February 15, 2019

Submitted via www.regulations.gov

Kenneth L. Marcus
Assistant Secretary for Civil Rights
Department of Education
400 Maryland Avenue SW
Washington, D.C. 20202

Re: ED Docket No. ED-2018-OCR-0064, RIN 1870-AA14, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.

Dear Mr. Marcus:

Equal Rights Advocates ("ERA") strongly opposes the Department of Education's ("the Department") proposal to reverse and undermine existing rules implementing Title IX of the Education Amendments of 1972 ("Title IX") as published in the Federal Register on November 29, 2018. The Department's proposed rules on Title IX set forth in the Notice of Proposed Rulemaking ("NPRM" or "proposed rules") are antithetical to the spirit and purpose of Title IX, which is to eradicate discrimination on the basis of sex in educational programs and activities receiving federal financial assistance (hereinafter, "schools and universities" or "educational programs"). This landmark civil rights law has helped fight sex discrimination and promote equal educational access and opportunities for girls and women.

Founded in 1974, ERA is a national non-profit civil rights organization dedicated to protecting and expanding educational access and opportunities for women and girls. For the past 45 years, ERA has advocated for gender equity in education across the country through a unique combination of strategies including litigation, policy reform, and community engagement. We provide free legal information and assistance to individuals facing discrimination at school and at work through our Advice and Counseling program. ERA represents victims of sexual harassment and assault in cases brought pursuant to Title IX at all stages, from the administrative agency process through and including the United States Supreme Court. We also collaborate with students, schools, and worker and community organizations to provide Know-Your-Rights workshops on issues related to gender discrimination and Title IX. We publish reports, fact sheets, and other materials about sexual harassment and gender-based violence in education. ERA recently launched an initiative to End Sexual Violence in Education ("ESVE") in order to narrow a rapidly expanding justice gap for survivors of sexual violence in schools. Students are ERA's clients and our partners in this work; their experiences, input, and needs drive ERA's commitment of resources, our search for solutions, and our fight for justice.

Twenty years ago, acting on the basis of Supreme Court decisions and the recognition that Title IX's promise of equality is hollow if a student can be subjected to sexual harassment with impunity, the Department issued its first guidance to educational institutions (both K-12 schools and institutions of higher education) on the standards that govern their response to sexual harassment, a form of sex discrimination. Since then, through several successive guidance materials issued under Administrations led by both political parties (as discussed below), the Department has reaffirmed that Title IX's

prohibition on sex discrimination requires schools and universities to prevent and redress sex and gender-based harassment. These policies recognize that students who experience sexual harassment, including in its most extreme form, sexual violence, suffer not only physically and emotionally, but also in their ability to participate in and benefit from educational opportunities, on the basis of their sex.

The proposed rules contravene Title IX and represent a betrayal of the Department's duty to promote and enforce the educational civil rights of all students. They turn the fundamental anti-discrimination purpose of Title IX on its head by curtailing the rights and protections afforded to victims and survivors of sex-based violence, running directly counter to the gender equity aim of the law these regulations should be advancing. The proposed rules will make campuses less safe and make equitable access to education more fragile and uncertain. They create dangerous mandates that will dissuade, if not prevent, many victims of sexual harassment from seeking support and obtaining the redress they need in order to maintain their access to an education. They push schools to adopt policies and processes that place a uniquely high burden on students who report sexual harassment or assault – the vast majority of whom are women and girls – and all but require students to retain an attorney in order to participate in grievance processes relating to sexual misconduct, whether as complainants or respondents. These rules will have a devastating impact on all students, but will be especially harmful to women and girls, particularly those who identify as people of color, members the LGBTQI community, and/or persons with disabilities, who are more vulnerable to sexual harassment and gender-based violence in the first place.

For the reasons discussed below, Equal Rights Advocates unequivocally opposes the Department's proposed rules.

I. The Proposed Rules Ignore the Realities of Sexual Harassment and Violence in Schools

The proposed rules ignore the pervasiveness and devastating impact of sexual violence in schools and universities. Instead of effectuating Title IX's purpose of eliminating sexual harassment, assault, and other forms of unlawful sex discrimination, they make it harder for students to report sexual and gender-based misconduct, allow (if not require) schools to ignore certain reports when they are made, and unfairly tilt the investigation process in favor of respondents to the direct detriment of survivors.

a. Sexual harassment occurs at epidemic levels in schools and universities.

