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Opening Brief for Plaintiff-Appellant, Roe v. Marshall University Board of Governors

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No. 24-1669

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Jane Roe,
Plaintiff-Appellant,

v.

Marshall University Board of Governors,
Defendant-Appellee.

On Appeal from a Final Judgment of the
United States District Court for the Southern District of West Virginia
Case No. 3:22-cv-00532, Judge Robert C. Chambers

OPENING BRIEF FOR PLAINTIFF-APPELLANT

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November 12, 2024

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 24-1669 Caption: Jane Roe v. Marshall University Board of Governors

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(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

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If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
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Signature: /s/ Madeline Meth Date: 11/12/24

Counsel for: Appellant Jane Roe

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Introduction

On September 3, 2022, Jane Roe, then a student at Marshall University, was violently sexually assaulted at a party following a Marshall football game. Roe's ex-boyfriend, another Marshall student, shoved her into a bathroom wall, strangled her, attempted to force his hand into her pants, and bit her hard enough to draw blood. Instead of fulfilling its Title IX obligation to respond in a way that prevented interference with Roe's education, Marshall exacerbated Roe's already difficult situation.

Without investigating the circumstances of Roe's assault, officials in Marshall's Title IX office shunted a police report about the assault out of the Title IX office and into a student-conduct investigation, which lacked the protections that the law requires schools put in place for victims of sexual violence and those who participate in Title IX investigations. Then, Marshall began investigating Roe, purportedly for underage drinking. It labeled Roe as a "witness" and lured her into aiding in its investigation against her by making her believe that the school wanted to help her confront the sexually hostile environment that she faced after her assault.

Ultimately, Marshall punished Roe, leading to a conduct violation on her transcript which will remain on her record until 2029. In contrast, it did not punish—or even investigate—other partygoers who engaged in underage drinking but had not suffered or reported a sexual assault.

Marshall's woefully inadequate response to an already vulnerable victim of sexual assault forms part of a larger pattern in which Marshall has failed to fulfill its Title IX obligations. These failings have received national press coverage, and a jury could conclude that what motivated Marshall's response to Roe's assault was not addressing the hostile environment she suffered under but minimizing the incident and protecting the school's reputation. Whether Marshall punished Roe because it did not care about protecting her access to education or because it sought to silence her and other Title IX victims to protect its reputation is a jury question. But in either case, Marshall's conduct violated Title IX.

The district court granted Marshall summary judgment based on a narrow, incorrect reading of Title IX regulations and inferences improperly drawn in Marshall's favor. However, Title IX prohibits Marshall's deliberately indifferent and retaliatory behavior. This Court should therefore reverse.

Jurisdictional Statement

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331. On June 24, 2024, the district court granted summary judgment to Marshall, disposing of all claims of all parties. JA372. On July 19, 2024, Roe timely filed a notice of appeal. ECF 206. This Court has jurisdiction under 28 U.S.C. § 1291.

Issues Presented

Title IX prohibits schools from responding with deliberate indifference to student-on-student sexual harassment that interferes with, or threatens to interfere with, a victim's education. It also prohibits schools from retaliating against students who engage in Title IX protected activity, such as reporting an assault. Here, another Marshall student sexually assaulted Roe at an off-campus residence near Marshall's campus. Roe reported the assault and other instances of student-on-student relationship abuse. In the assault's aftermath, Roe missed classes and limited her time on campus because she was afraid of encountering her assailant. Her grades suffered. Marshall did not address the student-on-student harassment using its Title IX procedures, grant Roe appropriate supportive measures, or inform her that a no-contact order against her assailant remained in effect. Instead, it shunted her report to its student-conduct office, investigated her, and punished her purportedly for engaging in underage drinking on the day she was assaulted.

This appeal presents two issues:

I. Whether a reasonable juror could conclude that Marshall violated Title IX by responding to student-on-student sexual harassment with deliberate indifference.

II. Whether a reasonable juror could conclude that Marshall violated Title IX by retaliating against Roe for reporting student-on-student sexual harassment and aiding in the investigation of her assailant.

Statement of the Case

I. Factual background

A. Marshall's Title IX publicity crisis is the backdrop when Roe experiences student-on-student sexual harassment.

In September 2022, Marshall was in the midst of a public-relations nightmare of its own creation. Its nascent Title IX office had come under intense scrutiny for mishandling instances of sexual harassment, assault, and rape. *See Zulauf v. Marshall Univ. Bd. of Governors*, No. 3:20-0607, 2021 WL 2169516 (S.D.W. Va. May 27, 2021); *Klug v. Marshall Univ. Joan C. Edwards Sch. of Med.*, No. 3:18-0711, 2019 WL 1386403 (S.D.W. Va. Mar. 27, 2019); *Gonzales v. Marshall Univ. Bd. of Governors*, No. 3:18-0235, 2019 WL 3432533 (S.D.W. Va. July 30, 2019) (finding Marshall had flaws in its Title IX procedures and had reinstated rapist as student, though granting summary judgment to Marshall).

Marshall's continuous mishandling of sexual misconduct between its students entered the national consciousness on November 16, 2022, when USA Today published an article titled "A Marshall University student is in prison for rape. His victims reveal how the school failed them," JA280 n.1., but the problems had existed for years. As the district court noted, the instant case is not Marshall's "first, second, or third appearance before [the] Court … on allegations of incompetent administration of Title IX." ECF 17 at 4. The day after the USA Today article was published, Marshall was finally forced to act. Marshall President Brad Smith met with students protesting

Marshall's Title IX procedures and announced Marshall would be enacting reforms and firing their current Title IX Coordinator. JA788-789, JA1093-1094. Unfortunately for Jane Roe, those reforms came too late.

B. Doe sexually assaults Roe at a Marshall football watch party.

Around noon on September 3, 2022, Roe went to watch a Marshall football game on campus with another Marshall student. JA422-425. At the game, she briefly encountered John Doe, her ex-boyfriend. JA422-425. After the game ended, Roe attended a watch party at another Marshall student's house, *see* JA447, two streets away from campus, JA430. Ten people, mostly Marshall students, JA513-518, had gathered there earlier to watch the game, JA431-432.

During the party she saw Doe again. He was "blackout drunk." JA894. Doe told her that he wanted to talk, so they went to a bathroom. JA450-451. Once inside, Doe became aggressive. He threatened to smash her phone unless she gave him the password to it. JA894. He questioned her about another man that she had been talking to and then shoved her against a wall, strangled her, and tried to put his hands down her pants against her will. JA450, JA894. Roe resisted and escaped through the back door of the house. JA894. Doe pursued her outside, tried to force a kiss on her, and bit her when she would not consent. JA451. Another partygoer intervened when he saw this, JA452, but Roe was left with bruises on her neck and a bloody lip, JA1148-1149.

Distraught, Roe called her brother who told her to call 911. JA452-453. She did, and the Huntington Police arrived soon after. JA453-454. An officer took Doe into custody and spoke with Roe. JA454. She showed the officer her injuries, told him that she was afraid of Doe, and explained that this was not the first time that Doe had been violent towards her. JA453-454, JA1115. Huntington Police recorded the details of the incident in a police report and sent it to the Marshall University Police Department, which forwarded it to Marshall's Title IX office for it to review Doe's misconduct. JA892, JA812.

C. Marshall's Title IX office fails Roe.

There are no contemporaneous notes in the record about why the committee that evaluates whether Marshall's Title IX office has authority to investigate and remedy a complaint of sexual harassment apparently determined that the office lacked authority over Roe's complaint. In the course of this litigation, however, the Title IX office has maintained that it refused to investigate Doe's abuse of Roe as a Title IX complaint based solely on the assault's location without investigating any surrounding circumstances, including the off-campus residence's owner, the type of event taking place, or whether the other instances of relationship abuse reported by Roe had occurred on-campus. JA853.

Marshall's student-conduct policies provided it with the authority to address off-campus conduct. JA133, JA150. For example, its Student Disciplinary Procedures state that "[student] conduct that occurs off

University property is subject to" the student disciplinary code when it "adversely affects the health, safety, or security of any other member of the University community." JA150. Moreover, the document outlining Marshall students' rights and responsibilities prohibits students from engaging in "physical or emotional/psychological abuse … whether such conduct occurs on or off University property." JA133. When students violate Marshall policies, the school has the ability to sanction them, including with suspension and expulsion. JA169-171.

Had the Title IX office investigated the incident as a Title IX complaint, Roe would have had immediate access to various mandated protections including automatic assignment of an advisor and academic accommodations. JA1107-1108. Instead, without informing Roe, the Title IX office redirected Roe's complaint to the Office of Student Conduct, where it was assigned to Assistant Director of Student Conduct Michaela Arthur. *See* JA853, JA892.

D. Marshall's Student Conduct Office fails Roe.

On September 7, following office policy that a charge letter be issued to a student immediately upon "allegation[s] of misconduct," Arthur notified Doe that he was being investigated and charged with violating two provisions of the Student Code of Rights and Responsibilities for his attack on Roe. JA1303, JA897-898. A charge letter, like the one sent to Doe, informs a student that they are being formally charged and investigated and details

the possible sanctions; the letter also explains the student's right to be accompanied by an advisor, which Doe invoked, and the right to a hearing. JA897-898. On that same day, Arthur sent Roe a letter identifying her as a "witness" to the September 3 assault and requesting a meeting to discuss it further. JA899-900. Arthur's request made no indication that Roe was herself under investigation. JA899-900. Arthur also issued "interim" no-contact orders to both Roe and Doe. *See* JA915, JA926.

