

## SUPPORTING STATEMENT FOR PAPERWORK REDUCTION ACT SUBMISSION

1. Explain the circumstances that make the collection of information necessary. Identify any legal or administrative requirements that necessitate the collection. Attach a hard copy of the appropriate section of each statute and regulation mandating or authorizing the collection of information, or you may provide a valid URL link or paste the applicable section<sup>1</sup>. Specify the review type of the collection (new, revision, extension, reinstatement with change, reinstatement without change). If revised, briefly specify the changes. If a rulemaking is involved, make note of the sections or changed sections, if applicable.

The U.S. Department of Education (the Department) published a Notice of Proposed Rulemaking for the Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (Title IX NPRM) to propose amendments to the Department's implementing regulations for Title IX of the Education Amendments of 1972 on July 12, 2022 (**87 FR 41390**). The Department describes the changes that the proposed regulations would have on the burden for affected entities.

Section 106.8(f) *Recordkeeping*. The Department's proposed regulations would require a recipient<sup>2</sup> to maintain documentation regarding its Title IX activities for a period of at least seven years: (1) for each complaint of sex discrimination, records documenting the informal resolution process under § 106.44(k), or the grievance procedures under § 106.45, and if applicable § 106.46, and the resulting outcome; (2) for each incident of conduct that may constitute sex discrimination under Title IX of which the Title IX Coordinator was notified, records documenting the actions the recipient took to meet its obligations under § 106.44; (3) all materials used to provide training under § 106.8(d), which the recipient must make 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; and (4) all records documenting the actions the recipient took to meet its obligations under §§ 106.40 and 106.57. These requirements are specified in proposed 34 CFR 106.8(f).

Proposed § 106.8(f) would modify the recordkeeping requirements in the current regulations at 34 CFR 106.45(b)(10)(i). The current regulations require a recipient to maintain for a period of seven years records of: (1) each sexual harassment investigation, including any determination regarding responsibility and any audio or audiovisual recording or transcript required under

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<sup>1</sup> Please limit pasted text to no longer than 3 paragraphs.

<sup>2</sup> Throughout this supporting statement, the Department refers to entities required to collection and maintain documentation as "recipients" rather than "respondents." "Respondent" is a defined term in the related notice of proposed rulemaking that means a person who is alleged to have violated a recipient's prohibition on sex discrimination. To avoid confusion and ensure consistency, the Department will not use the term "respondent" in a different manner here.

Tracking and OMB Number: 1870-NEW  
Revised: 6/30/2022  
RIN Number: 1870-AA16

§ 106.45(b)(6)(i), 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; (2) any appeal and the result therefrom; (3) any informal resolution and the result therefrom; and (4) all materials used to train Title IX Coordinators, investigators, decisionmakers, and any person who facilitates an informal resolution process, which the recipient must make 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. 34 CFR 106.45(b)(10)(i). In addition, under the current regulations, 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. 34 CFR 106.45(b)(10)(ii).

The Secretary has authority to regulate with regard to discrimination on the basis of sex specifically under 20 USC 1682 and generally under 20 USC 1221e-3 and 3474.

2. Indicate how, by whom, and for what purpose the information is to be used. Except for a new collection, indicate the actual use the agency has made of the information received from the current collection.

The information collected regarding documentation of a recipient's Title IX activities would allow recipients and the Department to assess on a longitudinal basis whether a recipient is complying with the Department's Title IX regulations when it has information about sex discrimination, the prevalence of sex discrimination affecting access to a recipient's education program or activity, and whether additional or different training is necessary for the recipient to fulfill its obligations under Title IX.

3. Describe whether, and to what extent, the collection of information involves the use of automated, electronic, mechanical, or other technological collection techniques or forms of information technology, e.g. permitting electronic submission of responses, and the basis for the decision of adopting this means of collection. Also describe any consideration given to using technology to reduce burden.

No automated, electronic, mechanical, or other technological collection techniques or forms of information technology are used to collect data regarding these information collection activities. In the ordinary course of an enforcement investigation the Department may request information

Tracking and OMB Number: 1870-NEW  
Revised: 6/30/2022  
RIN Number: 1870-AA16

from a recipient via email about the documents maintained by the recipient in compliance with the recordkeeping and written notice requirements in the NPRM (at such time, if any, as the requirements in the NPRM have become part of a final rule).

