, the actual or perceived sexual orientation or gender identity of the parties does not change a school's obligations. Indeed, lesbian, gay, bisexual, and transgender (LGBT) youth report high rates of sexual harassment and sexual violence. A school should investigate and resolve allegations of sexual violence regarding LGBT students using the same procedures and standards that it

[11] For additional informational on training please see the Department of Education's Resource and Emergency Management for Schools Technical Assistance Center – Adult Sexual Misconduct in Schools: Prevention and Management Training, available at http://rems.ed.gov/Docs/ASM_Marketing_Flyer.pdf.

uses in all complaints involving sexual violence. The fact that incidents of sexual violence may be accompanied by anti-gay comments or be partly based on a student's actual or perceived sexual orientation does not relieve a school of its obligation under Title IX to investigate and remedy those instances of sexual violence.

If a school's policies related to sexual violence include examples of particular types of conduct that violate the school's prohibition on sexual violence, the school should consider including examples of same-sex conduct. In addition, a school should ensure that staff are capable of providing culturally competent counseling to all complainants. Thus, a school should ensure that its counselors and other staff who are responsible for receiving and responding to complaints of sexual violence, including investigators and hearing board members, receive appropriate training about working with LGBT and gender-nonconforming students and same-sex sexual violence. See questions J-1 to J-4 for additional information regarding training.

Gay-straight alliances and similar student-initiated groups can also play an important role in creating safer school environments for LGBT students. On June 14, 2011, the Department issued guidance about the rights of student-initiated groups in public secondary schools under the Equal Access Act. That guidance is available at http://www2.ed.gov/policy/elsec/guid/secletter/110607.html.

B-3. What issues may arise with respect to students with disabilities who experience sexual violence?

Answer: When students with disabilities experience sexual violence, federal civil rights laws other than Title IX may also be relevant to a school's responsibility to investigate and address such incidents.[12] Certain students require additional assistance and support. For example, students with intellectual disabilities may need additional help in learning about sexual violence, including a school's sexual violence education and prevention programs, what constitutes sexual violence and how students can report incidents of sexual

[12] OCR enforces two civil rights laws that prohibit disability discrimination. Section 504 of the Rehabilitation Act of 1973 (Section 504) prohibits disability discrimination by public or private entities that receive federal financial assistance, and Title II of the American with Disabilities Act of 1990 (Title II) prohibits disability discrimination by all state and local public entities, regardless of whether they receive federal funding. *See* 29 U.S.C. § 794 and 34 C.F.R. part 104; 42 U.S.C. § 12131 *et seq.* and 28 C.F.R. part 35. OCR and the U.S. Department of Justice (DOJ) share the responsibility of enforcing Title II in the educational context. The Department of Education's Office of Special Education Programs in the Office of Special Education and Rehabilitative Services administers Part B of the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. 1400 *et seq*. and 34 C.F.R. part 300. IDEA provides financial assistance to states, and through them to local educational agencies, to assist in providing special education and related services to eligible children with disabilities ages three through twenty-one, inclusive.

violence. In addition, students with disabilities who experience sexual violence may require additional services and supports, including psychological services and counseling services. Postsecondary students who need these additional services and supports can seek assistance from the institution's disability resource office.

A student who has not been previously determined to have a disability may, as a result of experiencing sexual violence, develop a mental health-related disability that could cause the student to need special education and related services. At the elementary and secondary education level, this may trigger a school's child find obligations under IDEA and the evaluation and placement requirements under Section 504, which together require a school to evaluate a student suspected of having a disability to determine if he or she has a disability that requires special education or related aids and services.[13]

A school must also ensure that any school reporting forms, information, or training about sexual violence be provided in a manner that is accessible to students and employees with disabilities, for example, by providing electronically-accessible versions of paper forms to individuals with print disabilities, or by providing a sign language interpreter to a deaf individual attending a training. See question J-4 for more detailed information on student training.

B-4. What issues arise with respect to international students and undocumented students who experience sexual violence?

Answer: Title IX protects all students at recipient institutions in the United States regardless of national origin, immigration status, or citizenship status.[14] A school should ensure that all students regardless of their immigration status, including undocumented students and international students, are aware of their rights under Title IX. A school must also ensure that any school reporting forms, information, or training about sexual violence be provided in a manner accessible to students who are English language learners. OCR recommends that a school coordinate with its international office and its undocumented student program coordinator, if applicable, to help communicate information about Title IX in languages that are accessible to these groups of students. OCR also encourages schools to provide foreign national complainants with information about the U nonimmigrant status and the T nonimmigrant status. The U nonimmigrant status is set

[13] *See* 34 C.F.R. §§ 300.8; 300.111; 300.201; 300.300-300.311 (IDEA); 34 C.F.R. §§ 104.3(j) and 104.35 (Section 504). Schools must comply with applicable consent requirements with respect to evaluations. *See* 34 C.F.R. § 300.300.
[14] OCR enforces Title VI of the Civil Rights Act of 1964, which prohibits discrimination by recipients of federal financial assistance on the basis of race, color, or national origin. 42 U.S.C. § 2000d.

aside for victims of certain crimes who have suffered substantial mental or physical abuse as a result of the crime and are helpful to law enforcement agency in the investigation or prosecution of the qualifying criminal activity.[15] The T nonimmigrant status is available for victims of severe forms of human trafficking who generally comply with a law enforcement agency in the investigation or prosecution of the human trafficking and who would suffer extreme hardship involving unusual and severe harm if they were removed from the United States.[16]

A school should be mindful that unique issues may arise when a foreign student on a student visa experiences sexual violence. For example, certain student visas require the student to maintain a full-time course load (generally at least 12 academic credit hours per term), but a student may need to take a reduced course load while recovering from the immediate effects of the sexual violence. OCR recommends that a school take steps to ensure that international students on student visas understand that they must typically seek prior approval of the designated school official (DSO) for student visas to drop below a full-time course load. A school may also want to encourage its employees involved in handling sexual violence complaints and counseling students who have experienced sexual violence to approach the DSO on the student's behalf if the student wishes to drop below a full-time course load. OCR recommends that a school take steps to ensure that its employees who work with international students, including the school's DSO, are trained on the school's sexual violence policies and that employees involved in handling sexual violence complaints and counseling students who have experienced sexual violence are aware of the special issues that international students may encounter. See questions J-1 to J-4 for additional information regarding training.

A school should also be aware that threatening students with deportation or invoking a student's immigration status in an attempt to intimidate or deter a student from filing a Title IX complaint would violate Title IX's protections against retaliation. For more information on retaliation see question K-1.

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[15] For more information on the U nonimmigrant status, see http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/questions-answers-victims-criminal-activity-u-nonimmigrant-status.

[16] For more information on the T nonimmigrant status, see http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status.

B-5. How should a school respond to sexual violence when the alleged perpetrator is not affiliated with the school?

Answer: The appropriate response will differ depending on the level of control the school has over the alleged perpetrator. For example, if an athlete or band member from a visiting school sexually assaults a student at the home school, the home school may not be able to discipline or take other direct action against the visiting athlete or band member. However (and subject to the confidentiality provisions discussed in Section E), it should conduct an inquiry into what occurred and should report the incident to the visiting school and encourage the visiting school to take appropriate action to prevent further sexual violence. The home school should also notify the student of any right to file a complaint with the alleged perpetrator's school or local law enforcement. The home school may also decide not to invite the visiting school back to its campus.

Even though a school's ability to take direct action against a particular perpetrator may be limited, the school must still take steps to provide appropriate remedies for the complainant and, where appropriate, the broader school population. This may include providing support services for the complainant, and issuing new policy statements making it clear that the school does not tolerate sexual violence and will respond to any reports about such incidents. For additional information on interim measures see questions G-1 to G-3.

C. Title IX Procedural Requirements

Overview

C-1. What procedures must a school have in place to prevent sexual violence and resolve complaints?

Answer: The Title IX regulations outline three key procedural requirements. Each school must:

(1) disseminate a notice of nondiscrimination (see question C-2);[17]

(2) designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX (see questions C-3 to C-4);[18] and

[17] 34 C.F.R. § 106.9.
[18] *Id.* § 106.8(a).

(3) adopt and publish grievance procedures providing for the prompt and equitable resolution of student and employee sex discrimination complaints (see questions C-5 to C-6).[19]

These requirements apply to all forms of sex discrimination and are particularly important for preventing and effectively responding to sexual violence.

Procedural requirements under other federal laws may also apply to complaints of sexual violence, including the requirements of the Clery Act.[20] For additional information about the procedural requirements in the Clery Act, please see http://www2.ed.gov/admins/lead/safety/campus.html.

Notice of Nondiscrimination

C-2. What information must be included in a school's notice of nondiscrimination?

Answer: The notice of nondiscrimination must state that the school does not discriminate on the basis of sex in its education programs and activities, and that it is required by Title IX not to discriminate in such a manner. The notice must state that questions regarding Title IX may be referred to the school's Title IX coordinator or to OCR. The school must notify all of its students and employees of the name or title, office address, telephone number, and email address of the school's designated Title IX coordinator.[21]

Title IX Coordinator

C-3. What are a Title IX coordinator's responsibilities?

Answer: A Title IX coordinator's core responsibilities include overseeing the school's response to Title IX reports and complaints and identifying and addressing any patterns or systemic problems revealed by such reports and complaints. This means that the Title IX coordinator must have knowledge of the requirements of Title IX, of the school's own policies and procedures on sex discrimination, and of all complaints raising Title IX issues throughout the school. To accomplish this, subject to the exemption for school counseling employees discussed in question E-3, the Title IX coordinator must be informed of all

[19] *Id.* § 106.8(b).
[20] All postsecondary institutions participating in the Higher Education Act's Title IV student financial assistance programs must comply with the Clery Act.
[21] For more information on notices of nondiscrimination, please see OCR's Notice of Nondiscrimination (August 2010), available at http://www.ed.gov/ocr/docs/nondisc.pdf.

reports and complaints raising Title IX issues, even if the report or complaint was initially filed with another individual or office or if the investigation will be conducted by another individual or office. The school should ensure that the Title IX coordinator is given the training, authority, and visibility necessary to fulfill these responsibilities.

Because the Title IX coordinator must have knowledge of all Title IX reports and complaints at the school, this individual (when properly trained) is generally in the best position to evaluate a student's request for confidentiality in the context of the school's responsibility to provide a safe and nondiscriminatory environment for all students. A school may determine, however, that another individual should perform this role. For additional information on confidentiality requests, see questions E-1 to E-4. If a school relies in part on its disciplinary procedures to meet its Title IX obligations, the Title IX coordinator should review the disciplinary procedures to ensure that the procedures comply with the prompt and equitable requirements of Title IX as discussed in question C-5.

In addition to these core responsibilities, a school may decide to give its Title IX coordinator additional responsibilities, such as: providing training to students, faculty, and staff on Title IX issues; conducting Title IX investigations, including investigating facts relevant to a complaint, and determining appropriate sanctions against the perpetrator and remedies for the complainant; determining appropriate interim measures for a complainant upon learning of a report or complaint of sexual violence; and ensuring that appropriate policies and procedures are in place for working with local law enforcement and coordinating services with local victim advocacy organizations and service providers, including rape crisis centers. A school must ensure that its Title IX coordinator is appropriately trained in all areas over which he or she has responsibility. The Title IX coordinator or designee should also be available to meet with students as needed.

If a school designates more than one Title IX coordinator, the school's notice of nondiscrimination and Title IX grievance procedures should describe each coordinator's responsibilities, and one coordinator should be designated as having ultimate oversight responsibility.

C-4. Are there any employees who should not serve as the Title IX coordinator?

Answer: Title IX does not categorically preclude particular employees from serving as Title IX coordinators. However, Title IX coordinators should not have other job responsibilities that may create a conflict of interest. Because some complaints may raise issues as to whether or how well the school has met its Title IX obligations, designating

the same employee to serve both as the Title IX coordinator and the general counsel (which could include representing the school in legal claims alleging Title IX violations) poses a serious risk of a conflict of interest. Other employees whose job responsibilities may conflict with a Title IX coordinator's responsibilities include Directors of Athletics, Deans of Students, and any employee who serves on the judicial/hearing board or to whom an appeal might be made. Designating a full-time Title IX coordinator will minimize the risk of a conflict of interest.

Grievance Procedures

C-5. Under Title IX, what elements should be included in a school's procedures for responding to complaints of sexual violence?

Answer: Title IX requires that a school adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints of sex discrimination, including sexual violence. In evaluating whether a school's grievance procedures satisfy this requirement, OCR will review all aspects of a school's policies and practices, including the following elements that are critical to achieve compliance with Title IX:

(1) notice to students, parents of elementary and secondary students, and employees of the grievance procedures, including where complaints may be filed;

(2) application of the grievance procedures to complaints filed by students or on their behalf alleging sexual violence carried out by employees, other students, or third parties;

(3) provisions for adequate, reliable, and impartial investigation of complaints, including the opportunity for both the complainant and alleged perpetrator to present witnesses and evidence;

(4) designated and reasonably prompt time frames for the major stages of the complaint process (see question F-8);

(5) written notice to the complainant and alleged perpetrator of the outcome of the complaint (see question H-3); and

(6) assurance that the school will take steps to prevent recurrence of any sexual violence and remedy discriminatory effects on the complainant and others, if appropriate.

To ensure that students and employees have a clear understanding of what constitutes sexual violence, the potential consequences for such conduct, and how the school processes complaints, a school's Title IX grievance procedures should also explicitly include the following in writing, some of which themselves are mandatory obligations under Title IX:

(1) a statement of the school's jurisdiction over Title IX complaints;

(2) adequate definitions of sexual harassment (which includes sexual violence) and an explanation as to when such conduct creates a hostile environment;

(3) reporting policies and protocols, including provisions for confidential reporting;

(4) identification of the employee or employees responsible for evaluating requests for confidentiality;

(5) notice that Title IX prohibits retaliation;

(6) notice of a student's right to file a criminal complaint and a Title IX complaint simultaneously;

(7) notice of available interim measures that may be taken to protect the student in the educational setting;

(8) the evidentiary standard that must be used (preponderance of the evidence) (*i.e.*, more likely than not that sexual violence occurred) in resolving a complaint;

(9) notice of potential remedies for students;

(10) notice of potential sanctions against perpetrators; and

(11) sources of counseling, advocacy, and support.

For more information on interim measures, see questions G-1 to G-3.

The rights established under Title IX must be interpreted consistently with any federally guaranteed due process rights. Procedures that ensure the Title IX rights of the complainant, while at the same time according any federally guaranteed due process to both parties involved, will lead to sound and supportable decisions. Of course, a school should ensure that steps to accord any due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant.

A school's procedures and practices will vary in detail, specificity, and components, reflecting differences in the age of its students, school size and administrative structure, state or local legal requirements (*e.g.*, mandatory reporting requirements for schools working with minors), and what it has learned from past experiences.

C-6. Is a school required to use separate grievance procedures for sexual violence complaints?

Answer: No. Under Title IX, a school may use student disciplinary procedures, general Title IX grievance procedures, sexual harassment procedures, or separate procedures to resolve sexual violence complaints. However, any procedures used for sexual violence complaints, including disciplinary procedures, must meet the Title IX requirement of affording a complainant a prompt and equitable resolution (as discussed in question C-5), including applying the preponderance of the evidence standard of review. As discussed in question C-3, the Title IX coordinator should review any process used to resolve complaints of sexual violence to ensure it complies with requirements for prompt and equitable resolution of these complaints. When using disciplinary procedures, which are often focused on the alleged perpetrator and can take considerable time, a school should be mindful of its obligation to provide interim measures to protect the complainant in the educational setting. For more information on timeframes and interim measures, see questions F-8 and G-1 to G-3.

D. Responsible Employees and Reporting[22]

D-1. Which school employees are obligated to report incidents of possible sexual violence to school officials?

Answer: Under Title IX, whether an individual is obligated to report incidents of alleged sexual violence generally depends on whether the individual is a responsible employee of the school. A responsible employee must report incidents of sexual violence to the Title IX coordinator or other appropriate school designee, subject to the exemption for school counseling employees discussed in question E-3. This is because, as discussed in question A-4, a school is obligated to address sexual violence about which a responsible employee knew or should have known. As explained in question C-3, the Title IX coordinator must be informed of all reports and complaints raising Title IX issues, even if the report or

[22] This document addresses only Title IX's reporting requirements. It does not address requirements under the Clery Act or other federal, state, or local laws, or an individual school's code of conduct.

complaint was initially filed with another individual or office, subject to the exemption for school counseling employees discussed in question E-3.

D-2. Who is a "responsible employee"?

Answer: According to OCR's *2001 Guidance*, a responsible employee includes any employee: who has the authority to take action to redress sexual violence; who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX coordinator or other appropriate school designee; or whom a student could reasonably believe has this authority or duty.[23]

A school must make clear to all of its employees and students which staff members are responsible employees so that students can make informed decisions about whether to disclose information to those employees. A school must also inform all employees of their own reporting responsibilities and the importance of informing complainants of: the reporting obligations of responsible employees; complainants' option to request confidentiality and available confidential advocacy, counseling, or other support services; and complainants' right to file a Title IX complaint with the school and to report a crime to campus or local law enforcement.

Whether an employee is a responsible employee will vary depending on factors such as the age and education level of the student, the type of position held by the employee, and consideration of both formal and informal school practices and procedures. For example, while it may be reasonable for an elementary school student to believe that a custodial staff member or cafeteria worker has the authority or responsibility to address student misconduct, it is less reasonable for a college student to believe that a custodial staff member or dining hall employee has this same authority.

As noted in response to question A-4, when a responsible employee knows or reasonably should know of possible sexual violence, OCR deems a school to have notice of the sexual violence. The school must take immediate and appropriate steps to investigate or otherwise determine what occurred (subject to the confidentiality provisions discussed in Section E), and, if the school determines that sexual violence created a hostile environment, the school must then take appropriate steps to address the situation. The

[23] The Supreme Court held that a school will only be liable for money damages in a private lawsuit where there is actual notice to a school official with the authority to address the alleged discrimination and take corrective action. *Gebser v. Lago Vista Ind. Sch. Dist*., 524 U.S. 274, 290 (1998), and *Davis*, 524 U.S. at 642. The concept of a "responsible employee" under OCR's guidance for administrative enforcement of Title IX is broader.

school has this obligation regardless of whether the student, student's parent, or a third party files a formal complaint. For additional information on a school's responsibilities to address student-on-student sexual violence, see question A-5. For additional information on training for school employees, see questions J-1 to J-3.

D-3. What information is a responsible employee obligated to report about an incident of possible student-on-student sexual violence?

Answer: Subject to the exemption for school counseling employees discussed in question E-3, a responsible employee must report to the school's Title IX coordinator, or other appropriate school designee, all relevant details about the alleged sexual violence that the student or another person has shared and that the school will need to determine what occurred and to resolve the situation. This includes the names of the alleged perpetrator (if known), the student who experienced the alleged sexual violence, other students involved in the alleged sexual violence, as well as relevant facts, including the date, time, and location. A school must make clear to its responsible employees to whom they should report an incident of alleged sexual violence.

To ensure compliance with these reporting obligations, it is important for a school to train its responsible employees on Title IX and the school's sexual violence policies and procedures. For more information on appropriate training for school employees, see question J-1 to J-3.

D-4. What should a responsible employee tell a student who discloses an incident of sexual violence?

Answer: Before a student reveals information that he or she may wish to keep confidential, a responsible employee should make every effort to ensure that the student understands: (i) the employee's obligation to report the names of the alleged perpetrator and student involved in the alleged sexual violence, as well as relevant facts regarding the alleged incident (including the date, time, and location), to the Title IX coordinator or other appropriate school officials, (ii) the student's option to request that the school maintain his or her confidentiality, which the school (*e.g.*, Title IX coordinator) will consider, and (iii) the student's ability to share the information confidentially with counseling, advocacy, health, mental health, or sexual-assault-related services (*e.g.*, sexual assault resource centers, campus health centers, pastoral counselors, and campus mental health centers). As discussed in questions E-1 and E-2, if the student requests confidentiality, the Title IX coordinator or other appropriate school designee responsible for evaluating requests for confidentiality should make every effort to respect this request

and should evaluate the request in the context of the school's responsibility to provide a safe and nondiscriminatory environment for all students.

D-5. If a student informs a resident assistant/advisor (RA) that he or she was subjected to sexual violence by a fellow student, is the RA obligated under Title IX to report the incident to school officials?

Answer: As discussed in questions D-1 and D-2, for Title IX purposes, whether an individual is obligated under Title IX to report alleged sexual violence to the school's Title IX coordinator or other appropriate school designee generally depends on whether the individual is a responsible employee.

The duties and responsibilities of RAs vary among schools, and, therefore, a school should consider its own policies and procedures to determine whether its RAs are responsible employees who must report incidents of sexual violence to the Title IX coordinator or other appropriate school designee.[24] When making this determination, a school should consider if its RAs have the general authority to take action to redress misconduct or the duty to report misconduct to appropriate school officials, as well as whether students could reasonably believe that RAs have this authority or duty. A school should also consider whether it has determined and clearly informed students that RAs are generally available for confidential discussions and do not have the authority or responsibility to take action to redress any misconduct or to report any misconduct to the Title IX coordinator or other appropriate school officials. A school should pay particular attention to its RAs' obligations to report other student violations of school policy (*e.g.*, drug and alcohol violations or physical assault). If an RA is required to report other misconduct that violates school policy, then the RA would be considered a responsible employee obligated to report incidents of sexual violence that violate school policy.

If an RA is a responsible employee, the RA should make every effort to ensure that *before* the student reveals information that he or she may wish to keep confidential, the student understands the RA's reporting obligation and the student's option to request that the school maintain confidentiality. It is therefore important that schools widely disseminate policies and provide regular training clearly identifying the places where students can seek confidential support services so that students are aware of this information. The RA

[24] Postsecondary institutions should be aware that, regardless of whether an RA is a responsible employee under Title IX, RAs are considered "campus security authorities" under the Clery Act. A school's responsibilities in regard to crimes reported to campus security authorities are discussed in the Department's regulations on the Clery Act at 34 C.F.R. § 668.46.

should also explain to the student (again, before the student reveals information that he or she may wish to keep confidential) that, although the RA must report the names of the alleged perpetrator (if known), the student who experienced the alleged sexual violence, other students involved in the alleged sexual violence, as well as relevant facts, including the date, time, and location to the Title IX coordinator or other appropriate school designee, the school will protect the student's confidentiality to the greatest extent possible. Prior to providing information about the incident to the Title IX coordinator or other appropriate school designee, the RA should consult with the student about how to protect his or her safety and the details of what will be shared with the Title IX coordinator. The RA should explain to the student that reporting this information to the Title IX coordinator or other appropriate school designee does not necessarily mean that a formal complaint or investigation under the school's Title IX grievance procedure must be initiated if the student requests confidentiality. As discussed in questions E-1 and E-2, if the student requests confidentiality, the Title IX coordinator or other appropriate school designee responsible for evaluating requests for confidentiality should make every effort to respect this request and should evaluate the request in the context of the school's responsibility to provide a safe and nondiscriminatory environment for all students.

Regardless of whether a reporting obligation exists, all RAs should inform students of their right to file a Title IX complaint with the school and report a crime to campus or local law enforcement. If a student discloses sexual violence to an RA who is a responsible employee, the school will be deemed to have notice of the sexual violence even if the student does not file a Title IX complaint. Additionally, all RAs should provide students with information regarding on-campus resources, including victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance. RAs should also be familiar with local rape crisis centers or other off-campus resources and provide this information to students.

E. Confidentiality and a School's Obligation to Respond to Sexual Violence

E-1. How should a school respond to a student's request that his or her name not be disclosed to the alleged perpetrator or that no investigation or disciplinary action be pursued to address the alleged sexual violence?

Answer: Students, or parents of minor students, reporting incidents of sexual violence sometimes ask that the students' names not be disclosed to the alleged perpetrators or that no investigation or disciplinary action be pursued to address the alleged sexual violence. OCR strongly supports a student's interest in confidentiality in cases involving sexual violence. There are situations in which a school must override a student's request

for confidentiality in order to meet its Title IX obligations; however, these instances will be limited and the information should only be shared with individuals who are responsible for handling the school's response to incidents of sexual violence. Given the sensitive nature of reports of sexual violence, a school should ensure that the information is maintained in a secure manner. A school should be aware that disregarding requests for confidentiality can have a chilling effect and discourage other students from reporting sexual violence. In the case of minors, state mandatory reporting laws may require disclosure, but can generally be followed without disclosing information to school personnel who are not responsible for handling the school's response to incidents of sexual violence.[25]

Even if a student does not specifically ask for confidentiality, to the extent possible, a school should only disclose information regarding alleged incidents of sexual violence to individuals who are responsible for handling the school's response. To improve trust in the process for investigating sexual violence complaints, a school should notify students of the information that will be disclosed, to whom it will be disclosed, and why. Regardless of whether a student complainant requests confidentiality, a school must take steps to protect the complainant as necessary, including taking interim measures before the final outcome of an investigation. For additional information on interim measures see questions G-1 to G-3.

For Title IX purposes, if a student requests that his or her name not be revealed to the alleged perpetrator or asks that the school not investigate or seek action against the alleged perpetrator, the school should inform the student that honoring the request may limit its ability to respond fully to the incident, including pursuing disciplinary action against the alleged perpetrator. The school should also explain that Title IX includes protections against retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs. This includes retaliatory actions taken by the school and school officials. When a school knows or reasonably should know of possible retaliation by other students or third parties, including threats, intimidation, coercion, or discrimination (including harassment), it must take immediate

[25] The school should be aware of the alleged student perpetrator's right under the Family Educational Rights and Privacy Act ("FERPA") torequest to inspect and review information about the allegations if the information directly relates to the alleged student perpetrator and the information is maintained by the school as an education record. In such a case, the school must either redact the complainant's name and all identifying information before allowing the alleged perpetrator to inspect and review the sections of the complaint that relate to him or her, or must inform the alleged perpetrator of the specific information in the complaint that are about the alleged perpetrator. *See* 34 C.F.R. § 99.12(a) The school should also make complainants aware of this right and explain how it might affect the school's ability to maintain complete confidentiality.

and appropriate steps to investigate or otherwise determine what occurred. Title IX requires the school to protect the complainant and ensure his or her safety as necessary. See question K-1 regarding retaliation.

If the student still requests that his or her name not be disclosed to the alleged perpetrator or that the school not investigate or seek action against the alleged perpetrator, the school will need to determine whether or not it can honor such a request while still providing a safe and nondiscriminatory environment for all students, including the student who reported the sexual violence. As discussed in question C-3, the Title IX coordinator is generally in the best position to evaluate confidentiality requests. Because schools vary widely in size and administrative structure, OCR recognizes that a school may reasonably determine that an employee other than the Title IX coordinator, such as a sexual assault response coordinator, dean, or other school official, is better suited to evaluate such requests. Addressing the needs of a student reporting sexual violence while determining an appropriate institutional response requires expertise and attention, and a school should ensure that it assigns these responsibilities to employees with the capability and training to fulfill them. For example, if a school has a sexual assault response coordinator, that person should be consulted in evaluating requests for confidentiality. The school should identify in its Title IX policies and procedures the employee or employees responsible for making such determinations.

If the school determines that it can respect the student's request not to disclose his or her identity to the alleged perpetrator, it should take all reasonable steps to respond to the complaint consistent with the request. Although a student's request to have his or her name withheld may limit the school's ability to respond fully to an individual allegation of sexual violence, other means may be available to address the sexual violence. There are steps a school can take to limit the effects of the alleged sexual violence and prevent its recurrence without initiating formal action against the alleged perpetrator or revealing the identity of the student complainant. Examples include providing increased monitoring, supervision, or security at locations or activities where the misconduct occurred; providing training and education materials for students and employees; changing and publicizing the school's policies on sexual violence; and conducting climate surveys regarding sexual violence. In instances affecting many students, an alleged perpetrator can be put on notice of allegations of harassing behavior and be counseled appropriately without revealing, even indirectly, the identity of the student complainant. A school must also take immediate action as necessary to protect the student while keeping the identity of the student confidential. These actions may include providing support services to the student and changing living arrangements or course schedules, assignments, or tests.

E-2. What factors should a school consider in weighing a student's request for confidentiality?

Answer: When weighing a student's request for confidentiality that could preclude a meaningful investigation or potential discipline of the alleged perpetrator, a school should consider a range of factors.

These factors include circumstances that suggest there is an increased risk of the alleged perpetrator committing additional acts of sexual violence or other violence (e.g., whether there have been other sexual violence complaints about the same alleged perpetrator, whether the alleged perpetrator has a history of arrests or records from a prior school indicating a history of violence, whether the alleged perpetrator threatened further sexual violence or other violence against the student or others, and whether the sexual violence was committed by multiple perpetrators). These factors also include circumstances that suggest there is an increased risk of future acts of sexual violence under similar circumstances (e.g., whether the student's report reveals a pattern of perpetration (e.g., via illicit use of drugs or alcohol) at a given location or by a particular group). Other factors that should be considered in assessing a student's request for confidentiality include whether the sexual violence was perpetrated with a weapon; the age of the student subjected to the sexual violence; and whether the school possesses other means to obtain relevant evidence (e.g., security cameras or personnel, physical evidence).

A school should take requests for confidentiality seriously, while at the same time considering its responsibility to provide a safe and nondiscriminatory environment for all students, including the student who reported the sexual violence. For example, if the school has credible information that the alleged perpetrator has committed one or more prior rapes, the balance of factors would compel the school to investigate the allegation of sexual violence, and if appropriate, pursue disciplinary action in a manner that may require disclosure of the student's identity to the alleged perpetrator. If the school determines that it must disclose a student's identity to an alleged perpetrator, it should inform the student prior to making this disclosure. In these cases, it is also especially important for schools to take whatever interim measures are necessary to protect the student and ensure the safety of other students. If a school has a sexual assault response coordinator, that person should be consulted in identifying safety risks and interim measures that are necessary to protect the student. In the event the student requests that the school inform the perpetrator that the student asked the school not to investigate or seek discipline, the school should honor this request and inform the alleged perpetrator that the school made the decision to go forward. For additional information on interim measures see questions G-1 to G-3. Any school officials responsible for

discussing safety and confidentiality with students should be trained on the effects of trauma and the appropriate methods to communicate with students subjected to sexual violence. See questions J-1 to J-3.

On the other hand, if, for example, the school has no credible information about prior sexual violence committed by the alleged perpetrator and the alleged sexual violence was not perpetrated with a weapon or accompanied by threats to repeat the sexual violence against the complainant or others or part of a larger pattern at a given location or by a particular group, the balance of factors would likely compel the school to respect the student's request for confidentiality. In this case the school should still take all reasonable steps to respond to the complaint consistent with the student's confidentiality request and determine whether interim measures are appropriate or necessary. Schools should be mindful that traumatic events such as sexual violence can result in delayed decisionmaking by a student who has experienced sexual violence. Hence, a student who initially requests confidentiality might later request that a full investigation be conducted.

E-3. What are the reporting responsibilities of school employees who provide or support the provision of counseling, advocacy, health, mental health, or sexual assault-related services to students who have experienced sexual violence?