Arthur went on to meet with both Roe and Doe several times over the course of what Roe initially believed was an investigation intended to "protect her" from her assailant. JA892, JA489. On September 13, Doe lied to Arthur, claiming that he bit Roe's lip consensually, pushed her in self-defense, and never choked her. JA893-894. Roe's contrary report, photo evidence and medical records that she provided, and the police report from the day of the incident contradict Doe's assertions about the assault. JA901. During the same meeting, Doe told Arthur that there were ten other people at the party and "everyone was drinking." JA893. He also offered to confirm a list of witnesses from the party who were willing to speak with Arthur and provide their contact information. JA894. Despite Doe's report of other Marshall students drinking at the party and Marshall's purported mandate that alleged violations are "always" investigated, JA682, JA1116, Arthur did no investigation into other underage-drinking violations at the party. *See* JA1336.

Two days later, on September 15, Roe told Arthur that she and Doe were both drinking on the day of the incident, and Doe was "blackout drunk." JA894. Roe also reported to Arthur that Doe had been abusive in the past, including shoving her and holding her wrists, but had never been "this violent." JA894. Finally, Roe named a friend, another Marshall student, who also attended the party where everyone was drinking. JA894, JA893. Again, contrary to Marshall's policy regarding investigating all alleged violations, Arthur did not investigate these past instances of relationship violence or the other named student for underage drinking. JA891-913.

But Arthur did begin to investigate Roe's drinking. Arthur informed her supervisor, Lisa Martin, that Roe had admitted to off-campus underage drinking and, in Arthur's view, would need to be charged with a student-conduct violation. JA1188-1189. Martin agreed and instructed Arthur to ascertain the exact type and amount of alcohol that Roe consumed on the day of the incident, marking a clear transition away from investigating Doe's violence and towards investigating Roe's drinking. JA1334. Although Roe was now the subject of a student-conduct investigation, Arthur still did not issue her a charge letter informing her of her rights. JA1339-1340.

Roe therefore did not know that she had the right to an advisor. *See* JA1313. An advisor, among providing other supports, could have advocated that Roe not be punished for any student-conduct violations that lacked impact on the health or safety of other Marshall community members and that were learned about during the course of an investigation into Roe's

assault. *See* JA893. Or, an advisor may have recommended that Roe stop participating in the investigation, *see* JA896, particularly if her drinking violation would disqualify her from receiving support for being a victim of sexual assault and harassment.

Although Marshall knew it was "best practice," the university lacked a formal amnesty policy for underage drinking for sexual-assault victims. JA677-680. But it had a medical amnesty policy in place for individuals who report medical emergencies while using drugs or alcohol, and Roe went to the hospital after Doe assaulted her. JA678, JA160. And it had the discretion not to investigate Roe, the way it did not investigate or punish other partygoers. *See* JA937, JA667-668.

During their next meeting, still believing Marshall was trying to help her, Roe answered Arthur's questions about the underlying incident truthfully, telling Arthur that she consumed two to three alcoholic seltzers before the football game and two shots of Jägermeister at the party. JA896. Arthur also met with Doe a second time, where she specifically asked him how much and what type of alcohol he and Roe were both drinking on the day of the incident. JA896. He refused to answer, citing his ongoing legal process. J896.

On October 20, Marshall found Doe responsible for one count of physical or emotional violence, one count of relationship violence, and one count of underage drinking. JA900-901. Doe received what Marshall described as the "standard" sanction for underage drinking, which is probation, participation in an alcohol education course, and ten hours of community

service. JA667-668, JA900-901. Marshall had no standard punishment for Doe's violent-conduct violations. JA667. For these two counts of violence against Roe, Marshall imposed ten hours of community service. JA667. No matter how those ten extra hours were divided among the two counts of violence, Doe was punished less harshly for his assault on Roe than for his underage drinking. *See* JA667-668.

E. Marshall punishes Roe.

On the same day Doe was found responsible, over a month after Arthur began investigating Roe, Arthur finally issued Roe a charge letter informing her that she was under investigation for underage drinking and had the right to be accompanied by an advisor. JA909-910. Roe was overwhelmed at the thought of continuing the investigation alongside her academic responsibilities. *See* JA486. So, when Arthur affirmed that most students take a voluntary resolution, Roe agreed to accept discipline for underage drinking on the day she was assaulted. JA486-487. She was placed on conduct probation, had to participate in an alcohol education course, and had to complete ten hours of community service. JA911-912. A student who receives conduct probation as a sanction is "no longer in good disciplinary standing with the academic community." JA141. The school thus places a hold on the student's record, preventing them from registering for classes until their disciplinary obligations are fulfilled. JA141.

Following the investigation, Roe feared that she would be expelled from her nursing program because of the discipline on her record. JA933. To clarify the mark on her academic record, she felt compelled to disclose details of her assault to her nursing-program supervisors, which further humiliated her. *See* JA1140. She also suffered academically, as she was forced to miss classes and an examination to participate in Doe's criminal proceedings, while receiving no academic support from Marshall. JA1140. The make-up examination was ultimately the worst performance of her academic career. JA1140. Additionally, because, contrary to policy, *see* JA225-227, no university official ever informed Roe about an extension of the interim no-contact orders or about whether Marshall had disciplined Doe, she limited her time on campus out of fear of future encounters with him, JA1140.

Had Roe not been punished as a result of her cooperation with the sexual assault investigation, she would have urged Marshall to open a formal Title IX complaint once she realized that the university had not done so, sought more accountability for Doe, and spoken publicly about the incident. JA551.

The conduct violation on Roe's transcript will remain on her record until 2029, meaning it may affect various educational and professional applications in the future. JA1140. And even once the mark is removed from her transcript, she may be required to disclose the punishment on future applications. JA1140.

F. Marshall offers Roe no academic support.

Though Director of Student Conduct Lisa Martin testified that the student-conduct office always provides supportive measures when the complainant is a victim of sexual assault, Roe received no academic supports. JA641, JA1188-1189. Among other supportive measures, Marshall could have provided Roe with academic accommodations, including assistance in transferring course sections, requesting to withdraw or receive an incomplete grade, taking a leave of absence, or providing an alternative method of completing her course work. JA157-158. Marshall also could have helped Roe communicate her circumstances to her nursing program to assuage her fears that she would face further discipline and to explain the need to make up work. *See* JA933. Besides withholding these supportive measures from Roe, in the aftermath of the student-conduct investigation, Arthur refused to describe Roe as a "victim," JA1178-1187, and Martin would not say whether she believed physical assault was a more serious offense than underage drinking, JA658-661.

II. Procedural background

Complaint. Roe sued the Marshall University Board of Governors, under Title IX, 20 U.S.C. § 1681, for Marshall's failure to adequately respond to her assault and its decision to punish her for reporting details of the assault. ECF 1. Marshall moved to strike four paragraphs of Roe's complaint that described the historical dysfunction surrounding Marshall's Title IX office. ECF 8, 9. The district court denied Marshall's attempt to remove mentions of

its ongoing Title IX problems because Roe's description of its challenges was "not inaccurate." ECF 17 at 3.

Motion to dismiss. Marshall also moved to dismiss Roe's deliberate-indifference Title IX claim. ECF 6. It argued that it could not be held liable because it had no control over the context of the assault, and under Marshall's interpretation of a Title IX implementing regulation, 34 C.F.R. § 106.44(a) (2020), Marshall's Title IX office could not investigate Roe's assault because the assault happened off campus. ECF 7 at 5-6. The district court denied Marshall's motion to dismiss. ECF 15. It held that though Roe's assault took place off campus, the complaint "plausibly allege[d] a sufficient nexus between the off-campus assault and Marshall to meet the substantial control of context standard." ECF 15 at 10. The court explained that 34 C.F.R. § 106.44(a)'s language "unambiguously fails to limit the 'context' over which an institution exercises control to only physical locations." ECF 15 at 6. And the court emphasized that Marshall was "quick to investigate and impose discipline upon Ms. Roe for her underage drinking in connection with" the assault that Marshall now maintains it had no control over. ECF 15 at 9.

Amended complaint. With the district court's leave, Roe filed an amended complaint alleging retaliation under Title IX as well as her original deliberate-indifference claim. JA23-34.

Discovery. The district court denied Marshall's motion to compel an independent psychological evaluation of Roe because Roe stipulated that she would limit her emotional damages to "garden variety" emotional

distress so that the parties could forgo any expert testimony regarding her psychological condition. ECF 149 at 11-12; JA75.

Motion for summary judgment. Marshall moved for summary judgment. ECF 165. With respect to Roe's deliberate-indifference claim, Marshall again argued that it did not have control over the context of Roe's assault per the relevant Title IX regulations. JA83-90. It also argued that its actions during the student-conduct investigation were not deliberately indifferent. JA91-95. Marshall further argued that Roe's retaliation claim failed because it purportedly did not punish Roe for reporting her assault, only for underage drinking. JA95-101. Finally, the university maintained that it was entitled to summary judgment under *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212 (2022), because, in its view, its conduct had caused Roe to suffer only emotional-distress damages for which she cannot recover under Title IX. JA101-105.

The district court granted summary judgment to Marshall. JA372. In dismissing Roe's deliberate-indifference claim, the district court reversed its earlier holding that the university had enough control over the context of the harassment. JA383. Additionally, according to the court, Marshall did not act with deliberate indifference towards Roe's harassment because the university responded to her assault with a student-conduct investigation. JA387-388. The court did not address Marshall's hinted-at but not formally raised argument that the sex-based harassment Roe experienced was not

sufficiently severe and pervasive. Nor did it address Marshall's *Cummings* argument.

In granting summary judgment for Roe's retaliation claim, the district court held that Roe could not prove a causal connection between any protected conduct and Marshall's adverse actions against her because Marshall would have learned of her underage drinking from Doe and the police report even if Roe had not spoken with Student Conduct about her assault. JA391. The district court then credited Marshall's explanation that it had a legitimate, nonretaliatory reason to punish Roe, namely that Roe admitted to the student-conduct-code violation of underage drinking during the investigation. JA393.

Summary of Argument

I. A reasonable juror could conclude that Marshall is liable for responding to reports of Roe's sexual assault with deliberate indifference.

