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NSBA Comments on Department of Education Proposed Rule

Via Online Submission January 30, 2019:
www.regulations.gov

Re: Notice of Proposed Rulemaking, 34 CFR Part 106, Title IX of the Education Amendments of 1972

Docket ID: ED-2018-OCR-0064
RIN 1870-AA14
Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

The National School Boards Association (NSBA) represents through our state association members approximately 13,800 school boards nationwide. As the national voice for school boards, NSBA offers the following comments to the proposed rule, ED-2018-OCR-0064, issued by the Office for Civil Rights (OCR), Department of Education (Department).

NSBA appreciates the opportunity to comment on this rule, which could significantly affect K-12 public schools' procedures for addressing alleged sexual harassment. As presidential administrations change in future years, we urge the Department to remain committed to the administrative process so that stakeholder input can be obtained before final regulations are published.

General Comments

The Department should recognize current K-12 efforts to maintain safe, discrimination-free schools.

NSBA is dedicated to promoting supportive, safe school environments free from discrimination, where students can learn and thrive. The NSBA Delegate Assembly states clearly in its Beliefs & Policies that school boards play a crucial role in creating and sustaining such environments.[1]

[1] **Article II, Section 3 Commitment to Diversity and Equity**
3.2 Non-Discrimination
NSBA believes that school boards should ensure that students and school staff are not subjected to discrimination on the basis of socioeconomic status, race, color, national origin, religion, gender, gender identity, age, pregnancy, disability, or sexual orientation.

School boards across the country, supported by their state school boards associations, have adopted policies to support safe, non-discriminatory school climates, taking into account federal legal standards, as well as state law and regulation, and local community rules and priorities. Because public education is a mission largely governed by state law, informed by local concerns, and carried out by educators who know students, we urge the Department to retain its comments stressing the importance of flexibility and deference to K-12 educators, who will be subject to these regulations, including:

> "The Department wishes to emphasize that when determining how to respond to sexual harassment, recipients have flexibility to employ age-appropriate methods, exercise common sense and good judgment, and take into account the needs of the parties involved;" and

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…

Article IV, Section 2 Maintaining a Safe and Supportive School Climate

2.9 Elimination of Violence and Disruptive Behavior

NSBA supports state and local school board efforts to become more proactive in the elimination of violence and disruptive behavior at school, school-sponsored events, during school bus travel and while traveling to and from school. Such behavior includes, but is not limited to, physical violence, "bullying" by any means, disrespect of fellow students and school personnel, and other forms of harassment.

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2.12 Harassment

NSBA believes that all public school districts should adopt and enforce policies stating that harassment for any reason, including but not limited to harassment on the basis of race, ethnicity, gender, actual or perceived sexual orientation, gender identity, disability, age, and religion against students or employees will not be tolerated and that appropriate disciplinary measures will be taken against offenders. Such policies should include an effective complaint mechanism. Districts should institute in-service programs to train all school personnel, including volunteers to recognize and prevent harassment against employees and students. Districts should investigate complaints, initiate education programs for students, and institute programs to eliminate harassment

Beliefs & Policies of the National School Boards Association (As Amended April 6, 2018, San Antonio, Texas), available at https://cdn-files.nsba.org/s3fs-public/2018_Beliefs_&_Policies-Adopted-4-6-2018.pdf.

> "Moreover, the Department believes that teachers and local school leaders with unique knowledge of the school culture and student body are best positioned to make disciplinary decisions…."
>
> 83 Fed. Reg. 61468

The Rule's extensive procedural requirements will significantly burden K-12 schools.

The concerns NSBA raises below lie largely in the awkward fit of the proposed rule's detailed procedural requirements to the K-12 context, and the burden on school districts to revamp policies, procedures, and discipline codes. The proposed rule prescribes extensive procedures governing burdens of proof, conflicts of interest, hearing rights, hearing procedures, witness disclosure and notice rights, the creation of a "no violation" presumption, cross examination rights, a right to representation during investigative interviews, emergency removals, and the rendition of findings of fact and conclusions of law.

