January 30, 2019

The Honorable Betsy DeVos
Secretary
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, DC 20202

Submitted electronically

Re: National Employment Lawyers Association's Comments On NPRM Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: RIN 1870-AA14, Docket ID ED-2018-OCR-0064

Application of Proposed Regulations to Sexual Harassment of Employees

Dear Secretary DeVos:

The National Employment Lawyers Association (NELA) respectfully submits the following comments opposing issuance of the Department of Education's (DOE's) Proposed Regulation referenced above.

NELA is the largest professional membership organization in the country of lawyers who represent employees in labor, employment, wage and hour, and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. Ending discrimination and ensuring adequate remedies for individuals who face discrimination in the workplace are NELA priorities.

NELA's members litigate workplace harassment cases all across the country in all kinds of employment sectors. Many of our members represent employees of public and private educational institutions. Their years of work provide them, and NELA, with first-hand knowledge and expertise with respect to how these situations play out on the ground and in litigation. Thus, NELA has both extensive expertise and a strong interest in the proposed rule.

In the Notice of Proposed Rule Making (NPRM) accompanying the proposed amendments to the Title IX regulations, the DOE specifically requested comments on the application of the proposed amendments to employees. 83 Fed. Reg. 61483. This comment addresses the problems created by the proposed regulation in the context of a complaint that an employee of recipient was sexually harassed by another employee. In that context, the proposed

regulation would be in various respects unworkable, inconsistent with other regulations, and/or unacceptably confusing to recipients, complainants and respondents alike.

Although the primary focus of the regulations, as articulated in the NPRM, is on harassment of students, particularly student-on-student harassment, the regulations would also apply to sexual harassment of employees, which, in almost all cases, involves situations of harassment of one employee by another employee. Title IX applies to employees of recipients as well as to students at those institutions. *Cannon v. University of Chicago,* 441 U.S. 677 (1979). There are more than eight million employees in primary and secondary schools, and more than four million employees at institutions of higher education. At some institutions of higher education, the number of employees is comparable to or greater than the number of students. Johns Hopkins University, for example, has more than 50,000 employees, but only about 20,000 students.

Some difficulties in applying the regulations to sexual harassment of employees would arise because the wording of a number of sections, written to address the problem of harassment of students, make little sense with regard to the problem of harassment of employees. Sexual harassment of employees is covered by Title VII as well as Title IX, and several key provisions of the proposed regulations are inconsistent with Title VII standards. When DOE receives a Title IX complaint regarding employment discrimination, it is obligated by the Department of Justice (DOJ) coordinating regulations to consider Title VII standards. Although the proposed regulations are largely framed to establish the manner in which DOE would respond to a sexual harassment complaint involving harassment of a student, if the sexual harassment victim is an employee, the primary administrative responsibility for investigating and evaluating the complaint lies with the EEOC, not DOE.

The existing regulations contain a provision[1] addressing the relationship between the DOE regulations and Title VII. The proposed regulations would add a second such provision.[2] As explained below, however, neither of these provisions solves the problems that would arise if the regulations were applied to sexual harassment of employees. At best these two provisions increase the uncertainty and confusion that would arise if the proposed regulations were applied to sexual harassment claims by employees.

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[1] Section 106.6(a) provides:

> *Effect on other Federal provisions.* The obligations imposed by this part are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by . . . Title VII of the Civil Rights Act of 1964.

[2] Proposed section 106.6(f) would provide:

> *Title VII of the Civil Rights Act of 1964.* Nothing in this part shall be read in derogation of an employee's rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. or any regulations promulgated thereunder.

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(1) *The Coordinating Regulations*

Title IX provides in part that any regulation issued to effectuate Title IX must be approved by the President. The President has delegated that authority, at least in part, to the Attorney General of the United States, who has issued a number of regulations designed to coordinate enforcement by the various federal agencies of a number of overlapping anti-discrimination statutes. Those coordinating regulations address, inter alia, the handling of employment discrimination complaints under Title IX, Title VII, and other federal laws that prohibit discrimination by recipients of federal financial assistance. 28 C.F.R. §§ 42.601 *et seq.*

The coordinating regulations refer to a Title IX complaint that alleges employment discrimination as a "joint complaint," because employment discrimination would violate both Title IX (which would usually be enforced by the agency providing federal financial assistance) and Title VII (which is usually enforced by the EEOC).[3] If the DOE receives a Title IX complaint that asserts *only* employment discrimination, it is required by the coordinating regulation to refer that complaint to the EEOC. "An agency shall refer to EEOC all joint complaints solely alleging employment discrimination against an individual." 28 C.F.R. § 42.605(e). Such referral constitutes "delegat[ion] to EEOC [of the agency's] investigatory authority . . . under Title IX." 28 C.F.R. § 42.605(h). The EEOC then treats the referred complaint as a Title VII charge.