First, Marshall forfeited arguing that Roe did not experience severe and pervasive sexual harassment, and in any case, the record reflects that the sexual assault and other instances of student-on-student relationship violence contributed to an on-campus hostile environment so severe and pervasive that it interfered with Roe's education.

Second, there is a basis for imputing liability to Marshall. Marshall acted in a clearly unreasonable manner by shunting the incident away from the Title IX office's mandated protections into a student-conduct proceeding

where it deviated from its own procedures to punish Roe. Moreover, Marshall had the requisite control because of its disciplinary authority over the assault's setting, the assault's proximity to campus, the assault's targeting of one of its students, its ability to control other students who were in the setting where the assault took place, and the fact that the hostile environment that Roe faced permeated Marshall's campus where Marshall had the ability to remedy or mitigate it.

II. A reasonable juror could conclude that Marshall violated Title IX by retaliating against Roe in response to her reporting a sexual assault and taking part in the investigation of the assailant. Marshall not only deprived Roe of accommodations as a victim of a violent sexual assault, but it punished her purportedly for underage drinking, a charge that it only became aware of because it lured her into aiding in an investigation that she reasonably believed was a Title IX inquiry but that had actually transformed into an investigation of her. The record reflects that Marshall's real reason for punishing Roe and denying her support was her Title IX protected activity. And even if a jury were to agree with Marshall that it treated Roe unfavorably because she engaged in underage drinking on the day that she was assaulted, punishing a student for underage drinking that is revealed as part of a student's honest participation in a Title IX investigation is per se retaliatory.

Standard of Review

This Court "review[s] a district court's grant of summary judgment de novo." *Lee v. Town of Seaboard*, 863 F.3d 323, 327 (4th Cir. 2017).

Argument

Under Title IX, "[n]o 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." 20 U.S.C. § 1681(a). Marshall's response to the student-on-student sexual harassment Roe faced violated Title IX in two ways. First, Marshall's deliberate indifference to the assault and other sexual harassment was discriminatory and interfered with Roe's education. Second, Marshall retaliated against Roe for reporting the assault by punishing her and failing to provide her appropriate supportive measures.

I. Marshall is liable to Roe for its deliberate indifference to student-on-student sexual harassment.

To make out a Title IX deliberate-indifference claim, "a plaintiff must show that (1) she was a student at an educational institution receiving federal funds, (2) she was subjected to harassment based on her sex, (3) the harassment was sufficiently severe or pervasive to create a hostile (or abusive) environment in an educational program or activity, and (4) there is a basis for imputing liability to the institution." *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007). It is undisputed that Marshall is an educational

institution receiving federal funds and that Roe was subjected to sex-based harassment. *See* JA76-105.

A. Roe experienced severe, pervasive, and objectively offensive sexual harassment that affected her education.

In one lonely sentence below, buried in its deliberate-indifference analysis, Marshall gestured at an argument that Roe's assault was not sufficiently severe and pervasive. Specifically, it argued: "If Plaintiff is only alleging damages for 'garden variety' emotional distress as the result of the University's alleged actions, then there is no factual support for the essential element that the harassment 'is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.'" JA95. That fleeting statement is not only inaccurate (it conflates Roe's stipulation that she will not rely on expert testimony to prove emotional-distress damages with Title IX's liability standard), but it is also too obscure and unilluminating to avoid a forfeiture. *See APA Excelsior III L.P. v. Premiere Techs., Inc.*, 476 F.3d 1261, 1270 (11th Cir. 2007).

In any case, Roe experienced sufficiently "severe or pervasive" sexual harassment "to create a hostile (or abusive) environment in an educational program or activity." *Jennings*, 482 F.3d at 695. Harassment is severe or pervasive when it creates an environment that both a reasonable person and the victim herself would find hostile or abusive. *Id.* at 696. Accordingly, whether sexual harassment is sufficiently severe or pervasive "depends on a constellation of surrounding circumstances, expectations, and

relationships." *Id.* (citing *Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999)). Furthermore, the presence of an assailant on campus can create a hostile environment. *See Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1104-05 (10th Cir. 2019); *Kinsman v. Fla. State Univ. Bd. Trs.*, No. 4:15CV235, 2015 WL 11110848, at *4 (N.D. Fla. Aug. 12, 2015).

After Doe bit and strangled Roe, she was left with a bloody lip and bruising around her neck. JA906. The assault and the circumstances that followed made Roe feel, as they would any reasonable victim in Roe's shoes, that the environment on campus shared with Doe was hostile and abusive. JA553. Roe was "terrified to go on Marshall's campus" out of "fear that [she] might see [Doe]," so she drastically limited her time on campus to avoid seeing Doe, only going "once or twice to the rec center since everything has happened." JA553. Roe's fear made sense in light of the fact that she had seen Doe at the on-campus football game on the day that he later assaulted her. JA422. The assault was so severe that it had a concrete impact on Roe's ability to participate in her nursing program. She described feeling "shame and embarrassment" when she was forced, without support or accommodations from Marshall, to disclose the assault to her nursing supervisors. JA1140. She also had to miss classes and an examination, again with no support, to attend Doe's criminal proceedings. JA1140. Her grade on the make-up examination was ultimately the worst of her academic career, further evidence that she experienced a hostile environment. JA1140.

The harassment Roe experienced was also pervasive: Marshall knew that Doe had been violent with Roe prior to the off-campus assault that led her to report his repeated abuse. JA453-454, JA894. Moreover, when Marshall punished Roe following the assault, it further contributed to the hostile environment she experienced on campus, making her feel like "what happened to [her] didn't matter at all" and preventing her from using Marshall's Title IX office to seek accountability for Doe. JA551.

B. There is a basis for imputing liability to Marshall.

Below, Marshall contested whether a genuine dispute of material fact remains as to Roe's basis for imputing liability to the university. JA77; *see Jennings,* 482 F.3d at 695. It argued (1) that it was not deliberately indifferent to Roe's assault, JA91, and (2) that it did not have substantial control over Doe or the harm that Roe suffered, JA83. It is wrong on both counts.

1. Marshall was deliberately indifferent to Roe's sexual harassment.

Taken as a whole, Marshall's actions demonstrated its deliberate indifference in the aftermath of Roe's assault. Under Title IX, "a recipient's deliberate indifference to sexual harassment of a student by another student" is "'discrimination' 'on the basis of sex.'" *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) (quoting *Davis*, 526 U.S. at 643). Universities are deliberately indifferent in their response to reports of sex discrimination, including student-on-student sexual harassment, when their actions—or inaction—are "clearly unreasonable in light of the known circumstances."

Davis, 526 U.S. at 648. Thus, universities "must respond and must do so reasonably in light of the known circumstances" surrounding instances of sexual harassment. *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 261 (6th Cir. 2000).

A university that makes "an official decision ... not to remedy the violation" is deliberately indifferent. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998). A "half-hearted investigation or remedial action" is an insufficient response to sexual harassment under Title IX. *S.B. ex rel. A.L. v. Bd. of Educ. of Harford Cnty.*, 819 F.3d 69, 77 (4th Cir. 2016); *see also Feminist Majority Found. v. Hurley*, 911 F.3d 674, 690 (4th Cir. 2018) (holding university's "limited steps" in response to student-on-student harassment did "not preclude Title IX liability"). Furthermore, a university that "deliberately deprive[s] [a student] of internal … forms of support" in the interest of "minimizing the incident, protecting the school's reputation, and putting the incident behind the institution" is deliberately indifferent. *Rex v. W. Va. Sch. of Osteopathic Med.*, 119 F. Supp. 3d 542, 551 (S.D.W. Va. 2015).

Punishing Roe. Worse than doing nothing in response to Roe's harassment, punishing Roe was an alarming "official decision ... not to remedy the violation." *Gebser*, 524 U.S. at 290. While ostensibly meeting with Roe to hear her account of the assault as a witness in the investigation against Doe, Marshall officials decided to investigate Roe for her underage drinking. JA899, JA1324. During meetings where Roe believed she was giving information solely as a witness, Marshall officials questioned Roe about how

many beverages she consumed to determine whether Roe violated the student-conduct code. JA899, JA896. Without an advisor and unaware that Marshall officials were considering disciplining her, Roe answered these questions honestly because she believed the purpose of the student-conduct process was to help her "feel safe." JA550-552. Instead, Marshall punished Roe with probation, a mandatory course, and ten hours of community service. JA911-912.

That Roe's punishment for underage drinking was more severe than her assailant's punishment for assaulting her—Doe received just ten total hours of community service for both combined counts of violence related to the assault, *see* JA900-901—is further evidence that Marshall's conduct was "clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648; *see Gebser*, 524 U.S. at 290.

Failure to respond to other instances of relationship violence. One of the "known circumstances," *Davis*, 526 U.S. at 648, here was that Doe had abused Roe on prior occasions. JA894. Yet, once Roe reported this conduct, Marshall never investigated the instances of past violence. Nor did Marshall respond to this sexual harassment by offering Roe reasonable supportive measures. Marshall thus failed in its obligation to "respond" and to "do so reasonably in light of the known circumstances" surrounding the sexual harassment Roe faced. *Vance*, 261 F.3d at 261.

Half-hearted measures. Although Arthur issued Roe and Doe an "interim" "No Contact Order" at the beginning of the student-conduct

investigation, JA915, JA926, this was a "half-hearted ... remedial action." *S.B. ex rel. A.L.*, 819 F.3d at 77. Because Marshall failed to inform Roe of the duration of the "interim" order, Roe reasonably thought the order expired when the investigation into Doe ended. JA1140, JA225-227.