In addition to the significant administrative burden K-12 schools will face in revamping current policies, schools will be forced to adopt a judicial-like posture that will encourage litigation.[2] Throughout the rule's proposed procedural requirements, the Department references a "complainant" and a "respondent," which are not terms usually found in school district student discipline policies or current Title IX complaint procedures. The terms presume that every Title IX harassment complaint involves a single wrongdoer and a single victim, that any investigation is akin to a criminal investigation, and that any outcome must involve one student winning and the other losing. More often, at the K-12 level, student interactions involve more than two students and are investigated in context by educators who know the students well. K-12 school districts and their attorneys apply Title IX procedures to address the alleged victim(s)' complaint and needs, and apply school discipline policies and procedures to address misconduct, whether or not it amounts to sexual harassment under Title IX. K-12 recipients will take into account the age, developmental level, and English language proficiency of students during all stages of a sexual harassment incident investigation, including pursuant to a formal Title IX complaint. Very rarely

[2] Comments submitted by the Association of American University indicate that higher education institutions, as well, believe that the extensive procedures required by the proposed rules will create adversarial, court-like environments costly and burdensome to implement, and contrary to the institutions' education mission. https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Higher-Education-Regulation/AAU-Title-IX-Comments-1-24-19.pdf

do such investigations lead to expulsion of a student from school, and even then, students often still receive educational services.[3]

The Department's emphasis on parties and rights is likely to minimize the educational deference to which schools are entitled as they seek to create and support safe environments. The proposed regulations may thus unwittingly create an atmosphere where procedure takes precedence over finding a workable solution in a given situation. In particular, we caution that the Department's focus on the respondent's "equal" rights, including the right to file a Title IX complaint, could encourage litigation and *de facto* inequities as sophisticated and affluent parents/guardians of students charged with a violation of the code of conduct that involves sexual acts avail themselves of the new provisions to challenge legitimate school educational choices designed to keep all children safe.

We urge the Department to add regulatory language and modify existing language (with supporting commentary) providing that the Department grants K-12 leaders procedural flexibility when sexual harassment is alleged, including in the context of formal complaints. K-12 educators must be able to focus on the unique needs of the specific students involved, as well as the safety of the school environment for all students.

The Department should define "on the basis of sex" to include gender identity.

NSBA believes that all public school districts should adopt and enforce policies stating that harassment for any reason, including harassment on the basis of gender identity, against students will not be tolerated and that appropriate disciplinary measures will be taken against offenders. Indeed, NSBA believes that education is a civil right, and that no student should suffer discrimination based on characteristics including gender identity.[4] We urge the Department to take this opportunity to make clear that it regards harassment based on gender identity to be sexual harassment within the meaning of Title IX.[5]

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[3] See "50-State Comparison, School Discipline: Are there alternative schooling options available for students who are suspended or expelled?" Education Commission of the States, available at http://ecs.force.com/mbdata/MBQuest2RTanw?rep=SD1805. Kentucky, for example, requires that alternative educational services must be provided to students expelled for any misconduct, including sexual harassment, unless the school board determines on the record, supported by clear and convincing evidence, that the student posed a threat to the safety of other students or school staff. KRS § 158.150(2)(b).

[4] *See Supra* note 1.

[5] *See, e.g., Whitaker v. Kenosha Unified Sch. Dist. No. 1 Board of Education*, 858 F.3d 1034, 1049-50 (7th Cir. 2017)(holding that student denied use of school bathroom based on gender identity could demonstrate a likelihood

Below please find NSBA comments regarding specific provisions of the proposed rule, 34 CFR Part 106.

Educational institutions controlled by religious organizations (Proposed Sec. 106.12)

The proposed changes to Section 106.12 would revise subsection (b) regarding the procedure for a private educational institution to seek a religious exemption from the requirements of Part 106. Such schools would no longer have to submit a written statement to the Assistant Secretary in advance to assert an exemption but could submit such a statement upon notice that it is under investigation. By providing religious institutions more favorable treatment than other types of institutions, the Department may be implicating the Establishment Clause.