Answer: OCR does not require campus mental-health counselors, pastoral counselors, social workers, psychologists, health center employees, or any other person with a professional license requiring confidentiality, or who is supervised by such a person, to report, without the student's consent, incidents of sexual violence to the school in a way that identifies the student. Although these employees may have responsibilities that would otherwise make them responsible employees for Title IX purposes, OCR recognizes the importance of protecting the counselor-client relationship, which often requires confidentiality to ensure that students will seek the help they need.

Professional counselors and pastoral counselors whose official responsibilities include providing mental-health counseling to members of the school community are not required by Title IX to report *any* information regarding an incident of alleged sexual violence to the Title IX coordinator or other appropriate school designee.[26]

[26] The exemption from reporting obligations for pastoral and professional counselors under Title IX is consistent with the Clery Act. For additional information on reporting obligations under the Clery Act, see Office of Postsecondary Education, *Handbook for Campus Safety and Security Reporting* (2011), available at http://www2.ed.gov/admins/lead/safety/handbook.pdf. Similar to the Clery Act, for Title IX purposes, a pastoral counselor is a person who is associated with a religious order or denomination, is recognized by that religious

OCR recognizes that some people who provide assistance to students who experience sexual violence are not professional or pastoral counselors. They include all individuals who work or volunteer in on-campus sexual assault centers, victim advocacy offices, women's centers, or health centers ("non-professional counselors or advocates"), including front desk staff and students. OCR wants students to feel free to seek their assistance and therefore interprets Title IX to give schools the latitude not to require these individuals to report incidents of sexual violence in a way that identifies the student without the student's consent.[27] These non-professional counselors or advocates are valuable sources of support for students, and OCR strongly encourages schools to designate these individuals as confidential sources.

Pastoral and professional counselors and non-professional counselors or advocates should be instructed to inform students of their right to file a Title IX complaint with the school and a separate complaint with campus or local law enforcement. In addition to informing students about campus resources for counseling, medical, and academic support, these persons should also indicate that they are available to assist students in filing such complaints. They should also explain that Title IX includes protections against retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs. This includes retaliatory actions taken by the school and school officials. When a school knows or reasonably should know of possible retaliation by other students or third parties, including threats, intimidation, coercion, or discrimination (including harassment), it must take immediate and appropriate steps to investigate or otherwise determine what occurred. Title IX requires the school to protect the complainant and ensure his or her safety as necessary.

In order to identify patterns or systemic problems related to sexual violence, a school should collect aggregate data about sexual violence incidents from non-professional counselors or advocates in their on-campus sexual assault centers, women's centers, or

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order or denomination as someone who provides confidential counseling, and is functioning within the scope of that recognition as a pastoral counselor. A professional counselor is a person whose official responsibilities include providing mental health counseling to members of the institution's community and who is functioning within the scope of his or her license or certification. This definition applies even to professional counselors who are not employees of the school, but are under contract to provide counseling at the school. This includes individuals who are not yet licensed or certified as a counselor, but are acting in that role under the supervision of an individual who is licensed or certified. An example is a Ph.D. counselor-trainee acting under the supervision of a professional counselor at the school.

[27] Postsecondary institutions should be aware that an individual who is counseling students, but who does not meet the Clery Act definition of a pastoral or professional counselor, is not exempt from being a campus security authority if he or she otherwise has significant responsibility for student and campus activities. See fn. 24.

health centers. Such individuals should report only general information about incidents of sexual violence such as the nature, date, time, and general location of the incident and should take care to avoid reporting personally identifiable information about a student. Non-professional counselors and advocates should consult with students regarding what information needs to be withheld to protect their identity.

E-4. Is a school required to investigate information regarding sexual violence incidents shared by survivors during public awareness events, such as "Take Back the Night"?

Answer: No. OCR wants students to feel free to participate in preventive education programs and access resources for survivors. Therefore, public awareness events such as "Take Back the Night" or other forums at which students disclose experiences with sexual violence are not considered notice to the school for the purpose of triggering an individual investigation unless the survivor initiates a complaint. The school should instead respond to these disclosures by reviewing sexual assault policies, creating campus-wide educational programs, and conducting climate surveys to learn more about the prevalence of sexual violence at the school. Although Title IX does not require the school to investigate particular incidents discussed at such events, the school should ensure that survivors are aware of any available resources, including counseling, health, and mental health services. To ensure that the entire school community understands their Title IX rights related to sexual violence, the school should also provide information at these events on Title IX and how to file a Title IX complaint with the school, as well as options for reporting an incident of sexual violence to campus or local law enforcement.

F. Investigations and Hearings

Overview

F-1. What elements should a school's Title IX investigation include?

Answer: The specific steps in a school's Title IX investigation will vary depending on the nature of the allegation, the age of the student or students involved, the size and administrative structure of the school, state or local legal requirements (including mandatory reporting requirements for schools working with minors), and what it has learned from past experiences.

For the purposes of this document the term "investigation" refers to the process the school uses to resolve sexual violence complaints. This includes the fact-finding investigation and any hearing and decision-making process the school uses to determine: (1) whether or not the conduct occurred; and, (2) if the conduct occurred, what actions

the school will take to end the sexual violence, eliminate the hostile environment, and prevent its recurrence, which may include imposing sanctions on the perpetrator and providing remedies for the complainant and broader student population.

In all cases, a school's Title IX investigation must be adequate, reliable, impartial, and prompt and include the opportunity for both parties to present witnesses and other evidence. The investigation may include a hearing to determine whether the conduct occurred, but Title IX does not necessarily require a hearing.[28] Furthermore, neither Title IX nor the DCL specifies who should conduct the investigation. It could be the Title IX coordinator, provided there are no conflicts of interest, but it does not have to be. All persons involved in conducting a school's Title IX investigations must have training or experience in handling complaints of sexual violence and in the school's grievance procedures. For additional information on training, see question J-3.

When investigating an incident of alleged sexual violence for Title IX purposes, to the extent possible, a school should coordinate with any other ongoing school or criminal investigations of the incident and establish appropriate fact-finding roles for each investigator. A school should also consider whether information can be shared among the investigators so that complainants are not unnecessarily required to give multiple statements about a traumatic event. If the investigation includes forensic evidence, it may be helpful for a school to consult with local or campus law enforcement or a forensic expert to ensure that the evidence is correctly interpreted by school officials. For additional information on working with campus or local law enforcement see question F-3.

If a school uses its student disciplinary procedures to meet its Title IX obligation to resolve complaints of sexual violence promptly and equitably, it should recognize that imposing sanctions against the perpetrator, without additional remedies, likely will not be sufficient to eliminate the hostile environment and prevent recurrence as required by Title IX. If a school typically processes complaints of sexual violence through its disciplinary process and that process, including any investigation and hearing, meets the Title IX requirements discussed above and enables the school to end the sexual violence, eliminate the hostile environment, and prevent its recurrence, then the school may use that process to satisfy its Title IX obligations and does not need to conduct a separate Title IX investigation. As discussed in question C-3, the Title IX coordinator should review the disciplinary process

[28] This answer addresses only Title IX's requirements for investigations. It does not address legal rights or requirements under the U.S. Constitution, the Clery Act, or other federal, state, or local laws.

to ensure that it: (1) complies with the prompt and equitable requirements of Title IX; (2) allows for appropriate interim measures to be taken to protect the complainant during the process; and (3) provides for remedies to the complainant and school community where appropriate. For more information about interim measures, see questions G-1 to G-3, and about remedies, see questions H-1 and H-2.

The investigation may include, but is not limited to, conducting interviews of the complainant, the alleged perpetrator, and any witnesses; reviewing law enforcement investigation documents, if applicable; reviewing student and personnel files; and gathering and examining other relevant documents or evidence. While a school has flexibility in how it structures the investigative process, for Title IX purposes, a school must give the complainant any rights that it gives to the alleged perpetrator. A balanced and fair process that provides the same opportunities to both parties will lead to sound and supportable decisions.[29] Specifically:

- Throughout the investigation, the parties must have an equal opportunity to present relevant witnesses and other evidence.
- The school must use a preponderance-of-the-evidence (*i.e.*, more likely than not) standard in any Title IX proceedings, including any fact-finding and hearings.
- If the school permits one party to have lawyers or other advisors at any stage of the proceedings, it must do so equally for both parties. Any school-imposed restrictions on the ability of lawyers or other advisors to speak or otherwise participate in the proceedings must also apply equally.
- If the school permits one party to submit third-party expert testimony, it must do so equally for both parties.
- If the school provides for an appeal, it must do so equally for both parties.
- Both parties must be notified, in writing, of the outcome of both the complaint and any appeal (see question H-3).

[29] As explained in question C-5, the parties may have certain due process rights under the U.S. Constitution.

Intersection with Criminal Investigations

F-2. What are the key differences between a school's Title IX investigation into allegations of sexual violence and a criminal investigation?

Answer: A criminal investigation is intended to determine whether an individual violated criminal law; and, if at the conclusion of the investigation, the individual is tried and found guilty, the individual may be imprisoned or subject to criminal penalties. The U.S. Constitution affords criminal defendants who face the risk of incarceration numerous protections, including, but not limited to, the right to counsel, the right to a speedy trial, the right to a jury trial, the right against self-incrimination, and the right to confrontation. In addition, government officials responsible for criminal investigations (including police and prosecutors) normally have discretion as to which complaints from the public they will investigate.

By contrast, a Title IX investigation will never result in incarceration of an individual and, therefore, the same procedural protections and legal standards are not required. Further, while a criminal investigation is initiated at the discretion of law enforcement authorities, a Title IX investigation is not discretionary; a school has a duty under Title IX to resolve complaints promptly and equitably and to provide a safe and nondiscriminatory environment for all students, free from sexual harassment and sexual violence. Because the standards for pursuing and completing criminal investigations are different from those used for Title IX investigations, the termination of a criminal investigation without an arrest or conviction does not affect the school's Title IX obligations.

Of course, criminal investigations conducted by local or campus law enforcement may be useful for fact gathering if the criminal investigation occurs within the recommended timeframe for Title IX investigations; but, even if a criminal investigation is ongoing, a school must still conduct its own Title IX investigation.

A school should notify complainants of the right to file a criminal complaint and should not dissuade a complainant from doing so either during or after the school's internal Title IX investigation. Title IX does not require a school to report alleged incidents of sexual violence to law enforcement, but a school may have reporting obligations under state, local, or other federal laws.

F-3. How should a school proceed when campus or local law enforcement agencies are conducting a criminal investigation while the school is conducting a parallel Title IX investigation?

Answer: A school should not wait for the conclusion of a criminal investigation or criminal proceeding to begin its own Title IX investigation. Although a school may need to delay temporarily the fact-finding portion of a Title IX investigation while the police are gathering evidence, it is important for a school to understand that during this brief delay in the Title IX investigation, it must take interim measures to protect the complainant in the educational setting. The school should also continue to update the parties on the status of the investigation and inform the parties when the school resumes its Title IX investigation. For additional information on interim measures see questions G-1 to G-3.

If a school delays the fact-finding portion of a Title IX investigation, the school must promptly resume and complete its fact-finding for the Title IX investigation once it learns that the police department has completed its evidence gathering stage of the criminal investigation. The school should not delay its investigation until the ultimate outcome of the criminal investigation or the filing of any charges. OCR recommends that a school work with its campus police, local law enforcement, and local prosecutor's office to learn when the evidence gathering stage of the criminal investigation is complete. A school may also want to enter into a memorandum of understanding (MOU) or other agreement with these agencies regarding the protocols and procedures for referring allegations of sexual violence, sharing information, and conducting contemporaneous investigations. Any MOU or other agreement must allow the school to meet its Title IX obligation to resolve complaints promptly and equitably, and must comply with the Family Educational Rights and Privacy Act ("FERPA") and other applicable privacy laws.

The DCL states that in one instance a prosecutor's office informed OCR that the police department's evidence gathering stage typically takes three to ten calendar days, although the delay in the school's investigation may be longer in certain instances. OCR understands that this example may not be representative and that the law enforcement agency's process often takes more than ten days. OCR recognizes that the length of time for evidence gathering by criminal investigators will vary depending on the specific circumstances of each case.

Off-Campus Conduct

F-4. Is a school required to process complaints of alleged sexual violence that occurred off campus?

Answer: Yes. Under Title IX, a school must process all complaints of sexual violence, regardless of where the conduct occurred, to determine whether the conduct occurred in the context of an education program or activity or had continuing effects on campus or in an off-campus education program or activity.

A school must determine whether the alleged off-campus sexual violence occurred in the context of an education program or activity of the school; if so, the school must treat the complaint in the same manner that it treats complaints regarding on-campus conduct. In other words, if a school determines that the alleged misconduct took place in the context of an education program or activity of the school, the fact that the alleged misconduct took place off campus does not relieve the school of its obligation to investigate the complaint as it would investigate a complaint of sexual violence that occurred on campus.

Whether the alleged misconduct occurred in this context may not always be apparent from the complaint, so a school may need to gather additional information in order to make such a determination. Off-campus education programs and activities are clearly covered and include, but are not limited to: activities that take place at houses of fraternities or sororities recognized by the school; school-sponsored field trips, including athletic team travel; and events for school clubs that occur off campus (*e.g.*, a debate team trip to another school or to a weekend competition).

Even if the misconduct did not occur in the context of an education program or activity, a school must consider the effects of the off-campus misconduct when evaluating whether there is a hostile environment on campus or in an off-campus education program or activity because students often experience the continuing effects of off-campus sexual violence while at school or in an off-campus education program or activity. The school cannot address the continuing effects of the off-campus sexual violence at school or in an off-campus education program or activity unless it processes the complaint and gathers appropriate additional information in accordance with its established procedures.

Once a school is on notice of off-campus sexual violence against a student, it must assess whether there are any continuing effects on campus or in an off-campus education program or activity that are creating or contributing to a hostile environment and, if so, address that hostile environment in the same manner in which it would address a hostile environment created by on-campus misconduct. The mere presence on campus or in an

off-campus education program or activity of the alleged perpetrator of off-campus sexual violence can have continuing effects that create a hostile environment. A school should also take steps to protect a student who alleges off-campus sexual violence from further harassment by the alleged perpetrator or his or her friends, and a school may have to take steps to protect other students from possible assault by the alleged perpetrator. In other words, the school should protect the school community in the same way it would had the sexual violence occurred on campus. Even if there are no continuing effects of the off-campus sexual violence experienced by the student on campus or in an off-campus education program or activity, the school still should handle these incidents as it would handle other off-campus incidents of misconduct or violence and consistent with any other applicable laws. For example, if a school, under its code of conduct, exercises jurisdiction over physical altercations between students that occur off campus outside of an education program or activity, it should also exercise jurisdiction over incidents of student-on-student sexual violence that occur off campus outside of an education program or activity.

Hearings[30]

F-5. Must a school allow or require the parties to be present during an entire hearing?

Answer: If a school uses a hearing process to determine responsibility for acts of sexual violence, OCR does not require that the school allow a complainant to be present for the entire hearing; it is up to each school to make this determination. But if the school allows one party to be present for the entirety of a hearing, it must do so equally for both parties. At the same time, when requested, a school should make arrangements so that the complainant and the alleged perpetrator do not have to be present in the same room at the same time. These two objectives may be achieved by using closed circuit television or other means. Because a school has a Title IX obligation to investigate possible sexual violence, if a hearing is part of the school's Title IX investigation process, the school must not require a complainant to be present at the hearing as a prerequisite to proceed with the hearing.

[30] As noted in question F-1, the investigation may include a hearing to determine whether the conduct occurred, but Title IX does not necessarily require a hearing. Although Title IX does not dictate the membership of a hearing board, OCR discourages schools from allowing students to serve on hearing boards in cases involving allegations of sexual violence.

F-6. May every witness at the hearing, including the parties, be cross-examined?

Answer: OCR does not require that a school allow cross-examination of witnesses, including the parties, if they testify at the hearing. But if the school allows one party to cross-examine witnesses, it must do so equally for both parties.

OCR strongly discourages a school from allowing the parties to personally question or cross-examine each other during a hearing on alleged sexual violence. Allowing an alleged perpetrator to question a complainant directly may be traumatic or intimidating, and may perpetuate a hostile environment. A school may choose, instead, to allow the parties to submit questions to a trained third party (*e.g.*, the hearing panel) to ask the questions on their behalf. OCR recommends that the third party screen the questions submitted by the parties and only ask those it deems appropriate and relevant to the case.

F-7. May the complainant's sexual history be introduced at hearings?

Answer: Questioning about the complainant's sexual history with anyone other than the alleged perpetrator should not be permitted. Further, a school should recognize that the mere fact of a current or previous consensual dating or sexual relationship between the two parties does not itself imply consent or preclude a finding of sexual violence. The school should also ensure that hearings are conducted in a manner that does not inflict additional trauma on the complainant.

Timeframes

F-8. What stages of the investigation are included in the 60-day timeframe referenced in the DCL as the length for a typical investigation?

Answer: As noted in the DCL, the 60-calendar day timeframe for investigations is based on OCR's experience in typical cases. The 60-calendar day timeframe refers to the entire investigation process, which includes conducting the fact-finding investigation, holding a hearing or engaging in another decision-making process to determine whether the alleged sexual violence occurred and created a hostile environment, and determining what actions the school will take to eliminate the hostile environment and prevent its recurrence, including imposing sanctions against the perpetrator and providing remedies for the complainant and school community, as appropriate. Although this timeframe does not include appeals, a school should be aware that an unduly long appeals process may impact whether the school's response was prompt and equitable as required by Title IX.

OCR does not require a school to complete investigations within 60 days; rather OCR evaluates on a case-by-case basis whether the resolution of sexual violence complaints is prompt and equitable. Whether OCR considers an investigation to be prompt as required by Title IX will vary depending on the complexity of the investigation and the severity and extent of the alleged conduct. OCR recognizes that the investigation process may take longer if there is a parallel criminal investigation or if it occurs partially during school breaks. A school may need to stop an investigation during school breaks or between school years, although a school should make every effort to try to conduct an investigation during these breaks unless so doing would sacrifice witness availability or otherwise compromise the process.

Because timeframes for investigations vary and a school may need to depart from the timeframes designated in its grievance procedures, both parties should be given periodic status updates throughout the process.

G. Interim Measures

G-1. Is a school required to take any interim measures before the completion of its investigation?

Answer: Title IX requires a school to take steps to ensure equal access to its education programs and activities and protect the complainant as necessary, including taking interim measures before the final outcome of an investigation. The school should take these steps promptly once it has notice of a sexual violence allegation and should provide the complainant with periodic updates on the status of the investigation. The school should notify the complainant of his or her options to avoid contact with the alleged perpetrator and allow the complainant to change academic and extracurricular activities or his or her living, transportation, dining, and working situation as appropriate. The school should also ensure that the complainant is aware of his or her Title IX rights and any available resources, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance, and the right to report a crime to campus or local law enforcement. If a school does not offer these services on campus, it should enter into an MOU with a local victim services provider if possible.

Even when a school has determined that it can respect a complainant's request for confidentiality and therefore may not be able to respond fully to an allegation of sexual violence and initiate formal action against an alleged perpetrator, the school must take immediate action to protect the complainant while keeping the identity of the complainant confidential. These actions may include: providing support services to the

complainant; changing living arrangements or course schedules, assignments, or tests; and providing increased monitoring, supervision, or security at locations or activities where the misconduct occurred.

G-2. How should a school determine what interim measures to take?

Answer: The specific interim measures implemented and the process for implementing those measures will vary depending on the facts of each case. A school should consider a number of factors in determining what interim measures to take, including, for example, the specific need expressed by the complainant; the age of the students involved; the severity or pervasiveness of the allegations; any continuing effects on the complainant; whether the complainant and alleged perpetrator share the same residence hall, dining hall, class, transportation, or job location; and whether other judicial measures have been taken to protect the complainant (*e.g.*, civil protection orders).

In general, when taking interim measures, schools should minimize the burden on the complainant. For example, if the complainant and alleged perpetrator share the same class or residence hall, the school should not, as a matter of course, remove the complainant from the class or housing while allowing the alleged perpetrator to remain without carefully considering the facts of the case.

G-3. If a school provides all students with access to counseling on a fee basis, does that suffice for providing counseling as an interim measure?

Answer: No. Interim measures are determined by a school on a case-by-case basis. If a school determines that it needs to offer counseling to the complainant as part of its Title IX obligation to take steps to protect the complainant while the investigation is ongoing, it must not require the complainant to pay for this service.

H. Remedies and Notice of Outcome[31]

H-1. What remedies should a school consider in a case of student-on-student sexual violence?

Answer: Effective remedial action may include disciplinary action against the perpetrator, providing counseling for the perpetrator, remedies for the complainant and others, as well as changes to the school's overall services or policies. All services needed to remedy the hostile environment should be offered to the complainant. These remedies are separate from, and in addition to, any interim measure that may have been provided prior to the conclusion of the school's investigation. In any instance in which the complainant did not take advantage of a specific service (*e.g.*, counseling) when offered as an interim measure, the complainant should still be offered, and is still entitled to, appropriate final remedies that may include services the complainant declined as an interim measure. A refusal at the interim stage does not mean the refused service or set of services should not be offered as a remedy.

If a school uses its student disciplinary procedures to meet its Title IX obligation to resolve complaints of sexual violence promptly and equitably, it should recognize that imposing sanctions against the perpetrator, without more, likely will not be sufficient to satisfy its Title IX obligation to eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects. Additional remedies for the complainant and the school community may be necessary. If the school's student disciplinary procedure does not include a process for determining and implementing these remedies for the complainant and school community, the school will need to use another process for this purpose.

Depending on the specific nature of the problem, remedies for the complainant may include, but are not limited to:

- Providing an effective escort to ensure that the complainant can move safely between classes and activities;

[31] As explained in question A-5, if a school delays responding to allegations of sexual violence or responds inappropriately, the school's own inaction may subject the student to be subjected to a hostile environment. In this case, in addition to the remedies discussed in this section, the school will also be required to remedy the effects of the sexual violence that could reasonably have been prevented had the school responded promptly and appropriately.

- Ensuring the complainant and perpetrator do not share classes or extracurricular activities;

- Moving the perpetrator or complainant (if the complainant requests to be moved) to a different residence hall or, in the case of an elementary or secondary school student, to another school within the district;

- Providing comprehensive, holistic victim services including medical, counseling and academic support services, such as tutoring;

- Arranging for the complainant to have extra time to complete or re-take a class or withdraw from a class without an academic or financial penalty; and

- Reviewing any disciplinary actions taken against the complainant to see if there is a causal connection between the sexual violence and the misconduct that may have resulted in the complainant being disciplined.[32]

Remedies for the broader student population may include, but are not limited to:

- Designating an individual from the school's counseling center who is specifically trained in providing trauma-informed comprehensive services to victims of sexual violence to be on call to assist students whenever needed;

- Training or retraining school employees on the school's responsibilities to address allegations of sexual violence and how to conduct Title IX investigations;

- Developing materials on sexual violence, which should be distributed to all students;

- Conducting bystander intervention and sexual violence prevention programs with students;

- Issuing policy statements or taking other steps that clearly communicate that the school does not tolerate sexual violence and will respond to any incidents and to any student who reports such incidents;

[32] For example, if the complainant was disciplined for skipping a class in which the perpetrator was enrolled, the school should review the incident to determine if the complainant skipped class to avoid contact with the perpetrator.

- Conducting, in conjunction with student leaders, a campus climate check to assess the effectiveness of efforts to ensure that the school is free from sexual violence, and using that information to inform future proactive steps that the school will take;

- Targeted training for a group of students if, for example, the sexual violence created a hostile environment in a residence hall, fraternity or sorority, or on an athletic team; and

- Developing a protocol for working with local law enforcement as discussed in question F-3.

When a school is unable to conduct a full investigation into a particular incident (*i.e.*, when it received a general report of sexual violence without any personally identifying information), it should consider remedies for the broader student population in response.

H-2. If, after an investigation, a school finds the alleged perpetrator responsible and determines that, as part of the remedies for the complainant, it must separate the complainant and perpetrator, how should the school accomplish this if both students share the same major and there are limited course options?

Answer: If there are limited sections of required courses offered at a school and both the complainant and perpetrator are required to take those classes, the school may need to make alternate arrangements in a manner that minimizes the burden on the complainant. For example, the school may allow the complainant to take the regular sections of the courses while arranging for the perpetrator to take the same courses online or through independent study.

H-3. What information must be provided to the complainant in the notice of the outcome?

Answer: Title IX requires both parties to be notified, in writing, about the outcome of both the complaint and any appeal. OCR recommends that a school provide written notice of the outcome to the complainant and the alleged perpetrator concurrently.

For Title IX purposes, a school must inform the complainant as to whether or not it found that the alleged conduct occurred, any individual remedies offered or provided to the complainant or any sanctions imposed on the perpetrator that directly relate to the complainant, and other steps the school has taken to eliminate the hostile environment, if the school finds one to exist, and prevent recurrence. The perpetrator should not be notified of the individual remedies offered or provided to the complainant.

Sanctions that directly relate to the complainant (but that may also relate to eliminating the hostile environment and preventing recurrence) include, but are not limited to, requiring that the perpetrator stay away from the complainant until both parties graduate, prohibiting the perpetrator from attending school for a period of time, or transferring the perpetrator to another residence hall, other classes, or another school. Additional steps the school has taken to eliminate the hostile environment may include counseling and academic support services for the complainant and other affected students. Additional steps the school has taken to prevent recurrence may include sexual violence training for faculty and staff, revisions to the school's policies on sexual violence, and campus climate surveys. Further discussion of appropriate remedies is included in question H-1.

In addition to the Title IX requirements described above, the Clery Act requires, and FERPA permits, postsecondary institutions to inform the complainant of the institution's final determination and any disciplinary sanctions imposed on the perpetrator in sexual violence cases (as opposed to all harassment and misconduct covered by Title IX) not just those sanctions that directly relate to the complainant.[33]

I. Appeals

I-1. What are the requirements for an appeals process?

Answer: While Title IX does not require that a school provide an appeals process, OCR does recommend that the school do so where procedural error or previously unavailable relevant evidence could significantly impact the outcome of a case or where a sanction is substantially disproportionate to the findings. If a school chooses to provide for an appeal of the findings or remedy or both, it must do so equally for both parties. The specific design of the appeals process is up to the school, as long as the entire grievance process, including any appeals, provides prompt and equitable resolutions of sexual violence complaints, and the school takes steps to protect the complainant in the educational setting during the process. Any individual or body handling appeals should be trained in the dynamics of and trauma associated with sexual violence.

If a school chooses to offer an appeals process it has flexibility to determine the type of review it will apply to appeals, but the type of review the school applies must be the same regardless of which party files the appeal.

[33] 20 U.S.C. § 1092(f) and 20 U.S.C. § 1232g(b)(6)(A).

I-2. Must an appeal be available to a complainant who receives a favorable finding but does not believe a sanction that directly relates to him or her was sufficient?

Answer: The appeals process must be equal for both parties. For example, if a school allows a perpetrator to appeal a suspension on the grounds that it is too severe, the school must also allow a complainant to appeal a suspension on the grounds that it was not severe enough. See question H-3 for more information on what must be provided to the complainant in the notice of the outcome.

J. Title IX Training, Education and Prevention[34]

J-1. What type of training on Title IX and sexual violence should a school provide to its employees?

Answer: A school needs to ensure that responsible employees with the authority to address sexual violence know how to respond appropriately to reports of sexual violence, that other responsible employees know that they are obligated to report sexual violence to appropriate school officials, and that all other employees understand how to respond to reports of sexual violence. A school should ensure that professional counselors, pastoral counselors, and non-professional counselors or advocates also understand the extent to which they may keep a report confidential. A school should provide training to all employees likely to witness or receive reports of sexual violence, including teachers, professors, school law enforcement unit employees, school administrators, school counselors, general counsels, athletic coaches, health personnel, and resident advisors. Training for employees should include practical information about how to prevent and identify sexual violence, including same-sex sexual violence; the behaviors that may lead to and result in sexual violence; the attitudes of bystanders that may allow conduct to continue; the potential for revictimization by responders and its effect on students; appropriate methods for responding to a student who may have experienced sexual violence, including the use of nonjudgmental language; the impact of trauma on victims; and, as applicable, the person(s) to whom such misconduct must be reported. The training should also explain responsible employees' reporting obligation, including what should be included in a report and any consequences for the failure to report and the procedure for responding to students' requests for confidentiality, as well as provide the contact

[34] As explained earlier, although this document focuses on sexual violence, the legal principles apply to other forms of sexual harassment. Schools should ensure that any training they provide on Title IX and sexual violence also covers other forms of sexual harassment. Postsecondary institutions should also be aware of training requirements imposed under the Clery Act.

information for the school's Title IX coordinator. A school also should train responsible employees to inform students of: the reporting obligations of responsible employees; students' option to request confidentiality and available confidential advocacy, counseling, or other support services; and their right to file a Title IX complaint with the school and to report a crime to campus or local law enforcement. For additional information on the reporting obligations of responsible employees and others see questions D-1 to D-5.

There is no minimum number of hours required for Title IX and sexual violence training at every school, but this training should be provided on a regular basis. Each school should determine based on its particular circumstances how such training should be conducted, who has the relevant expertise required to conduct the training, and who should receive the training to ensure that the training adequately prepares employees, particularly responsible employees, to fulfill their duties under Title IX. A school should also have methods for verifying that the training was effective.

J-2. How should a school train responsible employees to report incidents of possible sexual harassment or sexual violence?

Answer: Title IX requires a school to take prompt and effective steps reasonably calculated to end sexual harassment and sexual violence that creates a hostile environment (*i.e.*, conduct that is sufficiently serious as to limit or deny a student's ability to participate in or benefit from the school's educational program and activity). But a school should not wait to take steps to protect its students until students have already been deprived of educational opportunities.

OCR therefore recommends that a school train responsible employees to report to the Title IX coordinator or other appropriate school official any incidents of sexual harassment or sexual violence that may violate the school's code of conduct or may create or contribute to the creation of a hostile environment. The school can then take steps to investigate and prevent any harassment or violence from recurring or escalating, as appropriate. For example, the school may separate the complainant and alleged perpetrator or conduct sexual harassment and sexual violence training for the school's students and employees. Responsible employees should understand that they do not need to determine whether the alleged sexual harassment or sexual violence actually occurred or that a hostile environment has been created before reporting an incident to the school's Title IX coordinator. Because the Title IX coordinator should have in-depth knowledge of Title IX and Title IX complaints at the school, he or she is likely to be in a better position than are other employees to evaluate whether an incident of sexual

harassment or sexual violence creates a hostile environment and how the school should respond. There may also be situations in which individual incidents of sexual harassment do not, by themselves, create a hostile environment; however when considered together, those incidents may create a hostile environment.

J-3. What type of training should a school provide to employees who are involved in implementing the school's grievance procedures?

Answer: All persons involved in implementing a school's grievance procedures (*e.g.*, Title IX coordinators, others who receive complaints, investigators, and adjudicators) must have training or experience in handling sexual violence complaints, and in the operation of the school's grievance procedures. The training should include information on working with and interviewing persons subjected to sexual violence; information on particular types of conduct that would constitute sexual violence, including same-sex sexual violence; the proper standard of review for sexual violence complaints (preponderance of the evidence); information on consent and the role drugs or alcohol can play in the ability to consent; the importance of accountability for individuals found to have committed sexual violence; the need for remedial actions for the perpetrator, complainant, and school community; how to determine credibility; how to evaluate evidence and weigh it in an impartial manner; how to conduct investigations; confidentiality; the effects of trauma, including neurobiological change; and cultural awareness training regarding how sexual violence may impact students differently depending on their cultural backgrounds.