Sexual harassment – which is conduct including, but not limited to, unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal, nonverbal, or physical conduct of a sexual nature that targets someone because of their sex, including sexual assault or other sexual violence (hereinafter "sexual harassment" or "sexual harassment, including sexual violence") – is widespread in schools across the country, particularly in institutions of higher education. Sexual harassment disproportionately impacts women and girls.

- In grades 7-12, 56% of girls and 40% of boys are sexually harassed in any given school year.[1] More than 1 in 5 girls ages 14-18 are kissed or touched without their consent.[2]

[1] Catherine Hill & Holly Kearl, *Crossing the Line: Sexual Harassment at School*, AAUW (2011) [hereinafter *Crossing the Line*], *available at* https://www.aauw.org/research/crossing-the-line.
[2] National Women's Law Center, *Let Her Learn: Stopping School Pushout for: Girls Who Have Suffered Harassment and Sexual Violence* at 1 (Apr. 2017) [hereinafter *Let Her Learn: Sexual Harassment and Violence*], *available at* https://nwlc.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence.

- During college, 62% of women and 61% of men experience sexual harassment.[3] More than 1 in 5 women and nearly 1 in 18 men are sexually assaulted in college.[4]
- Men and boys are far more likely to be victims of sexual assault than to be falsely accused of it.[5]

Students from historically marginalized and underrepresented groups are more likely to experience sexual harassment than their peers:

- 56% of girls ages 14-18 who are pregnant or parenting are kissed or touched without their consent.[6]
- More than half of LGBTQ students ages 13-21 are sexually harassed at school.[7]
- Nearly 1 in 4 transgender and gender non-conforming students are sexually assaulted during college.[8]
- Students with disabilities are 2.9 times more likely than their peers to be sexually assaulted.[9]

Sexual harassment occurs both on campus and in off-campus spaces closely associated with school. In fact, only 8% of all student sexual assaults occur on school property.[10] With nearly 9 in 10 college students living off campus,[11] it is not surprising that an estimated 41% of college sexual assaults involve

[3] Catherine Hill & Elena Silva, *Drawing the Line: Sexual Harassment on Campus*, AAUW at 17, 19 (2005) [hereinafter *Drawing the Line*], *available at* https://history.aauw.org/aauw-research/2006-drawing-the-line (noting difference in the types of sexual harassment and reactions to it).

[4] E.g., David Cantor et. al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, ASSOCIATION OF AMERICAN UNIVERSITIES at 13-14 (Sept. 2015) [hereinafter *AAU Campus Climate Survey*], *available at* https://www.aau.edu/key-issues/aau-climate-survey-sexual-assault-and-sexual-misconduct-2015.

[5] *See* Tyler Kingkade, *Males Are More Likely To Suffer Sexual Assault Than To Be Falsely Accused Of It*, HUFFINGTON POST (Dec. 8, 2014) [last updated Oct. 16, 2015], *available at* https://www.huffingtonpost.com/2014/12/08/false-rape-accusations_n_6290380.html (citing Centers for Disease Control and Prevention, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 FINDINGS ON VICTIMIZATION BY SEXUAL ORIENTATION, *available at* https://www.cdc.gov/ViolencePrevention/pdf/NISVS_SOfindings.pdf).

[6] National Women's Law Center, *Let Her Learn: Stopping School Pushout for Girls Who Are Pregnant or Parenting* at 12 (2017) [hereinafter *Let Her Learn: Pregnant or Parenting Students*], *available at* https://nwlc.org/resources/stopping-school-pushout-for-girls-who-are-pregnant-or-parenting.

[7] Joseph G. Kosciw et al., *The 2018 National School Climate Survey: The Experience of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools,* GLSEN at 26 (2018) [hereinafter *2017 National School Climate Survey*], *available at* https://www.glsen.org/article/2017-national-school-climate-survey-1; *see also* Centers for Disease Control and Prevention, Youth Risk Behavior Survey, MMWR Vol. 65, No. 9 (Aug. 12, 2016), *available at* https://www.cdc.gov/mmwr/volumes/65/ss/pdfs/ss6509.pdf (national survey finding that lesbian and bisexual girls and gay and bisexual boys in grades 9-12 experienced higher rates of sexual assault than their straight counterparts).