> A complaint of employment discrimination filed with an agency, which is . . . referred to EEOC under this regulation, shall be deemed a charge received by EEOC. For all purposes under Title VII . . ., the date such complaint was received by an agency shall be deemed the date it was received by EEOC. 28 C.F.R. § 42.606(a).

The EEOC investigates the complaint, applies Title VII legal standards, and then makes a determination as to whether "reasonable cause exists to believe that Title VII has been violated." 28 C.F.R. § 42.609(a). If the EEOC concludes that there is reasonable cause to believe that the sexual harassment violated Title VII, it attempts to resolve the violation through a settlement with the recipient. If the EEOC resolves the complaint through conciliation, that settlement is binding on the agency providing federal financial assistance. 28 C.F.R. § 42.611.

If the EEOC, following a determination of reasonable cause, is unable to conciliate the case, it takes two inter-related actions. First, the EEOC is required to send the complainant "a notice of right to sue under Title VII." 28 C.F.R. § 42.609(b)(3).[4] A complainant has 90 days from receipt of such a notice of right to sue within which to file a Title VII suit. Second, the EEOC must "[t]ransmit to the referring agency a copy of EEOC's investigative file, including its Letter of Determination and notice of failure of conciliation" 28 C.F.R. § 42.609(b)(2). The

[3] In some circumstances enforcement of Title VII is the responsibility of the Department of Justice.

[4] Under some circumstances the right to sue notice would be send to the complainant by the Attorney General. 28 C.F.R. § 42.609(b)(4).

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referring agency in turn must, within thirty days, determine whether the recipient violated the civil rights provision which is has responsibility to enforce. 28 C.F.R. § 42.610(a). Thus, if the EEOC were to conclude that a complainant was the victim of sexual harassment in violation of Title VII, and following a failure of conciliation transmitted the file to DOE, the Department would have only thirty days to determine whether the harassment constituted a Title IX violation.

Under the coordinating regulations, DOE's resolution of a referred-back claim under Title IX would be shaped in two important ways by Title VII and by the EEOC's determination. First, "[i]n any investigation, compliance review, hearing or other proceeding, agencies *shall consider* Title VII case law. . ., unless inapplicable, in determining whether a recipient of Federal financial assistance has engaged in an unlawful employment practice." 28 C.F.R. § 42.604 (emphasis added). This "shall consider" clause constrains DOE's ability to establish legal standards that might be inconsistent with Title VII case law. If DOE were to issue a regulation that squarely conflicted with Title VII case law, the regulation would have the effect of precluding the Department from "consider[ing] Title VII case law" in subsequent investigations, compliance reviews, hearings and other proceedings to which the regulation applied, in clear violation of section 42.6054.

Second, under the coordinating regulations "[t]he referring agency shall give *due weight* to the EEOC's determination that reasonable cause exists to believe that Title VII has been violated." 28 C.F.R. § 42.610(a) (emphasis added). In making that reasonable cause determination, the EEOC would, of course, apply Title VII standards. The due-weight clause thus constrains the Department's assessment of the legal and the factual issues of a particular case. Because DOE would have to act within 30 days of receiving the EEOC file and reasonable cause determination, DOE, as a practical matter, could not conduct any significant investigation of its own, and would effectively be limited to reviewing the issues addressed by the EEOC cause determination on the record created by the Commission.

(2) The Proposed Regulations Are Inconsistent With Title VII Standards

Under the proposed regulations, with certain limited exceptions[5], sexual harassment is defined as and limited to "[u]nwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity." Section 106.30. That is fundamentally different from and decidedly narrower than the definition of unlawful sexual harassment under Title VII case law.