In rare circumstances, employees involved in implementing a school's grievance procedures may be able to demonstrate that prior training and experience has provided them with competency in the areas covered in the school's training. For example, the combination of effective prior training and experience investigating complaints of sexual violence, together with training on the school's current grievance procedures may be sufficient preparation for an employee to resolve Title IX complaints consistent with the school's grievance procedures. In-depth knowledge regarding Title IX and sexual violence is particularly helpful. Because laws and school policies and procedures may change, the only way to ensure that all employees involved in implementing the school's grievance procedures have the requisite training or experience is for the school to provide regular training to all individuals involved in implementing the school's Title IX grievance procedures even if such individuals also have prior relevant experience.

J-4. What type of training on sexual violence should a school provide to its students?

Answer: To ensure that students understand their rights under Title IX, a school should provide age-appropriate training to its students regarding Title IX and sexual violence. At the elementary and secondary school level, schools should consider whether sexual violence training should also be offered to parents, particularly training on the school's process for handling complaints of sexual violence. Training may be provided separately or as part of the school's broader training on sex discrimination and sexual harassment. However, sexual violence is a unique topic that should not be assumed to be covered adequately in other educational programming or training provided to students. The school may want to include this training in its orientation programs for new students; training for student athletes and members of student organizations; and back-to-school nights. A school should consider educational methods that are most likely to help students retain information when designing its training, including repeating the training at regular intervals. OCR recommends that, at a minimum, the following topics (as appropriate) be covered in this training:

- Title IX and what constitutes sexual violence, including same-sex sexual violence, under the school's policies;
- the school's definition of consent applicable to sexual conduct, including examples;
- how the school analyzes whether conduct was unwelcome under Title IX;
- how the school analyzes whether unwelcome sexual conduct creates a hostile environment;
- reporting options, including formal reporting and confidential disclosure options and any timeframes set by the school for reporting;
- the school's grievance procedures used to process sexual violence complaints;
- disciplinary code provisions relating to sexual violence and the consequences of violating those provisions;
- effects of trauma, including neurobiological changes;
- the role alcohol and drugs often play in sexual violence incidents, including the deliberate use of alcohol and/or other drugs to perpetrate sexual violence;
- strategies and skills for bystanders to intervene to prevent possible sexual violence;
- how to report sexual violence to campus or local law enforcement and the ability to pursue law enforcement proceedings simultaneously with a Title IX grievance; and
- Title IX's protections against retaliation.

The training should also encourage students to report incidents of sexual violence. The training should explain that students (and their parents or friends) do not need to determine whether incidents of sexual violence or other sexual harassment created a

hostile environment before reporting the incident. A school also should be aware that persons may be deterred from reporting incidents if, for example, violations of school or campus rules regarding alcohol or drugs were involved. As a result, a school should review its disciplinary policy to ensure it does not have a chilling effect on students' reporting of sexual violence offenses or participating as witnesses. OCR recommends that a school inform students that the school's primary concern is student safety, and that use of alcohol or drugs never makes the survivor at fault for sexual violence.

It is also important for a school to educate students about the persons on campus to whom they can confidentially report incidents of sexual violence. A school's sexual violence education and prevention program should clearly identify the offices or individuals with whom students can speak confidentially and the offices or individuals who can provide resources such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance. It should also identify the school's responsible employees and explain that if students report incidents to responsible employees (except as noted in question E-3) these employees are required to report the incident to the Title IX coordinator or other appropriate official. This reporting includes the names of the alleged perpetrator and student involved in the sexual violence, as well as relevant facts including the date, time, and location, although efforts should be made to comply with requests for confidentiality from the complainant. For more detailed information regarding reporting and responsible employees and confidentiality, see questions D-1 to D-5 and E-1 to E-4.

K. Retaliation

K-1. Does Title IX protect against retaliation?

Answer: Yes. The Federal civil rights laws, including Title IX, make it unlawful to retaliate against an individual for the purpose of interfering with any right or privilege secured by these laws. This means that if an individual brings concerns about possible civil rights problems to a school's attention, including publicly opposing sexual violence or filing a sexual violence complaint with the school or any State or Federal agency, it is unlawful for the school to retaliate against that individual for doing so. It is also unlawful to retaliate against an individual because he or she testified, or participated in any manner, in an OCR or school's investigation or proceeding. Therefore, if a student, parent, teacher, coach, or other individual complains formally or informally about sexual violence or participates in an OCR or school's investigation or proceedings related to sexual violence, the school is prohibited from retaliating (including intimidating, threatening, coercing, or in any way

discriminating against the individual) because of the individual's complaint or participation.

A school should take steps to prevent retaliation against a student who filed a complaint either on his or her own behalf or on behalf of another student, or against those who provided information as witnesses.

Schools should be aware that complaints of sexual violence may be followed by retaliation against the complainant or witnesses by the alleged perpetrator or his or her associates. When a school knows or reasonably should know of possible retaliation by other students or third parties, it must take immediate and appropriate steps to investigate or otherwise determine what occurred. Title IX requires the school to protect the complainant and witnesses and ensure their safety as necessary. At a minimum, this includes making sure that the complainant and his or her parents, if the complainant is in elementary or secondary school, and witnesses know how to report retaliation by school officials, other students, or third parties by making follow-up inquiries to see if there have been any new incidents or acts of retaliation, and by responding promptly and appropriately to address continuing or new problems. A school should also tell complainants and witnesses that Title IX prohibits retaliation, and that school officials will not only take steps to prevent retaliation, but will also take strong responsive action if it occurs.

L. First Amendment

L-1. How should a school handle its obligation to respond to sexual harassment and sexual violence while still respecting free-speech rights guaranteed by the Constitution?

Answer: The DCL on sexual violence did not expressly address First Amendment issues because it focuses on unlawful physical sexual violence, which is not speech or expression protected by the First Amendment.

However, OCR's previous guidance on the First Amendment, including the 2001 Guidance, OCR's July 28, 2003, Dear Colleague Letter on the First Amendment,[35] and OCR's October 26, 2010, Dear Colleague Letter on harassment and bullying,[36] remain fully in effect. OCR has made it clear that the laws and regulations it enforces protect students from prohibited discrimination and do not restrict the exercise of any expressive activities or speech protected under the U.S. Constitution. Therefore, when a school works to prevent

[35] Available at http://www.ed.gov/ocr/firstamend.html.
[36] Available at http://www.ed.gov/ocr/letters/colleague-201010.html.

and redress discrimination, it must respect the free-speech rights of students, faculty, and other speakers.

Title IX protects students from sex discrimination; it does not regulate the content of speech. OCR recognizes that the offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a hostile environment under Title IX. Title IX also does not require, prohibit, or abridge the use of particular textbooks or curricular materials.[37]

M. The Clery Act and the Violence Against Women Reauthorization Act of 2013

M-1. How does the Clery Act affect the Title IX obligations of institutions of higher education that participate in the federal student financial aid programs?

Answer: Institutions of higher education that participate in the federal student financial aid programs are subject to the requirements of the Clery Act as well as Title IX. The Clery Act requires institutions of higher education to provide current and prospective students and employees, the public, and the Department with crime statistics and information about campus crime prevention programs and policies. The Clery Act requirements apply to many crimes other than those addressed by Title IX. For those areas in which the Clery Act and Title IX both apply, the institution must comply with both laws. For additional information about the Clery Act and its regulations, please see http://www2.ed.gov/admins/lead/safety/campus.html.

M-2. Were a school's obligations under Title IX and the DCL altered in any way by the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, including Section 304 of that Act, which amends the Clery Act?

Answer: No. The Violence Against Women Reauthorization Act has no effect on a school's obligations under Title IX or the DCL. The Violence Against Women Reauthorization Act amended the Violence Against Women Act and the Clery Act, which are separate statutes. Nothing in Section 304 or any other part of the Violence Against Women Reauthorization Act relieves a school of its obligation to comply with the requirements of Title IX, including those set forth in these Questions and Answers, the 2011 DCL, and the *2001 Guidance*. For additional information about the Department's negotiated rulemaking related to the Violence Against Women Reauthorization Act please see http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa.html.

[37] 34 C.F.R. § 106.42.

N. Further Federal Guidance

N-1. Whom should I contact if I have additional questions about the DCL or OCR's other Title IX guidance?

Answer: Anyone who has questions regarding this guidance, or Title IX should contact the OCR regional office that serves his or her state. Contact information for OCR regional offices can be found on OCR's webpage at https://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm. If you wish to file a complaint of discrimination with OCR, you may use the online complaint form available at http://www.ed.gov/ocr/complaintintro.html or send a letter to the OCR enforcement office responsible for the state in which the school is located. You may also email general questions to OCR at ocr@ed.gov.

N-2. Are there other resources available to assist a school in complying with Title IX and preventing and responding to sexual violence?

Answer: Yes. OCR's policy guidance on Title IX is available on OCR's webpage at http://www.ed.gov/ocr/publications.html#TitleIX. In addition to the April 4, 2011, Dear Colleague Letter, OCR has issued the following resources that further discuss a school's obligation to respond to allegations of sexual harassment and sexual violence:

- Dear Colleague Letter: Harassment and Bullying (October 26, 2010), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf
- *Sexual Harassment: It's Not Academic* (Revised September 2008), http://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.pdf
- *Revised Sexual Harassment Guidance: Harassment of Students by Employees, Other Students, or Third Parties* (January 19, 2001), http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf

In addition to guidance from OCR, a school may also find resources from the Departments of Education and Justice helpful in preventing and responding to sexual violence:

- Department of Education's Letter to Chief State School Officers on Teen Dating Violence Awareness and Prevention (February 28, 2013)
  https://www2.ed.gov/policy/gen/guid/secletter/130228.html

- Department of Education's National Center on Safe Supportive Learning Environments
  http://safesupportivelearning.ed.gov/

- Department of Justice, Office on Violence Against Women
  http://www.ovw.usdoj.gov/

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

September 2017

Q&A on Campus Sexual Misconduct

Under Title IX of the Education Amendments of 1972 and its implementing regulations, an institution that receives federal funds must ensure that no student suffers a deprivation of her or his access to educational opportunities on the basis of sex. The Department of Education intends to engage in rulemaking on the topic of schools' Title IX responsibilities concerning complaints of sexual misconduct, including peer-on-peer sexual harassment and sexual violence. The Department will solicit input from stakeholders and the public during that rulemaking process. In the interim, these questions and answers—along with the *Revised Sexual Harassment Guidance* previously issued by the Office for Civil Rights[1]—provide information about how OCR will assess a school's compliance with Title IX.

SCHOOLS' RESPONSIBILITY TO ADDRESS SEXUAL MISCONDUCT

Question 1:

What is the nature of a school's responsibility to address sexual misconduct?

Answer:

Whether or not a student files a complaint of alleged sexual misconduct or otherwise asks the school to take action, where the school knows or reasonably should know of an incident of sexual misconduct, the school must take steps to understand what occurred and to respond appropriately.[2] In particular, when sexual misconduct is so severe, persistent, or pervasive as to deny or limit a student's ability to participate in or benefit from the school's programs or activities, a hostile environment exists and the school must respond.[3]

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[1] Office for Civil Rights, *Revised Sexual Harassment Guidance* (66 Fed. Reg. 5512, Jan. 19, 2001), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf [hereinafter 2001 Guidance]; *see also* Office for Civil Rights, Dear Colleague Letter on Sexual Harassment (Jan. 25, 2006), *available at* https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html.

[2] 2001 Guidance at (VII).

[3] *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 631 (1999); 34 C.F.R. § 106.31(a); 2001 Guidance at (V)(A)(1). Title IX prohibits discrimination on the basis of sex "under any education program or activity" receiving federal financial assistance, 20 U.S.C. § 1681(a); 34 C.F.R. § 106.1, meaning within the "operations" of a postsecondary institution or school district, 20 U.S.C. § 1687; 34 C.F.R. § 106.2(h). The Supreme Court has explained that the statute "confines the scope of prohibited conduct based on the recipient's degree of control over the harasser and the environment in which the harassment occurs." *Davis*, 526 U.S. at 644. Accordingly, OCR has informed institutions that "[a] university does not have a duty under Title IX to address an incident of alleged harassment where the incident occurs off-campus and does not involve a program or activity of the recipient." Oklahoma State University Determination Letter at 2, OCR Complaint No. 06-03-2054 (June 10, 2004); *see also* University of Wisconsin-Madison Determination Letter, OCR Complaint No. 05-07-2074 (Aug. 6, 2009) ("OCR determined that the alleged assault did not occur in the context of an educational program or activity operated by the University."). Schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities. Under the Clery Act, postsecondary institutions are obliged to collect and report statistics on crimes that occur on campus, on noncampus properties controlled by the institution or an affiliated student organization and used for educational purposes, on public property within or immediately adjacent to campus, and in areas within the patrol jurisdiction of the campus police or the campus security department. 34 C.F.R. § 668.46(a); 34 C.F.R. § 668.46(c).

Each recipient must designate at least one employee to act as a Title IX Coordinator to coordinate its responsibilities in this area.[4] Other employees may be considered "responsible employees" and will help the student to connect to the Title IX Coordinator.[5]

In regulating the conduct of students and faculty to prevent or redress discrimination, schools must formulate, interpret, and apply their rules in a manner that respects the legal rights of students and faculty, including those court precedents interpreting the concept of free speech.[6]

THE CLERY ACT AND TITLE IX

Question 2:

What is the Clery Act and how does it relate to a school's obligations under Title IX?

Answer:

Institutions of higher education that participate in the federal student financial aid programs are subject to the requirements of the Clery Act as well as Title IX.[7] Each year, institutions must disclose campus crime statistics and information about campus security policies as a condition of participating in the federal student aid programs. The Violence Against Women Reauthorization Act of 2013 amended the Clery Act to require institutions to compile statistics for incidents of dating violence, domestic violence, sexual assault, and stalking, and to include certain policies, procedures, and programs pertaining to these incidents in the annual security reports. In October 2014, following a negotiated rulemaking process, the Department issued amended regulations to implement these statutory changes.[8] Accordingly, when addressing allegations of dating violence, domestic violence, sexual assault, or stalking, institutions are subject to the Clery Act regulations as well as Title IX.

INTERIM MEASURES

Question 3:

What are interim measures and is a school required to provide such measures?

Answer:

Interim measures are individualized services offered as appropriate to either or both the reporting and responding parties involved in an alleged incident of sexual misconduct, prior to an investigation or while an investigation is pending.[9] Interim measures include counseling, extensions of time or other course-related adjustments, modifications of work or class schedules, campus escort services, restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of campus, and other similar accommodations.

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[4] 34 C.F.R. § 106.8(a).
[5] 2001 Guidance at (V)(C).
[6] Office for Civil Rights, Dear Colleague Letter on the First Amendment (July 28, 2003), *available at* https://www2.ed.gov/about/offices/list/ocr/firstamend.html; 2001 Guidance at (XI).
[7] Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, Pub. L. No. 101-542, 20 U.S.C. § 1092(f).
[8] *See* 34 C.F.R. § 668.46.
[9] *See* 2001 Guidance at (VII)(A).

It may be appropriate for a school to take interim measures during the investigation of a complaint.[10] In fairly assessing the need for a party to receive interim measures, a school may not rely on fixed rules or operating assumptions that favor one party over another, nor may a school make such measures available only to one party. Interim measures should be individualized and appropriate based on the information gathered by the Title IX Coordinator, making every effort to avoid depriving any student of her or his education. The measures needed by each student may change over time, and the Title IX Coordinator should communicate with each student throughout the investigation to ensure that any interim measures are necessary and effective based on the students' evolving needs.

GRIEVANCE PROCEDURES AND INVESTIGATIONS

Question 4:

What are the school's obligations with regard to complaints of sexual misconduct?

Answer:

A school must adopt and publish grievance procedures that provide for a prompt and equitable resolution of complaints of sex discrimination, including sexual misconduct.[11] OCR has identified a number of elements in evaluating whether a school's grievance procedures are prompt and equitable, including whether the school (i) provides notice of the school's grievance procedures, including how to file a complaint, to students, parents of elementary and secondary school students, and employees; (ii) applies the grievance procedures to complaints filed by students or on their behalf alleging sexual misconduct carried out by employees, other students, or third parties; (iii) ensures an adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; (iv) designates and follows a reasonably prompt time frame for major stages of the complaint process; (v) notifies the parties of the outcome of the complaint; and (vi) provides assurance that the school will take steps to prevent recurrence of sexual misconduct and to remedy its discriminatory effects, as appropriate.[12]

Question 5:

What time frame constitutes a "prompt" investigation?

Answer:

There is no fixed time frame under which a school must complete a Title IX investigation.[13] OCR will evaluate a school's good faith effort to conduct a fair, impartial investigation in a timely manner designed to provide all parties with resolution.

Question 6:

What constitutes an "equitable" investigation?

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[10] 2001 Guidance at (VII)(A). In cases covered by the Clery Act, a school must provide interim measures upon the request of a reporting party if such measures are reasonably available. 34 C.F.R. § 668.46(b)(11)(v).
[11] 34 C.F.R. § 106.8(b); 2001 Guidance at (V)(D); *see also* 34 C.F.R. § 668.46(k)(2)(i) (providing that a proceeding which arises from an allegation of dating violence, domestic violence, sexual assault, or stalking must "[i]nclude a prompt, fair, and impartial process from the initial investigation to the final result").
[12] 2001 Guidance at (IX); *see also* 34 C.F.R. § 668.46(k). Postsecondary institutions are required to report publicly the procedures for institutional disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, and stalking, 34 C.F.R. § 668.46 (k)(1)(i), and to include a process that allows for the extension of timeframes for good cause with written notice to the parties of the delay and the reason for the delay, 34 C.F.R. § 668.46 (k)(3)(i)(A).
[13] 2001 Guidance at (IX); *see also* 34 C.F.R. § 668.46(k)(3)(i)(A).

Answer:

In every investigation conducted under the school's grievance procedures, the burden is on the school—not on the parties—to gather sufficient evidence to reach a fair, impartial determination as to whether sexual misconduct has occurred and, if so, whether a hostile environment has been created that must be redressed. A person free of actual or reasonably perceived conflicts of interest and biases for or against any party must lead the investigation on behalf of the school. Schools should ensure that institutional interests do not interfere with the impartiality of the investigation.

An equitable investigation of a Title IX complaint requires a trained investigator to analyze and document the available evidence to support reliable decisions, objectively evaluate the credibility of parties and witnesses, synthesize all available evidence—including both inculpatory and exculpatory evidence—and take into account the unique and complex circumstances of each case.[14]

Any rights or opportunities that a school makes available to one party during the investigation should be made available to the other party on equal terms.[15] Restricting the ability of either party to discuss the investigation (e.g., through "gag orders") is likely to deprive the parties of the ability to obtain and present evidence or otherwise to defend their interests and therefore is likely inequitable. Training materials or investigative techniques and approaches that apply sex stereotypes or generalizations may violate Title IX and should be avoided so that the investigation proceeds objectively and impartially.[16]

Once it decides to open an investigation that may lead to disciplinary action against the responding party, a school should provide written notice to the responding party of the allegations constituting a potential violation of the school's sexual misconduct policy, including sufficient details and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved, the specific section of the code of conduct allegedly violated, the precise conduct allegedly constituting the potential violation, and the date and location of the alleged incident.[17] Each party should receive written notice in advance of any interview or hearing with sufficient time to prepare for meaningful participation. The investigation should result in a written report summarizing the relevant exculpatory and inculpatory evidence. The reporting and responding parties and appropriate officials must have timely and equal access to any information that will be used during informal and formal disciplinary meetings and hearings.[18]

INFORMAL RESOLUTIONS OF COMPLAINTS

Question 7:

After a Title IX complaint has been opened for investigation, may a school facilitate an informal resolution of the complaint?

Answer:

If all parties voluntarily agree to participate in an informal resolution that does not involve a full investigation and adjudication after receiving a full disclosure of the allegations and their options for formal resolution and if a school determines that the particular Title IX complaint is appropriate for such a process, the school may facilitate an informal resolution, including mediation, to assist the parties in reaching a voluntary resolution.

[14] 2001 Guidance at (V)(A)(1)-(2); *see also* 34 C.F.R. § 668.46(k)(2)(ii).
[15] 2001 Guidance at (X).
[16] 34 C.F.R. § 106.31(a).
[17] 2001 Guidance at (VII)(B).
[18] 34 C.F.R. § 668.46(k)(3)(i)(B)(3).

DECISION-MAKING AS TO RESPONSIBILITY

Question 8:

What procedures should a school follow to adjudicate a finding of responsibility for sexual misconduct?

Answer:

The investigator(s), or separate decision-maker(s), with or without a hearing, must make findings of fact and conclusions as to whether the facts support a finding of responsibility for violation of the school's sexual misconduct policy. If the complaint presented more than a single allegation of misconduct, a decision should be reached separately as to each allegation of misconduct. The findings of fact and conclusions should be reached by applying either a preponderance of the evidence standard or a clear and convincing evidence standard.[19]

The decision-maker(s) must offer each party the same meaningful access to any information that will be used during informal and formal disciplinary meetings and hearings, including the investigation report.[20] The parties should have the opportunity to respond to the report in writing in advance of the decision of responsibility and/or at a live hearing to decide responsibility.

Any process made available to one party in the adjudication procedure should be made equally available to the other party (for example, the right to have an attorney or other advisor present and/or participate in an interview or hearing; the right to cross-examine parties and witnesses or to submit questions to be asked of parties and witnesses).[21] When resolving allegations of dating violence, domestic violence, sexual assault, or stalking, a postsecondary institution must "[p]rovide the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice."[22] In such disciplinary proceedings and any related meetings, the institution may "[n]ot limit the choice of advisor or presence for either the accuser or the accused" but "may establish restrictions regarding the extent to which the advisor may participate in the proceedings."[23]

Schools are cautioned to avoid conflicts of interest and biases in the adjudicatory process and to prevent institutional interests from interfering with the impartiality of the adjudication. Decision-making techniques or approaches that apply sex stereotypes or generalizations may violate Title IX and should be avoided so that the adjudication proceeds objectively and impartially.

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[19] The standard of evidence for evaluating a claim of sexual misconduct should be consistent with the standard the school applies in other student misconduct cases. In a recent decision, a court concluded that a school denied "basic fairness" to a responding party by, among other things, applying a lower standard of evidence only in cases of alleged sexual misconduct. *Doe v. Brandeis Univ*., 177 F. Supp. 3d 561, 607 (D. Mass. 2016) ("[T]he lowering of the standard appears to have been a deliberate choice by the university to make cases of sexual misconduct easier to prove—and thus more difficult to defend, both for guilty and innocent students alike. It retained the higher standard for virtually all other forms of student misconduct. The lower standard may thus be seen, in context, as part of an effort to tilt the playing field against accused students, which is particularly troublesome in light of the elimination of other basic rights of the accused."). When a school applies special procedures in sexual misconduct cases, it suggests a discriminatory purpose and should be avoided. A postsecondary institution's annual security report must describe the standard of evidence that will be used during any institutional disciplinary proceeding arising from an allegation of dating violence, domestic violence, sexual assault, or stalking. 34 C.F.R. § 668.46(k)(1)(ii).

[20] 34 C.F.R. § 668.46(k)(3)(i)(B)(3).

[21] A school has discretion to reserve a right of appeal for the responding party based on its evaluation of due process concerns, as noted in Question 11.

[22] 34 C.F.R. § 668.46(k)(2)(iii).

[23] 34 C.F.R. § 668.46(k)(2)(iv).

DECISION-MAKING AS TO DISCIPLINARY SANCTIONS

Question 9:

What procedures should a school follow to impose a disciplinary sanction against a student found responsible for a sexual misconduct violation?

Answer:

The decision-maker as to any disciplinary sanction imposed after a finding of responsibility may be the same or different from the decision-maker who made the finding of responsibility. Disciplinary sanction decisions must be made for the purpose of deciding how best to enforce the school's code of student conduct while considering the impact of separating a student from her or his education. Any disciplinary decision must be made as a proportionate response to the violation.[24] In its annual security report, a postsecondary institution must list all of the possible sanctions that the institution may impose following the results of any institutional disciplinary proceeding for an allegation of dating violence, domestic violence, sexual assault, or stalking.[25]

NOTICE OF OUTCOME AND APPEALS

Question 10:

What information should be provided to the parties to notify them of the outcome?

Answer:

OCR recommends that a school provide written notice of the outcome of disciplinary proceedings to the reporting and responding parties concurrently. The content of the notice may vary depending on the underlying allegations, the institution, and the age of the students. Under the Clery Act, postsecondary institutions must provide simultaneous written notification to both parties of the results of the disciplinary proceeding along with notification of the institution's procedures to appeal the result if such procedures are available, and any changes to the result when it becomes final.[26] This notification must include any initial, interim, or final decision by the institution; any sanctions imposed by the institution; and the rationale for the result and the sanctions.[27] For proceedings not covered by the Clery Act, such as those arising from allegations of harassment, and for all proceedings in elementary and secondary schools, the school should inform the reporting party whether it found that the alleged conduct occurred, any individual remedies offered to the reporting party or any sanctions imposed on the responding party that directly relate to the reporting party, and other steps the school has taken to eliminate the hostile environment, if the school found one to exist.[28] In an elementary or secondary school, the notice should be provided to the parents of students under the age of 18 and directly to students who are 18 years of age or older.[29]

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[24] 34 C.F.R. § 106.8(b); 2001 Guidance at (VII)(A).
[25] 34 C.F.R. § 668.46(k)(1)(iii).
[26] 34 C.F.R. § 668.46(k)(2)(v). The Clery Act applies to proceedings arising from allegations of dating violence, domestic violence, sexual assault, and stalking.
[27] 34 C.F.R. § 668.46(k)(3)(iv).
[28] A sanction that directly relates to the reporting party would include, for example, an order that the responding party stay away from the reporting party. *See* 2001 Guidance at vii n.3. This limitation allows the notice of outcome to comply with the requirements of the Family Educational Rights and Privacy Act. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.10; 34 C.F.R. § 99.12(a). FERPA provides an exception to its requirements only for a postsecondary institution to communicate the results of a disciplinary proceeding to the reporting party in cases of alleged crimes of violence or specific nonforcible sex offenses. 20 U.S.C. § 1232g(b)(6); 34 C.F.R. § 99.31(a)(13).
[29] 20 U.S.C. § 1232g(d).

Question 11:

How may a school offer the right to appeal the decision on responsibility and/or any disciplinary decision?

Answer:

If a school chooses to allow appeals from its decisions regarding responsibility and/or disciplinary sanctions, the school may choose to allow appeal (i) solely by the responding party; or (ii) by both parties, in which case any appeal procedures must be equally available to both parties.[30]

EXISTING RESOLUTION AGREEMENTS

Question 12:

In light of the rescission of OCR's 2011 Dear Colleague Letter and 2014 Questions & Answers guidance, are existing resolution agreements between OCR and schools still binding?

Answer:

Yes. Schools enter into voluntary resolution agreements with OCR to address the deficiencies and violations identified during an OCR investigation based on Title IX and its implementing regulations. Existing resolution agreements remain binding upon the schools that voluntarily entered into them. Such agreements are fact-specific and do not bind other schools. If a school has questions about an existing resolution agreement, the school may contact the appropriate OCR regional office responsible for the monitoring of its agreement.

Note: The Department has determined that this Q&A is a significant guidance document under the Final Bulletin for Agency Good Guidance Practices of the Office of Management and Budget, 72 Fed. Reg. 3432 (Jan. 25, 2007). This document does not add requirements to applicable law. If you have questions or are interested in commenting on this document, please contact the Department of Education at ocr@ed.gov or 800-421-3481 (TDD: 800-877-8339).

[30] 2001 Guidance at (IX). Under the Clery Act, a postsecondary institution must provide simultaneous notification of the appellate procedure, if one is available, to both parties. 34 C.F.R. § 668.46(k)(2)(v)(B). OCR has previously informed schools that it is permissible to allow an appeal only for the responding party because "he/she is the one who stands to suffer from any penalty imposed and should not be made to be tried twice for the same allegation." Skidmore College Determination Letter at 5, OCR Complaint No. 02-95-2136 (Feb. 12, 1996); *see also* Suffolk University Law School Determination Letter at 11, OCR Complaint No. 01-05-2074 (Sept. 30, 2008) ("[A]ppeal rights are not necessarily required by Title IX, whereas an accused student's appeal rights are a standard component of University disciplinary processes in order to assure that the student is afforded due process before being removed from or otherwise disciplined by the University."); University of Cincinnati Determination Letter at 6, OCR Complaint No. 15-05-2041 (Apr. 13, 2006) ("[T]here is no requirement under Title IX that a recipient provide a victim's right of appeal.").

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

April 4, 2011

Dear Colleague:

Education has long been recognized as the great equalizer in America. The U.S. Department of Education and its Office for Civil Rights (OCR) believe that providing all students with an educational environment free from discrimination is extremely important. The sexual harassment of students, including sexual violence, interferes with students' right to receive an education free from discrimination and, in the case of sexual violence, is a crime.

Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 *et seq.*, and its implementing regulations, 34 C.F.R. Part 106, prohibit discrimination on the basis of sex in education programs or activities operated by recipients of Federal financial assistance. Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX. In order to assist recipients, which include school districts, colleges, and universities (hereinafter "schools" or "recipients") in meeting these obligations, this letter[1] explains that the requirements of Title IX pertaining to sexual harassment also cover sexual violence, and lays out the specific Title IX requirements applicable to sexual violence.[2] Sexual violence, as that term is used in this letter, refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol. An individual also may be unable to give consent due to an intellectual or other disability. A number of different acts fall into the category of sexual violence, including rape,

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[1] The Department has determined that this Dear Colleague Letter is a "significant guidance document" under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), *available at:* http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/012507_good_guidance.pdf. OCR issues this and other policy guidance to provide recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations that we enforce. OCR's legal authority is based on those laws and regulations. This letter does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations. If you are interested in commenting on this guidance, please send an e-mail with your comments to OCR@ed.gov, or write to us at the following address: Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, SW, Washington, DC 20202.

[2] Use of the term "sexual harassment" throughout this document includes sexual violence unless otherwise noted. Sexual harassment also may violate Title IV of the Civil Rights Act of 1964 (42 U.S.C. § 2000c), which prohibits public school districts and colleges from discriminating against students on the basis of sex, among other bases. The U.S. Department of Justice enforces Title IV.

sexual assault, sexual battery, and sexual coercion. All such acts of sexual violence are forms of sexual harassment covered under Title IX.

The statistics on sexual violence are both deeply troubling and a call to action for the nation. A report prepared for the National Institute of Justice found that about 1 in 5 women are victims of completed or attempted sexual assault while in college.[3] The report also found that approximately 6.1 percent of males were victims of completed or attempted sexual assault during college.[4] According to data collected under the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act (Clery Act), 20 U.S.C. § 1092(f), in 2009, college campuses reported nearly 3,300 forcible sex offenses as defined by the Clery Act.[5] This problem is not limited to college. During the 2007-2008 school year, there were 800 reported incidents of rape and attempted rape and 3,800 reported incidents of other sexual batteries at public high schools.[6] Additionally, the likelihood that a woman with intellectual disabilities will be sexually assaulted is estimated to be significantly higher than the general population.[7] The Department is deeply concerned about this problem and is committed to ensuring that all students feel safe in their school, so that they have the opportunity to benefit fully from the school's programs and activities.