[8] *AAU Campus Climate Survey, supra* note 4 at 13-14.

[9] National Women's Law Center, *Let Her Learn: Stopping School Pushout for: Girls With Disabilities* at 7 (2017) [hereinafter *Let Her Learn: Girls with Disabilities*], *available at* https://www.nwlc.org/resources/stopping-school-pushout-for-girls-with-disabilities.

[10] RAINN, *Scope of the Problem: Statistics,* https://www.rainn.org/statistics/scope-problem.

[11] Rochelle Sharpe, *How Much Does Living Off-Campus Cost? Who Knows?*, NEW YORK TIMES (Aug. 5, 2016), *available at* https://www.nytimes.com/2016/08/07/education/edlife/how-much-does-living-off-campus-cost-who-knows.html.

off-campus parties.[12] Additionally, studies show that college students are far more likely to experience sexual assault if they are in a sorority (nearly 1.5x more likely) or fraternity (nearly 3x more likely).[13]

b. Sexual harassment and assault are vastly underreported.

Reporting sexual harassment or assault is never easy, and the proposed rules would make it even more difficult for students to come forward and ask their schools to support them and take appropriate corrective action. Nationally, studies estimate that only 7 to 12% of college student survivors[14] and 2% of girls aged 14-18 report sexual assault to their schools or the police.[15] Students do not report sexual assault and harassment for many reasons, including fear of reprisal, lack of knowledge about where or how to complain, stigma, fear of not being believed or taken seriously, and because they think that no one will do anything to help.[16] Students of color, undocumented students,[17] LGBTQI students,[18] and students with disabilities are even less likely than their peers to report sexual assault to law enforcement due to reasonable fears about being subjected to police violence and/or reported to immigration authorities. Survivors of color who are harassed or assaulted by another person of color may not want to report to law enforcement and thereby add to the criminalization of men and boys of color.[19] For students already facing significant social and cultural barriers to reporting sexual harassment and assault, it is especially important that schools and universities provide an accessible and equitable process for reporting harassment and for remedying the hostile educational environment created by such misconduct.

Contrary to the narrative espoused by the Department, most student victims of sexual assault and other gender-based violence do not wish to pursue criminal charges against their perpetrators. In ERA's experience, most students seeking our advice and assistance are concerned primarily with maintaining or recovering their access to education. They want to be heard and feel safe at school. More than

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[12] United Educators, *Facts From United Educators' Report – Confronting Campus Sexual Assault: An Examination of Higher Education Claims, available at* https://www.ue.org/sexual_assault_claims_study (last visited on January 27, 2019).

[13] Jennifer J. Freyd, *The UO Sexual Violence and Institutional Betrayal Surveys: 2014, 2015, and 2015-2016* (Oct. 16, 2014), *available at* https://www.uwire.com/2014/10/16/sexual-assault-more-prevalent-in-fraternities-and-sororities-study-finds (finding that 48.1% of females and 23.6% of males in fraternity and sorority life [FSL] have experienced non-consensual sexual contact, compared with 33.1% of females and 7.9% of males not in FSL).

[14] *Poll: One in 5 women say they have been sexually assaulted in college,* WASHINGTON POST (June 12, 2015), *available at* https://www.washingtonpost.com/graphics/local/sexual-assault-poll; *See also* The White House, The Second Report of the White House Task Force to Protect Students from Sexual Assault at 10 (Jan. 5, 2017), *available at* https://obamawhitehouse.archives.gov/sites/obamawhitehouse.archives.gov/files/images/Documents/1.4.17.VAW%20Event.TF%20Report.PDF (finding that only 7 percent of students who indicated that they had been raped reported the rape to school authorities).

[15] *Let Her Learn: Sexual Harassment and Violence, supra* FN 2 at 1.

[16] RAINN, *Campus Sexual Violence: Statistics, available at* https://www.rainn.org/statistics/campus-sexual-violence.

[17] *See* Jennifer Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation,* NEW YORK TIMES (April 30, 2017), *available at* https://www.nytimes.com/2017/04/30/us/immigrants-deportation-sexual-abuse.html?mcubz=3.

