a

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

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

Although the proposed rule declares, "Imputation of knowledge based solely on respondeat superior or constructive notice is insufficient to constitute actual knowledge," the provision allowing actual knowledge to be assumed with "teacher" knowledge at the K-12 level seems to do le p4s dc ace1r

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

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

NSBA urges the Department to consider the significant liability concerns it hands to school districts by imputing institutional knowledge through a K-12 teacher in the Title IX context and consider removing this requirement. Alternatively, the Department should explain clearly to what extent K-12 school districts will be considered to have "actual knowledge" when a teacher has knowledge of sexual harassment, keeping in mind the Supreme Court's emphasis in *Davis* that school districts cannot be liable for conduct until it has knowledge and is deliberately indifferent: "We thus conclude that funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have (t)-2 (e)4 (a)-6 (c)4 (he)-6 (r)3 (ha)4 (s)-
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benefit or service upon a person’s parti

Many of the proposed rules' grievance procedures for formal complaints described below are detached from the realities of many K-12 school buildings, extend far beyond current Title IX and student discipline requirements, and impose significant additional procedural responsibilities on K-12 recipients. There is some question as to whether Title IX grants the Department authority to adopt rules for (t)-6 ()4 (s)-1

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

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

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

requires recipients to "treat complainants and respondents equitably," which means remedies for a complainant where a finding of responsibility has been made, and due process protections for the respondent ahead of disciplinary sanctions.
similarly requires that a recipient's grievance procedures "describe the range of possible sanctions and remedies that the recipient may implement following any determination of responsibility."

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

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

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

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

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

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

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

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

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

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

[16] 20 U.S.C. §1Tj01 ( )]TSlict wi

complainant feels safe, but sanctions aff

imposing burdensome procedural requirements