A student who attends a private school that receives federal funds (including under a state voucher program) might not have the protection of Title IX nondiscrimination policies or grievance procedures if the institution asserts a Title IX religious exemption. The Department may still investigate a claim of discrimination by that institution, but a would-be complainant may not know he or she can complain to initiate an investigation unless the institution has a policy and notifies people about it as required by Title IX.

We suggest eliminating this revision to avoid an Establishment Clause conflict, and so that potential victims of sexual harassment or discrimination have notice that the private school believes itself exempt from one or more of the regulatory requirements.

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of success on the merits of his Title IX claim. "A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX."); *Grim v. Gloucester County Sch. Bd*, 302 F.Supp.3d 730 (E.D. Va. 2018)("This Court joins the District of Maryland and several other appellate courts in concluding that 'claims of discrimination on the basis of transgender status are per se actionable under a gender stereotyping theory' under Title IX…")

Definitions (Proposed Sec. 106.30)

Actual knowledge. The proposed rule defines "actual knowledge" to mean "notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, *or to a teacher in the elementary and secondary context with regard to student-on-student harassment*." (Emphasis added.) The actual knowledge definition is largely consistent with the standard set out by *Gebser v. Lago Vista Ind. Sch. Dist*., 524 U.S. 274 (1998) and *Davis v. Monroe County. Bd. of Educ*., 526 U.S. 629, 652 (1999) ("*Gebser"* and *"Davis"*), except with respect to an elementary or secondary school "teacher."

NSBA and its member state school boards associations strongly support policies and training for employees requiring diligent reporting of incidents of sexual harassment. These policies require that any employee who suspects that a student has experienced harassment must notify a building or district-level authority, such as the superintendent or Title IX coordinator. School districts across the country require teachers to report concerns that a student may be experiencing sexual harassment to an individual that would trigger "actual knowledge" by the district under the proposed rule. We are concerned, however, that the lack of clarity regarding this trigger in the K-12 context will subject school districts to additional liability without providing additional protections for students.

Although the proposed rule declares, "Imputation of knowledge based solely on respondeat superior or constructive notice is insufficient to constitute actual knowledge," the provision allowing actual knowledge to be assumed with "teacher" knowledge at the K-12 level seems to do exactly that. The provision is at odds with the standard for award of money damages laid out by the Supreme Court in *Davis*. There, the Court emphasized that a funding recipient can only be liable in money damages for its own conduct, not for that of one teacher alone. It noted that in *Gebser*, "we rejected the use of agency principles to impute liability to the district for the misconduct of its teachers…. Rather, we concluded that the district could be liable for damages only where the district itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to acts of teacher-student harassment of which it had actual knowledge."[6] Indeed, this reasoning is consistent with court decisions finding that Spending Clause statutes like Title IX cannot impose liability through agency. Although school districts train staff to report

[6] *Davis*, 526 U.S. at 642.

harassment, bullying or abuse, teachers make judgement calls about which incidents rise to the level of reporting. Imputing knowledge of sexual harassment to a school district when a teacher makes such a call is not consistent with Supreme Court precedent.

The issue is not whether teachers ought to report, but whether under Spending Clause analysis as interpreted by courts, a school district can be liable for a teacher's failure to report, as it is the district being charged and potentially subject to a loss of funds. Courts have found that teachers are not "control actors" whose possession of knowledge properly imputes notice to the recipient.[7]

NSBA urges the Department to consider the significant liability concerns it hands to school districts by imputing institutional knowledge through a K-12 teacher in the Title IX context and consider removing this requirement. Alternatively, the Department should explain clearly to what extent K-12 school districts will be considered to have "actual knowledge" when a teacher has knowledge of sexual harassment, keeping in mind the Supreme Court's emphasis in *Davis* that school districts cannot be liable for conduct until it has knowledge and is deliberately indifferent: "We thus conclude that funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."[8]