4. Describe efforts to identify duplication. Show specifically why any similar information already available cannot be used or modified for use for the purposes described in Item 2 above.

As described in the response to Question 1, the Department's current regulations require the collection and maintenance of similar information, and the proposed regulations would modify and replace those requirements. The Department is not aware of other existing sources of the information required under the proposed collection activities.

5. If the collection of information impacts small businesses or other small entities, describe any methods used to minimize burden. A small entity may be (1) a small business which is deemed to be one that is independently owned and operated and that is not dominant in its field of operation; (2) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field; or (3) a small government jurisdiction, which is a government of a city, county, town, township, school district, or special district with a population of less than 50,000.

The proposed collection activities would affect small entities that are recipients of Federal financial assistance, such as small local education agencies (LEAs). The NPRM minimizes the burdens on small entities by not requiring particular collection techniques or forms of information technology, leaving small entities with the flexibility to select the techniques and technology least burdensome for their needs.

6. Describe the consequences to Federal program or policy activities if the collection is not conducted or is conducted less frequently, as well as any technical or legal obstacles to reducing burden.

The collection activities proposed under the Department's proposed regulations are important to effectuate the statutory purpose of Title IX, to assist recipients in tracking the effectiveness of their compliance with Title IX, and to assist the Department in reviewing recipients' compliance with Title IX. Without the proposed recordkeeping requirements, the Department would have less reliable access to documentation detailing a recipient's activities to comply with Title IX in its enforcement of Title IX and its implementing regulations.

7. Explain any special circumstances that would cause an information collection to be conducted in a manner:

Tracking and OMB Number: 1870-NEW  
Revised: 6/30/2022  
RIN Number: 1870-AA16

- requiring respondents to report information to the agency more often than quarterly;
- requiring respondents to prepare a written response to a collection of information in fewer than 30 days after receipt of it;
- requiring respondents to submit more than an original and two copies of any document;
- requiring respondents to retain records, other than health, medical, government contract, grant-in-aid, or tax records for more than three years;
- in connection with a statistical survey, that is not designed to produce valid and reliable results than can be generalized to the universe of study;
- requiring the use of a statistical data classification that has not been reviewed and approved by OMB;
- that includes a pledge of confidentiality that is not supported by authority established in statute or regulation, that is not supported by disclosure and data security policies that are consistent with the pledge, or that unnecessarily impedes sharing of data with other agencies for compatible confidential use; or
- requiring respondents to submit proprietary trade secrets, or other confidential information unless the agency can demonstrate that it has instituted procedures to protect the information's confidentiality to the extent permitted by law.

The collection activities proposed under the Department's proposed regulations would require a recipient to retain records, other than health, medical, government contract, grant-in-aid, or tax records for more than three years. Specifically, the Department's proposed regulations would require a recipient to retain records for seven years. This requirement is specified in proposed § 106.8(f). This requirement is consistent with the current collection obligation imposed by the Department's current regulations and previously approved by OMB. In addition, this requirement is consistent with the Clery Act's recordkeeping requirements, 34 CFR 668.24(e) (92)(ii), and promotes uniformity in the recordkeeping requirements imposed on postsecondary recipients.

8. As applicable, state that the Department has published the 60 and 30 *Federal Register* notices as required by 5 CFR 1320.8(d), soliciting comments on the information collection prior to submission to OMB. Summarize public comments received in response to that notice and describe actions taken by the agency in response to these comments. Specifically address comments received on cost and hour burden.

Tracking and OMB Number: 1870-NEW  
 Revised: 6/30/2022  
 RIN Number: 1870-AA16

Describe efforts to consult with persons outside the agency to obtain their views on the availability of data, frequency of collection, the clarity of instruction and record keeping, disclosure, or reporting format (if any), and on the data elements to be recorded, disclosed, or reported.

Consultation with representatives of those from whom information is to be obtained or those who must compile records should occur at least once every 3 years – even if the collection of information activity is the same as in prior periods. There may be circumstances that may preclude consultation in a specific situation. These circumstances should be explained.