Marshall's failure to adequately address Doe's violence was particularly indifferent considering the seriousness of the assault. Doe strangled Roe. JA450. Strangulation "can cause severe physical, neurological, and psychological complications and often forebodes future domestic homicide." *United States v. Lamott*, 831 F.3d 1153, 1155 (9th Cir. 2016); *see also* Nancy Glass et. al., *Non-Fatal Strangulation Is an Important Risk Factor for Homicide of Women*, 35 J. Emergency Med. 329 (2008); Gael B. Strack & Casey Gwinn, *On the Edge of Homicide: Strangulation as a Prelude*, 26-FALL Crim. Just. 32 (2011); Heather Douglas & Robin Fitzgerald, *Strangulation, Domestic Violence and the Legal Response*, 36 Sydney L. Rev. 231 (2014).

Once it received the police report, Marshall knew that one of its students had been strangled as part of a sexual assault. JA892. Given this "known circumstance," *Davis*, 526 U.S. at 648, Marshall's "half-hearted" measures were a clearly unreasonable response to the harm that Roe faced, *S.B. ex rel. A.L.*, 819 F.3d at 77; *see Davis*, 526 U.S. at 648.

Clearly unreasonable student-conduct investigation. Marshall's deviations from its own procedural standards further indicate its deliberate indifference in handling Roe's assault. Marshall ignored its student-conduct

procedural protections while investigating Roe but afforded her attacker those protections.

For example, Marshall did not inform Roe of its investigation into her underage drinking by sending Roe a student-conduct charge letter until almost a month after Marshall started that investigation. *See* JA899, JA909-910. In contrast, Marshall sent Doe a charge letter at the beginning of the school's investigation into him, informing Doe of the disciplinary charges against him and his rights within the student-conduct process. JA897-898, JA900-901. The discrepancy between when Doe and Roe were put on notice that they were under investigation indicates that Marshall was seeking a pretextual justification for punishing Roe when its real purpose in turning the investigation on Roe and away from Doe was an attempt to quickly "put[] the incident"—that is, Doe's violent sexual assault of Roe—"behind the institution" to avoid adding to Marshall's Title IX public-relations crisis. *Rex*, 119 F. Supp. 3d at 551.

The record includes other evidence of deviations in standard procedures and disparate treatment of Roe during the student-conduct investigation. With respect to Roe's underage drinking, Marshall acted as if it was required to investigate and punish Roe, JA681-682, but it turned the other way when it learned that Doe had violated the student code of conduct by abusing Roe prior to assaulting her, JA894. Similarly, Marshall did not investigate other partygoers who were not victims of sexual assault but who were Marshall students that the university knew had engaged in underage drinking.

JA1116. From these facts too, a jury could draw the inference that Marshall was not motivated during the student-conduct investigation to remedy or mitigate sexual harassment, but to minimize the assault and quickly put it in the rear-view mirror. That is clearly unreasonable. *See Davis*, 526 U.S. at 648.

Lack of appropriate supportive measures. Marshall also failed to provide Roe with resources to mitigate the assault's ongoing harm. First, Marshall's failure to provide Roe with a timely charge letter, *see supra* 25, meant Roe was not informed of her right to an advisor to support her through the student-conduct process. *See* JA899, JA909-910. If she had an advisor, Roe likely would have understood that voluntary resolution was not her only option, *see* JA555, as an advisor could have advocated that because of Roe's status as a victim of sexual assault, she should not be punished for any student-conduct violations that lacked impact on the health or safety of other Marshall community members and that were learned about during the course of the investigation into Roe's assault, *see* JA150. Alternatively, an advisor may have recommended that Roe stop participating in the investigation. *See* JA896. The failure to provide Roe with a timely charge letter thus evidences Marshall's clearly unreasonable response to her sexual assault.

Additionally, Marshall failed to offer academic and housing accommodations to Roe to mitigate the harassment's effects. JA218-219. According to Martin, the student-conduct office always provides supportive

measures to victims of sexual assault. JA641. But no one ever discussed with Roe whether she needed assistance in transferring course sections, requesting to withdraw or receive an incomplete grade, taking a leave of absence, providing an alternative method of completing her course work, or the like. JA158. Nor did Marshall offer Roe any help in communicating with her nursing-program supervisors about her probation in a way that could have avoided humiliating her. *See* JA933.

Dismissal from Title IX office. The district court held that Marshall was not deliberately indifferent because it was supposedly reasonable to dismiss Roe's complaint from its Title IX office under Title IX regulations. JA387. That's wrong.

The relevant regulations require that Title IX Coordinators "promptly contact the complainant to discuss the availability of supportive measures," "consider the complainant's wishes with respect to supportive measures," "inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint." 34 C.F.R. § 106.44(a) (2020). If the complainant files a formal complaint, the Title IX office must undergo an involved "grievance process" that includes notice to the parties, investigatory rules, live hearings, written determinations of responsibility, and an appeals process. *Id.* §§ 106.44(b)(1), 106.45(b)(1)-(10). Title IX Coordinators must address harassment at "locations, events, or circumstances over which the recipient exercised substantial control over

both the respondent and the context in which the sexual harassment occurs." *Id.* § 106.44(a).

Despite receiving allegations in the police report that Roe had experienced a violent sexual assault, Marshall's Title IX office immediately funneled the incident to its student-conduct office without "promptly contact[ing]" Roe "to discuss the availability of supportive measures" or "explain[ing] to" Roe "the process for filing a formal complaint." *Id.* § 106.44(a); JA853-855. If Marshall had informed Roe of the formal complaint process, a formal complaint from her would have triggered Title IX's heightened "grievance process" procedural requirements, making Roe's complaint harder to dismiss. *See* 34 C.F.R. §§ 106.44(b)(1), 106.45(b)(1)-(10). Marshall's failure to do so is unsurprising given the Title IX office's publicly troubled history. A reasonable jury could conclude that Marshall dismissed Roe's assault from the Title IX office without informing Roe to "deliberately deprive[] her of internal ... forms of support" in the interest of "minimizing the incident, protecting the school's reputation, and putting the incident behind the institution." *Rex*, 119 F. Supp. 3d at 551.

Marshall maintained below that it quickly removed Roe's complaint from its Title IX office because the incident happened off campus, and therefore, the sexual assault of one of their students at the hands of another student and in the presence of other students "was not a Title IX matter." JA854. To the extent that this justification for shunting Roe's report out of its Title IX office is even accurate (a genuine dispute of material fact remains on this

point, *supra* 21-27), it is a clearly unreasonable decision for a university to funnel a complaint out of its Title IX office solely because the reported misconduct took place at an off-campus location. Here, Marshall relied only on the incident's off-campus location. JA853. The Title IX office thus could not have known whether the assault happened in "locations, events, or circumstances over which the recipient exercised substantial control." 34 C.F.R. § 106.44(a). The committee did not investigate whether the assault occurred at a university-sponsored event. JA854. The committee did not consider who owned the apartment. JA853. Nor did it consider whether the other sexual violence that Doe had perpetrated against Roe had occurred in a context over which the school maintained substantial control. *See* JA853. The committee's quick funneling of Roe's assault out of the Title IX office before any investigation into key facts was thus clearly unreasonable. *See Davis*, 526 U.S. at 648.

2. Marshall had substantial control over the context of Roe's harassment.

For a school to be liable for deliberate indifference to student-on-student sexual harassment, it must have "substantial control over both the harasser and the context in which the known harassment occurs." *Davis*, 526 U.S. at 645. The district court acknowledged that Marshall had substantial control over Doe, JA379, but held that Marshall lacked the requisite control over the context in which Roe experienced harassment, JA380.

The control-over-context requirement exists to cabin schools' liability to situations over which they had regulatory authority. That way, a school can only be responsible for "its *own* failure to act" after receiving notice of sexual harassment. *Davis*, 526 U.S. at 645-46. *Davis* grounds the control-over-context element in Title IX's text, explaining that "because the harassment must occur 'under' 'the operations of' a funding recipient, *see* 20 U.S.C. § 1681(a); § 1687 (defining 'program or activity'), the harassment must take place in a context subject to" the school's "control." *Davis*, 526 U.S. at 645. *Davis* relies on three dictionary definitions of "under," which all implicate regulatory authority: "in or into a condition of subjection, regulation, or subordination;" "subject to the guidance and instruction of;" and "subject to the authority, direction, or supervision of." *Id.* (citations omitted). A school's regulatory authority, including disciplinary authority, over harassment is thus the central consideration that determines whether a school has the requisite control over the context of harassment. Relatedly, courts consider whether a school has "the authority to take remedial action," *see id.* at 644, and whether there are other facts that demonstrate a nexus between an assault's setting and a university, *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1121 n.1 (10th Cir. 2008).

Applying *Davis*, in *Feminist Majority Foundation v. Hurley*, this Court held that the school's ability to address the harassment demonstrated the school's substantial control over the context of the harassment. *Hurley*, 911 F.3d at 688. There, the school could have identified the harassers, limited the

harassers' internet usage, communicated its sexual harassment policies to students, and educated students about sex discrimination. *Id.* As we now show, Marshall's regulatory and remedial authority and the nexus between the assault's setting and the university demonstrate its substantial control over the context of the student-on-student harassment Roe experienced.