In addition, we urge the Department to define the term "teacher," as the absence of clarity in the rule will lead to application of state law, which varies. Some states include in their statutory definition of "teacher" positions including aides, coaches, school librarians, and counselors.[9]

Sexual harassment. The proposed rule defines sexual harassment actionable under Title IX to mean any of the following three types of behavior: (1) A school employee conditioning an educational

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[7] *See, e.g., Bostic v. Smyrna School Dist*., 418 F.3d 355 (3d Cir. 2005)(quoting *Gebser*, "[D]amages may not be recovered under Title IX "for the sexual harassment of a student by one of the district's teachers ... unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct…. An 'appropriate person' is 'an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the ... [district's] behalf.'")(citations omitted); *Hill v. Cundiff*, 797 F.3d 9483 (11th Cir. 2015) (finding teacher's aide was not "appropriate person" who could put the school board on notice of sexual harassment and discrimination. "No evidence in the record suggests teacher's aides at Sparkman have the authority to discipline students for sexual harassment.")

[8] *Davis*, 526 U.S. at 652.

[9] *See, e.g*., Ind. Code Ann. § 20-18-2-22; Teacher Tenure Act, MN ST § 122A.41; 11; Iowa Code Ann. § 284.2.

benefit or service upon a person's participation in unwelcome sexual conduct (often called quid pro quo harassment); (2) Unwelcome conduct on the basis of sex that is so severe, pervasive and objectively offensive that it effectively denies a person equal access to the school's education program or activity; or (3) Sexual assault as that crime is defined in the Clery Act regulations.

NSBA urges the Department to consider and/or clarify the following regarding the definition of sexual harassment:

1) The proposed sexual harassment definition will not apply to inappropriate teacher-student relationships when the sexual conduct is not "unwelcome." Under the proposed rule, a consensual teacher-student relationship would not meet the definition of sexual harassment under Title IX. The Department should consider whether application in the K-12 context would have the unintended consequence of taking away a federal remedy when an adult employee abuses his or her power in a relationship with a student "based on sex." For example, the inappropriate teacher-student relationship in *Gebser* was consensual. The proposed rule should be amended to ensure consistency with U.S. Supreme Court precedent.
2) School boards will encounter confusion between the new Title IX sexual harassment regulatory definition, state laws governing bullying, abuse, or crimes where there is a state mandate to report, and school discipline violations, each of which has its own set of procedures that must be followed. NSBA urges the Department to seek input from stakeholders, including education leaders, on what types of technical assistance would be most helpful to school districts seeking to implement the new definition and requirements.

Recipient's response to sexual harassment (Proposed Sec. 106.44)

Proposed 106.44(a). NSBA asks the Department to clarify the proposed language in Subsection (a) limiting a recipient's duty to respond to sexual harassment "against a person in the United States." It is not clear whether the provision is intended to remove study abroad programs or field trips outside the United States from coverage. We suggest including any intended changes regarding application of the regulations to existing Section 106.11, "Application."

Proposed 106.44(b). *Specific Circumstances.* Although the Department offers "safe harbor" from a finding of deliberate indifference to both higher education and elementary and secondary recipients that follow specific procedures for a formal complaint (Proposed 106.44(b)(1)), it offers safe harbor only to institutions of *higher education* that offer and implement supportive measures absent a formal complaint (Proposed 106.44(b)(3)). According to the Department, safe harbor is appropriate in the higher education context as "college and university students are generally adults capable of deciding whether supportive measures alone suffice to protect their educational access." 83 Fed. Reg. 61470. The distinction for elementary and secondary context, however, fails to consider that although elementary and secondary *students* are generally not adults, elementary and secondary students have adult parent(s)/guardian(s) who *are* capable of deciding whether supportive measures alone suffice to protect their child's educational access.