The Department consulted with persons outside the agency through a nationwide virtual public hearing held by the Office for Civil Rights (OCR) in June 2021, listening sessions held by OCR in 2021 and 2022, and meetings with stakeholders held in 2022 under Executive Order 12866 with the Department. The Department received feedback concerning recordkeeping from stakeholders, including support for retaining the recordkeeping obligations and support for continuing to identify the type of records that must be kept, not the category of persons whose records do or do not fall under the recordkeeping provision. The Department also received feedback from stakeholders that the recordkeeping provisions in the 2020 amendments were burdensome for recipients. The proposed rule published 7/12/2022 (87 FR 41290) provides the public comment period for both the rule and ICR.

9. Explain any decision to provide any payment or gift to respondents, other than remuneration of contractors or grantees with meaningful justification.

No gifts or incentives will be provided to recipients responding to this information collection request.

10. Describe any assurance of confidentiality provided to respondents and the basis for the assurance in statute, regulation, or agency policy. If personally identifiable information (PII) is being collected, a Privacy Act statement should be included on the instrument. Please provide a citation for the Systems of Record Notice and the date a Privacy Impact Assessment was completed as indicated on the IC Data Form. A confidentiality statement with a legal citation that authorizes the pledge of confidentiality should be provided.<sup>3</sup> If the collection is subject to the Privacy Act, the Privacy Act statement is deemed sufficient with respect to confidentiality. If there is no expectation of

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<sup>3</sup> Requests for this information are in accordance with the following ED and OMB policies: Privacy Act of 1974, OMB Circular A-108 – Privacy Act Implementation – Guidelines and Responsibilities, OMB Circular A-130 Appendix I – Federal Agency Responsibilities for Maintaining Records About Individuals, OMB M-03-22 – OMB Guidance for Implementing the Privacy Provisions of the E-Government Act of 2002, OMB M-06-15 – Safeguarding Personally Identifiable Information, OM:6-104 – Privacy Act of 1974 (Collection, Use and Protection of Personally Identifiable Information).

Tracking and OMB Number: 1870-NEW  
 Revised: 6/30/2022  
 RIN Number: 1870-AA16

confidentiality, simply state that the Department makes no pledge about the confidentiality of the data.

There are no assurances of confidentiality as no such assurance is needed for the information collected. Any information collected from the recipient would exclude personal identifying information.

11. Provide additional justification for any questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private. The justification should include the reasons why the agency considers the questions necessary, the specific uses to be made of the information, the explanation to be given to persons from whom the information is requested, and any steps to be taken to obtain their consent.

There are no questions of a sensitive nature. However, in light of the nature of some of the issues being reported, (e.g., allegations of sex discrimination), the recordkeeping and reporting may contain discussions of a sensitive nature. To comply with the regulations, a recipient would be required to protect the information provided in statements and reports and only allow access to those who require it, as set out in proposed § 106.45(b)(5), take reasonable steps to prevent the unauthorized disclosure of information and evidence obtained solely through a recipient's sex-based harassment grievance procedures as set out in proposed § 106.46(e)(6)(iii); and ensure that it does not disclose information about any supportive measures to persons other than a complainant or respondent unless necessary to provide the supportive measure in proposed § 106.44(g)(5). Additionally, when conducting an informal resolution process, implementing grievance procedures, or requiring a Title IX Coordinator to take other appropriate steps under proposed § 106.44(f)(6), a recipient must not disclose the identity of a party, witness or other participant except in very limited circumstances as set forth in proposed § 106.44(j).

12. Provide estimates of the hour burden of the collection of information. The statement should:
  - Indicate the number of respondents by affected public type (federal government, individuals or households, private sector – businesses or other for-profit, private sector – not-for-profit institutions, farms, state, local or tribal governments), frequency of response, annual hour burden, and an explanation of how the burden was estimated, including identification of burden type: recordkeeping, reporting or third party disclosure. All narrative should be included in item 12. Unless directed to do so, agencies should not conduct special surveys to obtain information on which to base hour burden estimates. Consultation with a sample (fewer than 10) of potential respondents is desirable. If the hour burden on respondents is expected to vary widely because of differences in activity, size, or complexity, show the range of estimated hour burden, and explain the reasons for the variance. Generally,

Tracking and OMB Number: 1870-NEW  
Revised: 6/30/2022  
RIN Number: 1870-AA16

estimates should not include burden hours for customary and usual business practices.

