



January 28, 2019

Submitted via [www.regulations.gov](http://www.regulations.gov)

Brittany Bull  
U.S. Department of Education  
400 Maryland Avenue SW, Room 6E310  
Washington, DC 20202

Re: Docket No. ED-2018-OCR-0064, Comments in Response to proposed Rulemaking: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Dear Ms. Bull:

On behalf of the California School Boards Association which represents over 5,000 locally elected school board members and on behalf of the students served by California's public schools, we submit the following comments in response to the Department of Education's Notice of Proposed Rulemaking to amend regulations implementing Title IX of the Education Amendments of 1972 (Title IX).

It is CSBA's opinion that the proposed regulations seem to be directed toward higher education and fail to contemplate the complexities of the pre-school and K-12 student environment, including students with special needs. With that perspective in mind, we offer the following comments on three specific areas:

**I. Proposed Regulation Section 106.44(a): Recipient's response to Sexual Harassment – definition of "complainant."**

Proposed regulation section 106.30 defines "complainant" as "an individual who has reported being the victim of conduct that could constitute sexual harassment, or on whose behalf the Title IX Coordinator has filed a formal complaint. Additionally, for the purposes of this proposed paragraph, the person to whom the individual has reported must be the Title IX Coordinator or another person to whom notice of sexual harassment results in the recipient's actual knowledge under § 106.30."

A school ('recipient') can receive 'actual notice' of harassment in many ways without filing a formal complaint with the Title IX Coordinator. A student, parent, or witness to the incident could

complain to a teacher or other appropriate personnel such as a principal, campus security, a bus driver or a counselor. By limiting the definition of complainant to only “the victim,” the proposed regulations do not allow for parents to file complaints on behalf of their children, nor do they contemplate a witness making a complaint or a victim who may be non-verbal due a disability or even age.

A consequence of the proposed regulations is that they do not require the school to remedy an offensive and harassing environment when the victim fails or refuses to file a complaint. The US Supreme Court has recognized that a harassing environment is created any time there is offensive conduct that is so pervasive that it effectively denies access to the educational program or activity, even when there is no direct complaint. By limiting the definition of the “complainant” to the victim only, a school district may fail to take steps to stop such offending behavior, even though it has actual notice, and in turn, subject additional students to trauma resulting in additional liability. In sum, the proposed regulation should be amended to expand the definition of ‘complainant’ to include bystanders, witnesses, parents and legal guardians of students, in order to increase awareness of offending or harassing behavior so that the school is able to act and protect future victims.

## **II. Proposed Regulation Section 106.45(b)(2): Notice of the Allegations.**

The proposed regulation adds § 106.45(b)(2) stating that “upon receipt of a formal complaint, a recipient must provide written notice to the parties of the recipient’s grievance procedures and of the allegations. Such notice must include sufficient details (such as the identities of the parties involved in the incident, if known, the specific section of the recipient’s code of conduct allegedly violated, the conduct allegedly constituting sexual harassment under this part and under the recipient’s code of conduct, and the date and location of the alleged incident, if known) and provide sufficient time to prepare a response before any initial interview.”

It bears repeating that this proposed regulation does not take into consideration the complexities of the preschool-K-12 student environment. When younger children are involved in traumatic situations, identifying the victim or complainant may not be appropriate or even possible under specific circumstances. Similarly, providing “sufficient time for a response before any initial interview” does not consider the possible threat to the learning environment, nor the developing nature of a minor’s brain and memory capabilities. The proposed regulation should be amended to take into consideration the pervasiveness of the situation, and the ages of the complainant and the respondent in providing notice pursuant to this section.

### **III. Proposed Regulation Section 106.45(b)(5): Appeals.**

Proposed regulation section 106.45(b)(5) adds “that a recipient may choose to offer an appeal. If the recipient offers an appeal, it must allow both parties to appeal.”

This proposed regulation allowing the respondent an appeal is not limited to situations where there is an adverse finding against respondent. Thus, even when there is a finding that the complaint is unfounded or unsubstantiated, a respondent would have a right to appeal, potentially delaying final resolution of the matter, and subjecting the complainant and others to further administrative proceedings. This proposed regulation should be amended to allow a respondent an appeal only when an adverse finding has been made against them.

In summary, the proposed regulations do not contemplate the involvement of younger aged students and may lead to increased liability for school districts. If the proposed regulations are adopted and are determined to be applicable to pre-school and K-12 students, the result would likely be a reduction in the number of Title IX complaints filed, and a decreased response to offensive and/or harassing behavior. Subjecting these students to offensive and/or harassing conduct when such conduct could have been thwarted earlier would be antithetical to the mission of the California public school system and would expose school districts to additional legal liability. For these reasons, CSBA strongly urges you to reconsider the language of these proposed regulations with respect to the pre-K-12 school environment.

Sincerely,

A handwritten signature in black ink, appearing to read 'Erika K. Hoffman', with a long horizontal flourish extending to the right.

Erika K. Hoffman  
Legislative Advocate