By cutting elementary and secondary school parents/guardians out of the process here, the proposed rule may subject schools to suits alleging infringement of a parent's fundamental right under the Due Process Clause of the Fourteenth Amendment to make decisions concerning the care, custody, and control of their children. *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000). It appears contradictory for the proposed rule in section 106.44(b)(3) to subject a school district to suits based on this right, while the in section 106.6(d)(2) it states that "[n]othing in this part requires a recipient to: … (2) deprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution." The provision also seems inconsistent with the proposed provision allowing students to represent themselves in a quasi-legal formal complaint or informal resolution process (Proposed Section 106.45(b)(3)).

NSBA urges the Department to amend its proposed rule at section 106.44(b)(3) by removing the phrase "For institutions of higher education," making the provision applicable to elementary and secondary schools as well.

Grievance procedures for formal complaints of sexual harassment (Proposed Sec. 106.45)

Flexibility for K-12 institutions and Department authority. Many of the proposed rules' grievance procedures for formal complaints described below are detached from the realities of many K-12 school buildings, extend far beyond current Title IX and student discipline requirements, and impose significant additional procedural responsibilities on K-12 recipients. There is some question as to whether Title IX grants the Department authority to adopt rules for due process in school disciplinary matters beyond requiring that the procedures not discriminate on the basis of sex. The federal statute states:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken….
>
> 20 U.S.C. §1682.

The objective of Title IX is to prohibit discrimination on the basis of sex in any education program or activity of a recipient of federal funds. It is arguably outside the scope of the statute for the Department to define due process rights in school disciplinary procedures.

The Department explains in its commentary its purpose in adopting these procedures:

> Because a grievance process could result in a determination that the respondent sexually harassed the complainant, and because the resulting sanctions against the respondent could include a complete loss of access to the education program or activity of the recipient, an equitable grievance procedure will only reach such a conclusion following a process that seriously considers any contrary arguments or evidence the respondent might have, including by providing the respondent with all of the specific due process protections outlined in the rest of the proposed regulations.

83 Fed. Reg. 61472

The Department's approach assumes that every finding of sexual harassment could result in expulsion, which is simply not true in K-12 schools. As noted above, expulsions from K-12 public schools with no further educational services are extremely rare.[10] The Department's approach also assumes a "complainant" and a "respondent," and a finding of "guilt or liability."[11] Disciplinary situations in K-12 schools, including the sexual harassment context, do not involve the imposition of "guilt or liability." Rather, when an administrator imposes discipline on a student for sexual harassment, the administrator has good reason to believe that the student engaged in conduct that violates a standard outlined in carefully-crafted district policy. Courts have recognized that elementary and secondary school administrators have the authority to question students regarding potential code violations for non-law enforcement purposes without warnings about the right against self-incrimination.[12]

The creation of a "dual track" system mandating elevated evidentiary, investigative, and due process standards for formal complaints significantly exceeds the case law requirements governing student and staff due process rights at the K-12 level. In contrast with the post-secondary students, K-12 students are required to attend elementary and secondary school and have a recognized property right in continued attendance under the Due Process Clause of the Fourteenth Amendment.[13] Such students are not typically adults and as acknowledged in the Department's commentary, are subject to a "custodial and tutelary" level of supervision. The governing case law accordingly recognizes that greater flexibility must be afforded to school administrators regarding applicable procedural due process standards in elementary and secondary schools.[14] The Department's commentary relies upon *Doe v. University of Cincinnati*, 872 F.3d 393 (6th Cir. 2017), and *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018) for heightened due process standards,

[10] *See supra* Note 3.
[11] The Department commentary notes, "A fundamental notion of a fair proceeding is that a legal system does not prejudge a person's guilt or liability." 83 Fed. Reg. 61473
[12] *See S.E. v. Grant County Board of Education*, 544 F.3d 633 (6th Cir. 2008).
[13] *Goss v. Lopez*, 419 U.S. 565, 574 (1975) ("the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.")
[14] *See Newsome v. Batavia*, 842 F.2d 920, 924-926 (6th Cir. 1988) (applying *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

including the right of cross examination, that apply to hearing matters where students have allegedly engaged in sexually harassing conduct. However, the same court has held these standards do not apply at the elementary and secondary level.[15]

NSBA asks that the Department include language in the final rule noting that K-12 institutions have flexibility to implement grievance procedures for formal complaints in a manner appropriate to the context, and consistent with established constitutional and state law standards.