For the collection activity required under proposed 34 CFR 106.8(f), the Department estimates the number of affected recipients to be 18,131 LEAs, 6,054 institutions of higher education, and 600 other institutions (e.g., State education agencies, local libraries, Tribal cultural centers and a range of other entities that receive Federal grant funds from the Department). Each would have recordkeeping obligations, with a total annual hour burden for all recipients estimated at 598,982 hours in Year 1 and 500,980 hours in subsequent years.

- If this request for approval covers more than one form, provide separate hour burden estimates for each form and aggregate the hour burdens in the ROCIS IC Burden Analysis Table. (The table should at minimum include Respondent types, IC activity, Respondent and Responses, Hours/Response, and Total Hours)
- Provide estimates of annualized cost to respondents of the hour burdens for collections of information, identifying and using appropriate wage rate categories. The cost of contracting out or paying outside parties for information collection activities should not be included here. Instead, this cost should be included in Item 14.

Burden estimates were developed based on the RIA from the 2020 amendments as informed by comment in response to the 2018 NPRM, as well as information received by OCR through the June 2021 Title IX Public Hearing, in listening sessions, and during the meetings held pursuant to Executive Order 12866 in 2022. The estimates were further informed by the input of internal subject matter experts. The Year 1 burden and cost represent the ongoing existing paperwork burden for all recipients under the Department's current regulations, plus the added start-up costs associated with any additional paperwork burden imposed by the proposed regulations. The ongoing annual burden and cost reflects the ongoing existing paperwork burden for all recipients under the Department's current regulations, plus the additional ongoing paperwork burden for all recipients under the proposed regulations.

Tracking and OMB Number: 1870-NEW

Revised: 6/30/2022

RIN Number: 1870-AA16

Information Activity or IC (with type of respondent)	Sample Size (if applicable)	Respondent Response Rate (if applicable)	Number of Respondents	Number of Responses	Average Burden Hours per Response	Total Year 1 Burden Hours	Estimated Respondent Average Hourly Wage	Total Year Costs (hourly wage x total burden hours)
106.8(f) – LEAs (Title IX Coordinator)	N/A	N/A	18,131	18,131	4 hours	72,524	\$100.36	\$7,278,508
106.8(f) LEAs (Admin Assistant)	N/A	N/A	18,131	18,131	6 hours	108,786	\$61.06	\$6,642,473
106.8(f) – IHEs (Title IX Coordinator)	N/A	N/A	6,054	6,054	8 hours	48,432	\$100.36	\$4,860,635
106.8(f) IHEs (Admin Assistant)	N/A	N/A	6,054	6,054	48 hours	290,592	\$61.06	\$17,743,547
106.8(f) IHEs (Database administrator)	N/A	N/A	6,054	6,054	12 hours	72,648	\$76.54	\$5,560,477
106.8(f) – other entities (Title IX Coordinator)	N/A	N/A	600	600	4 hours	2,400	\$100.36	\$240,864
106.8(f) – other entities (Admin Assistant)	N/A	N/A	600	600	6 hours	3,600	\$61.06	\$219,816
Annualized Totals			24,600	24,600		598,982		\$42,546,322

**Estimated Year 1 Burden and Respondent Costs Table**



Tracking and OMB Number: 1870-NEW

Revised: 6/30/2022

RIN Number: 1870-AA16

Information Activity or IC (with type of respondent)	Sample Size (if applicable)	Respondent Response Rate (if applicable)	Number of Respondents	Number of Responses	Average Burden Hours per Response	Total Ongoing Burden Hours	Estimated Respondent Average Hourly Wage	Total Ongoing Costs (hourly wage x total burden hours)
106.8(f) – LEAs (Title IX Coordinator)	N/A	N/A	18,131	18,131	3 hours	54,393	\$100.36	\$5,458,881
106.8(f) LEAs (Admin Assistant)	N/A	N/A	18,131	18,131	5 hours	90,655	\$61.06	\$5,535,394
106.8(f) – IHEs (Title IX Coordinator)	N/A	N/A	6,054	6,054	5 hours	30,270	\$100.36	\$3,037,897
106.8(f) IHEs (Admin Assistant)	N/A	N/A	6,054	6,054	45 hours	272,430	\$61.06	\$16,634,570
106.8(f) IHEs (Database administrator)	N/A	N/A	6,054	6,054	8 hours	48,432	\$76.54	\$3,706,985
106.8(f) – other entities (Title IX Coordinator)	N/A	N/A	600	600	3 hours	1,800	\$100.36	\$180,648
106.8(f) – other entities (Admin Assistant)	N/A	N/A	600	600	5 hours	3,000	\$61.06	\$183,180
Annualized Totals			24,600	24,600		500,980		\$34,737,566