[18] National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey: Executive Summary* 12 (Dec. 2016) [hereinafter *2015 U.S. Transgender Survey*], *available at* https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf.

[19] *See, e.g.,* Lauren Rosenblatt, Q&A with Chardonnay Madkins, *Why it's Harder for African American Women to Report Campus Sexual Assaults, Even at Mostly Black Schools*, L.A. TIMES, Aug. 28, 2017, *available at* https://www.latimes.com/politics/la-na-pol-black-women-sexual-assault-20170828-story.html.

getting the individuals who harassed or assaulted them "punished," most students with whom ERA works identify as their primary goals: (1) getting help to mitigate the harm they or their academic careers have suffered due to the harassment and (2) making sure that other students are not harmed by the respondent's actions and choices in the future.

When schools fail to respond effectively to sexual violence against students, the impact can be devastating.[20] Too many survivors end up dropping out of school because they do not feel safe on campus;[21] some even face expulsion when their grades go down because they experienced trauma.[22] Of the victims we have worked with and heard from over the last three years who have been pushed out of their schools in the wake of severe harassment or sexual violence, 100% have cited their school's response (or lack thereof) as the driving factor of their pushout.

II. The Proposed Rules Would Hobble Title IX Enforcement and Discourage Reporting of Sexual Harassment, to the Detriment of Schools and Students.

For the better part of two decades, the Department has used one consistent standard to determine if a school violated Title IX by failing to adequately address sexual harassment and assault. The Department's 2001 Guidance, which went through public notice-and-comment and has been enforced under both Democratic and Republican administrations,[23] defines sexual harassment as "unwelcome conduct of a sexual nature."[24] The 2001 Guidance requires schools to address student-on-student harassment if *any employee* "knew, or in the exercise of reasonable care should have known" about the harassment. In the context of employee-on-student harassment, the Guidance requires schools to address harassment "whether or not the [school] has 'notice' of the harassment."[25] Under the 2001 Guidance, schools that fail to "take immediate and effective corrective action" would be in violation of

[20] *E.g.,* Audrey Chu, *I Dropped Out of College Because I Couldn't Bear to See My Rapist on Campus,* VICE (Sept. 26, 2017), *available at* https://broadly.vice.com/en_us/article/qvjzpd/i-dropped-out-of-college-because-i-couldnt-bear-to-see-my-rapist-on-campus.

[21] Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout,* 18 (2) J.C. STUDENT RETENTION: RES., THEORY & PRAC. 234, 244 (2015), *available at* https://doi.org/10.1177/1521025115584750 (reporting that 34% of college student survivors drop out).

[22] *E.g.,* Alexandra Brodsky, *How much does sexual assault cost college students every year?,* WASHINGTON POST (Nov. 18, 2014), *available at* https://www.washingtonpost.com/posteverything/wp/2014/11/18/how-much-does-sexual-assault-cost-students-every-year.

[23] The Department has reaffirmed these standards on numerous occasions in policy guidance issued after 2001. *E.g.*, U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter: Sexual Harassment* (Jan. 25, 2006) [hereinafter 2006 Guidance], *available at* https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html (Bush Administration); U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter: Harassment and Bullying* (Oct. 26, 2010) [hereinafter 2010 Guidance], *available at* https://ww2ed.gov/about/offices/list/ocr/letters/colleague/201104.pdf (Obama Administration); U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter: Sexual Violence* at 4, 6, 9, & 16 (Apr. 4, 2011) [hereinafter 2011 Guidance], *available at* https://ww2ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf (same); U.S. Dep't of Educ. Office for Civil Rights, *Question and Answers on Title IX and Sexual Violence* 1-2 (Apr. 29, 2014) [hereinafter 2014 Guidance], *available at* https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf (same); and U.S. Dep't of Educ. Office for Civil Rights, *Questions and Answers on Campus Sexual Misconduct* (Sept. 2017) [hereinafter 2017 Guidance], *available at* https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf (Trump administration).

[24] U.S. Department of Educ., Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001) [hereinafter 2001 Guidance], *available at* https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html.

[25] *Id*. at 10.