Control over context of assault. Marshall had substantial control over the context of the underlying assault. The Ninth Circuit, in *Brown v. Arizona*, emphasized that "a key consideration is whether the school has some form of disciplinary authority over the harasser in the setting in which the harassment takes place." *Brown v. Arizona*, 82 F.4th 863, 875 (9th Cir. 2023). The court ultimately held that a "[u]niversity's rules and 'sanction' authority" can create the connection needed to establish its control over an off-campus residence where assaults took place. *Id.* at 878. Similarly, in *Ross v. University of Tulsa*, the Tenth Circuit held that a school's disciplinary authority to punish a student for a rape in a privately owned apartment was enough to establish the school's substantial control over the context of the rape. *Ross v. Univ. of Tulsa*, 859 F.3d 1280, 1287 n.5 (10th Cir. 2018). Although the apartment building was on campus, the court's reasoning was not based on an arbitrary on-campus/off-campus distinction, but on whether the school had disciplinary authority over conduct occurring in the apartment. *Id.*

Beyond disciplinary authority, courts look to "all the circumstances of [the] case," *Brown*, 82 F.4th at 878, to determine whether the totality of the

circumstances creates a nexus between the harassment and the school, *see Rost*, 511 F.3d at 1121 n.1., meaning that the school has substantial control over the context of harassment. As already described, in *Hurley*, this Court took such an approach. In that case, plaintiffs sought to hold a school liable for its deliberate indifference to harassing messages sent from one group of students to another, the plaintiffs, through online social media. *Hurley*, 911 F.3d at 679-85. In support of its finding of control over the context of harassment, this Court recognized that a portion of the harassment happened on campus, but also found it relevant that another portion occurred "within the immediate vicinity of … campus." *Id.* at 687. Moreover, that the harassment "specifically targeted [university] students" also weighed towards the school's substantial control of context. *Id.* Lastly, the school's ability to address the harassment supported the school's substantial control. *See id.*

Here, Marshall had disciplinary authority over the setting of Roe's assault. Marshall wrote its student-conduct policies to explicitly grant itself authority to address the myriad off-campus infractions that can affect its students' safety and wellbeing. JA133, JA150. Marshall's policies provide that "[student] conduct that occurs off University property is subject to the Code where it … adversely affects the health, safety, or security of any other member of the University community." JA150. Moreover, Marshall's policies prohibit students from engaging in "[p]hysical or emotional/psychological abuse … whether such conduct occurs on or off

University property." JA133. Under its policies, Marshall had the authority to punish Doe for the assault with numerous sanctions, including suspension and expulsion. JA169-173. In the end, Marshall did punish Doe with probation, requiring him to take an alcohol education course, and requiring him to complete twenty hours of community service. JA900-901. Likewise, Marshall had regulatory authority over other students who were at the party where the assault took place. JA150, JA893-894. For example, it had the power to involve these students as witnesses in its investigation into Doe and/or discipline them for any misconduct. JA899, JA918-919. Marshall's contention that it lacked substantial control over the context of the assault while it retained and actually invoked its disciplinary authority to punish certain students for conduct occurring solely in the same setting as the assault defies common sense.

Moreover, the circumstances surrounding the assault and Marshall's handling of its aftermath indicate a nexus between Marshall and the assault and thus Marshall's substantial control of the assault's context. The assault took place at party where students gathered to watch a Marshall football game. JA431. More than half of the partygoers were Marshall students. JA937-938. The party took place within a Marshall student's home (which again, the school would have known had it taken any steps to investigate, *see supra* 28-29). JA430. As in *Hurley*, the assault took place "within the immediate vicinity of … campus," as the residence was just two streets away. *See Hurley*, 911 F.3d at 687; JA430. And the assault "specifically

targeted" a Marshall student, Roe. *See Hurley*, 911 F.3d at 687. Moreover, just as in *Hurley* where this Court considered the school's power to educate students about sex discrimination, here, Marshall had the power to educate its students who were bystanders at the watch party. JA452, JA665 (describing alcohol education course that Marshall required Roe and Doe to participate in before they could register for future classes); *Hurley*, 911 F.3d at 688.

Control over context of hostile environment. That Marshall had a wide variety of options available to mitigate the on-campus hostile environment that resulted from Doe's off-campus assault and other harassment further supports the conclusion that Marshall had sufficient control over the context of Roe's harassment. *See Hurley*, 911 F.3d at 688.

Schools have substantial control over their grounds. *Davis*, 526 U.S. at 646. So, when a sexually hostile environment permeates campus, schools have control over that context. *Id.* Moreover, as the United States has put it, "[a] school's 'substantial control' and potential liability under Title IX is … defined … also by its ability to respond to the harassment once on notice of a hostile environment." *Statement of Interest of the United States* at 15, *Weckhorst v. Kans. State Univ.*, 241 F. Supp. 3d 1154 (D. Kan. 2017).

As already described (*see* 19-21), the student-on-student harassment that Roe suffered created a sexually hostile environment on Marshall's campus. Roe was "terrified to go on Marshall's campus" out of "fear that [she] might see Doe," and thus reduced her time there. JA553. Marshall had the ability

to try to address this on-campus hostile environment. It could have told Roe that it had expanded what it had labeled an "interim" no-contact order, JA1140, or that it was disciplining Doe for the September 3rd assault, JA500-501. Instead, it never told her. JA500-501, JA1140. It could have investigated the repeated sexual violence that Doe perpetrated against Roe, including prior to September 3rd, JA892, JA894, and taken steps to limit Roe's risk of further harassment. Instead, it confined its half-hearted response to the September 3rd assault alone. It could have offered Roe support in the form of academic or housing accommodations, JA218-219. Instead, it withheld them. Marshall could have handled Roe's case within its Title IX office, giving her access to procedural safeguards. *See supra* 27-28; JA853-855. Instead, it immediately dismissed Roe's case as a Title IX matter and sent it to the Office of Student Conduct. JA853. Marshall could have declined to discipline Roe for underage drinking when she honestly cooperated with its student-conduct process. *See* JA1336 (not investigating other students who were drinking underage). Instead, it punished her and intensified the already-oppressive hostile environment. JA911-912. Marshall's ability to address the ongoing hostile environment that occurred after September 3 demonstrates its substantial control of its context. *See supra* 23, 26-27; *Hurley*, 911 F.3d at 688.

II. Marshall retaliated against Roe in violation of Title IX by punishing her because she participated in the sexual assault investigation.

When a university retaliates against a person because they complain of sexual assault, it has discriminated against them on the basis of sex in violation of Title IX. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74 (2003). Otherwise, victims and witnesses "would be loath to report" sexual assault "and all manner of Title IX violation might go unremedied." *Id*. at 180. To prove her Title IX retaliation claim at trial, Roe must show that she (1) engaged in protected activity under Title IX and (2) that Marshall took a materially adverse action against her (3) because of that protected activity. *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 694 (4th Cir. 2018).

A. Roe was engaged in Title IX protected activity when she reported her assault and aided in the investigation.

1. Roe's various reports of the sexual assault and other harassment, and her willing participation throughout the investigation, is protected conduct under Title IX. Advocating against and reporting sexual harassment are protected activities under Title IX. *Hurley*, 911 F.3d at 694. Moreover, an individual's participation in a sexual-assault investigation by answering investigative questions qualifies as opposition to sexual assault and is protected activity. *Crawford v. Metro. Gov't. of Nashville & Davidson Cnty.*, 555 U.S. 271, 273-76 (2009); *K.G. ex rel. Doe v. Bd. of Educ. of Woodford Ky.*, No. 18-CV-0555, 2022 WL 19692050, at *12 (E.D. Ky. Jan. 19, 2022).

Here, viewing the facts in Roe's favor, she engaged in protected activity when she repeatedly reported her assault and participated in the investigation of her assailant. After Roe reported the assault to the Huntington Police Department, JA892, which reported the incident to Marshall, s*ee* JA812, Roe again reported the assault and previous instances of Doe's violence against her to Arthur on September 15 during their first meeting, JA894. Roe continued to engage in protected activity when she took part in the sexual assault investigation. She had several meetings with Arthur, during which she spoke candidly about the incident and surrounding circumstances. JA894, JA896. She also provided pictures and other documentation to aid in the investigation. JA901, JA1147-1149. Roe's consistent reporting of the sexual assault, along with her active participation in the investigation, are protected activities under Title IX for the purposes of proving a retaliation claim. *Crawford,* 555 U.S. at 273-76

2. Critically, protected activity includes a person's opposition to conduct that they *reasonably believe* violates Title IX. *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 282 (4th Cir. 2015); *Doe v. Univ. of Chicago*, No. 16 C 08298, 2017 WL 4163960, at *9 (N.D. Ill. Sept. 20, 2017). Put differently, a plaintiff need not be able to succeed on an underlying discrimination claim to prove a retaliation claim. *Boyer-Liberto*, 786 F.3d at 282. Accordingly, Marshall cannot defend against Roe's retaliation claim by contending that, in its view, Roe did not engage in protected activity because the school (unreasonably) funneled Roe's report out of its Title IX office. To the contrary, even if

Marshall had been correct to handle Roe's complaint under its student-conduct procedure rather than as a Title IX complaint (it was not, *supra* 27-29), Roe still engaged in protected activity because she reasonably believed she was reporting a Title IX violation.

B. Marshall's disciplinary action against Roe was materially adverse.

Marshall's callous punishment of Roe and refusal to provide appropriate supportive measures were materially adverse actions. A university's action is materially adverse for retaliation purposes when it would objectively dissuade other reasonable students in the complainant's shoes from engaging in protected activity. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006); *Hurley*, 911 F.3d at 694. Punishing a victim of sexual assault based solely on information learned through an investigation into the victim's assailant would naturally dissuade a reasonable student in Roe's shoes from reporting sexual assault or harassment for fear of facing disciplinary action. The same goes for failing to provide reasonable supportive measures. After all, a principal reason why individuals report sexual harassment is to seek accommodations and safeguards. *See* JA550. A reasonable student who believes that they will be punished rather than supported is thus likely to forgo engaging in the Title IX protected reporting activity at all. *See infra* 45-46.

Though Roe need not show that she was personally deterred from enforcing her Title IX rights, the record reflects that Roe was indeed

dissuaded from engaging in further protected activity, including filing a formal Title IX complaint and seeking more accountability for Doe. JA551. The punishment and lack of support made her feel that "what happened to [her] didn't matter at all because [she] had alcohol in her system." JA550-551. In the same way that Marshall's disciplinary action against Roe prevented her from pursuing further action against Doe, a jury could conclude that other reasonable victims would be dissuaded from reporting sexual assault or harassment if they thought their university would punish them and withhold appropriate supportive measures in response.

C. Roe's report of her sexual assault and her participation in the investigation led Marshall to punish her and withhold support.