This letter begins with a discussion of Title IX's requirements related to student-on-student sexual harassment, including sexual violence, and explains schools' responsibility to take immediate and effective steps to end sexual harassment and sexual violence. These requirements are discussed in detail in OCR's *Revised Sexual Harassment Guidance* issued in 2001 (*2001 Guidance*).[8] This letter supplements the *2001 Guidance* by providing additional guidance and practical examples regarding the Title IX requirements as they relate to sexual violence. This letter concludes by discussing the proactive efforts schools can take to prevent sexual harassment and violence, and by providing examples of remedies that schools and OCR may use to end such conduct, prevent its recurrence, and address its effects. Although some examples contained in this letter are applicable only in the postsecondary context, sexual

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[3] CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT STUDY: FINAL REPORT xiii (Nat'l Criminal Justice Reference Serv., Oct. 2007), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf. This study also found that the majority of campus sexual assaults occur when women are incapacitated, primarily by alcohol. *Id.* at xviii.

[4] *Id.* at 5-5.

[5] U.S. Department of Education, Office of Postsecondary Education, Summary Crime Statistics (data compiled from reports submitted in compliance with the Clery Act), *available at* http://www2.ed.gov/admins/lead/safety/criminal2007-09.pdf. Under the Clery Act, forcible sex offenses are defined as any sexual act directed against another person, forcibly and/or against that person's will, or not forcibly or against the person's will where the victim is incapable of giving consent. Forcible sex offenses include forcible rape, forcible sodomy, sexual assault with an object, and forcible fondling. 34 C.F.R. Part 668, Subpt. D, App. A.

[6] SIMONE ROBERS ET AL., INDICATORS OF SCHOOL CRIME AND SAFETY: 2010 at 104 (U.S. Dep't of Educ. & U.S. Dep't of Justice, Nov. 2010), *available at* http://nces.ed.gov/pubs2011/2011002.pdf.

[7] ERIKA HARRELL & MICHAEL R. RAND, CRIME AGAINST PEOPLE WITH DISABILITIES, 2008 (Bureau of Justice Statistics, U.S. Dep't of Justice, Dec. 2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/capd08.pdf.

[8] The *2001 Guidance* is available on the Department's Web site at http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf. This letter focuses on peer sexual harassment and violence. Schools' obligations and the appropriate response to sexual harassment and violence committed by employees may be different from those described in this letter. Recipients should refer to the *2001 Guidance* for further information about employee harassment of students.

harassment and violence also are concerns for school districts. The Title IX obligations discussed in this letter apply equally to school districts unless otherwise noted.

Title IX Requirements Related to Sexual Harassment and Sexual Violence

Schools' Obligations to Respond to Sexual Harassment and Sexual Violence

Sexual harassment is unwelcome conduct of a sexual nature. It includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. Sexual violence is a form of sexual harassment prohibited by Title IX.[9]

As explained in OCR's *2001 Guidance*, when a student sexually harasses another student, the harassing conduct creates a hostile environment if the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the harassment is physical. Indeed, a single or isolated incident of sexual harassment may create a hostile environment if the incident is sufficiently severe. For instance, a single instance of rape is sufficiently severe to create a hostile environment.[10]

Title IX protects students from sexual harassment in a school's education programs and activities. This means that Title IX protects students in connection with all the academic, educational, extracurricular, athletic, and other programs of the school, whether those programs take place in a school's facilities, on a school bus, at a class or training program

[9] Title IX also prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, even if those acts do not involve conduct of a sexual nature. The Title IX obligations discussed in this letter also apply to gender-based harassment. Gender-based harassment is discussed in more detail in the *2001 Guidance,* and in the 2010 Dear Colleague letter on Harassment and Bullying, which is available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.

[10] *See*, *e.g.*, *Jennings v. Univ. of N.C.*, 444 F.3d 255, 268, 274 n.12 (4th Cir. 2006) (acknowledging that while not an issue in this case, a single incident of sexual assault or rape could be sufficient to raise a jury question about whether a hostile environment exists, and noting that courts look to Title VII cases for guidance in analyzing Title IX sexual harassment claims); *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 259 n.4 (6th Cir. 2000) ("'[w]ithin the context of Title IX, a student's claim of hostile environment can arise from a single incident'" (quoting *Doe v. Sch. Admin. Dist. No. 19*, 66 F. Supp. 2d 57, 62 (D. Me. 1999))); *Soper v. Hoben*, 195 F.3d 845, 855 (6th Cir. 1999) (explaining that rape and sexual abuse "obviously qualif[y] as…severe, pervasive, and objectively offensive sexual harassment"); *see also Berry v. Chi. Transit Auth.*, 618 F.3d 688, 692 (7th Cir. 2010) (in the Title VII context, "a single act can create a hostile environment if it is severe enough, and instances of uninvited physical contact with intimate parts of the body are among the most severe types of sexual harassment"); *Turner v. Saloon, Ltd.*, 595 F.3d 679, 686 (7th Cir. 2010) (noting that "'[o]ne instance of conduct that is sufficiently severe may be enough,'" which is "especially true when the touching is of an intimate body part" (quoting *Jackson v. Cnty. of Racine*, 474 F.3d 493, 499 (7th Cir. 2007))); *McKinnis v. Crescent Guardian, Inc.*, 189 F. App'x 307, 310 (5th Cir. 2006) (holding that "'the deliberate and unwanted touching of [a plaintiff's] intimate body parts can constitute severe sexual harassment'" in Title VII cases (quoting *Harvill v. Westward Commc'ns, L.L.C.*, 433 F.3d 428, 436 (5th Cir. 2005))).

sponsored by the school at another location, or elsewhere. For example, Title IX protects a student who is sexually assaulted by a fellow student during a school-sponsored field trip.[11]

If a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.[12] Schools also are required to publish a notice of nondiscrimination and to adopt and publish grievance procedures. Because of these requirements, which are discussed in greater detail in the following section, schools need to ensure that their employees are trained so that they know to report harassment to appropriate school officials, and so that employees with the authority to address harassment know how to respond properly. Training for employees should include practical information about how to identify and report sexual harassment and violence. OCR recommends that this training be provided to any employees likely to witness or receive reports of sexual harassment and violence, including teachers, school law enforcement unit employees, school administrators, school counselors, general counsels, health personnel, and resident advisors.

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. If a student files a complaint with the school, regardless of where the conduct occurred, the school must process the complaint in accordance with its established procedures. Because students often experience the continuing effects of off-campus sexual harassment in the educational setting, schools should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus. For example, if a student alleges that he or she was sexually assaulted by another student off school grounds, and that upon returning to school he or she was taunted and harassed by other students who are the alleged perpetrator's friends, the school should take the earlier sexual assault into account in determining whether there is a sexually hostile environment. The school also should take steps to protect a student who was assaulted off campus from further sexual harassment or retaliation from the perpetrator and his or her associates.

Regardless of whether a harassed student, his or her parent, or a third party files a complaint under the school's grievance procedures or otherwise requests action on the student's behalf, a school that knows, or reasonably should know, about possible harassment must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation. As discussed later in this letter, the school's Title IX investigation is different from any law enforcement investigation, and a law enforcement investigation does not relieve the school of its independent Title IX obligation to investigate the conduct. The specific steps in a school's

[11] Title IX also protects third parties from sexual harassment or violence in a school's education programs and activities. For example, Title IX protects a high school student participating in a college's recruitment program, a visiting student athlete, and a visitor in a school's on-campus residence hall. Title IX also protects employees of a recipient from sexual harassment. For further information about harassment of employees, see *2001 Guidance* at n.1.

[12] This is the standard for administrative enforcement of Title IX and in court cases where plaintiffs are seeking injunctive relief. *See 2001 Guidance* at ii-v, 12-13. The standard in private lawsuits for monetary damages is actual knowledge and deliberate indifference. *See Davis v. Monroe Cnty. Bd. of Ed.*, 526 U.S. 629, 643, 648 (1999).

investigation will vary depending upon the nature of the allegations, the age of the student or students involved (particularly in elementary and secondary schools), the size and administrative structure of the school, and other factors. Yet as discussed in more detail below, the school's inquiry must in all cases be prompt, thorough, and impartial. In cases involving potential criminal conduct, school personnel must determine, consistent with State and local law, whether appropriate law enforcement or other authorities should be notified.[13]

Schools also should inform and obtain consent from the complainant (or the complainant's parents if the complainant is under 18 and does not attend a postsecondary institution) before beginning an investigation. If the complainant requests confidentiality or asks that the complaint not be pursued, the school should take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue an investigation. If a complainant insists that his or her name or other identifiable information not be disclosed to the alleged perpetrator, the school should inform the complainant that its ability to respond may be limited.[14] The school also should tell the complainant that Title IX prohibits retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs.

As discussed in the *2001 Guidance*, if the complainant continues to ask that his or her name or other identifiable information not be revealed, the school should evaluate that request in the context of its responsibility to provide a safe and nondiscriminatory environment for all students. Thus, the school may weigh the request for confidentiality against the following factors: the seriousness of the alleged harassment; the complainant's age; whether there have been other harassment complaints about the same individual; and the alleged harasser's rights to receive information about the allegations if the information is maintained by the school as an "education record" under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 C.F.R. Part 99.[15] The school should inform the complainant if it cannot ensure confidentiality. Even if the school cannot take disciplinary action against the alleged harasser because the complainant insists on confidentiality, it should pursue other steps to limit the effects of the alleged harassment and prevent its recurrence. Examples of such steps are discussed later in this letter.

Compliance with Title IX, such as publishing a notice of nondiscrimination, designating an employee to coordinate Title IX compliance, and adopting and publishing grievance procedures, can serve as preventive measures against harassment. Combined with education and training programs, these measures can help ensure that all students and employees recognize the

[13] In states with mandatory reporting laws, schools may be required to report certain incidents to local law enforcement or child protection agencies.

[14] Schools should refer to the *2001 Guidance* for additional information on confidentiality and the alleged perpetrator's due process rights.

[15] For example, the alleged harasser may have a right under FERPA to inspect and review portions of the complaint that directly relate to him or her. In that case, the school must redact the complainant's name and other identifying information before allowing the alleged harasser to inspect and review the sections of the complaint that relate to him or her. In some cases, such as those where the school is required to report the incident to local law enforcement or other officials, the school may not be able to maintain the complainant's confidentiality.

nature of sexual harassment and violence, and understand that the school will not tolerate such conduct. Indeed, these measures may bring potentially problematic conduct to the school's attention before it becomes serious enough to create a hostile environment. Training for administrators, teachers, staff, and students also can help ensure that they understand what types of conduct constitute sexual harassment or violence, can identify warning signals that may need attention, and know how to respond. More detailed information and examples of education and other preventive measures are provided later in this letter.

Procedural Requirements Pertaining to Sexual Harassment and Sexual Violence

Recipients of Federal financial assistance must comply with the procedural requirements outlined in the Title IX implementing regulations. Specifically, a recipient must:

(A) Disseminate a notice of nondiscrimination;[16]

(B) Designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX;[17] and

(C) Adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints.[18]

These requirements apply to all forms of sexual harassment, including sexual violence, and are important for preventing and effectively responding to sex discrimination. They are discussed in greater detail below. OCR advises recipients to examine their current policies and procedures on sexual harassment and sexual violence to determine whether those policies comply with the requirements articulated in this letter and the *2001 Guidance.* Recipients should then implement changes as needed.

(A) *Notice of Nondiscrimination*

The Title IX regulations require that each recipient publish a notice of nondiscrimination stating that the recipient does not discriminate on the basis of sex in its education programs and activities, and that Title IX requires it not to discriminate in such a manner.[19] The notice must state that inquiries concerning the application of Title IX may be referred to the recipient's Title IX coordinator or to OCR. It should include the name or title, office address, telephone number, and e-mail address for the recipient's designated Title IX coordinator.

The notice must be widely distributed to all students, parents of elementary and secondary students, employees, applicants for admission and employment, and other relevant persons. OCR recommends that the notice be prominently posted on school Web sites and at various

[16] 34 C.F.R. § 106.9.
[17] *Id.* § 106.8(a).
[18] *Id*. § 106.8(b).
[19] *Id.* § 106.9(a).

locations throughout the school or campus and published in electronic and printed publications of general distribution that provide information to students and employees about the school's services and policies. The notice should be available and easily accessible on an ongoing basis.

Title IX does not require a recipient to adopt a policy specifically prohibiting sexual harassment or sexual violence. As noted in the *2001 Guidance*, however, a recipient's general policy prohibiting sex discrimination will not be considered effective and would violate Title IX if, because of the lack of a specific policy, students are unaware of what kind of conduct constitutes sexual harassment, including sexual violence, or that such conduct is prohibited sex discrimination. OCR therefore recommends that a recipient's nondiscrimination policy state that prohibited sex discrimination covers sexual harassment, including sexual violence, and that the policy include examples of the types of conduct that it covers.

(B) *Title IX Coordinator*

The Title IX regulations require a recipient to notify all students and employees of the name or title and contact information of the person designated to coordinate the recipient's compliance with Title IX.[20] The coordinator's responsibilities include overseeing all Title IX complaints and identifying and addressing any patterns or systemic problems that arise during the review of such complaints. The Title IX coordinator or designee should be available to meet with students as needed. If a recipient designates more than one Title IX coordinator, the notice should describe each coordinator's responsibilities (*e.g.*, who will handle complaints by students, faculty, and other employees). The recipient should designate one coordinator as having ultimate oversight responsibility, and the other coordinators should have titles clearly showing that they are in a deputy or supporting role to the senior coordinator. The Title IX coordinators should not have other job responsibilities that may create a conflict of interest. For example, serving as the Title IX coordinator and a disciplinary hearing board member or general counsel may create a conflict of interest.

Recipients must ensure that employees designated to serve as Title IX coordinators have adequate training on what constitutes sexual harassment, including sexual violence, and that they understand how the recipient's grievance procedures operate. Because sexual violence complaints often are filed with the school's law enforcement unit, all school law enforcement unit employees should receive training on the school's Title IX grievance procedures and any other procedures used for investigating reports of sexual violence. In addition, these employees should receive copies of the school's Title IX policies. Schools should instruct law enforcement unit employees both to notify complainants of their right to file a Title IX sex discrimination complaint with the school in addition to filing a criminal complaint, and to report incidents of sexual violence to the Title IX coordinator if the complainant consents. The school's Title IX coordinator or designee should be available to provide assistance to school law enforcement unit employees regarding how to respond appropriately to reports of sexual violence. The Title IX coordinator also should be given access to school law enforcement unit investigation notes

[20] *Id.* § 106.8(a).

and findings as necessary for the Title IX investigation, so long as it does not compromise the criminal investigation.

(C) *Grievance Procedures*

The Title IX regulations require all recipients to adopt and publish grievance procedures providing for the prompt and equitable resolution of sex discrimination complaints.[21] The grievance procedures must apply to sex discrimination complaints filed by students against school employees, other students, or third parties.

Title IX does not require a recipient to provide separate grievance procedures for sexual harassment and sexual violence complaints. Therefore, a recipient may use student disciplinary procedures or other separate procedures to resolve such complaints. Any procedures used to adjudicate complaints of sexual harassment or sexual violence, including disciplinary procedures, however, must meet the Title IX requirement of affording a complainant a prompt and equitable resolution.[22] These requirements are discussed in greater detail below. If the recipient relies on disciplinary procedures for Title IX compliance, the Title IX coordinator should review the recipient's disciplinary procedures to ensure that the procedures comply with the prompt and equitable requirements of Title IX.[23]

Grievance procedures generally may include voluntary informal mechanisms (*e.g.*, mediation) for resolving some types of sexual harassment complaints. OCR has frequently advised recipients, however, that it is improper for a student who complains of harassment to be required to work out the problem directly with the alleged perpetrator, and certainly not without appropriate involvement by the school (*e.g.*, participation by a trained counselor, a trained mediator, or, if appropriate, a teacher or administrator). In addition, as stated in the *2001 Guidance*, the complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process. Moreover, in cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis. OCR recommends that recipients clarify in their grievance procedures that mediation will not be used to resolve sexual assault complaints.

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[21] *Id.* § 106.8(b). Title IX also requires recipients to adopt and publish grievance procedures for employee complaints of sex discrimination.

[22] These procedures must apply to all students, including athletes. If a complaint of sexual violence involves a student athlete, the school must follow its standard procedures for resolving sexual violence complaints. Such complaints must not be addressed solely by athletics department procedures. Additionally, if an alleged perpetrator is an elementary or secondary student with a disability, schools must follow the procedural safeguards in the Individuals with Disabilities Education Act (at 20 U.S.C. § 1415 and 34 C.F.R. §§ 300.500-300.519, 300.530-300.537) as well as the requirements of Section 504 of the Rehabilitation Act of 1973 (at 34 C.F.R. §§ 104.35-104.36) when conducting the investigation and hearing.

[23] A school may not absolve itself of its Title IX obligations to investigate and resolve complaints of sexual harassment or violence by delegating, whether through express contractual agreement or other less formal arrangement, the responsibility to administer school discipline to school resource officers or "contract" law enforcement officers. *See* 34 C.F.R. § 106.4.

Prompt and Equitable Requirements

As stated in the *2001 Guidance*, OCR has identified a number of elements in evaluating whether a school's grievance procedures provide for prompt and equitable resolution of sexual harassment complaints. These elements also apply to sexual violence complaints because, as explained above, sexual violence is a form of sexual harassment. OCR will review all aspects of a school's grievance procedures, including the following elements that are critical to achieve compliance with Title IX:

- Notice to students, parents of elementary and secondary students, and employees of the grievance procedures, including where complaints may be filed;
- Application of the procedures to complaints alleging harassment carried out by employees, other students, or third parties;
- Adequate, reliable, and impartial investigation of complaints, including the opportunity for both parties to present witnesses and other evidence;
- Designated and reasonably prompt time frames for the major stages of the complaint process;
- Notice to parties of the outcome of the complaint;[24] and
- An assurance that the school will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.

As noted in the *2001 Guidance*, procedures adopted by schools will vary in detail, specificity, and components, reflecting differences in the age of students, school sizes and administrative structures, State or local legal requirements, and past experiences. Although OCR examines whether all applicable elements are addressed when investigating sexual harassment complaints, this letter focuses on those elements where our work indicates that more clarification and explanation are needed, including:

(A) *Notice of the grievance procedures*

The procedures for resolving complaints of sex discrimination, including sexual harassment, should be written in language appropriate to the age of the school's students, easily understood, easily located, and widely distributed. OCR recommends that the grievance procedures be prominently posted on school Web sites; sent electronically to all members of the school community; available at various locations throughout the school or campus; and summarized in or attached to major publications issued by the school, such as handbooks, codes of conduct, and catalogs for students, parents of elementary and secondary students, faculty, and staff.

(B) *Adequate, Reliable, and Impartial Investigation of Complaints*

OCR's work indicates that a number of issues related to an adequate, reliable, and impartial investigation arise in sexual harassment and violence complaints. In some cases, the conduct

[24] "Outcome" does not refer to information about disciplinary sanctions unless otherwise noted. Notice of the outcome is discussed in greater detail in Section D below.

may constitute both sexual harassment under Title IX and criminal activity. Police investigations may be useful for fact-gathering; but because the standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX. Conduct may constitute unlawful sexual harassment under Title IX even if the police do not have sufficient evidence of a criminal violation. In addition, a criminal investigation into allegations of sexual violence does not relieve the school of its duty under Title IX to resolve complaints promptly and equitably.

A school should notify a complainant of the right to file a criminal complaint, and should not dissuade a victim from doing so either during or after the school's internal Title IX investigation. For instance, if a complainant wants to file a police report, the school should not tell the complainant that it is working toward a solution and instruct, or ask, the complainant to wait to file the report.

Schools should not wait for the conclusion of a criminal investigation or criminal proceeding to begin their own Title IX investigation and, if needed, must take immediate steps to protect the student in the educational setting. For example, a school should not delay conducting its own investigation or taking steps to protect the complainant because it wants to see whether the alleged perpetrator will be found guilty of a crime. Any agreement or Memorandum of Understanding (MOU) with a local police department must allow the school to meet its Title IX obligation to resolve complaints promptly and equitably. Although a school may need to delay temporarily the fact-finding portion of a Title IX investigation while the police are gathering evidence, once notified that the police department has completed its gathering of evidence (not the ultimate outcome of the investigation or the filing of any charges), the school must promptly resume and complete its fact-finding for the Title IX investigation.[25] Moreover, nothing in an MOU or the criminal investigation itself should prevent a school from notifying complainants of their Title IX rights and the school's grievance procedures, or from taking interim steps to ensure the safety and well-being of the complainant and the school community while the law enforcement agency's fact-gathering is in progress. OCR also recommends that a school's MOU include clear policies on when a school will refer a matter to local law enforcement.

As noted above, the Title IX regulation requires schools to provide equitable grievance procedures. As part of these procedures, schools generally conduct investigations and hearings to determine whether sexual harassment or violence occurred. In addressing complaints filed with OCR under Title IX, OCR reviews a school's procedures to determine whether the school is using a preponderance of the evidence standard to evaluate complaints. The Supreme Court has applied a preponderance of the evidence standard in civil litigation involving discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.* Like Title IX,

[25] In one recent OCR sexual violence case, the prosecutor's office informed OCR that the police department's evidence gathering stage typically takes three to ten calendar days, although the delay in the school's investigation may be longer in certain instances.

Title VII prohibits discrimination on the basis of sex.[26] OCR also uses a preponderance of the evidence standard when it resolves complaints against recipients. For instance, OCR's Case Processing Manual requires that a noncompliance determination be supported by the preponderance of the evidence when resolving allegations of discrimination under all the statutes enforced by OCR, including Title IX.[27] OCR also uses a preponderance of the evidence standard in its fund termination administrative hearings.[28] Thus, in order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (*i.e.*, it is more likely than not that sexual harassment or violence occurred). The "clear and convincing" standard (*i.e.*, it is highly probable or reasonably certain that the sexual harassment or violence occurred), currently used by some schools, is a higher standard of proof. Grievance procedures that use this higher standard are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX. Therefore, preponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence.

Throughout a school's Title IX investigation, including at any hearing, the parties must have an equal opportunity to present relevant witnesses and other evidence. The complainant and the alleged perpetrator must be afforded similar and timely access to any information that will be used at the hearing.[29] For example, a school should not conduct a pre-hearing meeting during which only the alleged perpetrator is present and given an opportunity to present his or her side of the story, unless a similar meeting takes place with the complainant; a hearing officer or disciplinary board should not allow only the alleged perpetrator to present character witnesses at a hearing; and a school should not allow the alleged perpetrator to review the complainant's

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[26] *See*, *e.g.*, *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003) (noting that under the "conventional rule of civil litigation," the preponderance of the evidence standard generally applies in cases under Title VII); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-55 (1989) (approving preponderance standard in Title VII sex discrimination case) (plurality opinion); *id.* at 260 (White, J., concurring in the judgment); *id.* at 261 (O'Connor, J., concurring in the judgment). The *2001 Guidance* noted (on page vi) that "[w]hile *Gebser* and *Davis* made clear that Title VII agency principles do not apply in determining liability for money damages under Title IX, the *Davis* Court also indicated, through its specific references to Title VII caselaw, that Title VII remains relevant in determining what constitutes hostile environment sexual harassment under Title IX." *See also Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) ("We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.").

[27] OCR's Case Processing Manual is available on the Department's Web site, at http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.html.

[28] The Title IX regulations adopt the procedural provisions applicable to Title VI of the Civil Rights Act of 1964. *See* 34 C.F.R. § 106.71 ("The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference."). The Title VI regulations apply the Administrative Procedure Act to administrative hearings required prior to termination of Federal financial assistance and require that termination decisions be "supported by and in accordance with the reliable, probative and substantial evidence." 5 U.S.C. § 556(d). The Supreme Court has interpreted "reliable, probative and substantial evidence" as a direction to use the preponderance standard. *See Steadman v. SEC*, 450 U.S. 91, 98-102 (1981).

[29] Access to this information must be provided consistent with FERPA. For example, if a school introduces an alleged perpetrator's prior disciplinary records to support a tougher disciplinary penalty, the complainant would not be allowed access to those records. Additionally, access should not be given to privileged or confidential information. For example, the alleged perpetrator should not be given access to communications between the complainant and a counselor or information regarding the complainant's sexual history.

statement without also allowing the complainant to review the alleged perpetrator's statement.

While OCR does not require schools to permit parties to have lawyers at any stage of the proceedings, if a school chooses to allow the parties to have their lawyers participate in the proceedings, it must do so equally for both parties. Additionally, any school-imposed restrictions on the ability of lawyers to speak or otherwise participate in the proceedings should apply equally. OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing. Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment. OCR also recommends that schools provide an appeals process. If a school provides for appeal of the findings or remedy, it must do so for both parties. Schools must maintain documentation of all proceedings, which may include written findings of facts, transcripts, or audio recordings.

All persons involved in implementing a recipient's grievance procedures (*e.g.*, Title IX coordinators, investigators, and adjudicators) must have training or experience in handling complaints of sexual harassment and sexual violence, and in the recipient's grievance procedures. The training also should include applicable confidentiality requirements. In sexual violence cases, the fact-finder and decision-maker also should have adequate training or knowledge regarding sexual violence.[30] Additionally, a school's investigation and hearing processes cannot be equitable unless they are impartial. Therefore, any real or perceived conflicts of interest between the fact-finder or decision-maker and the parties should be disclosed.

Public and state-supported schools must provide due process to the alleged perpetrator. However, schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant.

(C) *Designated and Reasonably Prompt Time Frames*

OCR will evaluate whether a school's grievance procedures specify the time frames for all major stages of the procedures, as well as the process for extending timelines. Grievance procedures should specify the time frame within which: (1) the school will conduct a full investigation of the complaint; (2) both parties receive a response regarding the outcome of the complaint; and (3) the parties may file an appeal, if applicable. Both parties should be given periodic status updates. Based on OCR experience, a typical investigation takes approximately 60 calendar days following receipt of the complaint. Whether OCR considers complaint resolutions to be timely, however, will vary depending on the complexity of the investigation and the severity and extent of the harassment. For example, the resolution of a complaint involving multiple incidents with multiple complainants likely would take longer than one involving a single incident that

[30] For instance, if an investigation or hearing involves forensic evidence, that evidence should be reviewed by a trained forensic examiner.

occurred in a classroom during school hours with a single complainant.

(D) *Notice of Outcome*

Both parties must be notified, in writing, about the outcome of both the complaint and any appeal,[31] *i.e.*, whether harassment was found to have occurred. OCR recommends that schools provide the written determination of the final outcome to the complainant and the alleged perpetrator concurrently. Title IX does not require the school to notify the alleged perpetrator of the outcome before it notifies the complainant.

Due to the intersection of Title IX and FERPA requirements, OCR recognizes that there may be confusion regarding what information a school may disclose to the complainant.[32] FERPA generally prohibits the nonconsensual disclosure of personally identifiable information from a student's "education record." However, as stated in the *2001 Guidance*, FERPA permits a school to disclose to the harassed student information about the sanction imposed upon a student who was found to have engaged in harassment when the sanction directly relates to the harassed student. This includes an order that the harasser stay away from the harassed student, or that the harasser is prohibited from attending school for a period of time, or transferred to other classes or another residence hall.[33] Disclosure of other information in the student's "education record," including information about sanctions that do not relate to the harassed student, may result in a violation of FERPA.

Further, when the conduct involves a crime of violence or a non-forcible sex offense,[34] FERPA permits a postsecondary institution to disclose to the alleged victim the final results of a

[31] As noted previously, "outcome" does not refer to information about disciplinary sanctions unless otherwise noted.

[32] In 1994, Congress amended the General Education Provisions Act (GEPA), of which FERPA is a part, to state that nothing in GEPA "shall be construed to affect the applicability of title VI of the Civil Rights Act of 1964, title IX of Education Amendments of 1972, title V of the Rehabilitation Act of 1973, the Age Discrimination Act, or other statutes prohibiting discrimination, to any applicable program." 20 U.S.C. § 1221(d). The Department interprets this provision to mean that FERPA continues to apply in the context of Title IX enforcement, but if there is a direct conflict between the requirements of FERPA and the requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions. *See 2001 Guidance* at vii.

[33] This information directly relates to the complainant and is particularly important in sexual harassment cases because it affects whether a hostile environment has been eliminated. Because seeing the perpetrator may be traumatic, a complainant in a sexual harassment case may continue to be subject to a hostile environment if he or she does not know when the perpetrator will return to school or whether he or she will continue to share classes or a residence hall with the perpetrator. This information also directly affects a complainant's decision regarding how to work with the school to eliminate the hostile environment and prevent its recurrence. For instance, if a complainant knows that the perpetrator will not be at school or will be transferred to other classes or another residence hall for the rest of the year, the complainant may be less likely to want to transfer to another school or change classes, but if the perpetrator will be returning to school after a few days or weeks, or remaining in the complainant's classes or residence hall, the complainant may want to transfer schools or change classes to avoid contact. Thus, the complainant cannot make an informed decision about how best to respond without this information.

[34] Under the FERPA regulations, crimes of violence include arson; assault offenses (aggravated assault, simple assault, intimidation); burglary; criminal homicide (manslaughter by negligence); criminal homicide (murder and

disciplinary proceeding against the alleged perpetrator, regardless of whether the institution concluded that a violation was committed.[35] Additionally, a postsecondary institution may disclose to anyone—not just the alleged victim—the final results of a disciplinary proceeding if it determines that the student is an alleged perpetrator of a crime of violence or a non-forcible sex offense, and, with respect to the allegation made, the student has committed a violation of the institution's rules or policies.[36]

Postsecondary institutions also are subject to additional rules under the Clery Act. This law, which applies to postsecondary institutions that participate in Federal student financial aid programs, requires that "both the accuser and the accused must be informed of the outcome[37] of any institutional disciplinary proceeding brought alleging a sex offense."[38] Compliance with this requirement does not constitute a violation of FERPA. Furthermore, the FERPA limitations on redisclosure of information do not apply to information that postsecondary institutions are required to disclose under the Clery Act.[39] Accordingly, postsecondary institutions may not require a complainant to abide by a nondisclosure agreement, in writing or otherwise, that would prevent the redisclosure of this information.

Steps to Prevent Sexual Harassment and Sexual Violence and Correct its Discriminatory Effects on the Complainant and Others

Education and Prevention

In addition to ensuring full compliance with Title IX, schools should take proactive measures to prevent sexual harassment and violence. OCR recommends that all schools implement preventive education programs and make victim resources, including comprehensive victim services, available. Schools may want to include these education programs in their (1) orientation programs for new students, faculty, staff, and employees; (2) training for students who serve as advisors in residence halls; (3) training for student athletes and coaches; and (4) school assemblies and "back to school nights." These programs should include a

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non-negligent manslaughter); destruction, damage or vandalism of property; kidnapping/abduction; robbery; and forcible sex offenses. Forcible sex offenses are defined as any sexual act directed against another person forcibly or against that person's will, or not forcibly or against the person's will where the victim is incapable of giving consent. Forcible sex offenses include rape, sodomy, sexual assault with an object, and forcible fondling. Non-forcible sex offenses are incest and statutory rape. 34 C.F.R. Part 99, App. A.