Section 106.45(b) lays out procedural requirements that far exceed the level of due process to which courts have held K-12 students in disciplinary matters are entitled. Even in expulsion proceedings, a student does not have the right to notice of every investigative interview with enough time to prepare a response. The proposed rule would limit the ability of K-12 school administrators to respond swiftly to conduct violations and create confusion by overlapping with state and local disciplinary procedures.

Section 106.45(b)(1)(i) requires recipients to "treat complainants and respondents equitably," which means remedies for a complainant where a finding of responsibility has been made, and due process protections for the respondent ahead of disciplinary sanctions. **Section 106.45(b)(1)(vi)** similarly requires that a recipient's grievance procedures "describe the range of possible sanctions and remedies that the recipient may implement following any determination of responsibility." NSBA urges the Department to offer examples of the types of remedies it would find equitable, and the types of sanctions and remedies it would find acceptable. At minimum, the Department should make clear that it defers to the educational judgment of schools to take into consideration the myriad factors impacting the K-12 environment, from age to developmental level and beyond, in implementing the "equitability" requirement.

Section 106.45(b)(1)(v) requires written notice of delay in investigation timelines based on "good cause" such as law enforcement involvement, disability accommodation, or unavailability of a party or witness. NSBA asks that the Department provide a description or definition of "delay," in relation to the requirement that timeframes be "reasonably prompt." Also, we ask the Department

[15] *Id*. (school administration's custodial role and familiarity with students in contained elementary and secondary environment and chilling effect on student reporting, as well as possibility of reprisals and corresponding threat to school safety outweighed right of cross-examination in student expulsion matter)

to clarify that the examples of good cause are not exclusive. Given the significant administrative burden on K-12 schools if the regulations go into effect as proposed, some districts may not have enough staff to carry out all formal grievance procedures required by the regulations in a "reasonably prompt" manner, which could cause delay.

Section 106.45(b)(2)(i)(B) requires advance written notice to known parties of the allegations "with sufficient time to prepare a response before any initial interview." **Section 106.45(b)(2)(ii)** requires that notice be given again if the recipient expands the scope of investigation beyond the allegations included in the notice. This requirement will impose significant burden on school staff processing complaints, and will constrain school administrators' authority to respond quickly to allegations in order to maintain a safe school environment and avoid disruption while still affording due process comporting with policy and Constitutional standards. The requirement also exceeds standards issued by courts in the K-12 context. We ask the Department to strike this requirement as regards K-12 schools or, alternatively, make clear that this heightened notice standard may occur via methods consistent with the setting -- for example, a phone call to the parents of the student/s involved.

Section 106.45(b)(2)(i)(B) requires that written notice of a formal complaint issued to the parties include, if known, "the identities of the parties involved in the incident." NSBA asks the Department to clarify whether this means a recipient cannot honor a complainant's request to proceed with a formal complaint anonymously, and that the filing of a formal complaint is therefore unavailable to any complainants who wish to remain anonymous. In addition, we request that the Department confirm this means that if a Title IX Coordinator elects to file a formal complaint on behalf of a complainant, he or she must deny any request by the complainant to remain anonymous.

Section 106.45(b)(3)(iii) prohibits recipients from restricting the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence. This proposed rule is well-intentioned but overly broad. A building-level administrator, such as a principal, should be able to restrict a student from randomly or maliciously discussing allegations of sexual harassment without impeding the student's ability to participate in the formal complaint process. We ask the Department to clarify this provision with respect to the K-12 setting.

Section 106.45(b)(3)(v) requires written notice to a party whose participation is invited or expected of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with a party, with sufficient time for the party to prepare to participate. "The Department believes that this proposed provision, which is similar to the Clery Act regulation at 34 CFR 688.46(k)(3)(i)(B) with respect to timely notice of meetings, is equally important at the elementary and secondary education level and the postsecondary education level to ensure that both parties are treated equitably." 83 Fed. Reg. 61476.