The touchstone of illegality under Title VII is not whether the harassment limits "access" to anything, but whether the harassment creates a hostile work environment. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) ("sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment"); *Harris v. Forklift Systems, Inc*., 510 U.S. 17, 22 (1993) ("so severe or pervasive that it created a work environment abusive to employees because of their …gender…"; "so long as the environment would reasonably be perceived, and is perceived, as hostile or abusive."). The EEOC regulations,

[5] The exceptions are quid pro quo demands and sexual assaults as defined in 34 C.F.R. 668.46(a). Section 106.30.

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in relevant part, correctly summarize Title VII case law as turning on whether the harassment "has the purpose or effect or unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." 28 C.F.R. § 1604.11(a).[6] Although the proposed regulation requires that the harassment be severe "and" pervasive, the Title VII standard requires only that the harassment be sufficiently severe "or" pervasive to create a hostile work environment.

The definition of sexual harassment in the proposed regulation makes little sense in the context of sexual harassment of employees. The reference to harassment that "denies a person equal access to the recipient's education program or activity" is from the discussion of student-on-student harassment in *Davis v. Monroe County Bd. of Educ.,* 526 U.S. 629 (1999). In that decision, denial of access referred to the fact that the harassment was alleged to have had a "negative effect on [the victim's] ability to receive an education." 526 U.S. at 654. But in a case of sexual harassment of an employee, ability to receive an education is irrelevant, and access to the workplace is rarely an issue. The victim is usually able to come to work and to do his or her job; the injury at issue is not unequal access to the workplace but the emotional harm caused by the harassment that occurs when the plaintiff is there. Although evidence that sexual harassment affected a victim's job performance might lend support to a Title VII sexual harassment claim, it clearly is not required.[7] Even impaired job performance would not involve a lesser "access" to the recipient's program or activity, except in the highly unusual case in which the victim's performance declined so greatly that the worker was demoted or fired. The NPRM itself explains that the regulation permits putting a respondent employee on administrative leave, so long as the respondent is not also an employee, precisely because being on administrative leave would not affect the non-student employee's access to the recipient's education program or activity.[8] In DOE's account, "access" refers to a complainant's access to an education, an interpretation which would render the equal access clause (and that aspect of the definition of the section 106.30 sexual harassment) virtually inapplicable to a non-student employee.

Sexual harassment is expressly outside the scope and protection of the proposed regulations if the harassment did not occur "in [the recipient's] education program or activity." Section 106.44(a) and 106.44(b)(4). Although the meaning of this proposed limitation is unclear, the apparent intent of DOE is to do away with the standard established by OCR policy guidances

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[6] Section 1604.11(a) provides:

> Harassment on the basis of sex is a violation of section 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection f such conduct by an individual is sued as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect or unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

[7] *Faragher v. City of Boca Raton,* 524 U.S. 775, 787 (1998).

[8] 83 Fed. Reg. 61471 ("placing a non-student respondent on administrative leave does not implicate access to the recipient's education programs and activities in the same way that other respondent-focused measures might").

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dating back to 1997, under which sexual harassment off campus (and otherwise outside the education program or activity) would give rise to a Title IX violation if it led to a hostile environment in the program itself. But under Title VII, the existence or lack thereof of a hostile environment remains the standard of illegality.

Under the proposed regulations, a recipient would have no responsibility for sexual harassment unless the recipient responded to allegations of such harassment in a manner that was "clearly unreasonable." Section 106.44(a) and 106.44(b)(4). Under Title VII, the standard of employer responsibility is completely different. If an employee is sexually harassed by his or her supervisor, the employer is ordinarily strictly liable.[9] The employer may be able to establish an affirmative defense if it can show that it took reasonable care to prevent sexual harassment and reasonable care to correct sexual harassment. *Faragher v. City of Boca Raton,* 524 U.S. 775, 807 (1998); *Burlington Industries, Inc .v. Ellerth,* 524 U.S. 742, 765 (1998). Under these Supreme Court decisions, the employer's responses must be reasonable; an employer would be liable under Title VII if its actions were unreasonable, even if those actions were not (as under the proposed regulation) *clearly* unreasonable. Moreover, once a harassment victim herself or himself complains, an employer is strictly liable under Title VII for any subsequent harassment, no matter how reasonable the employer's response to that complaint. The affirmative defense requires proof that the victim unreasonably failed to complain, so an actual complaint bars that defense as to any subsequent harassment. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

The proposed regulation creates several "safe harbors," which preclude even an inquiry as to whether the recipient was clearly unreasonable. Sections 106.44(b)(2) and 106.44(b)(3). An employer whose actions falls within those provisions is guaranteed immunity from responsibility if a complaint is filed with DOE. But if a sexual harassment complaint were filed by an employee, the EEOC, applying Title VII standards, would not recognize any such safe harbors, and the Department could not do so without violating the requirements of the coordinating regulations.