[35] 34 C.F.R. § 99.31(a)(13). For purposes of 34 C.F.R. §§ 99.31(a)(13)-(14), disclosure of "final results" is limited to the name of the alleged perpetrator, any violation found to have been committed, and any sanction imposed against the perpetrator by the school. 34 C.F.R. § 99.39.

[36] 34 C.F.R. § 99.31(a)(14).

[37] For purposes of the Clery Act, "outcome" means the institution's final determination with respect to the alleged sex offense and any sanctions imposed against the accused. 34 C.F.R. § 668.46(b)(11)(vi)(B).

[38] 34 C.F.R. § 668.46(b)(11)(vi)(B). Under the Clery Act, forcible sex offenses are defined as any sexual act directed against another person forcibly or against that person's will, or not forcibly or against the person's will where the person is incapable of giving consent. Forcible sex offenses include forcible rape, forcible sodomy, sexual assault with an object, and forcible fondling. Non-forcible sex offenses include incest and statutory rape. 34 C.F.R. Part 668, Subpt. D, App. A.

[39] 34 C.F.R. § 99.33(c).

discussion of what constitutes sexual harassment and sexual violence, the school's policies and disciplinary procedures, and the consequences of violating these policies.

The education programs also should include information aimed at encouraging students to report incidents of sexual violence to the appropriate school and law enforcement authorities. Schools should be aware that victims or third parties may be deterred from reporting incidents if alcohol, drugs, or other violations of school or campus rules were involved.[40] As a result, schools should consider whether their disciplinary policies have a chilling effect on victims' or other students' reporting of sexual violence offenses. For example, OCR recommends that schools inform students that the schools' primary concern is student safety, that any other rules violations will be addressed separately from the sexual violence allegation, and that use of alcohol or drugs never makes the victim at fault for sexual violence.

OCR also recommends that schools develop specific sexual violence materials that include the schools' policies, rules, and resources for students, faculty, coaches, and administrators. Schools also should include such information in their employee handbook and any handbooks that student athletes and members of student activity groups receive. These materials should include where and to whom students should go if they are victims of sexual violence. These materials also should tell students and school employees what to do if they learn of an incident of sexual violence. Schools also should assess student activities regularly to ensure that the practices and behavior of students do not violate the schools' policies against sexual harassment and sexual violence.

Remedies and Enforcement

As discussed above, if a school determines that sexual harassment that creates a hostile environment has occurred, it must take immediate action to eliminate the hostile environment, prevent its recurrence, and address its effects. In addition to counseling or taking disciplinary action against the harasser, effective corrective action may require remedies for the complainant, as well as changes to the school's overall services or policies. Examples of these actions are discussed in greater detail below.

Title IX requires a school to take steps to protect the complainant as necessary, including taking interim steps before the final outcome of the investigation. The school should undertake these steps promptly once it has notice of a sexual harassment or violence allegation. The school should notify the complainant of his or her options to avoid contact with the alleged perpetrator and allow students to change academic or living situations as appropriate. For instance, the school may prohibit the alleged perpetrator from having any contact with the complainant pending the results of the school's investigation. When taking steps to separate the complainant and alleged perpetrator, a school should minimize the burden on the

[40] The Department's Higher Education Center for Alcohol, Drug Abuse, and Violence Prevention (HEC) helps campuses and communities address problems of alcohol, other drugs, and violence by identifying effective strategies and programs based upon the best prevention science. Information on HEC resources and technical assistance can be found at www.higheredcenter.org.

complainant, and thus should not, as a matter of course, remove complainants from classes or housing while allowing alleged perpetrators to remain. In addition, schools should ensure that complainants are aware of their Title IX rights and any available resources, such as counseling, health, and mental health services, and their right to file a complaint with local law enforcement.[41]

Schools should be aware that complaints of sexual harassment or violence may be followed by retaliation by the alleged perpetrator or his or her associates. For instance, friends of the alleged perpetrator may subject the complainant to name-calling and taunting. As part of their Title IX obligations, schools must have policies and procedures in place to protect against retaliatory harassment. At a minimum, schools must ensure that complainants and their parents, if appropriate, know how to report any subsequent problems, and should follow-up with complainants to determine whether any retaliation or new incidents of harassment have occurred.

When OCR finds that a school has not taken prompt and effective steps to respond to sexual harassment or violence, OCR will seek appropriate remedies for both the complainant and the broader student population. When conducting Title IX enforcement activities, OCR seeks to obtain voluntary compliance from recipients. When a recipient does not come into compliance voluntarily, OCR may initiate proceedings to withdraw Federal funding by the Department or refer the case to the U.S. Department of Justice for litigation.

Schools should proactively consider the following remedies when determining how to respond to sexual harassment or violence. These are the same types of remedies that OCR would seek in its cases.

Depending on the specific nature of the problem, remedies for the complainant might include, but are not limited to:[42]

- providing an escort to ensure that the complainant can move safely between classes and activities;
- ensuring that the complainant and alleged perpetrator do not attend the same classes;
- moving the complainant or alleged perpetrator to a different residence hall or, in the case of an elementary or secondary school student, to another school within the district;
- providing counseling services;
- providing medical services;
- providing academic support services, such as tutoring;

[41] The Clery Act requires postsecondary institutions to develop and distribute a statement of policy that informs students of their options to notify proper law enforcement authorities, including campus and local police, and the option to be assisted by campus personnel in notifying such authorities. The policy also must notify students of existing counseling, mental health, or other student services for victims of sexual assault, both on campus and in the community. 20 U.S.C. §§ 1092(f)(8)(B)(v)-(vi).

[42] Some of these remedies also can be used as interim measures before the school's investigation is complete.

- arranging for the complainant to re-take a course or withdraw from a class without penalty, including ensuring that any changes do not adversely affect the complainant's academic record; and
- reviewing any disciplinary actions taken against the complainant to see if there is a causal connection between the harassment and the misconduct that may have resulted in the complainant being disciplined.[43]

Remedies for the broader student population might include, but are not limited to:

Counseling and Training

- offering counseling, health, mental health, or other holistic and comprehensive victim services to all students affected by sexual harassment or sexual violence, and notifying students of campus and community counseling, health, mental health, and other student services;
- designating an individual from the school's counseling center to be "on call" to assist victims of sexual harassment or violence whenever needed;
- training the Title IX coordinator and any other employees who are involved in processing, investigating, or resolving complaints of sexual harassment or sexual violence, including providing training on:
    - the school's Title IX responsibilities to address allegations of sexual harassment or violence
    - how to conduct Title IX investigations
    - information on the link between alcohol and drug abuse and sexual harassment or violence and best practices to address that link;
- training all school law enforcement unit personnel on the school's Title IX responsibilities and handling of sexual harassment or violence complaints;
- training all employees who interact with students regularly on recognizing and appropriately addressing allegations of sexual harassment or violence under Title IX; and
- informing students of their options to notify proper law enforcement authorities, including school and local police, and the option to be assisted by school employees in notifying those authorities.

Development of Materials and Implementation of Policies and Procedures

- developing materials on sexual harassment and violence, which should be distributed to students during orientation and upon receipt of complaints, as well as widely posted throughout school buildings and residence halls, and which should include:
    - what constitutes sexual harassment or violence
    - what to do if a student has been the victim of sexual harassment or violence
    - contact information for counseling and victim services on and off school grounds
    - how to file a complaint with the school
    - how to contact the school's Title IX coordinator

[43] For example, if the complainant was disciplined for skipping a class in which the harasser was enrolled, the school should review the incident to determine if the complainant skipped the class to avoid contact with the harasser.

    - what the school will do to respond to allegations of sexual harassment or violence, including the interim measures that can be taken
- requiring the Title IX coordinator to communicate regularly with the school's law enforcement unit investigating cases and to provide information to law enforcement unit personnel regarding Title IX requirements;[44]
- requiring the Title IX coordinator to review all evidence in a sexual harassment or sexual violence case brought before the school's disciplinary committee to determine whether the complainant is entitled to a remedy under Title IX that was not available through the disciplinary committee;[45]
- requiring the school to create a committee of students and school officials to identify strategies for ensuring that students:
    - know the school's prohibition against sex discrimination, including sexual harassment and violence
    - recognize sex discrimination, sexual harassment, and sexual violence when they occur
    - understand how and to whom to report any incidents
    - know the connection between alcohol and drug abuse and sexual harassment or violence
    - feel comfortable that school officials will respond promptly and equitably to reports of sexual harassment or violence;
- issuing new policy statements or other steps that clearly communicate that the school does not tolerate sexual harassment and violence and will respond to any incidents and to any student who reports such incidents; and
- revising grievance procedures used to handle sexual harassment and violence complaints to ensure that they are prompt and equitable, as required by Title IX.

School Investigations and Reports to OCR

- conducting periodic assessments of student activities to ensure that the practices and behavior of students do not violate the school's policies against sexual harassment and violence;
- investigating whether any other students also may have been subjected to sexual harassment or violence;
- investigating whether school employees with knowledge of allegations of sexual harassment or violence failed to carry out their duties in responding to those allegations;
- conducting, in conjunction with student leaders, a school or campus "climate check" to assess the effectiveness of efforts to ensure that the school is free from sexual harassment and violence, and using the resulting information to inform future proactive steps that will be taken by the school; and

[44] Any personally identifiable information from a student's education record that the Title IX coordinator provides to the school's law enforcement unit is subject to FERPA's nondisclosure requirements.

[45] For example, the disciplinary committee may lack the power to implement changes to the complainant's class schedule or living situation so that he or she does not come in contact with the alleged perpetrator.

- submitting to OCR copies of all grievances filed by students alleging sexual harassment or violence, and providing OCR with documentation related to the investigation of each complaint, such as witness interviews, investigator notes, evidence submitted by the parties, investigative reports and summaries, any final disposition letters, disciplinary records, and documentation regarding any appeals.

Conclusion

The Department is committed to ensuring that all students feel safe and have the opportunity to benefit fully from their schools' education programs and activities. As part of this commitment, OCR provides technical assistance to assist recipients in achieving voluntary compliance with Title IX.

If you need additional information about Title IX, have questions regarding OCR's policies, or seek technical assistance, please contact the OCR enforcement office that serves your state or territory. The list of offices is available at http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm. Additional information about addressing sexual violence, including victim resources and information for schools, is available from the U.S. Department of Justice's Office on Violence Against Women (OVW) at http://www.ovw.usdoj.gov/.[46]

Thank you for your prompt attention to this matter. I look forward to continuing our work together to ensure that all students have an equal opportunity to learn in a safe and respectful school climate.

Sincerely,

/s/

Russlynn Ali
Assistant Secretary for Civil Rights

[46] OVW also administers the Grants to Reduce Domestic Violence, Dating Violence, Sexual Assault, and Stalking on Campus Program. This Federal funding is designed to encourage institutions of higher education to adopt comprehensive, coordinated responses to domestic violence, dating violence, sexual assault, and stalking. Under this competitive grant program, campuses, in partnership with community-based nonprofit victim advocacy organizations and local criminal justice or civil legal agencies, must adopt protocols and policies to treat these crimes as serious offenses and develop victim service programs and campus policies that ensure victim safety, offender accountability, and the prevention of such crimes. OVW recently released the first solicitation for the Services, Training, Education, and Policies to Reduce Domestic Violence, Dating Violence, Sexual Assault and Stalking in Secondary Schools Grant Program. This innovative grant program will support a broad range of activities, including training for school administrators, faculty, and staff; development of policies and procedures for responding to these crimes; holistic and appropriate victim services; development of effective prevention strategies; and collaborations with mentoring organizations to support middle and high school student victims.

Outline of Title IX Investigations Models
Matt Kren
Lindsay Greene

1. University of Cincinnati
    a. Investigator
        i. "The university reserves the right to utilize outside investigators to conduct fact finding during this process"
    b. Standard of review
        i. The university applies the preponderance of the evidence or "more likely than not" standard in investigating, adjudicating, and resolving complaints of sex discrimination, including allegations of sexual harassment or violence.
    c. Appeal
        i. The complainant and respondent have equal rights to file an appeal. The university maintains a trained pool of individuals who may serve as appeal board panelists. The appeal process will be carried out consistent with the Student Code of Conduct. The complainant and respondent will receive concurrent written notice of the outcome of the appeal process.
    d. Formal resolution
        i. This procedure provides for the prompt, reliable, impartial resolution of complaints of sex discrimination. Complaints will generally be resolved within 60 days of the filing of a complaint; however, in some circumstances, complaints may take longer to resolve (e.g., if filed during university breaks.)
        ii. If there is a need to extend the timelines set forth below, the Title IX Coordinator will make the determination and notify the parties. Notwithstanding the waiver, complainants who have experienced sexual violence are still encouraged to file complaints. Complainants and respondents will receive regular updates regarding the status of their complaints.
    e. Reports to the Title IX process: Reports or complaints of possible Title IX violations where the alleged perpetrator is not a UC employee can be made by contacting the Title IX Coordinator or appropriate Deputy Title IX Coordinator:
        i. Title IX Office, titleix@uc.edu, (513) 556-3349
        ii. 3rd floor, 3115 Edwards 1, 45 Corry Blvd, Cincinnati, OH 45221-0158
        iii. Deputy Title IX Coordinator for UC Blue Ash College, Greg Metz, (513)-745-5670
        iv. Deputy Title IX Coordinator for UC Clermont College, Jennifer Radt, (513)732-8964 or 513-732-5319
        v. Deputy Title IX Coordinator for faculty and staff, Matthew Olovson, (513) 556-5503
2. University of Connecticut:
    a. Under Title IX:
        i. No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to

discrimination under any education program or activity receiving federal financial assistance.

ii. The Title IX Coordinator is charged with monitoring the University's compliance with Title IX, ensuring appropriate education and training, coordinating the University's investigation, response, and resolution of all reports under this Policy, and ensuring appropriate actions to eliminate Prohibited Conduct, prevent its recurrence, and remedy its effects. The Office of Institutional Equity oversees reports involving Students, Employees, and Third Parties. The University has also designated Deputy Title IX Coordinators who may assist the Title IX Coordinator in the discharge of these responsibilities. The Title IX Coordinator and Deputy Title IX Coordinators receive ongoing appropriate training to discharge their responsibilities.

iii. Concerns about the University's application of Title IX may be addressed to the Title IX Coordinator. Additionally, concerns about the University's application of Title VII and/or other federal and state anti-discrimination laws may be addressed to the Office of Institutional Equity.

iv. The Title IX Coordinator and Deputy Title IX Coordinators can be contacted by telephone, email, or in person during regular office hours:

1. **Elizabeth A. Conklin**
   Associate Vice President, Office of Institutional Equity
   Title IX Coordinator

2. **Sarah Chipman**
   Director of Investigations, Office of Institutional Equity
   Deputy Title IX Coordinator

3. **Kevin O'Connell**
   Deputy Title IX Coordinator, Office of Institutional Equity

3. **Claremont McKenna**- Has a Title IX Coordinator with four deputies to handle each specific group involved in the case.
    a. Report Created
        i. Report is created and goes to Grievance Committee
            1. The Grievance Committee shall consist of the elected tenured Faculty members of the Claremont McKenna from the handbook.
        ii. Informal oral and written procedures
            1. These may be used at Complainant's discretion, however in cases alleging sexual or other unlawful harassment, a Complainant may proceed directly to the Formal Resolution Procedures.
                a. If Complainant elects for the Informal Resolution process and it produces no mutually satisfactory solution and the Complainant wishes to proceed further, he/she must file a complaint (as described below) in no later than 14 days after the conclusion of the informal resolution process.

b. Formal Resolution Process
    i. If the Complainant does not do the informal process, the may proceed to the complaint process.
    ii. Complaint process:
        1. To initiate a formal grievance, the Complainant files a written request for a hearing (the complaint) with the Dean of Faculty (DOF), forwards it to the Grievance Committee within five days.
        2. The complaint must include:
            a. A detailed description of the activity or action, inaction or decision complained about.
            b. A specification of the covered grievance under which the complaint arises.
            c. The requested remedy (to be included only in those cases where the Complainant requests remedial action other than, or in addition to, a penalty).
            d. Any available and relevant written or other documentation. (However, failure to include written or other documentation with the complaint does not preclude later submission of such material.)
    iii. Within five days of receiving the complaint, the Dean of Faculty must provide the Grievance Committee with all relevant material from the informal process that is in the DOF's possession, including all written filings and decisions, if an informal process was first pursued.
    iv. Within five days of receiving the complaint, the Dean of Faculty must notify the Respondent of the complaint and provide the Complainant and the Respondent with copies of all material forwarded to the Grievance Committee.
c. Hearing and Assignment of Penalty and/or Remedy
    i. Within 14 days of receiving the complaint, the DOF and chair of Administrative Committee has an initial Grievance Committee meeting.
    ii. At its initial meeting, the Grievance Committee randomly selects 5 faculty members to act as voting members and 2 of its faculty members to serve as alternates to serve in the deliberation process.
    iii. If, after reviewing all documents submitted, at least 2 members of the Grievance Committee agree that the grievance is not frivolous, the Committee grants a hearing to the Complainant and develops a tentative schedule for the grievance process
        1. If the Grievance Committee decides the grievance is frivolous, they inform complainant in writing within 2 days after convening, the basis for its determination, and that the Complainant may appeal to the President.
d. Hearing Procedures
    i. The Grievance Committee completes a hearing within 21 days of the initial meeting and allows the Complainant and the Respondent "reasonably sufficient" time to prepare for the formal hearing(s).

ii. These hearings are closed and the Grievance Committee keeps a taped or other verbatim record of all sessions or portions of sessions in which it receives oral evidence (but not of its deliberations) which are made available to the Complainant and the Respondent.

iii. The Complainant and the Respondent may each be accompanied by an individual of his/her own choosing who is an employee of Claremont McKenna College.

1. In cases where a student is involved, he/she may be accompanied by an individual of his/her own choosing who may or may not be an employee of the College.
2. No legal counsel allowed, except in cases in which any party to the grievance faces potential criminal charges or if required by applicable law.
    a. In such cases the attorney will only be permitted in a nonparticipatory advisory role for each involved Complainant and Respondent.

iv. The Complainant and the Respondent each make statements to the Grievance Committee. The Complainant and the Respondent can question each other as well as all witnesses.

v. The Grievance Committee may ask for statements from other parties and for relevant College records.

vi. It is the responsibility of the Grievance Committee to reasonably ensure that all relevant evidence is available and considered at the hearing.

e. Completion of Hearing

i. The voting members of the Grievance Committee complete the consideration of the grievance in a closed session without the parties present and shall reach decisions by majority vote.

ii. Within 10 days of the completion of the hearing process, the Dean of Faculty is provided with a decision and, if appropriate, its recommendations for a penalty and/or other remedy, if any, or dismissal of the complaint.

iii. These findings and recommendations shall also be reported to the Complainant, the Respondent, the Director of Human Resources and the Dean of Students (when a Student is involved).

iv. The Grievance Committee's recommendations of penalty and/or remedy to the DOF are only advisory.

v. Second Review of proceedings

1. The DOF reviews the record of the Grievance Committee's proceedings, findings and recommendation, and after consideration regarding the penalty and/or other remedy, if any, the DOF determines what penalty, if any, will be levied and/or what other remedy, if any, is appropriate or if the complaint should be dismissed.

f. Notice of Findings

i. The DOF shall notify relevant parties and explain the decision in writing within 10 days of receiving the Grievance Committee's findings and recommendations.
ii. Notification shall be by sending a copy of the decision to the Complainant, the Respondent, and the Grievance Committee for each's review and any comments.
iii. Comments by either the Complainant, Respondent, or Grievance Committee must be made within 10 days of the DOF's notification. The DOF shall also concurrently notify the President by submitting a copy of the decision in cases deemed to be automatically appealed.

g. Modifications of decision
i. The DOF may modify the decision within 10 days of receiving the comments.
ii. If the Dean does not modify the penalty and/or remedy, if any, or dismiss the complaint, he/she shall promptly forward these comments to the President in the event his/her decision is appealed.
iii. If the Dean does modify the penalty and/or remedy, if any, or dismiss the complaint, then he/she shall again be bound by the notification procedures.

Title IX Presentation Outline

I. Montana State University

A. Single Investigator Model

B. Reports are made to the ”Responsible Official” on the campus

1. RO is a neutral individual and not an advocate for either party

2. RO is to provide both parties with information and keep records of the investigation

A. Reports can be made: via voice mail, filing an official form via the Title IX info webpage, email to RO, letter to RO, in-person visit to RO, reporting to a University official who will report to the RO

C. 2 avenues for resolution of the Title IX Violation complaint: informal and formal

D. Informal Process

1. Has to be agreed to by RO, complainant, and respondent

2. RO will conduct an investigation within 20 days of receipt of complaint

3. “The informal resolution must adequately address the concerns of the Complainant, as well as the rights of the Respondent, and the overall intent of the University to stop, remedy and prevent Policy Violations.”

1. “Informal actions might include, but are not limited to: providing training to a work unit; having an informal discussion with an individual whose conduct, if not stopped, could rise to the level of discrimination or hostile environment harassment; having a confidential conversation with a supervisor or instructor; or taking appropriate personnel action.”

E. Formal Process

1. RO discusses concerns with both complainant and respondent

2. RO determines if the office has jurisdiction to investigate the matter (limited to Policy Violation reports)

a) -no jurisdiction: RO gives complainant and/or respondent appropriate resource to address issues

b) -jurisdiction: RO conducts a fair and impartial investigation of the alleged Policy Violation, typically within 40 days

F. Investigation:

1. RO informs both parties of rights to: have attorneys present at every stage, identify witnesses, provide evidence

2. RO will provide respondent with a written summary of allegations

3. RO will interview witnesses and collect evidence

4. If, by a preponderance of the evidence, RO concludes an individual engaged in a policy violation, the RO will present a written Report of Findings with a list of steps to take and is forwarded to the appropriate disciplinary authority

a) Student Respondents- Dean of Students

b) Employees- University administrator

5. Disciplinary authority informs RO of what action is taken and RO informs complainant

G. Appeal

1. Complainant and respondent can file an appeal requesting a hearing

2. Hearing request is submitted to the President

a) Copy of the request is submitted to the RO to send to non-appealing party

3. Request must be in writing, state desired outcome, and state grounds for appeal. The appeal is limited to procedural issues and newly discovered evidence. The appeal cannot question the factual determination of the investigator.

4. President designates a Hearings Officer to determine if there are grounds for appeal

a) If yes, respondent must submit detailed statement of facts and all pertinent evidence

5. If either party wants legal counsel, University Legal Counsel will be present

a) A party's attorney may not speak at the hearing but may consult with the attorney's client and client witnesses.

6. Hearing Officer conducts the hearing in a non-adversarial manner

a) Determines which witnesses and evidence may be presented

7. Hearing Officer will submit a written decision to the President

8. President will review Hearing Officer's decision and President will inform all parties of his/her decision to uphold or modify findings

9. President forwards the Hearing Officer's decision to appropriate disciplinary authority

II. University of Kentucky

A. All complaints, wherever initially reported, are sent to the Office of Institutional Equity and Equal Opportunity (IEEO)

1. 1 coordinator
2. 3 deputy coordinators

B. Interim remedies that may be initiated at the beginning of the process include:

1. Alteration of class schedules, housing, work stations; no contact orders

C. Upon receiving a complaint, IEEO begins an investigation
D. Investigation Process
    1. Interviews both parties, interviews witnesses, reviews documents
    2. At conclusion, both parties receive a copy of the Final Report
E. If there is evidence of a policy violation, the matter is recommended to move to a hearing
F. An IEEO representative will meet privately with complainant and again with the respondent for a pre-hearing conference
G. Respondent can choose to resolve the matter at the pre-hearing conference or not
H. If no, case is referred to a Hearing Officer and formal resolution by a Hearing Panel
I. Formal Hearing
    1. 3 member panel
    2. Conducted by the Hearing Officer
    3. University presents a case against the respondent
    4. Both the complaining and the respondent party can present evidence and witnesses
    5. Hearing panel deliberates if there is a finding of a violation by a preponderance of the evidence
    6. If yes, there will be another hearing, in the same manner, to decide sanctions
        a) Expulsion, suspension, revocation of degree, etc.
J. Appeal
    1. Either party can appeal to the Sexual Misconduct Appeals Board (SMAB)
        a) Grounds for appeal: lack of due process, inappropriate sanction, new information has come to light
    2. IEEO notifies other party of appeal
    3. SMAB considers all existing documentary, letters of appeal, written recommendations from Hearing Panel, transcript of the hearing
    4. SMAB can:
        a) Uphold Hearing Panel decisions
        b) Modify sanctions
        c) Remand case back to Hearing Panel (only for procedural error or new information)
    5. SMAB decision is final and binding for students
        a) Employees can appeal again under law or pursuant to University regulations

III. James Madison University

Title IX Presentation Outline

A. Summary of Investigation Procedures:

1. Title IX Office investigates and provides information to OSARP
2. OSARP contacts reporter and gives reporter option to have OSARP contact the responding party
3. In circumstances that threaten the safety of the campus or the community, the OSARP may adjudicate the case through the Sexual Misconduct Accountability Process
4. After Responding Party is notified of alleged violation, No Contact Order is instituted between reporter and responding party
5. Both parties will be assigned their own individual Advisor by OSARP and will meet with them (attorneys or support people are permitted to attend)
6. Both parties will have access to and be able to submit written documentation or other items submitted as evidence and submit witnesses or witness statements

B. Hearing

1. The OSARP usually schedules the Sexual Misconduct Case Review to occur within 30 days of the responding party being notified of the alleged violation
2. Both parties have right to have a support person or attorney of their choice attend the Case Review, but the support person/attorney may not speak on behalf of a party
3. Board of Case Administrators:
    a) *One staff member from OSARP*
    b) *Two faculty/staff members of Accountability Board*
4. Schedule and time limits for parties throughout Case Review, including opening/closing statements, etc.
5. Case Review is recorded (audio/visual)
6. Findings are based on preponderance of the evidence and are determined by a majority vote
7. Board makes recommendations;
    a) *OSARP conveys recommendations to both parties*
    b) *If neither party submits an appeal of the Board's recommendations, then the Dean of Students or designee will conduct final review and make final decision.*

C. In cases where a responding party is found responsible for and suspended or expelled for sexual violence, a notation will be made in the responding party's transcript for duration of suspension or expulsion. The transcript notations are permanent in cases of expulsion.

D. Four Title IX Officers – as much as possible, JMU requests that:

1. Students report to Coordinator
2. Faculty report to Officer for Faculty
3. Staff report to Officer for Staff
4. Athletics report to Officer for Athletics

E. JMU distinguishes between a "report" to Title IX and a "Formal Report"

1. JMU "uses the term report to refer to information that Title IX receives about instances of sexual misconduct involving JMU community members. When someone tells the Title IX Coordinator or a Title IX Officer about sexual misconduct, whether it is in person, over the phone, email, or an online form, it is a report."

2. "JMU community members who would like to have their cases heard through a campus conduct process sign a Formal Report form with Title IX in order to begin the steps in that process."

a) Campus conduct processes are only available if the person who caused the harm is a member of the university community

F. JMU offers Interim Measures to students even if the students do not wish to make a formal report and go through a campus conduct process.

1. Interim Measures include:

a) Assistance with housing arrangements
b) Academic assistance
c) No Contact Orders
d) Referrals to on-campus resources like Counseling Center and Health Center

G. Responsible Employees are responsible for reporting information that they learned, directly or indirectly, about sexual misconduct involving JMU community members to Title IX

1. JMU designates Counseling Center, University Health Center, and campus clergy as confidential resources who do not share information about instances of sexual misconduct involving JMU students with Title IX

H. Investigation:

1. Title IX Officer directly receives the report from the reporter, or contacts the reporter promptly after receiving notice of a report from a responsible employee

2. If Title IX Officer determines that act of sexual violence may have been committed, Title IX Officer reports the information to the Sexual Violence Review Committee (SVRC)

a) SVRC meets within 72 hours to review information

b) If SVRC determines that disclosure of information is necessary to protect health/safety of reporter or other individuals, the representative of the university police department on the SVRC shall immediately disclose the information to the law enforcement agency responsible for investigating alleged act of sexual violence

(1) SVRC notifies reporter of the disclosure

c) If act would constitute felony in Virginia, representative of university police department on SVRC shall inform SVRC members and consult with prosecutor responsible for prosecuting alleged act

3. Formal Complaint – no time limit for filing, but untimely formal complaints may be dismissed (final and not appealable)
4. If offender is student:

a) Title IX Officer informs reporter of options for filing formal complaint

b) Officer will collect statements related to the complaint and provide the Office of Student Accountability and Restorative Practices (OSARP) for a hearing under the OSARP Sexual Misconduct Accountability Process.

c) If alleged conduct would constitute criminal activity, reporter will be informed of his/her option to file criminal charges with appropriate law enforcement authority

d) Students found to have violated JMU Sexual Misconduct policy may be disciplined, suspended, or expelled

5. If offender is employee:

a) Officer obtains statements and provides copy to Title IX Coordinator

(1) Title IX Coordinator will convene hearing panel for determination on complaint

(a) Employee's supervisor will make determination on formal complaint

6. If offender is faculty:

a) Title IX Coordinator selects three people from the hearing and appeals pool to hear the case

b) In a hearing neither party is required to be present (may submit a written statement instead)

c) Both parties may have advice from and access to legal counsel during the hearing

d) May call witnesses

e) Information about reporter or respondent's prior or subsequent sexual history shall not be relevant unless it is subject of prior civil, criminal, or administrative determination

f) Evidentiary standard is preponderance of evidence

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 18a0200p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOHN DOE,

Plaintiff-Appellant,

v.

No. 17-2213

DAVID H. BAUM; SUSAN PRITZEL; TABITHA BENTLEY; E. ROYSTER HARPER; NADIA BAZZY; ERIK WESSEL; UNIVERSITY OF MICHIGAN; BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 2:16-cv-13174—David M. Lawson, District Judge.

Argued: August 1, 2018

Decided and Filed: September 7, 2018

Before: GILMAN, GIBBONS, and THAPAR, Circuit Judges.

COUNSEL

ARGUED: Deborah L. Gordon, DEBORAH GORDON LAW, Bloomfield Hills, Michigan, for Appellant. David W. DeBruin, JENNER & BLOCK, LLP, Washington, D.C., for Appellees. **ON BRIEF:** Deborah L. Gordon, Irina L. Vaynerman, DEBORAH GORDON LAW, Bloomfield Hills, Michigan, for Appellant. David W. DeBruin, JENNER & BLOCK, LLP, Washington, D.C., Brian M. Schwartz, MILLER, CANFIELD, PADDOCK, AND STONE, P.L.C., Detroit, Michigan, for Appellees.

THAPAR, J., delivered the opinion of the court, in which GIBBONS, J., joined, and GILMAN, J., joined in part. GIBBONS, J. (pg. 17), delivered a separate concurrence. GILMAN, J. (pp. 18–25), delivered a separate opinion concurring in part and dissenting in part.

OPINION

THAPAR, Circuit Judge. Thirteen years ago, this court suggested that cross-examination may be required in school disciplinary proceedings where the case hinged on a question of credibility. *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 641 (6th Cir. 2005). Just last year, we encountered the credibility contest that we contemplated in *Flaim* and confirmed that when credibility is at issue, the Due Process Clause mandates that a university provide accused students a hearing with the opportunity to conduct cross-examination. *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 401–02 (6th Cir. 2017). Today, we reiterate that holding once again: if 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. Because the University of Michigan failed to comply with this rule, we reverse.