NSBA asks the Department to clarify how Clery Act regulations apply to elementary and secondary schools regarding timely notice of meetings. This requirement is likely to be unrealistic and overly burdensome in the K-12 context and goes far beyond the due process to which students usually are entitled prior to a meeting or an interview in a disciplinary matter. In K-12 schools, the vast majority of which do not have a dedicated Title IX office or even a full-time coordinator, these meetings will often be handled by building-level administrators or counselors. A principal does not always know in advance who will be at a meeting or exactly where the meeting will be held. And, depending on the severity of the allegations, K-12 schools need to be able to respond quickly to ensure student safety. Formalistic hearing and meeting notice requirements hinder the necessary flexibility K-12 schools require.

Section 106.45(b)(3)(vi) states that "[f]or recipients that are elementary and secondary schools, the recipient's grievance procedure may require a live hearing." This proposal is appropriate to the extent it allows elementary and secondary schools the flexibility to decide whether to conduct a live hearing. But the proposed rule asks K-12 officials to take on a legal role that may not be appropriate in many school buildings. This section requires the decision-maker, after incorporating the parties' responses to the investigative report, to ask each party and any witnesses any "relevant" questions and follow-up questions that a party wants asked, with the exception of questions about the complainant's sexual behavior or predisposition unless such evidence is offered to prove that someone other than the respondent committed the alleged conduct. The decision-maker also must explain any decision to exclude a question as irrelevant.

This requirement would essentially require a K-12 administrator to make evidentiary determinations akin to a legal professional. The provision would in effect require school officials like principals and counselors to make jurisprudential determinations, challenging even for

lawyers and judges, and well beyond the purview of their educational and professional training. The proposed regulation assumes that the investigator prepares the report, after which the decision-maker incorporates the parties' written responses and issues a final determination. With some exceptions for larger districts, the vast majority of K-12 schools lack the kind of personnel and administrative resources to implement a procedure with multiple tiers of investigation and decision-making by individuals contemplated by the regulations who are free from associations with the students that could be considered a "conflict." (see Proposed 106.5(b)(1)(iii)). Additionally, providing the non-hearing equivalent of cross-examination in a live hearing will be difficult for K-12 leaders to implement without significant legal guidance, as the purpose of live cross-examination is for the decision-maker to judge credibility. Some schools or districts with significant resources may be able to hold live hearings with cross-examination; others may not or may choose not to depending on the age and vulnerabilities of the students involved. By attempting to lay a quasi-judicial process over K-12 school processes, the proposed rule is likely to result is varying degrees of "process" in different schools and districts, which may lead to inequities and inconsistencies. NSBA asks the Department to exempt K-12 school from these ill-fitting requirements or provide basic regulatory guidelines for K-12 school leaders who choose not to use cross-examination at a live hearing.

Section 106.45(b)(3)(viii) requires recipients to provide both parties the opportunity to inspect and review evidence directly related to the allegations, even if the recipient does not intend to rely on the evidence in reaching a determination, at least 10 days prior to the completion of the investigative report. The evidence must be sent to each party and any party's advisor in an electronic format that restricts downloading or copying the evidence. The proposed rule asks K-12 officials to take on a quasi-judicial pre-decisional oversight role over disclosures, including weighing in on relevancy. This requirement is unrealistic, not required by due process standards or case law, and may in some situations hamper a school district's ability to maintain a safe school environment. If a witness to an alleged incident of sexual harassment is young and suffers from a cognitive disability, for example, the school may wish to protect the identity of the witness to help ensure her safety. The proposed rule seems to require the district to oversee the disclosure of the witness's identity. School administrators and their legal advisors should be able to decide how best to use student witnesses based on individual circumstances, rather than a federal regulatory standard that greatly exceeds due process guarantees in the elementary and secondary context.