Under the proposed regulations, if a recipient concludes that a complainant has been the victim of sexual harassment, the only required remedy it is "to restore or preserve access to the recipient's education program or activity." Section 106.45(b)(1)(i). But if the complainant were a sexually harassed employee, an employer under that regulation would usually not have to take any remedial steps at all, because harassment of an employee rarely has any impact on access to the job. Title VII, however, requires that an employer take steps to end the harassment that created a hostile work environment, and to eliminate that unlawful environment.

Section 106.30 defines a "formal complaint" as "a document signed by a complainant . . . alleging sexual harassment against a respondent about conduct within its education program or activity and requesting initiation of the recipient's grievance procedures . . ." In the absence of such a signed document, none of the procedures in section 106.45 would be required. The NPRM

[9] Liability under Title VII for harassment by co-workers and certain supervisors is governed by a negligence standard. *Faragher,* 524 U.S. at 799. Negligence can be established by a showing of a lack of reasonable care, and does not require proof (as does the proposed regulation) of *clearly* unreasonable conduct.

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advises recipients that they are only required to investigate a report of sexual harassment if there is such a formal complaint.[10] In Title VII cases, on the other hand, the courts have repeatedly held that an employer acts unreasonably, and is strictly liable for sexual harassment, if it fails to investigate or correct sexual harassment on the ground that the plaintiff (or an earlier victim), who in fact complained to the employer, had failed to do so in a sufficiently formal manner. *Agusty-Reyes v. Dep't of Educ. of Puerto Rico,* 601 F.3d 45, 56 (1st Cir. 2010); *Freytes-Torres v. City of Sanford,* 270 Fed. Appx. 885, 8992 (11th Cir. 2008).[11]

Although the regulations include two provisions (one existing, one proposed) regarding Title VII, it is not clear whether either would override the specific terms of the regulations to the extent that they differ from Title VII standards. But even if those provisions did so, that would not solve the problem created by the proposed regulations, because it would be unclear to recipients which regulations were and were not applicable to an employee's claim of sexual harassment. The express purpose of the proposed regulations is to provide recipients with reasonably specific guidance as to the manner in which DOE will handle a sexual harassment complaint. That purpose would be completely frustrated if one or both of the disclaimers, to assure compliance with the coordinating regulations, were construed to mean "With regard to sexual harassment of an employee, the Secretary will not enforce any provision of this part that is different than the requirements of Title VII, but will instead apply Title VII standards." That would force recipients to guess which of the proposed regulations would and would not be applied to an employee's complaint of sexual harassment. To resolve this, DOE should either spell out which provisions of the proposed regulations it will and will not apply to sexual harassment claims by employees, or exclude employee claims entirely from the scope of the regulations.

(3) The Proposed Regulations Require Recipients to Act in a Manner That Would Vitiate An Affirmative Defense Under Faragher and Ellerth

Under *Faragher* and *Ellerth*, an employer is strictly liable if an employee is sexually harassed by his or her supervisor, unless (in addition to several other requirements) the employer can establish an affirmative defense by showing that it took reasonable care to prevent sexual harassment and reasonable care to correct sexual harassment. The proposed regulations require employers, as a condition of receiving federal funds, to take a number of steps which a trier of fact could conclude demonstrated a lack of such reasonable care.

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[10] 83 Fed. Reg. 61487 ("The proposed regulations require recipients to conduct an investigation only in the event of a formal complaint of sexual harassment. . . . [W]e estimate that the requirement to investigate only in the event of formal complaints would result in a reduction in the average number of investigations . . .").