The district court held that Roe could not prove a causal connection between her protected activity and the adverse action that Marshall took against her. However, the record reflects otherwise for two reasons that we explain below. First, though Marshall maintains that it punished Roe only because she admitted to underage drinking while aiding in the investigation of her assailant, the evidence supports the conclusion that this proffered explanation is pretextual. Second, even if a jury were to conclude that Marshall punished Roe for underage drinking on the day of her assault, doing so was per se retaliatory.

1. Marshall's real reason for punishing Roe and withholding support was her Title IX protected activity.

A "causal connection between" "protected activity" and an adverse action "can be established indirectly with circumstantial evidence, for example, by showing that the protected activity was followed by discriminatory treatment." *Sumner v. U.S. Postal Serv.*, 899 F.2d 203, 209 (2d Cir. 1990). Moreover, summary judgment is inappropriate when a plaintiff has introduced evidence that a defendant's proffered non-discriminatory reason for taking an adverse action is pretextual. *Combs v. Plantation Patterns*, 106 F.3d 1519, 1532 (11th Cir. 1997); *see Lashley v. Spartanburg Methodist Coll.*, 66 F.4th 168, 176 (4th Cir. 2023). Pretext can be shown at summary judgment by "a convincing mosaic of circumstantial evidence." *Herron-Williams v. Ala. State Univ.*, 805 F. App'x 622, 630-31 (11th Cir. 2020). As demonstrated by Marshall's deviation from established procedures, Roe's comparator evidence, the university's hostility towards Roe, and the temporal proximity between Roe's protected activity, Marshall's public-relations problems, and her punishment, a jury could conclude that Marshall's real reason for punishing Roe was to silence those who report sexual harassment.

Deviation from established procedures. An institution's deviation from its standard procedure creates a genuine dispute of material fact about whether that institution's proffered reason for taking an adverse action is pretext. *See Stiles v. Gen. Elec. Co.*, No. 92-1886, 1993 WL 46889, at *4 (4th Cir.

Feb. 12, 1993); *Doe v. Morgan State Univ.*, 544 F. Supp. 3d 563, 587 (D. Md. 2021).

A reasonable jury could rely on the same deviation-from-procedure facts that support an inference of Marshall's deliberate indifference (*see supra* 24-26) to conclude that Marshall acted with retaliatory intent. As previously explained, Marshall deviated from its established student-conduct procedures by not issuing Roe a charge letter until over a month after they began their investigation of her underage drinking, despite their policy to issue charge letters immediately upon allegations of misconduct. *Supra* 25. Again, had Roe been issued a charge letter upon the first allegation of underage drinking on September 13, she would have been aware that she was under investigation and had the right to be accompanied by an advisor during all meetings, a right that Doe had enjoyed throughout the investigation. Instead, Marshall allowed Roe to believe she was a "witness" helping to investigate her assailant, JA899-900, which could drive a jury to conclude that Marshall wanted to elicit information from Roe it would later use to punish her.

Comparators. Moreover, as we have emphasized (at 25-26), Marshall treated Roe differently than other similarly situated Marshall students. Comparator evidence is "a particularly probative means for discerning whether a given adverse action was the product of a discriminatory [or retaliatory] motive." *Laing v. Fed. Exp. Corp.*, 703 F.3d 713, 719 (4th Cir. 2013). Marshall learned during the course of its investigation about other students

who were also drinking alcohol but who did not report being sexually assaulted. Though universities have discretion to determine what they investigate, Arthur testified that at Marshall "allegations of violations" are "always … expected to be investigated," and that policy is not limited to the charge initially alleged in a complaint, but also applied to allegations made during an investigation. JA1116. However, Arthur learned that several Marshall students were drinking at the party where the sexual assault took place and did no investigation into those alleged underage-drinking violations. JA893. Roe had told Arthur the name of the friend (a Marshall student) that she arrived at the party with, and Arthur had access to the police report from the day of the incident, which included the address of another Marshall student. JA894. Still, she did not follow up on any additional underage drinking charges.

Additionally, as detailed above (at 25), Roe reported that Doe had been violent towards her in the past, telling Arthur that he previously shoved her and held her wrists. JA894. Again, contrary to their policy about investigating all allegations of student-conduct violations, Arthur did not investigate Doe's prior violence. *See* JA891-913. A jury could conclude that Doe's prior violence represents a more serious student-conduct violation than Roe's drinking, but that Doe received more favorable treatment from the university because he had not engaged in any protected reporting activity.

A jury could also conclude that Marshall treated Roe differently than other similarly situated individuals because it had an amnesty policy for medical emergencies but not for those who report sexual assault. Its medical amnesty policy protected students from punishment who reported medical emergencies related to drugs or alcohol use. JA160. This policy's purpose was to "encourage students to seek medical attention." JA160. In contrast, its lack of an amnesty policy for sexual assault victims serves only to deter victims from reporting, undermining the protections set out in *Jackson*. *Supra* 38.

Hostility toward Roe. A reasonable jury could also find that Marshall's conduct shows hostility and animus towards Roe, discrediting its proffered reason for discipline and indicating pretext. "Hostility toward a complainant in the wake of protected activity is archetypical evidence of retaliatory animus." *Morgan State Univ.*, 544 F. Supp. 3d at 586; *see Jensen v. IOC Black Hawk Cnty Inc.*, 745 Fed. App'x 651, 653 (8th Cir. 2018) (finding a lack of causation between plaintiff's protected activity and the adverse employment action in part because of a lack of animus).

Marshall's unwillingness to provide accommodations to Roe (*supra* 26-27) is evidence from which a jury could conclude that Marshall harbored animus towards her as a sexual-assault complainant. Moreover, Marshall's hostility towards Roe was on display in its testimony about the investigation, where Arthur refused to describe Roe as a "victim," JA1178-1187, and Martin would not say whether she believed physical assault was

a more serious offense than underage drinking, JA658-661. Taken together, a reasonable jury could interpret Marshall's animus as an indicator that its proffered explanation for punishing Roe is nothing more than pretext.

Temporal proximity. The temporal proximity between Roe's report and Marshall's disciplinary action further bolsters Roe's claim that she was punished for reporting. *Ali v. BC Architects Eng'rs, PLC*, 832 F. App'x 167, 173 (4th Cir. 2020) (finding the two-week period between the plaintiff's report and her termination is a "close temporal proximity" sufficient to infer causation for a prima facie Title VII retaliation claim). Roe was punished allegedly for underage drinking just six weeks after she reported her sexual assault, and a mere four weeks after she first reported the assault to Arthur. *See* JA892-894, JA911-912. Those lengths of time understate the temporal proximity between the report and the retaliatory conduct here because the university began to investigate and failed to provide adequate supportive measures to Roe even closer in time to her protected activity. *See* JA1324.

Moreover, as previously described, Marshall's prior Title IX failings and ongoing public-relations crisis provided it with ample motive to deter sexual assault victims from reporting sexual harassment. *Supra* 28. In this context, a jury could draw the reasonable inference that the university sought to silence Roe and other Title IX complainants from engaging in any reporting activity.

In sum, the record reflects that Marshall's proffered reason for Roe's punishment was mere pretext, and it actually punished her for participating in protected activity.

2. Failing to provide appropriate supportive measures and disciplining complainants for underage drinking revealed through a sexual-assault investigation is per se retaliation.

Marshall argues that it punished Roe for underage drinking, not for reporting her sexual assault. But failing to maintain an amnesty policy for victims of sexual assault for underage drinking is per se retaliation under Title IX, so even if Marshall punished Roe for underage drinking following her sexual assault, its conduct violated Title IX's anti-retaliation guarantee. At least 50% of all sexual assaults among college students involve alcohol consumption. Antonia Abbey, *Alcohol-Related Sexual Assault: A Common Problem Among College Students*, 14 J. Studs. on Alcohol 118, 119 (2002). Indeed, the record reflects that students often engage in underage drinking in environments where sexual assault is likely to occur. *See* JA270, JA893, JA937-938. Given the prevalence of alcohol consumption during sexual assault for college students, failing to maintain an amnesty policy that protects complainants from punishment for underage drinking when they report sexual assault or harassment virtually ensures that victims of sexual harassment and witnesses will "be loath to report it, and all manner of Title IX violation[s] might go unremedied." *Jackson*, 544 U.S. at 180. The reason that retaliation is a form of Title IX prohibited intentional discrimination is

that if it "were not prohibited, Title IX's enforcement scheme would unravel." *Id.* The same can be said for failing to maintain a relevant amnesty policy that protects the victims and witnesses whom a university should be relying on to sustain Title IX's enforcement scheme, but who will inevitably be dissuaded from pursuing Title IX remedies for fear of reprisal.

Moreover, withholding supportive measures from a student because they engaged in underage drinking on the day that they were assaulted is per se retaliation. Why would reasonable students in Roe's shoes ever report Title IX violations if they have reason to fear that their university will withhold support from them solely because they had alcohol in their system? JA551. Marshall's reliance on a medical-amnesty policy shows it knows the answer to this rhetorical question: students are likely to be dissuaded from seeking university help when they fear they will not be supported. JA678, JA160.

Taken together, even if a jury were to reject Roe's evidence that Marshall's justification for punishing Roe was pretextual, Roe's retaliation claim could still succeed at trial because failing to maintain an amnesty policy for drinking violations learned about through the course of an investigation into a sexual assault is per se retaliatory.

Conclusion

This Court should reverse the district court's order and remand Roe's Title IX deliberate-indifference and retaliation claims for trial.

Respectfully submitted,

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November 12, 2024

REQUEST FOR ORAL ARGUMENT

Plaintiff requests oral argument. Argument would aid the Court in understanding this important appeal and lengthy record.

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this document contains 10,933 words. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Palatino Linotype.