I.

John Doe and Jane Roe were students at the University of Michigan. Halfway through Roe's freshman and Doe's junior year, the two crossed paths at a "Risky Business" themed fraternity party. While there, they had a drink, danced, and eventually had sex. Two days later, Roe filed a sexual misconduct complaint with the university claiming that she was too drunk to consent. And since having sex with an incapacitated person (unsurprisingly) violates university policy, the administration immediately launched an investigation. Over the course of three months, the school's investigator collected evidence and interviewed Roe, Doe, and twenty-three other witnesses. Two stories emerged.

First, Doe told the investigator that Roe did not appear drunk and that she was an active participant in their sexual encounter. According to him, the night went something like this: after he and Roe had a drink, danced, and kissed at the party, the two decided to go upstairs to his bedroom. Once there, they kissed "vigorous[ly]" and eventually made their way onto his bed. R. 16, Pg. ID 332. After they jointly removed their clothing, he asked Roe if she wanted to have

sex. She said, "Yeah," and the two proceeded to have intercourse followed by oral sex. *Id.* at Pg. ID 333–34. When they were done, they cuddled until Roe became sick and vomited into a trash can by Doe's bed. Doe rubbed her back for five or so minutes and then left to use the bathroom and talk with friends. By the time he returned, Roe was crying and another female student was helping her gather her things. He asked Roe if she was okay, but Roe's new companion told him to "[g]o away" and the two women walked out of the room. *Id.* at Pg. ID 335. At the time, he assumed that Roe was upset because he had left her alone after they had sex. He asserted that he had no reason to believe that she was drunk or that Roe thought any of his sexual advances were unwelcome.

Roe remembered the night differently. According to her, she was drunk and unaware of her surroundings when she and Doe went to his room. While kissing near the doorway, she told Doe "no sex" before she "flopped" onto his bed. *Id.* at Pg. ID 325–26. Without asking, Doe undressed her and had intercourse with her while she "laid there in a hazy state of black out." *Id.* at Pg. ID 326. And at some point, she passed out and woke up to Doe having oral sex with her. Afterwards, she felt a "spinning sensation" and fell back onto the bed. *Id.* at Pg. ID 327. Doe asked her if she was okay, and she told him that she was not. So Doe placed a trash can by the side of his bed and left the room. She proceeded to vomit into the trash can. Afterward, she attempted to find her clothes but could not get her bearings. Feeling a sense of "desperation and defeat," she tried to catch another female student's attention by making "vomit sounds." *Id.* It worked, and the female student ("Witness 2") helped Roe find her clothes, put them on, and get back to her dorm.

If Doe's and Roe's stories seem at odds, the twenty-three other witnesses did not offer much clarification. Almost all of the male witnesses corroborated Doe's story, and all of the female witnesses corroborated Roe's. For example, Doe's roommate said that Roe "didn't seem like she was hammered or that drunk," although he stated that he did not "want to speculate" about whether she had had some alcohol because he did not talk to her directly or "really interact with [her]" much. *Id.* at Pg. ID 339. Yet he mentioned that in his two interactions with her, he did not smell alcohol on her. *Id.* Doe's roommate further alleged that Roe and Witness 2 were just "rallying against a fraternity guy." *Id.* at Pg. ID 339–41. Another member of Doe's

fraternity told the investigator that he saw Doe and Roe "making out" on the dance floor and there was no reason to suspect that either of them had too much to drink. *Id.* at Pg. ID 347. And two others stated that Roe did not appear drunk when she left Doe's room at the end of the night, although they indicated they had limited observations of Roe.

Roe's sorority sisters, on the other hand, reported that Roe seemed "more than a little buzzed" at the party because her eyes were "open but unfocused" and she "trail[ed] off at the end of sentences." *Id.* at Pg. ID 345–46. The female student who helped Roe leave the party told the investigator that she found Roe crying and "very drunk" in Doe's bed. *Id.* at Pg. ID 342–43. And two other friends provided that when Roe returned to her dorm that night, she sobbed on the floor of her room and said "she thought she'd been raped." *Id.* at Pg. ID 352.

Given the students' conflicting statements, the investigator concluded that the evidence supporting a finding of sexual misconduct was not more convincing than the evidence offered in opposition to it. The investigator did note, however, that Witness 2 might have been a more credible witness because she had no prior connection to Doe, Roe, or their respective Greek organizations. But because Witness 2 only observed Roe after the sexual encounter had ended, the investigator concluded that she could not address the relevant question—Roe's level of intoxication *during* the encounter or what signs of intoxication she manifested at that time. So after three months of thorough fact-finding, the investigator was unable to say that Roe exhibited outward signs of incapacitation that Doe would have noticed before initiating sexual activity. Accordingly, the investigator recommended that the administration rule in Doe's favor and close the case.

Roe appealed. She argued that the evidence did not support the investigator's findings and asked the university to reconsider. The case went up to the university's Appeals Board, and a three-member panel reviewed the investigator's report. After two closed sessions (without considering new evidence or interviewing any students), the Board reversed. Although the Board found that the investigation was fair and thorough, it thought the investigator was wrong to conclude that the evidence was in equipoise. According to the Board, Roe's description of events was "more credible" than Doe's, and Roe's witnesses were more persuasive. R. 6-5, Pg. ID 274–75. As a result, the university set the investigator's recommendation aside and

proceeded to the sanction phase. Facing the possibility of expulsion, Doe agreed to withdraw from the university. He was 13.5 credits short of graduating.

Since then, Doe filed a lawsuit claiming that the university's disciplinary proceedings violated the Due Process Clause and Title IX. He argues that because the university's decision turned on a credibility finding, the school was required to give him a hearing with an opportunity to cross-examine Roe and adverse witnesses. He also maintains that the Board violated Title IX by discriminating against him on account of his gender. The university filed a motion to dismiss, which the district court granted in full. Doe now appeals, and we review de novo. *Kottmyer v. Maas*, 436 F.3d 684, 688 (6th Cir. 2006).

II.

To survive a motion to dismiss, a complaint must provide "a short and plain statement of the claim showing that the [plaintiff] is entitled to relief." Fed. R. Civ. P. 8(a)(2). A plaintiff shows that he is entitled to relief by "plausibly suggesting" that he can meet the elements of his claim. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007). And a plaintiff's suggestion is plausible when it contains enough factual content that the court can reasonably infer that the defendant is liable. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Legal conclusions, "formulaic recitation[s]" of the claim's elements, and "naked assertion[s]" of liability are all insufficient. *Id.* (second alteration in original) (quoting *Twombly*, 550 U.S. at 557).

When evaluating a complaint's sufficiency, courts use a three-step process. First, the court must accept all of the plaintiff's factual allegations as true. *Logsdon v. Hains*, 492 F.3d 334, 340 (6th Cir. 2007). Second, the court must draw all reasonable inferences in the plaintiff's favor. *Id.* And third, the court must take all of those facts and inferences and determine whether they plausibly give rise to an entitlement to relief. *Iqbal*, 556 U.S. at 679. If it is at all plausible (beyond a wing and a prayer) that a plaintiff would succeed if he proved everything in his complaint, the case proceeds.

III.

Doe first argues that the university violated his due process rights during his disciplinary proceedings. He claims that because the university's decision ultimately turned on a credibility determination, the school was required to give him a hearing with an opportunity to cross-examine Roe and other adverse witnesses. The district court dismissed this claim, finding that even if credibility was at issue, the university's failure to allow for cross-examination was "immaterial" in Doe's case. R. 74, Pg. ID 2871. We disagree.

When it comes to due process, the "opportunity to be heard" is the constitutional minimum. *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). But determining what being "heard" looks like in each particular case is a harder question. The Supreme Court has declined to set out a universal rule and instead instructs lower courts to consider the parties' competing interests. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Goss v. Lopez*, 419 U.S. 565, 579 (1975). So, consistent with this command, our circuit has made two things clear: (1) if a student is accused of misconduct, the university must hold some sort of hearing before imposing a sanction as serious as expulsion or suspension, and (2) when the university's determination turns on the credibility of the accuser, the accused, or witnesses, that hearing must include an opportunity for cross-examination. *Univ. of Cincinnati*, 872 F.3d at 399–402; *Flaim*, 418 F.3d at 641.

Due process requires cross-examination in circumstances like these because it is "the greatest legal engine ever invented" for uncovering the truth. *Univ. of Cincinnati*, 872 F.3d at 401–02 (citation omitted).[1] Not only does cross-examination allow the accused to identify inconsistencies in the other side's story, but it also gives the fact-finder an opportunity to assess a witness's demeanor and determine who can be trusted. *Id.* So if a university is faced with competing narratives about potential misconduct, the administration must facilitate some form of cross-examination in order to satisfy due process. *Id.* at 402.

[1]Even popular culture recognizes the importance of cross-examination. *See A Few Good Men* (Castle Rock Entertainment 1992) (depicting one of the most memorable examples of cross-examination in American cinema); *My Cousin Vinny* (Palo Vista Productions et al. 1992) (demonstrating that cross-examination can both undermine and establish the credibility of witnesses).

Doe claims that the university ran afoul of this well-established rule in his disciplinary proceedings. And the pleadings in his case suggest that he is right. The university's decision rested on a credibility determination: the Board found Doe responsible after concluding that Roe and her witnesses were "more credible" than Doe and his. R. 6-5, Pg. ID 274–75. Nevertheless, Doe never received an opportunity to cross-examine Roe or her witnesses—not before the investigator, and not before the Board. As a result, there is a significant risk that the university erroneously deprived Doe of his protected interests.[2] *See Mathews*, 424 U.S. at 335.

This risk is all the more troubling considering the significance of Doe's interests and the minimal burden that the university would bear by allowing cross-examination in Doe's case. *See id.* at 334–35. Time and again, this circuit has reiterated that students have a substantial interest at stake when it comes to school disciplinary hearings for sexual misconduct. *Doe v. Miami Univ.*, 882 F.3d 579, 600 (6th Cir. 2018); *Univ. of Cincinnati*, 872 F.3d at 400; *Doe v. Cummins*, 662 F. App'x 437, 446 (6th Cir. 2016). Being labeled a sex offender by a university has both an immediate and lasting impact on a student's life. *Miami Univ.*, 882 F.3d at 600. The student may be forced to withdraw from his classes and move out of his university housing. *Id.* His personal relationships might suffer. *See id.* And he could face difficulty obtaining educational and employment opportunities down the road, especially if he is expelled. *Id.*

In contrast, providing Doe a hearing with the opportunity for cross-examination would have cost the university very little. As it turns out, the university already provides for a hearing with cross-examination in all misconduct cases other than those involving sexual assault. So the administration already has all the resources it needs to facilitate cross-examination and knows how to oversee the process. *See Univ. of Cincinnati*, 872 F.3d at 406 (noting that a university does not bear a significant administrative burden when it already has procedures in place to accommodate cross-examination). And, importantly, the university identifies no substantial burden that would be imposed on it if it were required to provide an opportunity for cross-examination in this context.

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[2]Contrary to the concurrence/dissent's characterization, we apply the *Mathews* factors herein. We consider the seriousness of Doe's deprivation, the burden on the university, and the risk of an erroneous outcome in a process without live cross-examination. *See infra* Part III; *see also Mathews*, 424 U.S. at 335.

Still, the university offers four reasons why Doe's claim is not as plausible as it seems. None do the trick. First, the university contends that even if Doe did not have a formal opportunity to question Roe, he was permitted to review her statement and submit a response identifying inconsistencies for the investigator. As such, the university claims that there would have been no added benefit to cross-examination. But this circuit has already flatly rejected that argument. In *University of Cincinnati*, we explained that an accused's ability "to draw attention to alleged inconsistencies" in the accuser's statements does not render cross-examination futile. *Id.* at 401–02. That conclusion applies equally here, and we see no reason to doubt its wisdom. Cross-examination is essential in cases like Doe's because it does *more* than uncover inconsistencies—it "takes aim at credibility like no other procedural device." *Id.* Without the back-and-forth of adversarial questioning, the accused cannot probe the witness's story to test her memory, intelligence, or potential ulterior motives. *Id.* at 402. Nor can the fact-finder observe the witness's demeanor under that questioning. *Id.* For that reason, written statements cannot substitute for cross-examination. *See* Brutus Essay XIII, in *The Anti-Federalist* 180 (Herbert J. Storing ed., 1985) ("It is of great importance in the distribution of justice that witnesses should be examined face to face, that the parties should have the fairest opportunity of cross-examining them in order to bring out the whole truth; there is something in the manner in which a witness delivers his testimony which cannot be committed to paper, and which yet very frequently gives a complexion to his evidence, very different from what it would bear if committed to writing . . . ."). Instead, the university must allow for some form of *live* questioning *in front of* the fact-finder. *See Univ. of Cincinnati*, 872 F.3d at 402–03, 406 (noting that this requirement can be facilitated through modern technology, including, for example, by allowing a witness to be questioned via Skype "without physical presence").

That is not to say, however, that the accused student always has a right to *personally* confront his accuser and other witnesses. *See Miami Univ.*, 882 F.3d at 600 (noting that "even in the face of a sexual-assault accusation," the protections afforded to an accused "need not reach the same level . . . that would be present in a criminal prosecution" (quoting *Univ. of Cincinnati*, 872 F.3d at 400)). Universities have a legitimate interest in avoiding procedures that may subject an alleged victim to further harm or harassment. And in sexual misconduct cases,

allowing the accused to cross-examine the accuser may do just that. *See Univ. of Cincinnati*, 872 F.3d at 403. But in circumstances like these, the answer is not to deny cross-examination altogether. Instead, the university could allow the accused student's agent to conduct cross-examination on his behalf. After all, an individual aligned with the accused student can accomplish the benefits of cross-examination—its adversarial nature and the opportunity for follow-up—without subjecting the accuser to the emotional trauma of directly confronting her alleged attacker. *Cf. Maryland v. Craig*, 497 U.S. 836, 857 (1990) (holding that where forcing the alleged victim to testify in the physical presence of the defendant may result in trauma, the court could use an alternative procedure that "ensures the reliability of the evidence by subjecting it to rigorous adversarial testing" through "full cross-examination" and ensuring that the alleged victim could be "observed by the judge, jury, and defendant as they testified"). The university's first argument is therefore unavailing.[3]

Second, the university contends that Doe is not entitled to cross-examination because the university's decision did not depend *entirely* on a credibility contest between Roe and Doe. For support, the university brings our attention back to *University of Cincinnati*, where we emphasized the exclusively "he said/she said" nature of the investigation at issue in that case. 872 F.3d at 395, 402. But the university reads far too much into that point. When we emphasized the exclusively "he said/she said" nature of the *University of Cincinnati* dispute, we were not implying that cross-examination would be less important in cases where the school's finding rested on the credibility of several witnesses instead of one or two. Rather, we merely distinguished that case from others holding that cross-examination was unnecessary when the university's decision did not rely on *any testimonial evidence at all*. *Id.* at 401, 405 (distinguishing *Plummer v. Houston*, 860 F.3d 767, 775–76 (5th Cir. 2017), which held that cross-examination was unnecessary when conduct depicted in videos and photos was sufficient to sustain a finding of misconduct without resorting to testimonial evidence); *see also Flaim*, 418 F.3d at 641. Accordingly, *University of Cincinnati* does not stand for the proposition that

[3]The concurrence/dissent poses a number of thoughtful questions about what universities need to do going forward. None of these, however, are currently before us. Doe asks for an opportunity for a hearing with live cross-examination. Due process requires as much. If the university is worried about the accused confronting the accuser, it could consider other procedures such as a witness screen. But if the university does not want the accused to cross-examine the accuser under any scenario, then it must allow a representative to do so.

cross-examination is required only if the university's decision depends solely on the accuser's statement. Instead, *University of Cincinnati* is consistent with our conclusion today: if credibility is in dispute and material to the outcome, due process requires cross-examination. *See* 872 F.3d at 406 (recognizing that credibility disputes might be more common in sexual misconduct proceedings than other university disciplinary investigations).

Third, the university claims that cross-examination was unnecessary in Doe's case because he admitted to the misconduct in a police interview the day after the incident in question. Here, the university is right about the law but wrong about the facts. This court has long held that cross-examination is unnecessary if a student admits to engaging in misconduct. *Flaim*, 418 F.3d at 641. After all, there is little to be gained by subjecting witnesses to adversarial questioning when the accused student has already confessed. But at the motion-to-dismiss stage, we cannot conclude that Doe confessed to the misconduct in this case. To see why, a closer look at the police report is instructive.

During the police interview, a detective asked Doe to describe the previous night's sexual encounter. When doing so, Doe told the detective that Roe performed oral sex on him before they engaged in intercourse, and that when the pair began to have intercourse, Roe was on top. As it turns out, this story was different than the one Roe had reported to the detective earlier that day. According to the detective, Roe claimed that she told Doe "no sex" before making her way to the bed, and that she performed oral sex on Doe after the pair had intercourse. The detective thus relayed Roe's version of the story to Doe, and Doe immediately conceded that Roe was right and that he "got it all wrong." R. 16, Pg. ID 356. Even so, however, Doe reiterated that (1) he never heard Roe say "no sex," (2) he "didn't rape" Roe, and (3) he believed their sexual encounter was consensual. *Id.*

Because the district court made this report part of the pleadings, we must read it in the light most favorable to Doe.[4] *See Logsdon*, 492 F.3d at 340. When we do, we cannot conclude

[4]The district court considered the administrative record (which included the police report) when deciding the motion to dismiss, even though it was not attached to the complaint, because it was referenced in the complaint and integral to Doe's claims. Since neither party objected then or in their appellate briefs, we, like the district court, consider the administrative record as part of the pleadings.

that Doe admitted to any of the critical facts in his case—i.e., that Roe was too drunk to consent to sex, and that he knew or should have known as much. For one, we would have to ignore Doe's claim that the sex was "consensual." R. 16, Pg. ID 356. And for another, because Doe did not mention anything about Roe's level of intoxication in his own account of the night's events, his concession that Roe was correct and that he "got it all wrong" appears to relate only to the points on which the detective said their two accounts actually diverged—the order of the sexual acts. *See id.*, Pg. ID 354–56. This alleged confession thus does not sufficiently rebut the plausibility of Doe's claim.

The university offers one last ditch effort to avoid reversal. It points out that although Doe did not have an opportunity to cross-examine Roe in the university disciplinary process, he recently deposed her in state civil proceedings. According to the university, because Roe's deposition is consistent with what she told the investigator, Doe's inability to cross-examine her during the disciplinary proceedings did not cause any prejudice. To start, Doe disputes whether Roe's deposition is, in fact, consistent with her earlier statements in the disciplinary process. But more importantly, Roe's later deposition has no bearing on this case. As discussed above, the value of cross-examination is tied to the fact-finder's ability to assess the witness's demeanor. *Univ. of Cincinnati*, 872 F.3d at 402. So just as a written response insufficiently substitutes for cross-examination, so too does a written deposition transcript. And, critically, cross-examination for the sake of cross-examination is not what Doe seeks. Rather, Doe seeks cross-examination as part of the credibility assessment *by the university*. That a state court later allowed for cross-examination as a part of *its* fact-finding after the university had already made its decision is beside the point. If anything, the fact that the state court allowed cross-examination only goes to show just how far removed the university's fact-finding procedures are from the tried and true methods invoked by courts. *See id.* at 404–05 (noting that while classrooms are not courtrooms, at the very least a circumscribed version of cross-examination is required (citing *Cummins*, 662 F. App'x at 448)).

In sum, accepting all of Doe's factual allegations as true and drawing all reasonable inferences in his favor, he has raised a plausible claim for relief under the Due Process Clause. We thus reverse the district court's decision to dismiss his claim.[5]

IV.

Doe also sued under Title IX, which prohibits federally-funded universities from discriminating against students on the basis of sex. 20 U.S.C. § 1681(a); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 717 (1979) (recognizing an implied private right of action under Title IX). He advances three theories of liability, claiming that the university (1) reached an erroneous outcome in his case because of his sex, (2) relied on archaic assumptions about the sexes when rendering a decision, and (3) exhibited deliberate indifference to sex discrimination in his disciplinary proceedings.

Erroneous Outcome. A university violates Title IX when it reaches an erroneous outcome in a student's disciplinary proceeding because of the student's sex. *See Miami Univ.*, 882 F.3d at 592. To survive a motion to dismiss under the erroneous-outcome theory, a plaintiff must plead facts sufficient to (1) "cast some articulable doubt" on the accuracy of the disciplinary proceeding's outcome, and (2) demonstrate a "particularized . . . causal connection between the flawed outcome and gender bias." *Id.* (alteration in original) (quoting *Cummins*, 662 F. App'x at 452). The district court held that Doe's complaint failed to meet either element and dismissed his claim. We reverse.

First, because Doe alleged that the university did not provide an opportunity for cross-examination even though credibility was at stake in his case, he has pled facts sufficient to cast some articulable doubt on the accuracy of the disciplinary proceeding's outcome. *See Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994) (noting the "pleading burden in this regard is not heavy" and can be met by alleging "particular procedural flaws affecting the proof"); *see also Univ. of Cincinnati*, 872 F.3d at 401 ("Few procedures safeguard accuracy better than adversarial

[5]We need not address Doe's argument that the district court abused its discretion in denying his motion to reopen and file an amended complaint. We hold that Doe stated a claim under the Due Process Clause absent the new evidence he seeks to add to the complaint. Should Doe want to introduce that evidence later in this litigation, the district court will need to determine whether, and under what circumstances, it may be used.

questioning."). Second, Doe has pointed to circumstances surrounding his disciplinary proceedings that, accepting all of his factual allegations as true and drawing all reasonable inferences in his favor, plausibly suggest the university acted with bias based on his sex. *See Iqbal*, 556 U.S. at 681–82.

Around two years before Doe's disciplinary proceeding, the federal government launched an investigation to determine whether the university's process for responding to allegations of sexual misconduct discriminated against women. When news of the investigation broke, student groups and local media outlets sharply criticized the administration. The federal government's investigation and the negative media reports continued for years, throughout the Board's consideration of Doe's case.

This public attention and the ongoing investigation put pressure on the university to prove that it took complaints of sexual misconduct seriously. The university stood to lose millions in federal aid if the Department found it non-compliant with Title IX. The university also knew that a female student had triggered the federal investigation and that the news media consistently highlighted the university's poor response to female complainants. Of course, all of this external pressure alone is not enough to state a claim that the university acted with bias in this particular case. Rather, it provides a backdrop that, when combined with other circumstantial evidence of bias in Doe's specific proceeding, gives rise to a plausible claim. *See Twombly*, 550 U.S. at 570.

Specifically, the Board credited exclusively female testimony (from Roe and her witnesses) and rejected all of the male testimony (from Doe and his witnesses). In doing so, the Board explained that Doe's witnesses lacked credibility because "many of them were fraternity brothers of [Doe]." But the Board did not similarly note that several of Roe's witnesses were her sorority sisters, nor did it note that they were female. This is all the more telling in that the initial investigator who actually interviewed all of these witnesses found in favor of Doe. The Board, by contrast, made all of these credibility findings on a cold record.

When viewing this evidence in the light most favorable to Doe, as we must, one plausible explanation is that the Board discredited all males, including Doe, and credited all females,

including Roe, because of gender bias. And so this specific allegation of adjudicator bias, combined with the external pressure facing the university, makes Doe's claim plausible. Indeed, other courts facing similar allegations have reached the same result. *See, e.g.*, *Miami Univ.*, 882 F.3d at 594 (plaintiff's complaint was sufficient where allegations included that the university faced "pressure from the government to combat vigorously sexual assault on college campuses and the severe potential punishment—loss of all federal funds—if it failed to comply"); *Doe v. Columbia Univ.*, 831 F.3d 46, 56–57 (2d Cir. 2016) (plaintiff's complaint pointing to student group criticism and university statements was sufficient to raise a plausible inference of bias under a "minimal plausible inference" standard); *Doe v. Amherst Coll.*, 238 F. Supp. 3d 195, 223 (D. Mass. 2017) (plaintiff's complaint was sufficient where allegations suggested that university was trying to "appease" a biased, student-led movement); *Doe v. Lynn Univ., Inc.*, 235 F. Supp. 3d 1336, 1340–42 (S.D. Fla. 2017) (plaintiff's complaint was sufficient where allegations suggested that university was reacting to "pressure from the public and the parents of female students" to punish males accused of sexual misconduct); *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746, 751 (S.D. Ohio 2014) (plaintiff's complaint was sufficient where, taken together, his allegations suggested that university was "reacting against him[] as a male" in response to a Department of Education investigation).

The dissent disagrees, taking a deep and thoughtful dive into the factual record to conclude that there is "no basis to reasonably infer" that Doe was a victim of gender discrimination. But when viewed against the backdrop of external pressure, the Board's decision to discredit Doe's fraternity brothers in part because they were fraternity brothers, while not holding Roe's witnesses to the same standard, is basis enough at the motion-to-dismiss stage. Of course, anti-male bias is not the only plausible explanation for the university's conduct, or even the most plausible. The university might have been unaffected by the federal investigation or the media's criticism, and the significance of the Board's decision to disregard Doe's witnesses' statements might be overblown. And as the dissent points out, the Board might have ruled the way it did because it believed Witness 2's testimony was more credible. But alternative explanations are not fatal to Doe's ability to survive a Rule 12(b)(6) motion to dismiss. *See 16630 Southfield Ltd. P'ship v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 505 (6th Cir. 2013) ("[T]he mere existence of more likely alternative explanations does not automatically

entitle a defendant to dismissal."); *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 458 (6th Cir. 2011) (noting that there are often several plausible explanations for a defendant's conduct, but "[f]erreting out the most likely reason for the defendants' actions is not appropriate at the pleadings stage"). Doe's allegations do not have to give rise to the *most* plausible explanation—they just have to give rise to one of them. *See Iqbal*, 556 U.S. at 678 (stating that there is no "probability requirement" at the pleading stage (quoting *Twombly*, 550 U.S. at 556)).

As this case proceeds and a record is developed, evidence might very well come to show that today's inference is the least plausible of the bunch. Certain allegations that we must assume are true might be proven false. And with the benefit of exhibits, testimony, and cross-examination, a fact-finder may conclude that the inferences we were required to draw in Doe's favor are simply untenable. But these possibilities cannot affect this court's evaluation of Doe's complaint. Our job is simply to ensure that Doe is not deprived of an opportunity to prove what he has alleged unless he would lose regardless. Because Doe has alleged facts that state a plausible claim for relief, we reverse the district court's decision to dismiss his complaint. Whether he will ultimately succeed is a question for another day.

Archaic Assumptions and Deliberate Indifference. Doe advances two more theories of Title IX liability. First, he maintains that the university relied on archaic assumptions about the sexes when resolving his case. And second, he claims that the university was deliberately indifferent to the Board's sex discrimination. The problem for Doe, however, is that neither of these theories applies in the context of university disciplinary proceedings.

Title IX plaintiffs use the archaic-assumptions theory to show that a school denied a student an equal opportunity to participate in an athletic program because of historical assumptions about boys' and girls' physical capabilities. *See Mallory v. Ohio Univ.*, 76 F. App'x 634, 638–39 (6th Cir. 2003). This court has never applied the theory outside of the athletic context, and, indeed, we have repeatedly refused litigants' requests to do so. *See Cummins*, 662 F. App'x at 451 n.9. Since Doe has not offered any reason why we should change course and take that step today, we affirm the district court's decision to dismiss on this ground.

The same problem dooms Doe's deliberate-indifference theory. The deliberate-indifference theory was designed for plaintiffs alleging *sexual harassment*. *See Horner v. Ky. High Sch. Athletic Ass'n*, 206 F.3d 685, 693 (6th Cir. 2000) (explaining that the deliberate-indifference test arose from Supreme Court cases that "all address deliberate indifference to sexual harassment"). And though sexual harassment is a form of discrimination for purposes of Title IX, *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 649–50 (1999), we have held that to plead a Title IX deliberate-indifference claim, "the misconduct alleged must be sexual harassment," not just a biased disciplinary process. *Miami Univ.*, 882 F.3d at 591. Because Doe did not allege that actionable sexual harassment occurred during his disciplinary proceedings, he failed to state a claim under Title IX by way of deliberate indifference.

V.

Accordingly, we **REVERSE** the district court's dismissal of John Doe's procedural due process claim insofar as it is based on the university's failure to provide a hearing with the opportunity for cross-examination, we **REVERSE** the district court's dismissal of John Doe's Title IX claim insofar as it is based on erroneous outcome, and we **REMAND** for further proceedings consistent with this opinion.

CONCURRENCE

JULIA SMITH GIBBONS, Circuit Judge, concurring. I write separately to make one discrete point with respect to the Title IX Claim. I agree that Doe has plausibly alleged a claim of gender bias. The inclusion of materials, other than the complaint, in the record makes a summary judgment standard tempting. The dissent avoids summary judgment language, but its analytical approach is analogous to the process by which a judge determines the existence of a genuine issue of material fact. Yet Doe is entitled to the full benefit of the standard for considering a motion to dismiss. Under that standard, my view is that Doe's complaint survives.

CONCURRING IN PART AND DISSENTING IN PART

RONALD LEE GILMAN, Circuit Judge, concurring in part and dissenting in part. I concur in the majority's judgment (but not in its discussion) with regard to the disposition of Doe's due process claim. As to Doe's Title IX claim, I would affirm the judgment of the district court because of Doe's failure to plausibly state a claim under Title IX.

I. Due process claim

Although I agree that Doe's due process rights were violated when he was not permitted the opportunity to engage in *any form* of cross-examination of the witnesses against him, I disagree with the majority about the scope of cross-examination mandated by the United States Constitution in this context. I particularly believe that the majority has traveled "a bridge too far" in mandating that "if the university does not want the accused to cross examine the accuser under any scenario, then it must allow a representative to do so." Maj. Op. at 9 n.3.

This court has found that when witness credibility is at issue, the accused must have an opportunity for at least a "circumscribed form" of cross-examination where he or she is allowed to submit questions to the trier of fact, who will then directly pose those questions to the witnesses. *Doe v. Cummins*, 662 F. App'x 437, 446 (6th Cir. 2016). *Cummins* held that this requirement was met even where the trier of fact did not ask all the questions submitted or allow an opportunity to submit follow-up questions. *Id.* at 448; *see also Doe v. Univ. of Cincinnati*, 872 F.3d 393, 406 (6th Cir. 2017) (emphasizing that the university has only a narrow obligation to provide the trier of fact with an opportunity "to evaluate an alleged victim's credibility, not [to allow] the accused to physically confront his accuser," and that "what matters" is that the trier of fact has the "ability to assess the demeanor of both the accused and his accuser"); *Nash v. Auburn University*, 812 F.2d 655, 664 (11th Cir. 1987) (finding that the due process rights of a student suspended for academic dishonesty were not violated where he was given the opportunity to submit questions to the trier of fact, who would then direct the questions to the

witnesses, and that the student did not have a right to "question the adverse witnesses in the usual, adversarial manner").