[11] See EEOC, Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, part V-C-1 ("When an employee complaints to management about alleged harassment, the employer is obligated to investigate the allegation regardless of whether it conforms to a particular format or is made in writing."), available at https://www.eeoc.gov/policy/docs/harassmnet.html

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Section 106.45(b)(4)(1) requires a recipient, in certain circumstances, to apply a heightened clear and convincing evidence standard. In such a situation, even though the recipient believed that a preponderance of the evidence showed that sexual harassment had occurred, the recipient would have to exonerate the respondent and would be barred from taking any disciplinary action. A trier of fact could conclude that an employer that chose to use such a heighted standard was not exercising reasonable care to correct harassment. Employers virtually never utilize that standard to resolve allegations of abusive treatment of employees, and such a heightened standard in sexual harassment cases would significantly increase the risk of a mistaken conclusion that the harassment alleged did not occur. Sexual harassment complaints usually require an employer to resolve conflicting first-hand accounts of what occurred. A clear and convincing standard tilts the scale in favor of disbelieving the complainant. A trier of fact could fairly conclude that doing so was inconsistent with reasonable care to accurately determine whether the complainant had been sexually harassed and reasonable care to correct any such harassment.

Under section 106.45(b)(3), if an employee alleged harassment that met the Title VII sexual harassment standard, but did not meet the section 106.30 definition of sexual harassment, a recipient would have to dismiss that employee's formal complaint. Many, if not most employee complaints would not involve a denial of equal access. If the employer was nonetheless willing to assess the employee's allegation using the Title VII standard, it would have to restart the grievance process, but now advising the complainant *not* to submit a signed complaint, because doing so would constitute a formal complaint subject to again being dismissed under section 106.45(b)(3). A trier of fact could easily conclude that an employer which chose to use such a pointlessly burdensome and time-consuming process was not exercising reasonable care.

Section 106.45 imposes on recipients a detailed grievance process which would normally take several months to complete. The NPRM objects to a previous guidelines suggesting that the resolution of a sexual harassment complaint should be completed within 60 days.[12] Employers usually resolve a sexual harassment complaint in far shorter period of time. That delay might not itself be fatal to the affirmative defense under *Faragher* and *Ellerth* if, during the weeks or months the grievance was pending, the employer were to take prompt and effective action to protect the complainant from further harassment and to end the hostile environment. The explanation in the NPRM of several provisions, however, suggests that DOE intends to construe the regulations to bar most interim protective measures. Under section 106.44(c) an employer could exclude a respondent from the workplace if there were an immediate threat to health or safety, but it is unclear whether that would apply to most sexual harassers. Under section 106.44(d) a school could put a non-student employee on administrative leave. That may preclude a school from putting on leave a graduate teaching assistant or research assistant who is sexually harassing other employees. It would not be practicable to put a faculty member on leave in the middle of a semester-long or year-long course, or while he or she was the principal investigator on a large multi-year grant. Sections 106.44(c) and 106.44(d) do not approve the other types of interim measures that would at times be the only practicable protective steps a school could take during the pendency of a grievance process.

[12] 83 Fed. Reg. 61473.

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Section 106.45(b)(3)(vii) requires, in the case of institutions of higher education, that the grievance procedure must provide for a live hearing, and must permit the advisor of the respondent to cross-examine the complainant. That section appears to force the recipient to permit the advisor to ask any question that is relevant and outside the rape-shield provision in the regulation, thus allowing a wide range of cross-examination questions that would not be permitted at a civil trial. A substantial body of practical experience strongly indicates that this sort of cross-examination carries such a considerable risk of abuse, and would thus deter victims of sexual harassment from filing or pursuing a complaint. The risk is particularly great when the harassment involves rape or other serious physical abuse. In the past, the vast majority of schools and virtually all other employers have avoided this practice, often because of the danger that fear of abusive cross-examination would deter legitimate complaints and thus fatally undermine their effort to detect and correct sexual harassment. Under *Faragher* and *Ellerth*, an employer must as part of its affirmative defense demonstrate that the complainant unreasonably failed to utilize the employer's internal corrective mechanism. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. If a recipient were to implement the procedure set out in section 106.45(b)(3)(vii), a Title VII plaintiff could credibly urge that it was reasonable to refuse to be subjected to that procedure[13], and could seek to make a factual showing that the procedure was indeed deterring sexual harassment complaints, or had in fact resulted in abusive treatment of complainants.