### Estimated Ongoing Annual Burden and Respondents Cost Table

13. Provide an estimate of the total annual cost burden to respondents or record keepers resulting from the collection of information. (Do not include the cost of any hour burden shown in Items 12 and 14.)
  - The cost estimate should be split into two components: (a) a total capital and start-up cost component (annualized over its expected useful life); and (b) a total

Tracking and OMB Number: 1870-NEW  
 Revised: 6/30/2022  
 RIN Number: 1870-AA16

operation and maintenance and purchase of services component. The estimates should take into account costs associated with generating, maintaining, and disclosing or providing the information. Include descriptions of methods used to estimate major cost factors including system and technology acquisition, expected useful life of capital equipment, the discount rate(s), and the time period over which costs will be incurred. Capital and start-up costs include, among other items, preparations for collecting information such as purchasing computers and software; monitoring, sampling, drilling and testing equipment; and acquiring and maintaining record storage facilities.

- If cost estimates are expected to vary widely, agencies should present ranges of cost burdens and explain the reasons for the variance. The cost of contracting out information collection services should be a part of this cost burden estimate. In developing cost burden estimates, agencies may consult with a sample of respondents (fewer than 10), utilize the 60-day pre-OMB submission public comment process and use existing economic or regulatory impact analysis associated with the rulemaking containing the information collection, as appropriate.
- Generally, estimates should not include purchases of equipment or services, or portions thereof, made: (1) prior to October 1, 1995, (2) to achieve regulatory compliance with requirements not associated with the information collection, (3) for reasons other than to provide information or keep records for the government or (4) as part of customary and usual business or private practices. Also, these estimates should not include the hourly costs (i.e., the monetization of the hours) captured above in Item 12

Total Annualized Capital/Startup Cost:

Total Annual Costs (O&M):

Total Annualized Costs Requested:

There are no costs to recipients responding to this information collection request.

14. Provide estimates of annualized cost to the Federal government. Also, provide a description of the method used to estimate cost, which should include quantification of hours, operational expenses (such as equipment, overhead, printing, and support staff), and any other expense that would not have been incurred without this collection of information. Agencies also may aggregate cost estimates from Items 12, 13, and 14 in a single table.

There are no costs to the Federal government.

Tracking and OMB Number: 1870-NEW  
Revised: 6/30/2022  
RIN Number: 1870-AA16

15. Explain the reasons for any program changes or adjustments. Generally, adjustments in burden result from re-estimating burden and/or from economic phenomenon outside of an agency's control (e.g., correcting a burden estimate or an organic increase in the size of the reporting universe). Program changes result from a deliberate action that materially changes a collection of information and generally are result of new statute or an agency action (e.g., changing a form, revising regulations, redefining the respondent universe, etc.). Burden changes should be disaggregated by type of change (i.e., adjustment, program change due to new statute, and/or program change due to agency discretion), type of collection (new, revision, extension, reinstatement with change, reinstatement without change) and include totals for changes in burden hours, responses and costs (if applicable).

This is a new collection and the program change is due to modification of the collection of information under amendments to the Department's Title IX regulations and it would result in an increase of burden. In total, modifications to recordkeeping systems would cost \$42,546,322.76 in Year 1 and would have an ongoing burden of \$34,737,562.06 per year. The program change would also result in a total Year 1 burden for all recipients estimated at 598,982 hours in Year 1 and 500,980 burden hours in subsequent years.

16. For collections of information whose results will be published, outline plans for tabulation and publication. Address any complex analytical techniques that will be used. Provide the time schedule for the entire project, including beginning and ending dates of the collection of information, completion of report, publication dates, and other actions.

No information will be published.

17. If seeking approval to not display the expiration date for OMB approval of the information collection, explain the reasons that display would be inappropriate.

We are not seeking this approval.

18. Explain each exception to the certification statement identified in the Certification of Paperwork Reduction Act.

No exceptions are necessary for this information collection.