Although *Cummins* is factually distinguishable because the two accused students faced only suspension and probation rather than expulsion, the majority cites no case that would support its expansion of Doe's cross-examination rights beyond those set forth in *Cummins*. Nor does the majority explain why the *Eldridge* balancing factors would require the added protection of unfettered cross-examination by a representative whenever expulsion from a university is a potential penalty. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

And this expansion, in the absence of a focused and caselaw-supported analysis, leaves many questions unanswered. For example, who is the "representative" that will be allowed to question witnesses on the accused's behalf? Is it an attorney? If so, then this expanded right of cross-examination conflicts with our caselaw making clear that a student has no constitutional right to have an attorney actively participate in his disciplinary hearings, except in very limited circumstances. *See Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 640 (6th Cir. 2005) (noting that a student has no recognized right to have counsel participate in school disciplinary proceedings except, possibly, where the proceedings are complex or where the university itself utilizes an attorney); *Cummins*, 662 F. App'x at 448–49 (same); *Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 16 (1st Cir. 1998) (noting that "the weight of authority is against [recognizing the right to] representation by counsel at [school] disciplinary hearings, unless the student is also facing criminal charges stemming from the incident in question"); *Donohue v. Baker*, 976 F. Supp. 136, 146 (N.D.N.Y. 1997) (noting that a student in a school disciplinary hearing has a right to counsel only to protect his Fifth Amendment right against self-incrimination, not to affect the outcome of the hearing through cross-examination).

Should the representative instead be a teacher or an administrator? Such an individual would undoubtedly need to be paid for his or her work, imposing an additional burden on the university. Could the representative be a friend or family member of the accused? And would the rules of evidence apply to the cross-examination? *Cf. Flaim*, 418 F.3d at 635 (observing that "[c]ourts have generally been unanimous . . . in concluding . . . that neither rules of evidence nor rules of civil or criminal procedure need be applied" in school disciplinary hearings). Assuming

they would not, who would decide what limits to impose on the representative's questioning and using what criteria?

This court has repeatedly held that "[f]ull-scale adversarial hearings in school disciplinary proceedings have never been required by the Due Process Clause." *Univ. of Cincinnati*, 173 F. Supp. 3d at 603 (quoting *Flaim*, 418 F.3d at 640). And the burden of allowing a representative to participate by cross-examining witnesses "in every disciplinary hearing would be significant due to the added time, expense, and increased procedural complexity." *Cummins*, 662 F. App'x at 449; *see also Flaim*, 418 F.3d at 640–41 ("[C]onducting [full adversarial hearings] with professional counsel would entail significant expense and additional procedural complexity."). This would be especially true if the university were also required to provide representation for a student who could not provide his or her own.

Although a university may choose to allow an agent or representative of an accused student to cross-examine the complainant and his or her witnesses, no court has previously held that this is constitutionally required. This court has instead held that the university must provide at least the "circumscribed form" of cross-examination set out in *Cummins*, 662 F. App'x at 446. And because Doe was not provided with even this level of cross-examination, I agree that his due process rights were violated.

I recognize that a case might arise where the Constitution requires more than the procedures that this court approved of in *Cummins*, but we should address that issue only if and when it arises. We need not—and should not—resolve it today because we have been given neither the facts nor the arguments necessary to conduct an adequate analysis. I therefore believe that we should refrain from imposing on all universities a rigid requirement to provide students facing expulsion with an opportunity to have a representative cross-examine adverse witnesses. *See Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 482 (1982) ("We must bear in mind that no single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause. . . . 'The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.'" (quoting *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 609 (1974))); *Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 16 (1st Cir. 1988) ("[O]n review, the courts ought not to extol form over substance, and impose on

educational institutions all the procedural requirements of a common law criminal trial. . . . In all cases the inquiry is whether, under the particular circumstances presented, the hearing was fair, and accorded the individual the essential elements of due process.").

II. Title IX claim

I now turn to Doe's claim under Title IX. Doe contends that the University faced pressure from the United States Department of Education, the general public, and student groups to adequately address sexual-assault complaints made against male students on campus and that, as a consequence, the University erroneously found him responsible for sexual misconduct because of his gender. But no circuit court has ever held that a student plausibly states a claim that deficiencies in his disciplinary proceedings were motivated by gender bias where the only fact that he alleges to show such bias is general pressure on the university to adequately address allegations of sexual assault. *Cf. Doe v. Miami Univ.*, 882 F.3d 579, 593 (6th Cir. 2018) (noting that to survive a motion to dismiss, a plaintiff must show a "causal connection between the flawed [disciplinary] outcome and gender bias" by alleging, "inter alia, statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender").

In *Miami University*, this court found the complaint sufficient where it alleged facts showing a pattern of gender-based decision-making, in addition to general pressure on the university to take sexual-assault claims seriously. *Id.* at 593. This evidence included "an affidavit from an attorney who represents many students in Miami University's disciplinary proceedings, which describes a pattern of the University pursuing investigations concerning male students, but not female students." *Id.* It also included an allegation that the university investigated the complaint of sexual misconduct made against the male plaintiff but did not investigate his allegation that his female accuser actually perpetrated sexual misconduct against him. *Id.* at 590–91, 593.

The *Miami University* court further noted that the university "was facing pressure to increase the zealousness of its 'prosecution' of sexual assault and the harshness of the sanctions it imposed because it was a defendant in a lawsuit brought by a student who alleged that she

would not have been assaulted if the University had expelled her attacker for prior offenses." *Id.* at 594. This alleged pattern of activity relating to sexual-assault matters, combined with the general pressure on the university, was deemed sufficient to "support a reasonable inference of gender discrimination" and therefore to survive a motion to dismiss. *Id.*

Similarly, in *Doe v. Columbia University*, 831 F.3d 46, 57 (2d Cir. 2016), the Second Circuit held that a complaint plausibly alleged gender discrimination when it contended that, "during the period preceding the disciplinary hearing, there was substantial criticism of the University[] both in the student body and in the public media [that] accus[ed] the University of not taking seriously complaints of female students alleging sexual assault by male students." *Id.* The complaint further alleged that "the University's administration was cognizant of, and sensitive to, these criticisms, to the point that the President called a University-wide open meeting with the Dean to discuss the issue." *Id.* Moreover, the investigator in that case had been subjected to "personal criticism" by the student body and in news articles "for her role in prior cases in which the University was seen as not taking seriously the complaints of female students." *Id.* at 51, 58.

The investigator in *Columbia University* was thus aware that the university "had been criticized for . . . conducting the investigations in a manner that favored male athletes and that was insufficiently protective of sexually assaulted females." *Id.* Finally, the plaintiff in *Columbia University* alleged that the investigator failed to interview key witnesses identified by the plaintiff, that she was hostile to him during interviews, and that she failed to inform him of his right to make a statement at the hearing. *Id.* at 49, 52.

Unlike the plaintiffs in *Miami University* and *Columbia University*, Doe crucially fails to link general pressure on the University of Michigan to the particular proceedings that he faced. *See Doe v. Cummins*, 662 F. App'x 437, 452 (6th Cir. 2016) (noting that "to state an erroneous-outcome claim, a plaintiff must plead . . . a '*particularized* . . . causal connection between the flawed outcome and gender bias'" (emphasis and first ellipsis added; second ellipsis in original) (quoting *Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994))). Nor does Doe allege any facts suggesting a pattern of discriminatory behavior by the University in its response to sexual-assault allegations, or that he made any sexual-misconduct complaints himself that the

University ignored, in contrast to the plaintiff's allegations in *Miami University*, 882 F.3d at 590–91, 593. There is also no allegation here that the investigator faced individualized criticism for her handling of previous sexual-assault claims and subsequently manifested hostility toward Doe, in contrast to the plaintiff's contentions in *Columbia University*, 831 F.3d at 49, 51–52, 58. In fact, the investigator here found in favor of Doe, and Doe acknowledged that her investigation was "thorough."

Doe also fails to show how general pressure on the University's administration to pursue and effectively address sexual-assault complaints led the Appeals Board—a board made up of an assistant dean from the law school, a retired professor from the dentistry school, and a student—to take actions against him based on gender bias. He also fails to identify any practice or policy adopted by the University in response to either external or internal pressure that would reflect bias against males. Moreover, the media reports published *after* the Appeals Board decision (which reports allege that the University was continuing to inadequately address sexual-misconduct complaints) would appear to belie any contention that the University had overcorrected by adopting policies or practices biased against male students accused of sexual misconduct.

The majority in fact recognizes that the alleged external pressure on the University alone is not sufficient to plausibly show that a university acted based on gender bias in Doe's particular case. Maj. Op. at 13. But it concludes that this pressure is sufficient when combined with Doe's allegation that the Appeals Board adopted all of the statements made by the female witnesses and rejected all of the statements made by the male witnesses. Maj. Op. at 13–14. More specifically, the majority reasons that "when viewed against the backdrop of external pressure, the Board's decision to discredit Doe's fraternity brothers in part because they were fraternity brothers, while not holding Roe's witnesses to the same standard, is basis enough at the motion-to-dismiss-stage." Maj. Op. at 14. But the majority's observation about the Appeals' Board's alleged disparate treatment of the witnesses is not borne out by the record. (I recognize that the record would not normally be considered at the motion to dismiss stage of the case. But as acknowledged in footnote 4 of the majority opinion, the administrative record was referenced in the complaint and, without objection by either party, considered as part of the pleadings.)

To start with, the Appeals Board discussed statements from only two of Roe's sorority sisters, although additional sorority sisters provided statements that were contained in the investigator's report. The record reflects the following evaluation by the Appeals Board:

> Two witnesses who know [Roe] reported that they observed [Roe] drinking from the wine bag at [Doe's] fraternity and also reported that they perceived she was intoxicated for a variety of reasons (very energetic when she's drunk; inhibitions were lowered; and speech that was 'not completely clear,' contained 'occasional slurs,' and occasionally trailed off at the end of sentences).

The Appeals Board provided no further discussion of these statements that would suggest that it was relying on them beyond its observation that Roe's statements were "corroborated by other witnesses, particularly by Witness 2's observations of [Roe's] behavior and physical condition immediately after the sexual encounter." And this observation by the Appeals Board leads directly to the biggest weakness in both Doe's and the majority's position: the Appeals Board's decision to credit the testimony of Roe and Witness 2 (and subsequently to find Doe responsible for sexual misconduct) was based on the considerations that (1) Witness 2 spent significant time with Roe following Roe's sexual encounter with Doe, and (2) Witness 2 had no connection to Doe, Roe, or their respective Greek institutions.

The Appeals Board explained:

> Although there were other witnesses who observed Complainant both prior to and after the sexual encounter with Respondent, many of them were fraternity brothers of Respondent, and all of them only observed Complainant briefly and/or at a distance. For these reasons, we find their statements to be significantly less persuasive than the statements of Complainant and Witness 2. Complainant knew that she consumed an excessive amount of alcohol and recognized that she was not mentally or physically in control. Witness 2 had no previous connection to Complainant and observed her for a lengthy period of time, spanning from a few minutes after Complainant's sexual encounter with the Respondent, through the time she got Complainant into bed at her dorm.

Whether the statements made by Roe's sorority sisters were credible was not discussed. The Appeals Board's decision instead shows that the statements by Doe and his witnesses were disfavored only as compared to the statements of Roe and Witness 2, and that there was no categorical preference shown for or against statements by fraternity brothers versus sorority sisters, or for or against statements by men versus women as such. The Appeals Board also

noted that Witness 2's observations were further corroborated by two witnesses who helped Roe into a vehicle outside the fraternity house and who, like Witness 2, had no connection to Doe or Roe.

I therefore find no basis to reasonably infer that the Appeals Board declined to rely on the statements made by Doe and his witnesses *simply because they were men*. This leaves us with only one fact from which to infer that gender bias caused the procedural defects in Doe's disciplinary proceedings—the general pressure on the University to adequately address sexual-assault claims. But as discussed above, this is not sufficient to show the "particularized . . . casual connection" required to plausibly allege a claim of gender bias under Title IX. *See Doe v. Miami Univ.*, 882 F.3d 579, 592 (6th Cir. 2018) (quoting *Doe v. Cummins*, 662 F. App'x 437, 452 (6th Cir. 2016)); *Cummins*, 662 F. App'x at 453 (noting that a complaint is insufficient if it shows at most "a disciplinary system that is biased in favor of alleged victims and against those accused of misconduct"). Absent an allegation of some particularized facts linking *gender bias* to the University's disciplinary practices or proceedings, I respectfully dissent as to the viability of Doe's Title IX claim.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

JOHN DOE,	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 1:17-cv-401**
	)	
MARYMOUNT UNIVERSITY, *et al.*,	)	
Defendants.	)	

MEMORANDUM OPINION

Plaintiff John Doe ("Doe"), a former student at Marymount University ("Marymount"), was accused by a fellow student, Jane Roe ("Roe"), of sexual assault and was ultimately suspended for two years after Marymount adjudicated Doe guilty of sexual assault using Marymount's then existing disciplinary procedures. Doe now brings this action against three defendants – Marymount, Jane Roe, and Linda McMurdock, Marymount's Title IX coordinator – asserting various claims. Specifically, Doe sues:

i. Roe for defamation; [1]

ii. Marymount for Title IX gender discrimination, breach of contract, breach of the covenant of good faith and fair dealing and breach of the law of associations; and

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[1] Roe's motion to dismiss Doe's defamation claim was resolved by a separate memorandum opinion and order. *See Doe v. Roe, et al.*, _ F.Supp.3d._, 1:17-cv-401 (E.D. Va. Jan. 31, 2018) (granting in part and denying in part Roe's motion to dismiss Doe's defamation claim).

iii. Marymount and Linda McMurdock for breaching a common law duty purportedly owed by Marymount and its employees to Marymount's students.

Marymount and McMurdock have moved to dismiss all of Doe's claims against them.

The matter has been fully briefed and argued, and for the reasons that follow Marymount and McMurdock's motion to dismiss must be granted in part and denied in part.

I.[2]

A. The Incident

Doe was an undergraduate student at Marymount between August 2014 and August 2016. His accuser, Jane Roe ("Roe"), was also a student at Marymount at that time and ultimately graduated from Marymount in 2017.

Doe and Roe first came into contact with one another in November 2014, when Roe contacted Doe by text message. The two arranged for Roe to visit Doe's dorm room on November 8, 2014. Roe arrived at Doe's room at 6:06 p.m. and the two talked for about twenty minutes in the presence of Doe's roommate. When Doe's roommate left, Doe alleges he and Roe "began to make out" and "fondle each other," but that they did not touch one another's genitals. Pl.'s Compl. ¶ 65. Doe further claims that approximately thirty (30) minutes later Roe got up and said she wanted to go visit some

[2] The facts recited here are derived from plaintiff's complaint and must be accepted as true at this stage, as required by law. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

other friends. Doe purportedly "stood up and leaned against the door, in a friendly, playful effort to persuade [] Roe not to leave, [but] he did not forcefully restrain her from leaving." *Id.* ¶ 67. Thereafter, according to Doe, Roe kissed him on the cheek, told him she needed to meet some friends and then left his room without incident.

At 8:10 p.m., approximately one hour later, Doe texted Roe telling her that he was "hanging out" with his friends and asking her what she was doing. Roe responded at 8:23 p.m. asking "Y'all aren't going out," and then stating "I'm eating pizza haha." *Id.* ¶ 70. After that exchange Doe texted Roe several times, but Roe either did not answer or was slow to respond. On November 15, 2014, after receiving little communication from Roe, Doe sent Roe the following message: "So I don't mean to be [a] weirdo but I wanna ask what's up[?] [I]t's bothering me." *Id.* ¶ 72. Six days later, Roe responded to this message, saying "Hey, so I don't know what you remember about when I was in your room the other night, but you really scared me when you wouldn't take no for an answer. I think you're a really nice guy, I really, really do, but you got really pushy and I just wanted to let you know . . . I hope you have an amazing weekend!!" *Id.* Doe replied to Roe's message stating, "Ok I'm sorry I frightened you, you have a good one too." *Id.* ¶ 73. After this final text message, Doe and Roe never communicated again.

B. Marymount's Investigation

On the evening of November 8, 2014, Roe allegedly told Z.M., another Marymount student, that Doe had physically and sexually assaulted her. Z.M. was the first person with whom Roe shared her assault allegations. According to the Complaint, Roe did not tell anyone else about the alleged assault until late summer, early fall 2015,

almost one year after the alleged incident, when she shared her allegations with C.S., her resident assistant.[3] In September 2015, C.S. filed a written report with Marymount detailing Roe's assault allegations, which led Marymount to initiate an investigation into the November 8, 2014 incident.

Doe was first notified by Marymount officials of Roe's allegations on September 8, 2015. On that same day Marymount issued a no-contact order which forbade Doe from "mak[ing] [any] contact, direct or indirect with [Ms. Roe]," and from "discussi[ng] . . . the order or the alleged acts that led to its issuance with other Marymount University students or employees with the exception of support persons identified as Confidential Resources per the University's Sexual Harassment and Interpersonal Misconduct Policy."[4] *Id.* ¶ 82.

As part of the investigation, Marymount assigned two faculty or staff members, Dr. Bernadette Costello and Mr. Paul Easton, to serve as investigators. The investigators interviewed Doe on September 21, 2015. Initially, Dr. Costello informed Doe that he would not be allowed to consult with his attorney, but she later relented, allowing Doe to speak with his attorney briefly – for less than two-minutes – before the interview ended.

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[3] The record does not indicate the exact date of the interaction between Roe and her resident assistant. It appears, though, that Roe reported the assault to her resident assistant, who in turn prepared a written incident report, sometime in September 2015.

[4] According to the Complaint, the No Contact Order precluded Doe from contacting either directly or indirectly "other University students who might have information necessary or useful" to his defense. Compl. ¶¶ 83 – 84.

Roe was then interviewed by the investigators on two separate occasions: October 1, 2015 and November 18, 2015. According to the Complaint, Roe made the following statements to Marymount's investigators in these interviews:[5]

- Roe told investigators that Doe held her down on the bed and tried to remove her clothes by force;
- Roe stated that Doe performed oral sex on her without her consent and that she "kneed him in the face" to stop him;
- Roe further stated that when she got up off the bed, Doe pushed her into the door and put his fist up her vagina while she was standing there.
- Roe claimed that Doe locked the door from the inside that prevented her from leaving.
- Roe finally alleged that Doe took off his pants and threw her on the bed, but that she "grabbed and yanked his penis," and he let her leave saying "if you don't want me, that's ok." *Id.* ¶ 105.

Doe alleges Roe lied to the investigators during her second interview when she was confronted with the text messages Doe and Roe had exchanged on the evening of the alleged incident. She allegedly told investigators that she sent those messages before the alleged sexual assault, although the time-stamp on the messages revealed that they were sent after the alleged assault.

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[5] Doe further alleges that the statements Roe ultimately made to Marymount's Title IX investigators differed from the original written report produced by C.S., Roe's resident assistant.

Marymount's investigators also interviewed Roe's roommate, L.J., on October 22, 2015, and she allegedly told investigators that Roe had previously stated that she wanted to "climb [Doe] like a [expletive] tree" and wanted him to "throw [her] against the wall." *Id.* ¶ 76. L.J. further reported that upon Roe's return to their shared dorm room on the evening of November 8th Roe was "happy and giddy," showed off her hickeys, and told her roommates that Doe was "good with his tongue." *Id.* ¶ 75. L.J. further stated that after none of her roommates paid attention to her, Roe started drinking heavily and her mood changed. Only then, after being ignored by her roommates and consuming alcohol, did Roe claim that Doe had been "aggressive" with her and that she "didn't ask for it." *Id.* ¶ 76. L.J. also allegedly told investigators that Roe was "good at making herself seem like a victim" and that she often "bent the truth." *Id.* ¶ 105.

Another female student, W.R., was also interviewed by investigators and confirmed that immediately following the alleged assault Roe bragged about the hickeys she had received from Doe. W.R. otherwise corroborated L.J.'s account of the evening of November 8, 2014.

After interviewing the relevant parties, the investigators prepared a draft investigative report on November 24, 2015. The draft report was first provided to Doe approximately sixty days after Roe filed her complaint, despite the fact that Marymount's Sexual Harassment and Interpersonal Misconduct Policy ("Policy") provides only twenty days for sexual assault investigations. Despite this delay, on December 1, 2015, Doe was permitted to review a copy of the report and was also permitted to take some notes. However, he was not allowed to have his attorney present when reviewing the draft

report. When Doe's attorney objected to his exclusion from this process, Marymount permitted Doe to review the draft report a second time on December 7, 2015, this time with his attorney present. But significantly, Doe and his attorney were not permitted to take verbatim notes and were not permitted to retain a copy of the report.

Doe submitted his response to the draft investigative report on December 22, 2015, objecting to the report on multiple grounds, including:

- That Marymount's investigators asked Doe the irrelevant question whether he knew any rape victims and included Doe's equally irrelevant response that he did not know any sexual assault victims, but that he had watched some crime shows on television that portrayed sexual assault victims;

- That Marymount's investigators included irrelevant statements describing Mr. Doe's attorney's behavior during the interviews, including that Mr. Doe's attorney asked for the air conditioner to be turned down and for an opportunity to take a break to "advise Mr. Doe";

- That Marymount's investigators included Roe's irrelevant and unverified statement that Doe "sleeps around" to alleviate the pain he feels from his sister's death from cancer;

- That Marymount's investigators included in their Report summaries of interviews with three students who spoke about Doe's general drinking habits;

- That Marymount's investigators included entries from Roe's journal despite the fact there was no effort made to authenticate these entries;

- That Marymount's investigators failed to gather any physical evidence that Roe had kneed Doe in the face on November 8, 2014, or that Doe had stuck his fist up Doe's vagina, and otherwise failed to mention the absence of such evidence;

- That Marymount's investigators failed to ascertain whether Roe had visited a counselor immediately following the alleged sexual assault, as she alleged, and that the investigators also failed to mention the absence of such evidence.

On February 2, 2016, Marymount informed Doe that an amended draft report had been prepared and permitted him to review the new draft with his attorney. The new draft, however, did not address any of Doe's objections. In response to this amended draft report, Doe raised the same objections he had raised to the original report. Thereafter, Marymount prepared a second amended draft report which removed the statements made by Doe's attorney during Doe's interview and also removed references to Doe's general drinking habits and the allegation that Doe "sleeps around." None of Doe's other objections were sustained and Marymount made no effort to gather the evidence Doe identified as pertinent to his case. Finally, on April 28, 2016, the third amended draft report was issued by Marymount and reviewed by Doe and his counsel. This third amended draft report still included statements and material that Doe had consistently objected to since the issuance of the very first draft report, and also omitted important facts that Doe insisted should be included.

Relying on this third amended draft report, Marymount's investigators determined "that there [was] sufficient information alleged to suggest that violations of [the University's sexual misconduct policy] may have occurred." *Id.* ¶ 137. On May 12, 2016, the investigators referred the matter for a hearing before an adjudicator. The investigators reached this conclusion over Doe's repeated procedural objections. In his Complaint, Doe alleges that Marymount's procedures throughout the investigation were grossly inadequate and were designed to find male students guilty of sexual assault.

C. Disciplinary Proceedings

Marymount appointed Donald Lavanty ("Lavanty"), a business professor, to serve as adjudicator of Doe's case. When reviewing Doe's case, Lavanty relied exclusively on: (i) the investigative report, which Doe claims was one-sided and designed to find him guilty, and (ii) Doe and Roe's written impact statements. Doe claims he was effectively precluded from presenting his case to Lavanty. Specifically, Doe alleges he was (i) denied the opportunity to meet with Lavanty in person, (ii) denied the opportunity to present additional exculpatory evidence, and (iii) denied the opportunity to call and examine witnesses. On July 11, 2016, Lavanty, based on the meager record before him and without oral argument by Doe, determined by a preponderance of the evidence that Doe had violated Marymount's sexual misconduct policy on November 8, 2014, and recommended suspending Doe from Marymount through the summer semester of 2018.

Doe appealed Lavanty's decision, an appeal that was ultimately denied on August 8, 2016, without providing Doe a hearing. Following the denial of his appeal, Doe was suspended from Marymount for two years and banned from the campus.

D. This Action

In response to his suspension Doe filed this action, claiming: (i) that Marymount violated Title IX by erroneously suspending him based on a gender-biased sexual misconduct policy, investigation and adjudication, when the evidence supported his innocence;[6] (ii) that Marymount breached an implied contract with Doe by suspending

him from school without just cause; (iii) that Marymount and McMurdock negligently conducted Doe's investigation and adjudication; and (iv) that Marymount violated the common law of associations by expelling Doe without cause.

In response to Doe's allegations, Marymount and McMurdock (collectively, "defendants") filed a threshold motion to dismiss challenging the legal sufficiency of Doe's Complaint. Specifically, defendants assert (i) that Doe's Title IX erroneous outcome claim fails because his Complaint falls short of creating a plausible inference that the outcome of his Title IX adjudication was erroneous and that the outcome was motivated, at least in part, by gender; (ii) that Doe's breach of contract claim fails because there was no contract between the parties; and (iii) that Doe's tort claims fail because he identifies no legally cognizable duty that has been breached.

Thus, at issue in this case is (i) whether Doe has pled sufficient facts to show that he is likely innocent of sexual assault, that he was wrongfully adjudicated guilty of sexual

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[6] Doe specifically identifies the following irregularities which he believes demonstrate gender-bias: (i) that during his initial meeting with Marymount's investigators he was only allowed to speak with his attorney for less than two minutes; (ii) that Marymount refused to allow Doe's attorney to review the draft investigative report; (iii) that Doe was not given his own copy of the investigative report, but was instead allowed to take notes after reviewing Marymount's copy of the report; (iv) that the investigative team overruled Doe's objections to the report and included this objectionable information in the final report that was provided to the adjudicator; (v) that Marymount, through defendant McMurdock, refused Doe's request to meet with the adjudicator in person; (vi) that the adjudicator failed to consider any other evidence other than Doe and Roe's competing written accounts of the event (including exculpatory evidence Doe had provided); (vii) that Marymount denied Doe access to records concerning the investigation and adjudication (*i.e.* he was given no formal discovery); (viii) that Doe was not allowed to offer his own evidence or call witnesses, and in fact was precluded from contacting potential witnesses by Marymount's No-Contact Order; (ix) that Doe was not allowed to confront or cross-examine Roe; and (x) that Marymount subsequently allowed Lavanty, an individual with gender biases, to serve as a Title IX investigator, evidencing its intent to adjudicate male students guilty of sexual assault.

assault by Marymount, and that this erroneous outcome is based in part on impermissible gender biases by Marymount and its employees; (ii) whether paying tuition to Marymount vested Doe with certain implied procedural protections that were ultimately breached by Marymount; (iii) whether Marymount and McMurdock owed Doe a duty of fairness and whether they violated this duty during Doe's investigation and adjudication; and (iv) whether Doe and Marymount were members of a common law association and whether Marymount expelled Doe from the association without just cause.

II.

A court may dismiss a claim if, after accepting all well-pleaded allegations in the complaint as true and drawing all reasonable factual inferences in the plaintiff's favor, the complaint does not allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). It is undisputed that this familiar standard governs Doe's breach of contract and tort claims; it is less certain, however, whether *Iqbal/Twombly* applies to Doe's Title IX claim.[7]

Notably, the Second Circuit appears to apply a modified version of *Iqbal/Twombly* in discrimination cases.[8] In contrast, the Sixth Circuit has declined to modify the

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[7] After the Supreme Court's decisions in *Twombly* and *Iqbal*, lower courts struggled to reconcile these standards with the Court's earlier decision in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). *See, e.g., McCleary-Evans v. Maryland Dep't of Transp., State Highway Admin.*, 780 F.3d 582, 585 (4th Cir. 2015).

[8] The Second Circuit has held that a complaint under Title IX "is sufficient with respect to the element of discriminatory intent . . . if it pleads specific facts that support a *minimal plausible inference* of such discrimination." *Doe v. Columbia Univ.*, 831 F.3d 46, 56 (2d Cir. 2016) (emphasis added). The Second Circuit has reasoned that in discrimination cases *Twombly/Iqbal*

Iqbal/Twombly standard in discrimination cases and has criticized the Second Circuit for doing so. *See Doe v. Miami University, et al.*, __ F.3d__, 2018 WL 797451, at *5 (6th Cir. Feb. 9, 2018); *Keys v. Humana, Inc.*, 684 F.3d 605, 610 (6th Cir. 2012). To the extent there is a circuit split on the question of the applicable Rule 12(b)(6) standard in discrimination cases, the Sixth Circuit has taken the approach that would likely be followed by the Fourth Circuit.[9] Accordingly, Doe's Title IX claim will be reviewed using the *Iqbal/Twombly* standard and will only survive if Doe's factual allegations give rise to "more than [the] sheer possibility that [the] defendant[s] [] acted unlawfully." *Iqbal*, 556 U.S. at 678.

III.

Title IX prohibits gender discrimination in federally-funded education programs and institutions, and is applicable to private universities that accept federal funding, including all universities that enroll students who receive federally-guaranteed loans to pay their tuition. *See* 20 U.S.C. § 1681(a) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial

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must give way so that plaintiffs do not lose the benefit of *McDonnell-Douglas'* temporary presumption of discrimination. *Littlejohn v. City of New York*, 795 F.3d 297, 310 (2d Cir. 2015).

[9] Although the Fourth Circuit has yet to address the pleading standard in Title IX cases, it is unlikely that the Fourth Circuit would adopt the Second Circuit's modified "minimal plausible inference" standard given the Fourth Circuit's recent Title VII decisions. Specifically, in *McCleary-Evans*, a Title VII case, the Fourth Circuit held that a plaintiff's factual allegations must be supported by a "reasonable inference that the decision-makers were motivated by an impermissible bias." 780 F.3d 582, 586 (4th Cir. 2015).

assistance."); *see also Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 466 (1999); *Columbia Univ.*, 831 F.3d at 53 (citing *Yusuf v. Vassar Coll.*, 35 F.3d 709, 714–15 (2d Cir. 1994)); *A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791, 805 (3d Cir. 2007). Title IX's prohibition is enforceable through an implied private right of action,[10] and as such, "is understood to bar the imposition of university discipline where gender is a motivating factor in the decision to discipline." *Id.* In this case, Doe claims his gender was the impermissible motivating factor in Marymount's decision to suspend him for two years.

Although the Fourth Circuit has not yet had occasion to address the applicability of Title IX in the context of student disciplinary proceedings, other courts have done so and have permitted students like Doe to challenge university disciplinary actions based on a variety of legal theories including the erroneous outcome theory and selective enforcement theory.[11] Here, Doe raises essentially an erroneous outcome claim.

As a historical note, Doe's erroneous outcome claim is but the latest of a spate of actions where a male student accused of sexual assault sues his university or college alleging gender discrimination in violation of Title IX.[12] Some commentators,[13]

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[10] *See Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 639 (1999) (holding that Title IX created a private right of action).

[11] *See Miami Univ.*, 2018 WL 797451, at *8; *Yusuf*, 35 F.3d at 715; *Mallory v. Ohio Univ.*, 76 F. App'x. 634, 638–39 (6th Cir. 2003); *Saravanan v. Drexel Univ.*, No. CV 17-3409, 2017 WL 4532243, at *3 (E.D. Pa. Oct. 10, 2017); *Stenzel v. Peterson*, No. CV 17-580 (JRT/LIB), 2017 WL 4081897, at *4 (D. Minn. Sept. 13, 2017); *Doe v. Univ. of Cincinnati*, 173 F. Supp. 3d 586, 606 (S.D. Ohio 2016); *Bleiler v. Coll. of Holy Cross*, No. CIV.A. 11-11541-DJC, 2013 WL 4714340, at *5 (D. Mass. Aug. 26, 2013); *Doe v. Univ. of the S.*, 687 F. Supp. 2d 744, 756 (E.D. Tenn. 2009).