If restrictions of this sort on a school's response to sexual harassment allegations were mandated by Congress, compliance with such a statute might justify actions that were otherwise inconsistent with reasonable care under *Faragher* and *Ellerth*. But the regulations do not and could not *require* schools to engage in any practices. Rather, the regulation, like Title IX itself, only delineates the contractual obligations which a recipient would voluntarily assume in return for federal funding. Federal law does not require any institution to take the money and thus assume the attendant conditions. Voluntarily agreeing to the conditions the come with a federal grant is no different than agreeing to the conditions that might be attached to a grant from a private foundation or an individual donor. If accepting federal funds and complying with the appurtenant conditions might expose a school to liability under other laws, that is a risk a school must consider in determining whether to take the money. To the extent that the regulations impose funding conditions which, if complied with, would be inconsistent with reasonable care to prevent or correct sexual harassment, or would justify a victim in not utilizing the recipient's internal corrective mechanisms, a school simply has to choose between forsaking the funds or forsaking the *Faragher* and *Ellerth* affirmative defense.

Neither of the Title IX regulations regarding Title VII would solve these problems. The standards in *Faragher* and *Ellerth* concern an employer's affirmative defense to a sexual harassment claim, and are distinct from the Title VII prohibitions against harassment that would

[13] See EEOC, Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, part V-D-1 ("if the process entailed . . . unnecessarily intimidating or burdensome requirements, failure to invoke it on such a basis would be reasonable"), available at https://www.eeoc.gov/policy/docs/harassmnet.html

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constitute "discriminat[ion] on the basis of sex." Section 106.6(f). Similarly, these regulations may be in derogation of the employer's ability to defend a Title VII sexual harassment case, but they are not in "derogation of an employee's rights under Title VII." Section 106.6(f).

(4) Proposed Section 106.44(b)(5) Conflicts With Section 42.610(a) of the Coordinating Regulations

Under the grievance procedure mandated by proposed section 106.45, a recipient's decision-maker will make a "determination regarding responsibility," including a factual determination of what occurred. Section 106.45(b)(4). The factual determination will usually be critical to the disposition of the complaint. Under proposed section 106.44(b)(5), the Department will treat as conclusive the recipient's determination of whether the alleged sexual harassment occurred.

The Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient merely because the Assistant Secretary reaches a different determination based on an independent weighing of the evidence.

So if a complainant asserts that the respondent repeatedly touched her in a sexual manner, and made lewd remarks, but the school concludes the respondent did not do so, DOE, under section 106.44(b)(5) will ordinarily accept the school's factual determination.

But applying section 106.44(b)(5) to a sexual harassment claim by an employee would be squarely inconsistent with the coordinating regulations. If the employee were to file a complaint with the Department, that complaint would have to be referred to the EEOC for investigation and initial evaluation. The EEOC would never defer to an employer's conclusion that its officials did nothing wrong; if the Commission did so, every employer could avoid a finding of reasonable cause merely by conducting an exculpatory internal investigation. The EEOC conducts its own investigation, and makes an independent assessment of the facts. In a sexual harassment case, a Commission finding of reasonable cause necessarily entails a factual finding that sexual harassment indeed occurred. Section 42.610(a) requires the Department to "give due weight to EEOC's determination that reasonable cause exists to believe that Title VII has been violated." DOE could not give "due weight" to the EEOC's determination regarding the relevant facts if, under section 106.44(b)(5) the Department instead gave conclusive weight to the recipient's contrary determination regarding the same factual issues.

Existing section 106.6(a) does not solve this problem, which does not concern the nature of an employer's "obligations not to discriminate," but instead addresses who is to decide the facts related to a discrimination claim. Whether proposed section 106.6(f) would resolve this problem would turn on whether the coordinating regulations constitute regulations "promulgated []under" Title VII. At best, a recipient would not know whether DOE, in resolving a sexual harassment claim by an employee, would apply section 42.610(a) of the coordinating regulations or proposed section 106.44(b)(5).

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NELA strongly urges DOE to withdraw the proposed regulations. If DOE at some future date decides to issue regulations regarding sexual harassment under Title IX, the provisions of that proposal regarding sexual harassment of employees must be consistent with the standards in Title VII and with the requirements of the coordinating regulations.

Terry O'Neill
Executive Director,
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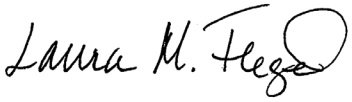

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