/s/ Madeline Meth
Madeline Meth

Counsel for Plaintiff-Appellant

November 12, 2024

CERTIFICATE OF SERVICE

I certify that, on November 12, 2024, this brief was filed using the Court's CM/ECF system. All attorney participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ Madeline Meth
Madeline Meth

Counsel for Plaintiff-Appellant

STATUTORY REGULATORY ADDENDUM

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ported to a public school in accordance with a court order, may seek to reopen or intervene in the further implementation of such court order, currently in effect, if the time or distance of travel is so great as to risk the health of the student or significantly impinge on his or her educational process.

(Pub. L. 92–318, title VIII, § 804, June 23, 1972, 86 Stat. 372.)

§ 1655. Uniform rules of evidence of racial discrimination

The rules of evidence required to prove that State or local authorities are practicing racial discrimination in assigning students to public schools shall be uniform throughout the United States.

(Pub. L. 92–318, title VIII, § 805, June 23, 1972, 86 Stat. 372.)

§ 1656. Prohibition against official or court orders to achieve racial balance or insure compliance with constitutional standards applicable to entire United States

The proviso of section 407(a) of the Civil Rights Act of 1964 [42 U.S.C. 2000c–6(a)] providing in substance that no court or official of the United States shall be empowered to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards shall apply to all public school pupils and to every public school system, public school and public school board, as defined by title IV [42 U.S.C. 2000c et seq.], under all circumstances and conditions and at all times in every State, district, territory, Commonwealth, or possession of the United States regardless of whether the residence of such public school pupils or the principal offices of such public school system, public school or public school board is situated in the northern, eastern, western, or southern part of the United States.

(Pub. L. 92–318, title VIII, § 806, June 23, 1972, 86 Stat. 373.)

REFERENCES IN TEXT

The Civil Rights Act of 1964, referred to in text, is Pub. L. 88–352, July 2, 1964, 78 Stat. 241, as amended. Title IV of the Civil Rights Act of 1964 is classified generally to subchapter IV (§ 2000c et seq.) of chapter 21 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 2000a of Title 42 and Tables.

CHAPTER 38—DISCRIMINATION BASED ON SEX OR BLINDNESS

Sec.

§ 1681. Sex

(a) Prohibition against discrimination; exceptions

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, except that:

(1) Classes of educational institutions subject to prohibition

in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions

in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy

in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations

this section shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences

this section shall not apply to—

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for—

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) "Educational institution" defined

For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

(Pub. L. 92–318, title IX, §901, June 23, 1972, 86 Stat. 373; Pub. L. 93–568, §3(a), Dec. 31, 1974, 88 Stat. 1862; Pub. L. 94–482, title IV, §412(a), Oct. 12, 1976, 90 Stat. 2234; Pub. L. 96–88, title III, §301(a)(1), title V, §507, Oct. 17, 1979, 93 Stat. 677, 692; Pub. L. 99–514, §2, Oct. 22, 1986, 100 Stat. 2095.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (b) and (c), was in the original ''this title'', meaning title IX of Pub. L. 92–318 which enacted this chapter and amended sections 203 and 213 of Title 29, Labor, and sections 2000c, 2000c–6, 2000c–9, and 2000h–2 of Title 42, The Public Health and Welfare. For complete classification of title IX to the Code, see Short Title note below and Tables.

AMENDMENTS

1986—Subsec. (a)(6)(A). Pub. L. 99–514 substituted ''Internal Revenue Code of 1986'' for ''Internal Revenue Code of 1954'', which for purposes of codification was translated as ''title 26'' thus requiring no change in text.

1976—Subsec. (a)(6) to (9). Pub. L. 94–482 substituted ''this'' for ''This'' in par. (6) and added pars. (7) to (9).

1974—Subsec. (a)(6). Pub. L. 93–568 added par. (6).

EFFECTIVE DATE OF 1976 AMENDMENT

Pub. L. 94–482, title IV, §412(b), Oct. 12, 1976, 90 Stat. 2234, provided that: ''The amendment made by subsection (a) [amending this section] shall take effect upon the date of enactment of this Act [Oct. 12, 1976].''

EFFECTIVE DATE OF 1974 AMENDMENT

Pub. L. 93–568, §3(b), Dec. 31, 1974, 88 Stat. 1862, provided that: ''The provisions of the amendment made by subsection (a) [amending this section] shall be effective on, and retroactive to, July 1, 1972.''

SHORT TITLE OF 1988 AMENDMENT

Pub. L. 100–259, §1, Mar. 22, 1988, 102 Stat. 28, provided that: ''This Act [enacting sections 1687 and 1688 of this title and section 2000d–4a of Title 42, The Public Health and Welfare, amending sections 706 and 794 of Title 29, Labor, and section 6107 of Title 42, and enacting provisions set out as notes under sections 1687 and 1688 of this title] may be cited as the 'Civil Rights Restoration Act of 1987'.''

SHORT TITLE

Pub. L. 107–255, Oct. 29, 2002, 116 Stat. 1734, provided ''That title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.; Public Law 92–318) [title IX of Pub. L. 92–318, enacting this chapter and amending sections 203 and 213 of Title 29, Labor, and sections 2000c, 2000c–6, 2000c–9, and 2000h–2 of Title 42, The Public Health and Welfare] may be cited as the 'Patsy Takemoto Mink Equal Opportunity in Education Act'.''

TRANSFER OF FUNCTIONS

''Secretary'' substituted for ''Commissioner'' in subsec. (a)(2) pursuant to sections 301(a)(1) and 507 of Pub. L. 96–88, which are classified to sections 3441(a)(1) and 3507 of this title and which transferred functions of Commissioner of Education to Secretary of Education.

COORDINATION OF IMPLEMENTATION AND ENFORCEMENT OF PROVISIONS

For provisions relating to the coordination of implementation and enforcement of the provisions of this chapter by the Attorney General, see section 1–201(b) of Ex. Ord. No. 12250, Nov. 2, 1980, 45 F.R. 72995, set out under section 2000d–1 of Title 42, The Public Health and Welfare.

REGULATIONS; NATURE OF PARTICULAR SPORTS: INTERCOLLEGIATE ATHLETIC ACTIVITIES

Pub. L. 93–380, title VIII, § 844, Aug. 21, 1974, 88 Stat. 612, directed Secretary to prepare and publish, not more than 30 days after Aug. 21, 1974, proposed regulations implementing the provisions of this chapter regarding prohibition of sex discrimination in federally assisted programs, including reasonable regulations for intercollegiate athletic activities considering the nature of the particular sports.

§ 1682. Federal administrative enforcement; report to Congressional committees

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. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided*, *however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

(Pub. L. 92–318, title IX, § 902, June 23, 1972, 86 Stat. 374.)

DELEGATION OF FUNCTIONS

Functions of President relating to approval of rules, regulations, and orders of general applicability under this section, delegated to Attorney General, see section 1–102 of Ex. Ord. No. 12250, Nov. 2, 1980, 45 F.R. 72995, set out under section 2000d–1 of Title 42, The Public Health and Welfare.

§ 1683. Judicial review

Any department or agency action taken pursuant to section 1682 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 1682 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that title.

(Pub. L. 92–318, title IX, § 903, June 23, 1972, 86 Stat. 374.)

CODIFICATION

''Section 1682 of this title'', where first appearing, substituted in text for ''section 1002'' as conforming to intent of Congress as Pub. L. 92–318 was enacted without any section 1002 and subsequent text refers to ''section 902'', which is classified to section 1682 of this title.

§ 1684. Blindness or visual impairment; prohibition against discrimination

No person in the United States shall, on the ground of blindness or severely impaired vision, be denied admission in any course of study by a recipient of Federal financial assistance for any education program or activity, but nothing herein shall be construed to require any such institution to provide any special services to such person because of his blindness or visual impairment.

(Pub. L. 92–318, title IX, § 904, June 23, 1972, 86 Stat. 375.)

§ 1685. Authority under other laws unaffected

Nothing in this chapter shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

(Pub. L. 92–318, title IX, § 905, June 23, 1972, 86 Stat. 375.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this title'', meaning title IX of Pub. L. 92–318 which enacted this chapter and amended sections 203 and 213 of Title 29, Labor, and sections 2000c, 2000c–6, 2000c–9, and 2000h–2 of Title 42, The Public Health and Welfare. For complete classification of title IX to the Code, see Short Title note set out under section 1681 of this title and Tables.

part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

(Pub. L. 92–318, title IX, § 902, June 23, 1972, 86 Stat. 374.)

Executive Documents

DELEGATION OF FUNCTIONS

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Editorial Notes

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(Pub. L. 92–318, title IX, § 904, June 23, 1972, 86 Stat. 375.)

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Nothing in this chapter shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

(Pub. L. 92–318, title IX, § 905, June 23, 1972, 86 Stat. 375.)

Editorial Notes

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this title'', meaning title IX of Pub. L. 92–318 which enacted this chapter and amended sections 203 and 213 of Title 29, Labor, and sections 2000c, 2000c–6, 2000c–9, and 2000h–2 of Title 42, The Public Health and Welfare. For complete classification of title IX to the Code, see Short Title note set out under section 1681 of this title and Tables.

§ 1686. Interpretation with respect to living facilities

Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.

(Pub. L. 92–318, title IX, § 907, June 23, 1972, 86 Stat. 375.)

Editorial Notes

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this title'', meaning title IX of Pub. L. 92–318 which enacted this chapter and amended sections 203 and 213 of Title 29, Labor, and sections 2000c, 2000c–6, 2000c–9, and 2000h–2 of Title 42, The Public Health and Welfare. For complete classification of title IX to the Code, see Short Title note set out under section 1681 of this title and Tables.

This Act, referred to in text, is Pub. L. 92–318, June 23, 1972, 86 Stat. 235, known as the Education Amendments of 1972. For complete classification of this Act to the Code, see Short Title note set out under section 1001 of this title and Tables.