[12] *See, e.g., Doe v. Miami University, et al.*, __ F.3d__, 2018 WL 797451, at *5 (6th Cir. Feb. 9, 2018); *Plummer v. Univ. of Houston*, 860 F.3d 767, 770 (5th Cir. 2017), as revised (June 26, 2017); *Doe v. Cummins*, 662 F. App'x 437, 452 (6th Cir. 2016); *Doe v. Columbia University*,

including some federal courts,[14] have observed that this spate of cases can be traced to the now-rescinded[15] April 4, 2011 Dear Colleague Letter ("Dear Colleague Letter") from the

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831 F.3d 46 (2d Cir. 2016); *Doe v. Rider Univ.*, No. 3:16-CV-4882-BRM-DEA, 2018 WL 466225, at *1 (D.N.J. Jan. 17, 2018); *Doe v. Columbia College Chicago, et. al.*, No. 17-CV-00748, 2017 WL 4804982, at *11 (N.D. Ill. Oct. 25, 2017); *Rolph v. Hobart & William Smith Colleges*, __F.Supp.3d__, 2017 WL 4174933, at *11 (W.D.N.Y. Sept. 20, 2017); *Doe v. Case W. Reserve Univ.*, No. 1:17 CV 414, 2017 WL 3840418, at *1 (N.D. Ohio Sept. 1, 2017); *Doe v. Univ. of Colorado, Boulder*, 255 F. Supp. 3d 1064 (D. Colo. 2017); *Naumov v. McDaniel Coll.*, Inc., No. GJH-15-482, 2017 WL 1214406, at *1 (D. Md. Mar. 31, 2017); *Doe v. Coll. of Wooster*, 243 F. Supp. 3d 875, 881 (N.D. Ohio 2017); *Doe v. Amherst Coll.*, 238 F. Supp. 3d 195 (D. Mass. 2017); *Neal v. Colorado State Univ.-Pueblo*, No. 16-CV-873-RM-CBS, 2017 WL 633045, at *1 (D. Colo. Feb. 16, 2017); *Doe v. Lynn Univ., Inc.*, 235 F. Supp. 3d 1336, 1343 (S.D. Fla. 2017); *Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 190 (D.R.I. 2016); *Doe v. Colgate Univ.*, No. 515CV1069LEKDEP, 2016 WL 1448829, at *1 (N.D.N.Y. Apr. 12, 2016); *Nungesser v. Columbia Univ.*, 169 F. Supp. 3d 353, 358 (S.D.N.Y. 2016); *Collick, et al. v. William Paterson Univ., et al.*, No. 16-471 (KM) (JBC), 2016 WL 6824374, at *12 (D.N.J. Nov. 17, 2016)), aff'd in part, remanded in part sub nom., No. 16-4344, 2017 WL 4857456 (3d Cir. Oct. 26, 2017); *Tsuruta v. Augustana Univ.*, No. 4:15-CV-04150-KES, 2015 WL 5838602, at *1 (D.S.D. Oct. 7, 2015); *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 452 (S.D.N.Y. 2015); *Doe v. Washington & Lee Univ.*, No. 6:14-CV-00052, 2015 WL 4647996, at *1 (W.D. Va. Aug. 5, 2015); *Tanyi v. Appalachian State Univ.*, No. 5:14-CV-170RLV, 2015 WL 4478853, at *1 (W.D.N.C. July 22, 2015); *Doe v. Univ. of Massachusetts-Amherst*, No. CV 14-30143-MGM, 2015 WL 4306521, at *1 (D. Mass. July 14, 2015)

[13] *See* KC Johnson & Stuart Taylor, *The Campus Rape Frenzy: The Attack on Due Process at America's Universities* (1st ed., 2017); *see also* KC Johnson & Stuart Taylor, *The Path to Obama's 'Dear Colleague' Letter, Washington Post*, January 31, 2017, at Opinion; KC Johnson & Stuart Taylor, *Campus Due Process in the Courts*, Washington Post, February 1, 2017, at Opinion ("About one new due process lawsuit per week was filed last year against a college by a student who had been found guilty of sexual assault by a campus tribunal, despite what the lawsuits claim is strong evidence of innocence.").

[14] *See, e.g., Doe v. Ohio State Univ.*, 239 F. Supp. 3d 1048, 1072 (S.D. Ohio 2017) ("There is little doubt that universities around the country have felt pressure to tighten the investigation and punishments in sexual misconduct cases because this is a very sensitive issue."); *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 572 (D. Mass. 2016) ("[U]niversities across the United States have adopted procedural and substantive policies intended to make it easier for victims of sexual assault to make and prove their claims and for the schools to adopt punitive measures in response. That process has been substantially spurred by the [2011] "Dear Colleague" letter. The goal of reducing sexual assault, and providing appropriate discipline for offenders, is certainly laudable. Whether the elimination of basic procedural protections—and the substantially increased risk that innocent students will be punished—is a fair price to achieve that goal is

Department of Education's Office of Civil Rights ("OCR"),[16] which, on threat of withholding federal funds, instructed universities to replace the "beyond a reasonable doubt" or "clear and convincing" evidence standards previously used by many universities when adjudicating sexual assault complaints with a "preponderance of the evidence" standard. By this letter, OCR sought to lower or remove perceived barriers faced by students reporting sexual assault, which naturally led to (i) the removal of certain procedural protection for alleged assailants, and (ii) increased rates of conviction for alleged assailants based on lower burdens of proof. Doe, like the many plaintiffs who have raised similar erroneous outcome claims, argues that OCR's Dear Colleague Letter led universities to change their sexual assault policies to discriminate against students accused of sexual assault, students who are almost invariably male.

In an erroneous outcome case, a plaintiff generally claims he "was innocent and wrongly found to have committed an offense," and challenges the "university disciplinary proceeding on grounds of gender bias." *Gischel v. Univ. of Cincinnati, et al.*, No. 1:17-

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another question altogether."); *Doe v. Washington & Lee Univ.*, No. 6:14-CV-00052, 2015 WL 4647996, at *9 (W.D. Va. Aug. 5, 2015) (The 2011 Dear Colleague Letter "provided guidance as to how schools should conduct sexual misconduct investigations and warned them that if they did not adequately address sexual assault on campus, then they could face loss of federal funding, investigation by the OCR, and referral to the Department of Justice for civil or criminal action.").

[15] Stephanie Saul and Kate Taylor, *Betsy DeVos Reverses Obama-era Policy on Campus Sexual Assault Investigations*, NY Times, September 23, 2017, at A1.

[16] Russlynn Ali, Assistant Secretary of Education for Civil Rights, Dear Colleague Letter, U.S. Dept. of Educ. at 11 (Apr. 4, 2011), available at: https://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html

CV-475, 2018 WL 705886, at *7 (S.D. Ohio Feb. 5, 2018) (quoting *Yusuf*, 35 F.3d at 715)). That is precisely what we have here: Doe claims he is innocent and that Marymount wrongly found that Doe sexually assaulted Roe because of Marymount's allegedly gendered investigation and disciplinary proceedings.

For Doe's erroneous outcome claim to survive Marymount's motion to dismiss, as the Sixth Circuit has already correctly observed, Doe must allege: "(1) 'facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding' and (2) a 'particularized . . . causal connection between the flawed outcome and gender bias.'" *Miami Univ.*, 2018 WL 797451, at *8 (quoting *Doe v. Cummins*, 662 F. App'x 437, 452 (6th Cir. 2016)). Importantly, "allegations of a procedurally or otherwise flawed proceeding that has led to an adverse and erroneous outcome combined with a conclusory allegation of gender discrimination [are] not sufficient to survive a motion to dismiss." *Cummins*, 662 F. App'x at 452 (quoting *Yusuf*, 35 F.3d at 715). Simply put, Doe must plead sufficient facts to create an inference that he was wrongfully accused and that he was wrongfully adjudicated guilty and disciplined, in part because of his gender. *Id.*

The first element of an erroneous outcome claim – casting articulable doubt on the accuracy of the outcome – is not a significant barrier for Doe to cross. Doe can satisfy this element in a number of ways including: (i) pointing to procedural flaws in the investigatory and adjudicative processes, (ii) noting inconsistencies or errors in the adjudicator's oral or written findings, or (iii) challenging the overall sufficiency and reliability of the evidence. In this case, Doe alleges certain procedural flaws in the

investigatory and adjudicative process and also challenges the sufficiency and reliability of the evidence against him.

Procedurally, Doe claims he was deprived the opportunity to identify and interview potential witnesses, to gather exculpatory evidence, to meet with the adjudicator in person, and to cross-examine Roe.[17] Additionally, some objectionable material remained in the investigatory report while certain exculpatory material was either left out of the report or was never investigated. These are just some of the procedural insufficiencies and irregularities identified by Doe in his Complaint. Although many of these procedural deficiencies may appear insignificant in isolation, taken together they warrant concern that Doe was denied a full and fair hearing.

The procedural deficiencies alleged by Doe are sufficient, standing alone, to cast doubt on the accuracy of the outcome of Doe's Title IX hearing. But in this case Doe has alleged more than procedural irregularities. More precisely, Doe challenges the sufficiency of the evidence used to find him guilty of sexual assault. For example, Doe alleges that his accuser, Roe, made inconsistent and incredible statements and that her statements were contradicted by other evidence in the case. In this regard, Doe alleges,

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[17] Although colleges and universities are not required to hold formal trials, *see, e.g., Doe v. Univ. of Cincinnati*, 173 F. Supp. 3d 586, 600 (S.D. Ohio 2016) ("Schools are not required to employ procedures used in criminal trials"), institutions of higher education must avoid depriving students accused of sexual assault of the investigative and adjudicative tools necessary to clear their names even when there are no due process requirements. A student adjudicated guilty of sexual assault by a college or university experiences significant direct and collateral consequences, consequences that are not unlike a criminal conviction. It follows that colleges 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.

among other things: (i) that there was no evidence that either Doe or Roe was physically injured despite Roe's allegations of a violent assault where she kneed Doe in the face and Doe shoved his entire fist up Roe's vagina; and (ii) that there is evidence that Roe was "happy and giddy," following Doe and Roe's encounter on November 8, 2014, and that she showed off her "hickeys" to her roommates and told them that Doe was "good with his tongue." Doe asserts that Roe's contemporaneous statements and demeanor together with the absence of any evidence of physical injury corroborates his version of events, not Roe's, and further asserts that no reasonable factfinder could have found him guilty of sexual assault by a preponderance of the evidence on a fair and complete record. Importantly, Doe claims that significant facts were either not brought to the adjudicator's attention or were ignored by the adjudicator.

In sum, the Complaint's factual allegations cast articulable doubt on the accuracy of the adjudicator's decision that Doe sexually assaulted Roe. Doe has alleged that the adjudicator was not provided with compelling exculpatory evidence that was omitted from the investigative report and instead relied exclusively on the investigative report and Doe and Roe's competing narratives to reach his final conclusion that Doe sexually assaulted Roe. Doe also contends that Roe's statements to Marymount officials were dishonest, inconsistent and factually improbable.[18] Moreover, Doe argues that Roe's behavior immediately following the incident, as reported by multiple neutral observers, is

[18] For example, Doe asserts that it is physically impossible for him to have stuck his entire fist up Roe's vagina while she was standing, as Roe claimed in her oral and written statements to Marymount officials.

inconsistent with her allegation that she had just been brutally sexually assaulted. Taking these allegations, viewed in the light most favorable to Doe, and granting Doe all reasonable inferences, as is required at this stage,[19] it is clear that Doe has satisfied his threshold pleading burden with respect to the articulable doubt element of an erroneous outcome claim.

Because Doe has adequately pled the first element of an erroneous outcome claim, the only remaining issue is whether Doe has alleged "particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding." *Doe v. Purdue Univ.*, No. 2:17-CV-33-PRC, 2017 WL 5483362, at *14 (N.D. Ind. Nov. 15, 2017) (quoting *Yusuf*, 35 F.3d at 715); *see also Miami Univ.*, 2018 WL 797451, at *9 ("[A Title IX plaintiff] must [] allege facts showing a 'particularized . . . causal connection between the flawed outcome and gender bias.'" quoting *Cummins*, 662 F. App'x. at 452)).

To plead the causation or discrimination element of an erroneous outcome claim, Doe must allege some factual material that creates a plausible inference that the University's decision was infected with gender bias. When reviewing whether a Title IX plaintiff has pled the requisite gender bias, other courts have considered the following types of factual allegations: "statements by members of the disciplinary tribunal,

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[19] *Harbourt v. PPE Casino Resorts Maryland, LLC*, 820 F.3d 655, 658 (4th Cir. 2016) ("[W]e accept as true the well-pled allegations of the complaint and construe the facts and reasonable inferences derived therefrom in the light most favorable to the plaintiff." citing *Iqbal*, 556 U.S. at 678)).

statements by pertinent university officials, or patterns of decision-making that [] tend to show the influence of gender." *Cummins*, 662 F. App'x at 452 (quoting *Yusuf*, 35 F.3d at 715). Stated differently, a Title IX plaintiff successfully alleges gender bias if he or she points to statistical evidence of gender bias in the University's decision making, policies and procedures that are designed to reach gender-specific outcomes, and/or statements by university officials evidencing gender bias. *Id.*

Doe raises many allegations which he believes demonstrate Marymount's gender bias. But one particular allegation is noteworthy because, if accepted as true, it reveals that Doe's adjudicator, Professor Lavanty, adhered to certain gendered beliefs. Specifically, Doe alleges that in a subsequent sexual assault investigation at Marymount, a male student accused a female student of touching his genitals without his consent and of pushing his hand into her genitals without his consent. Professor Lavanty served as the investigator in that case and allegedly asked the male student "were you aroused" by this unwanted touching? When the student responded, "no," Lavanty, in apparent disbelief, allegedly asked the male student again, "not at all?" This unpleasant exchange between Lavanty and another male student at Marymount, a fact which must be accepted as true at this stage, reveals that Lavanty's decision-making was infected with impermissible gender bias, namely Lavanty's discriminatory view that males will always enjoy sexual contact even when that contact is not consensual.

Because Lavanty served as Doe's adjudicator and was ultimately responsible for determining Doe's guilt or innocence, any evidence of Lavanty's gender bias is particularly probative. If Lavanty possessed the outdated and discriminatory views of

gender and sexuality alleged in Doe's Complaint, these views would have naturally infected the outcome of Doe's Title IX disciplinary proceedings. Therefore, this allegation alone is sufficient to satisfy Doe's burden to plead a fact that creates an inference of gender discrimination in Marymount's disciplinary proceedings.

In addition to the allegation regarding Lavanty's gender bias, Doe also identifies several other facts which he believes demonstrate gender bias on the part of Marymount and its employees:

- The provision in Marymount's sexual assault policy which provides a complainant whose allegations are determined to lack merit with a *de novo* review by Marymount's Title IX team, while denying a respondent the same opportunity if the investigative team reaches the opposite conclusion.

- The inclusion in the final investigative report—over Doe's repeated objections—of: (i) the investigative team's question to Doe as to whether he knew anyone who had been raped and Doe's response that he did not, but that he had watched crime shows on television; and (ii) alleged entries in Roe's journal, which Roe did not provide to the investigative team until more than a month after she first mentioned the journal.

- The refusal of the Title IX coordinator, McMurdock, and adjudicator, Lavanty, to permit oral argument by Doe or his attorney or to permit an informal meeting with Lavanty, Doe and his attorney.

- Lavanty's failure to consider evidence that supported Doe's claims and refuted Roe's allegation, including the fact that Roe sent friendly text messages to Doe shortly after he allegedly assaulted her and that other students provided statements that Roe was "happy" and "giddy" following the alleged incident.

- The investigative team's refusal to make any effort—despite Doe's repeated requests that they do so—to obtain evidence that would refute allegations made by Roe, including witnesses that could state that Doe had no marks on his face (which

is inconsistent with Roe's claim that she kneed Doe in the face), or any evidence of physical injury that would refute Roe's claim that Doe put his entire fist in her vagina while she was standing.

- Marymount's refusal to provide an exception to the no-contact order which precluded Doe from discussing Roe's allegations with other Marymount students who were witnesses or potential witnesses, hampering his ability to prepare his own defense.

- Marymount's investigation lasted 53 business days, nearly three times the 20 day timeframe for completion of an investigation set out in Marymount's disciplinary policies. And it took Marymount approximately 335 days to resolve the complaint against Doe, more than five times the length of the 60 day timeframe set forth by Marymount's disciplinary policies.

- Marymount's refusal to provide Doe unfettered access to the final investigative report, namely by preventing him or his attorney to make a copy or take verbatim notes.

- The fact that the University credited Roe's purportedly implausible allegations over the accounts of Doe and other neutral witnesses.

- Marymount's decision to employ and retain biased investigators and adjudicators, including Lavanty and Ms. Okubadejo.

    - Specifically, Ms. Okubadejo is quoted in a May 12, 2014 interview as saying:

> I think the statistics also show that most people who complain about sexual assault are telling the truth. And so if most people who complain about sexual assault on campus are telling the truth and if these cases aren't being handled or aren't being handled appropriately through the criminal system or aren't being taken to conviction through the criminal system

> then what is happening to these people who are complaining about sexual assault on campus.

See Pl's Compl. at ¶ 195.

Doe also alleges that Marymount's sexual assault policy was influenced by the Dear Colleague Letter and other political forces and that the University's procedures were designed to convict male students of sexual assault, whether they were guilty or not. Specifically, Doe alleges that Marymount's Deputy Title IX Coordinator admitted to Doe's parents during a face-to-face meeting that "the Title IX process is increasingly politicized, especially in Virginia." *Id.* ¶ 107. This statement by a senior university official appears to be an implicit acknowledgment that Marymount's sexual assault policies and Title IX procedures were influenced, at least in part, by political pressure to convict respondents in sexual assault cases – respondents who are almost invariably male.

Whether any one of Doe's additional allegations of gender bias, standing alone, would satisfy Doe's pleading burden is irrelevant here as Doe's allegation that his adjudicator demonstrated gender bias in a later case is sufficient to defeat Marymount's motion to dismiss. Moreover, viewing all of Doe's allegations collectively, he has clearly nudged his Title IX claim over the Rule 12(b)(6) bar. Therefore, the University's motion to dismiss Doe's Title IX erroneous outcome claim must be denied.

III. Breach of Contract and Breach of Duty of Good Faith and Fair Dealing

Marymount also moves to dismiss Doe's breach of contract claim, arguing that Marymount's Student Handbook and Sexual Assault Policy are not contracts.

Marymount is correct in this regard. Under Virginia law, a University's student conduct policies are not binding, enforceable contracts;[20] rather, they are behavior guidelines that may be unilaterally revised by Marymount at any time. Thus, Doe cannot rely on Marymount's Student Handbook or Sexual Assault Policy as enforceable contracts or as terms of an implied contract.

Doe concedes that Marymount's Student Handbook or Sexual Assault Policy are not contracts. Doe claims instead that he entered into an implied contract with Marymount and that the payment of tuition guarantees that he cannot be expelled for an arbitrary and capricious reason. Thus the question is whether an implied contract existed between Doe and Marymount under Virginia law simply because Doe paid tuition, and if so, whether Marymount breached a term or requirement of that implied contract.

Significantly, the parties have not cited any Supreme Court of Virginia decision holding that an implied contract is created between a student and his or her university merely through the payment of tuition. In support of his implied contractual theory, Doe

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[20] *See Brown v. Rectors & Visitors of Univ. of Virginia*, 361 F. App'x 531, 534 (4th Cir. 2010) (holding there were no factual allegations that the parties understood the UVA's student handbook to be an enforceable contract between the University and its students); *Tibbetts v. Yale Corp.*, 47 F. App'x 648, 656 (4th Cir. 2002) (applying Virginia law and holding that "[Yale's] Student Handbook is not a contract, but merely a university policy."); *Jackson v. Liberty Univ.*, No. 6:17-CV-00041, 2017 WL 3326972, at *7 (W.D. Va. Aug. 3, 2017) ("The Liberty Way fails to meet Virginia's definition of a contract. It is not binding upon Liberty as it contains requirements for students only. The promises that Liberty allegedly makes are mere aspirational statements of educational ideals; they are so vague and indefinite that they cannot be enforceable terms."); *Doe v. Washington & Lee Univ.*, No. 6:14-CV-00052, 2015 WL 4647996, at *11 (W.D. Va. Aug. 5, 2015) ("[T]he Student Handbook does not form a mutuality of engagement between W&L and [its students], and therefore does not create a contract. . . [Moreover,] the terms of the Interim Sexual Harassment and Misconduct Policy cannot plausibly be considered anything other than 'policies,' which . . . are not contractual in nature because they are subject to 'continual examination and revision.'") (internal citations omitted).

cites a single federal district court case concluding that an implied contractual relationship arises from the payment of tuition.[21] To accept Doe's argument would impermissibly expand Virginia law without any input from Virginia's highest court.[22]

In any event, assuming without deciding that an implied contract existed between Doe and Marymount, the terms of any implied contract between these two parties are exceptionally narrow. More specifically, Doe's payment of tuition could only result in a single implied term: *i.e.* Doe cannot be suspended for an arbitrary and capricious reason or no reason at all. There are no factual allegations in Doe's Complaint which support a plausible inference that Marymount breached this implied term. Accepting all of Doe's allegations as true, Marymount suspended him because of Roe's allegation of sexual assault. Regardless of whether the outcome of the disciplinary proceeding was erroneous or not, Marymount did not act arbitrarily or capriciously by suspending Doe and therefore did not breach the only term of the implied contract. *See, e.g., Butler v. Rector & Bd. of Visitors of Coll. of William & Mary*, 121 F. App'x 515, 521 (4th Cir. 2005) (Even

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[21] *See Krasnow v. Va. Polytechnic Inst. & State Univ.*, 414 F. Supp. 55, 56 (W.D. Va. 1976) ("[S]tudents enrolled in state supported institutions acquire a contractual right for the period of enrollment to attend, subject to compliance with scholastic and behavioral rules of the institution, and to dismissal for violation thereof, provided the dismissal was not arbitrary or capricious."); *see also Spectra-4, LLP v. Uniwest Commercial Realty, Inc.*, 290 Va. 36, 43, 772 S.E.2d 290, 293 (2015) (discussing the law of implied contracts in Virginia).

[22] *See Sheehan v. Saoud*, 650 F. App'x 143, 155 (4th Cir. 2016) ("Absent a strong countervailing federal interest, the federal court ... should not elbow its way into this controversy to render what may be an uncertain and ephemeral interpretation of state law." quoting *Time Warner Entm't–Advance/Newhouse P'ship v. Carteret–Craven Elec. Membership Corp.*, 506 F.3d 304, 314 (4th Cir. 2007));*Gariety v. Vorono*, 261 F. App'x 456, 463 (4th Cir. 2008) ("In reviewing state law, a federal court 'should not create or expand [a] State's public policy.'" quoting *St. Paul Fire & Marine Ins. Co. v. Jacobson*, 48 F.3d 778, 783 (4th Cir. 1995)).

"[a]ssuming that William and Mary had a contract with Butler. . . . Butler [] has not presented evidence demonstrating that, by expelling her in the manner that it did, William and Mary breached an [] implied promise to Butler.").

Doe seeks to expand the basic implied contract he ostensibly had with Marymount by importing a host of implied contractual terms. In doing so, Doe attempts to erect a veritable procedural fortress around him, arguing that Marymount could not suspend him without complying with these implied conditions. Doe's position is an attempted end-run around clear precedent holding that student handbooks and disciplinary policies are not contracts. Doe attempts to label the procedural protections provided by Marymount's Student Handbook and Sexual Assault Policy as implied terms, but adopting Doe's position would prejudice Marymount because it never assented to being bound by the procedural protections identified by Doe. Nothing in the act of paying tuition implies that a student is entitled to any specific procedural protections. Instead, to the extent any contract can be implied between a student and his or her university, the student is only protected from irrational, haphazard treatment by the university. Doe may disagree with Marymount's decision and he may believe he was treated unfairly, but he cannot imply a host of contractual terms to which the parties never assented. Instead, Doe will have to rely on the statutory remedy provided by Title IX.

For these reasons Doe's breach of contract claim fails; and for the same reasons, Doe's claim for breach of the implied covenant of good faith and fair dealing also fails.[23]

IV. State Tort Claims

In addition to his Title IX and contractual claims, Doe raises two novel tort claims. Both of these claims must be dismissed, however, because neither claim is established in Virginia.

A.

First, Doe argues that there is a special relationship between a university and its students and that Marymount and McMurdock owed and breached a duty to exercise special care throughout Doe's disciplinary proceedings. Stated simply, Doe believes Marymount owed him a duty to be fair, especially considering the impact that school disciplinary proceedings can have on a student's life. In support of his belief, Doe cites a Tennessee federal district court decision and a Minnesota Court of Appeals decision, both of which have recognized a special relationship between a university and its students giving rise to certain duties. *See Doe v. Univ. of the South*, 4:09-CV-62, 2011 WL1258104 at *21 (E.D. Tenn. 2011); *Rollins v. Cardinal Stritch Univ.*, 626 N.W.2d 464, 470 (Minn. Ct. App. 1981). Unfortunately for Doe, the United States District Court for the Eastern District of Tennessee and the Minnesota Court of Appeals do not make Virginia law and there appears to be no Virginia law establishing the duty he claims Marymount and McMurdock breached. Consistent with the Fourth Circuit's published

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[23] To state a claim for a breach of the implied covenant of good faith and fair dealing under Virginia law, a plaintiff must plead "(1) a contractual relationship between the parties, and (2) a breach of the implied covenant." *Enomoto v. Space Adventures, Ltd.*, 624 F. Supp. 2d 443, 450 (E.D. Va. 2009) (citing *Charles E. Brauer Co. v. NationsBank of Va.*, N.A., 251 Va. 28, 466 S.E.2d 382 (1996)). Here, there was no breach of an implied covenant. Marymount did not act arbitrarily by suspending Doe.

opinion in *Broussard v. Meineke Disc. Muffler Shops, Inc.*, this federal district court will not recognize a new common law tort that has not been previously recognized by the Supreme Court of Virginia or Virginia Court of Appeals. *See Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 348 (4th Cir.1998) ("As a federal court exercising concurrent jurisdiction over this important question of state law we are most unwilling to extend North Carolina tort law farther than any North Carolina court has been willing to go."). Thus, Doe's negligence claim against Marymount and McMurdock fails as a matter of law because the claim is not currently recognized in Virginia.

B.

Doe also asserts that Marymount breached the common law of associations. In support of this particular tort claim, Doe cites a single 1994 Loudoun County Circuit Court decision. *See Corrigan v. N.S. Skirmish Ass'n, Inc.*, No. 14616, 1994 WL 1031211, at *2 (Va. Cir. Ct. Loudoun Cnty. June 9, 1994). In the interests of full disclosure, the Court discovered an additional Virginia Circuit Court decision that mentions the law of associations in passing, but does not meaningfully apply it in any way. *See Helton v. Univ. of Richmond*, 2 Va. Cir. 254 (Va. Cir. Ct. City of Richmond 1985). Additionally, there is at least one Supreme Court of Virginia decision which appears to apply the common law of association in the corporate context, *see Gottlieb v. Econ. Stores, Inc.*, 199 Va. 848, 858 (Va. 1958), but not in the context of higher education. The question then is whether these cases are sufficient to warrant a federal court recognizing the legal duty Doe claims Marymount owed to him and breached.

Two circuit court decisions from 1985 and 1994 do not make Virginia law; and federal courts are not bound to follow state trial court decisions in exercising their supplemental jurisdiction.[24] And even if these decisions were considered binding authority on Virginia law, they are not helpful to Doe.

First, the *Corrigan* decision is factually inapposite because it involved a corporate association of civil war reenactors and whether the board of directors could expel a member for apparent misconduct. *Corrigan* in no way pertains to the relationship between a university and its students, or the application of a university's disciplinary codes. Moreover, to its credit, the *Corrigan* court recognized that if the law of associations applies in Virginia, the role of reviewing courts is extremely limited. For these reasons, *Corrigan* is of no assistance to Doe.

Second, the *Helton* decision admittedly mentions the law of associations in the context of a university disciplinary proceeding. Specifically, the *Helton* court concluded that a University of Richmond student was disciplined unfairly and was entitled to relief. It is difficult to discern, however, what legal theory the *Helton* court relied on in reaching its conclusion. Thus, in the end, the *Helton* decision is also of no assistance to Doe.

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[24] *See King v. Order of United Commercial Travelers of America*, 333 U.S. 153, 161 (1948) ("[A] Court of Common Pleas does not appear to have such importance and competence within South Carolina's own judicial system that its decisions should be taken as authoritative expositions of that State's law."); *Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C.*, 433 F.3d 365, 370 (4th Cir. 2005) ("[A] federal court sitting in diversity is not bound by a state trial court's decision on matters of state law.").

Finally, the Supreme Court of Virginia's *Gottlieb* decision admittedly recognizes that corporate entities are generally permitted to expel their shareholders or members, but not for arbitrary or bad faith reasons:

> [C]orporations . . . have an inherent power to disfranchise their members for any one of three causes, namely, offenses of an infamous character indictable at common law; offenses against the member's duty as a corporator; and offenses compounded of the two.
>
> . . .
>
> In reviewing an action expelling a member of a corporation, [a court] may inquire whether the member was given reasonable notice of the hearing of the charge against him, whether he was afforded an opportunity to be heard, and whether the hearing and expulsion were in good faith.

Gottlieb, 199 Va. at 855–57 The *Gottlieb* court curtailed the authority of reviewing courts to question the decision of a corporation to expel its member(s) to those cases involving "fraud, bad faith, breach of trust, gross mismanagement, or *ultra vires* acts." *Id.* at 857.

Although the Supreme Court of Virginia appears to have recognized certain duties members of corporate associations owe to one another, it is uncertain whether Virginia's highest court would expand those duties to the situation presented here: the relationship between a university and its students. Because the expansion of the law of associations into the educational sphere could have significant policy implications, Virginia law will not be expanded in this federal case when there is no indication that Virginia's appellate courts would so expand the law. *See Wade v. Danek Medical, Inc.*, 182 F.3d 281, 286 (4th Cir.1999) ("In predicting whether the Virginia Supreme Court would apply an

equitable tolling rule, we are mindful of the general principle that [i]n trying to determine how the highest state court would interpret the law, we should not create or expand that State's public policy") (internal marks omitted).

It is worth noting that even if the principles articulated in *Gottlieb* applied to institutions of higher education, Doe's claim would still fail. *Gottlieb* is clear that in "cases where the evidence is conflicting, the action of the [association] is conclusive," and reviewing courts should not "interfere with the merits of the decision." 199 Va. at 857–58. In this case, there was conflicting evidence – namely, Roe's statements that Doe sexually assaulted her – and therefore Marymount's "action is conclusive."

For these reasons, Doe's law of associations claim must be dismissed.

V. Conclusion

For the reasons stated in this Memorandum Opinion, Doe's Title IX claim survives Marymount's motion to dismiss. However, Doe's contractual and tort claims must be dismissed.

An appropriate order will issue.

/s/

T. S. Ellis, III
United States District Judge