In addition to the significant administrative burden it causes, the disclosure requirement also expands rights guaranteed by the Family Educational Rights and Privacy Act (FERPA), 20 USC 1232g. The Department's commentary under proposed paragraph (b)(3)(viii) states that the requirement is consistent with FERPA, but it goes further: education records under FERPA must be provided in 45 days, and there is no specific format requirement.

Section 106.45(b)(4)(i) prohibits the decision-maker and the Title IX coordinator or investigator from being the same person. Many school districts, especially those in rural areas, lack sufficient personnel to comply with this requirement. This subsection also requires recipients to employ the same standard of proof for complaints against students as for complaints against employees, including faculty. There is some question as to whether the Department has the authority to require this, as it lies outside the scope of Title IX to adopt rules designed to regulate fair treatment between students and employees. This requirement may also interfere with employment contract rights or collective bargaining agreements.

Section 106.45(b)(4)(ii) requires districts to make a written determination that includes, among other things, "A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, <u>any sanctions the recipient imposes on the respondent</u>, and any remedies provided by the recipient to the complainant designed to restore or preserve access to the recipient's education program or activity." **Section 106.45(b)(4)(iii)** requires the district to provide the determination to the parties (respondent and complainant) simultaneously.

The Department's commentary states that these provisions generally track the language of the Clery Act regulations applicable to institutions of higher education and that the benefit of these provisions are equally applicable at the elementary and secondary level. By requiring a school district to disclose all sanctions imposed on the respondent, however, these provisions overlap and conflict with the district's responsibilities under FERPA[16] and state student records laws. In advising districts with respect to their obligations under FERPA and state law, school attorneys frequently advise that sanctions which are issued and affect the complainant (e.g., by prohibiting the respondent from attending school-sponsored activities in an effort to allow the complainant to attend without worry of harassment), may be disclosed to the complainant to ensure that the

[16] 20 U.S.C. §1232g; 34 C.F.R. Part 99.

complainant feels safe, but sanctions affecting only the respondent (e.g. suspension from school), may not be disclosed. This provision makes no distinction with respect to sanctions issued to the respondent and may lead districts to violate unwittingly both state and federal laws regarding confidentiality of student records.

Section 106.45(b)(4)(iii) states that, if a recipient offers an appeal process, the recipient's determination of responsibility does not become final until the appeal process is concluded or, if no appeal is filed, the date on which an appeal would no longer be considered timely. NSBA asks the Department to clarify the meaning of "final." If "final" means that the determination can be the basis for disciplinary measures, it may conflict with existing state timelines and appeal procedures for disciplinary decisions.

Section 106.45(b)(5) regarding appeals states that the appeal decision-maker cannot be the same person as any investigator or decision-maker that reached the determination of responsibility. This requirement will be unrealistic for small or rural K-12 school districts. NSBA suggests that the regulations require any decision-maker or investigator to apply objective criteria and to make independent judgments with respect to a Title IX sexual harassment proceeding under this Section.

Section 106.45(b)(7) requires a recipient to create and maintain for three years records of any actions taken in response to a report or formal complaint of sexual harassment, including documentation of the basis for the recipient's conclusion that its response was not clearly unreasonable. It is not clear from the rest of the proposed rule that recipients are required to determine the reasonableness of the recipient's own response to sexual harassment allegations. Indeed, that is a determination made by the Department if and when a civil right complaint is investigated. We ask the Department to remove the requirement that recipients keep records for the bases of their conclusions and defer to state laws regarding retention periods.

Conclusion

NSBA urges the Department to revise the proposed rule to reflect the realities of K-12 school district operations, including where necessary to exempt K-12 schools from provisions therein. The Department's regulations in this area should support school boards' commitment to ensure safe, nurturing learning environments without expanding legal liability for school districts and

imposing burdensome procedural requirements akin to judicial proceedings where they are not legally required, and in many situations are inconsistent with the district's educational mission.

Sincerely,

Thomas J. Gentzel

Executive Director & CEO