§ 1687. Interpretation of "program or activity"

For the purposes of this chapter, the term ''program or activity'' and ''program'' mean all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section section[1] 7801 of this title), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance, except that such term does not include any operation of an entity which is controlled by a religious organization if the application of section 1681 of this title to such operation would not be consistent with the religious tenets of such organization.

(Pub. L. 92–318, title IX, §908, as added Pub. L. 100–259, §3(a), Mar. 22, 1988, 102 Stat. 28; amended Pub. L. 103–382, title III, §391(g), Oct. 20, 1994, 108 Stat. 4023; Pub. L. 107–110, title X, §1076(j), Jan. 8, 2002, 115 Stat. 2091; Pub. L. 114–95, title IX, §9215(bb), Dec. 10, 2015, 129 Stat. 2173.)

Editorial Notes

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this title'', meaning title IX of Pub. L. 92–318 which enacted this chapter and amended sections 203 and 213 of Title 29, Labor, and sections 2000c, 2000c–6, 2000c–9, and 2000h–2 of Title 42, The Public Health and Welfare. For complete classification of title IX to the Code, see Short Title note set out under section 1681 of this title and Tables.

AMENDMENTS

2015—Par. (2)(B). Pub. L. 114–95 substituted ''section 7801 of this title), system of vocational education, or other school system;'' for ''7801 of this title), system of vocational education, or other school system;''.

2002—Par. (2)(B). Pub. L. 107–110 substituted ''7801'' for ''8801''.

1994—Par. (2)(B). Pub. L. 103–382 substituted ''section 8801'' for ''section 2854(a)(10)''.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2015 AMENDMENT

Amendment by Pub. L. 114–95 effective Dec. 10, 2015, except with respect to certain noncompetitive programs and competitive programs, see section 5 of Pub. L. 114–95, set out as a note under section 6301 of this title.

EFFECTIVE DATE OF 2002 AMENDMENT

Amendment by Pub. L. 107–110 effective Jan. 8, 2002, except with respect to certain noncompetitive programs and competitive programs, see section 5 of Pub. L. 107–110, set out as an Effective Date note under section 6301 of this title.

FINDINGS OF CONGRESS

Pub. L. 100–259, §2, Mar. 22, 1988, 102 Stat. 28, provided that: ''The Congress finds that—

''(1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.], and title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.]; and

''(2) legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered.''

CONSTRUCTION

Pub. L. 100–259, §7, Mar. 22, 1988, 102 Stat. 31, provided that: ''Nothing in the amendments made by this Act [see Short Title of 1988 Amendment note under section 1681 of this title] shall be construed to extend the application of the Acts so amended [Education Amendments of 1972, Pub. L. 92–318, see Short Title of 1972 Amendment, set out as a note under section 1001 of this title, Rehabilitation Act of 1973, 29 U.S.C. 701 et seq., Age Discrimination Act of 1975, 42 U.S.C. 6101 et seq., and Civil Rights Act of 1964, 42 U.S.C. 2000a et seq.] to ultimate beneficiaries of Federal financial assistance excluded from coverage before the enactment of this Act [Mar. 22, 1988].''

ABORTION NEUTRALITY

This section not to be construed to force or require any individual or hospital or any other institution, program, or activity receiving Federal funds to perform or pay for an abortion, see section 8 of Pub. L. 100–259, set out as a note under section 1688 of this title.

§1688. Neutrality with respect to abortion

Nothing in this chapter shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion. Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion.

(Pub. L. 92–318, title IX, §909, as added Pub. L. 100–259, §3(b), Mar. 22, 1988, 102 Stat. 29.)

Editorial Notes

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this title'', meaning title IX of Pub. L. 92–318 which enacted this chapter and amended sections 203 and 213 of Title 29, Labor, and sections 2000c, 2000c–6, 2000c–9, and 2000h–2 of Title 42, The Public Health and Welfare. For complete classification of title IX to the Code, see Short Title note set out under section 1681 of this title and Tables.

Statutory Notes and Related Subsidiaries

CONSTRUCTION

This section not to be construed to extend application of Education Amendments of 1972, Pub. L. 92–318, to ultimate beneficiaries of Federal financial assistance excluded from coverage before Mar. 22, 1988, see section 7 of Pub. L. 100–259, set out as a note under section 1687 of this title.

[1] So in original.

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93–380, 88 Stat. 484)

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, § 106.41 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.42 Textbooks and curricular material.

Nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, § 106.42 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.43 Standards for measuring skill or progress in physical education classes.

If use of a single standard of measuring skill or progress in physical education classes has an adverse effect on members of one sex, the recipient shall use appropriate standards that do not have that effect.

(Authority: 20 U.S.C. 1681, 1682)

[71 FR 62543, Oct. 25, 2006]

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, § 106.43 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.44 Recipient's response to sexual harassment.

(a) *General response to sexual harassment.* A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. For the purposes of this section, §§ 106.30, and 106.45, ''education program or activity'' includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a post-secondary institution. A recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the

complainant the process for filing a formal complaint. The Department may not deem a recipient to have satisfied the recipient's duty to not be deliberately indifferent under this part based on the recipient's restriction of rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment.

(b) *Response to a formal complaint.* (1) In response to a formal complaint, a recipient must follow a grievance process that complies with §106.45. With or without a formal complaint, a recipient must comply with §106.44(a).

(2) The Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.

(c) *Emergency removal.* Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

(d) *Administrative leave.* Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with §106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

EFFECTIVE DATE NOTE: At 85 FR 30574, May 19, 2020, §106.44 was added, effective Aug. 14, 2020.

§106.45 Grievance process for formal complaints of sexual harassment.

(a) *Discrimination on the basis of sex.* A recipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.

(b) *Grievance process.* For the purpose of addressing formal complaints of sexual harassment, a recipient's grievance process must comply with the requirements of this section. Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in §106.30, must apply equally to both parties.

(1) *Basic requirements for grievance process.* A recipient's grievance process must—

(i) Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in §106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient's education program or activity. Such remedies may include the same individualized services described in §106.30 as ''supportive measures''; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent;

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

(iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. A recipient must ensure that Title

IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in §106.30, the scope of the recipient's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section. Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment;

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

(v) Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities;

(vi) Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility;

(vii) State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment;

(viii) Include the procedures and permissible bases for the complainant and respondent to appeal;

(ix) Describe the range of supportive measures available to complainants and respondents; and

(x) Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

(2) *Notice of allegations*—(i) Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties who are known:

(A) Notice of the recipient's grievance process that complies with this section, including any informal resolution process.

(B) Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in §106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment under §106.30, and the date and location of the alleged incident, if known. The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must inform the

parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section. The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

(ii) If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known.

(3) *Dismissal of a formal complaint*—(i) The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in §106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct.

(ii) The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

(iii) Upon a dismissal required or permitted pursuant to paragraph (b)(3)(i) or (b)(3)(ii) of this section, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.

(4) *Consolidation of formal complaints.* A recipient may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances. Where a grievance process involves more than one complainant or more than one respondent, references in this section to the singular ''party,'' ''complainant,'' or ''respondent'' include the plural, as applicable.

(5) *Investigation of a formal complaint.* When investigating a formal complaint and throughout the grievance process, a recipient must—

(i) Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties provided that the recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under this section (if a party is not an ''eligible student,'' as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a ''parent,'' as defined in 34 CFR 99.3);

(ii) Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;

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

(iv) Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either

the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;

(v) Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;

(vi) Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and

(vii) Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

(6) *Hearings.* (i) For postsecondary institutions, the recipient's grievance process must provide for a live hearing. At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings. At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party. Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the

live hearing or refusal to answer cross-examination or other questions. Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other. Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

(ii) For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the recipient's grievance process may, but need not, provide for a hearing. With or without a hearing, after the recipient has sent the investigative report to the parties pursuant to paragraph (b)(5)(vii) of this section and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party. With or without a hearing, questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.

(7) *Determination regarding responsibility.* (i) The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply the standard of evidence described in paragraph (b)(1)(vii) of this section.

(ii) The written determination must include—

(A) Identification of the allegations potentially constituting sexual harassment as defined in §106.30;

(B) A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;

(C) Findings of fact supporting the determination;

(D) Conclusions regarding the application of the recipient's code of conduct to the facts;

(E) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and

(F) The recipient's procedures and permissible bases for the complainant and respondent to appeal.

(iii) The recipient must provide the written determination to the parties simultaneously. The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

(iv) The Title IX Coordinator is responsible for effective implementation of any remedies.

(8) *Appeals.* (i) A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:

(A) Procedural irregularity that affected the outcome of the matter;

(B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and

(C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

(ii) A recipient may offer an appeal equally to both parties on additional bases.

(iii) As to all appeals, the recipient must:

(A) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

(B) Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;

(C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section;

(D) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;

(E) Issue a written decision describing the result of the appeal and the rationale for the result; and

(F) Provide the written decision simultaneously to both parties.

(9) *Informal resolution.* A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section. Similarly, a recipient may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed. However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient—

(i) Provides to the parties a written notice disclosing: The allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;

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

(iii) Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

(10) *Recordkeeping.* (i) A recipient must maintain for a period of seven years records of—

(A) Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity;

(B) Any appeal and the result therefrom;

(C) Any informal resolution and the result therefrom; and

(D) All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.

(ii) For each response required under §106.44, a recipient must create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not

deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity. If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

EFFECTIVE DATE NOTE: At 85 FR 30575, May 20, 2020, §106.45 was added, effective Aug. 14, 2020.

§106.46 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

EFFECTIVE DATE NOTE: At 85 FR 30578, May 20, 2020, §106.47 was added, effective Aug. 14, 2020.

Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs or Activities Prohibited

§106.51 Employment.

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity which admits as students only or predominantly members of one sex, if the giving of such preferences has the effect of discriminating on the basis of sex in violation of this part.

(b) *Application.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including those that are social or recreational; and