Title IX.[26] These standards help effectuate Title IX's nondiscrimination mandate by requiring schools to quickly and effectively respond to serious instances of harassment and enabling the Office for Civil Rights ("OCR") to fulfill its duties of ensuring equal access to education and enforcing students' civil rights.

In the very specific and narrow context of a Title IX lawsuit *seeking monetary damages* against a school because of sexual harassment, the Supreme Court has held that, in order to recover monetary damages, a plaintiff must show that their school was *deliberately indifferent* to *known* sexual harassment that was severe *and* pervasive and which deprived the plaintiff of access to educational opportunities and benefits.[27] In establishing this standard, the Court acknowledged that it was different from that which applied to administrative enforcement or other agency actions. The Court drew a distinction between "defining[ing] the scope of behavior that Title IX proscribes" and identifying the narrower circumstances in which a school's failure to respond to harassment supports a claim for monetary damages.[28] It specifically noted that the Department could still enforce rules addressing a broader range of conduct in order to fulfill Title IX's nondiscrimination mandate.[29] The 2001 Guidance directly addressed this, concluding that it was inappropriate for the Department to limit its enforcement activities to the narrower damages standard and that the Department would continue to enforce the broad protections provided under Title IX. Indeed, in the current proposed regulations, the Department acknowledges that it is "not required to adopt the liability standards applied by the Supreme Court in private suits for money damages."[30]

As set out in further detail below, the actual notice requirement, "severe and pervasive" definition of harassment, and the deliberate indifference standard are meant to be applied in the unique circumstance of determining schools' liability for monetary damages in private suits. They have no place in the far different context of administrative enforcement of Title IX, with its iterative process and focus on voluntary corrective action by schools. By choosing to import those liability standards into the proposed rules, the Department will hobble Title IX enforcement and discourage reporting of sexual harassment, to the detriment of schools and students.

a. The proposed changes to the notice requirements, deliberate indifference standard, and definition of sexual harassment leave students far less protected than employees.

The proposed rules change the definition of sexual harassment and dramatically shrink schools' responsibility to intervene. In many instances, the rules will *prohibit* schools from taking the same steps to protect children that they are *required* to take to protect adults in the workplace. Even where the rules do not affirmatively prohibit schools from taking action, they create a more demanding standard for seeking help and ending sexual harassment for children in schools than for adults in the workplace.

Under Title VII, the federal law that prohibits sex discrimination in employment, employers – including schools – are potentially liable for harassment of an employee if the harassment is "sufficiently severe or pervasive to alter the conditions of [the victim's] employment" and thereby creates a discriminatorily hostile or abusive working environment.[31] If an employee is harassed by a co-worker or other third

[26] *Id*. at 12 (citing 34 CFR §106.31(b)).
[27] *Gebser v. Lago Vista Independent School Dist.,* 524 U.S. 274, 290 (1998) (detailing standard for employee-on-student harassment); *Davis v. Monroe Cty. Bd. Of Educ.,* 526 U.S. 629, 650 (1999) (detailing standard for student-on-student harassment).
[28] *Davis,* 526 U.S. at 639.
[29] *Gebser,* 524 U.S. at 291-92 (citing 20 U.S.C. § 1682).
[30] 83 Fed. Reg. 61468, 61469.
[31] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) (citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986)).

party, the employer is liable if: (1) it "knew or should have known of the misconduct" and (2) failed to take immediate and appropriate corrective action.[32] If the employee is harassed by a supervisor, the school is automatically liable if the harassment resulted in a tangible employment action such as firing or demotion, and otherwise unless the school can prove that the employee unreasonably failed to take advantage of opportunities offered by the school to address harassment.[33] However, under the Department's proposed rules on prohibited sexual harassment under Title IX, a school or program would only be liable for harassment against a student if it is (1) deliberately indifferent to (2) sexual harassment that is so severe, pervasive, *and* objectively offensive that it *denied* the student access to the school's program or activity; (3) the harassment occurred within the school's program or activity; and (4) a school employee with "the authority to institute corrective measures" had "actual knowledge" of the harassment. In other words, under the proposed rules, schools would be held to a far lesser standard in addressing harassment perpetrated against students – including minors under their care – than addressing harassment of adult employees.

Moreover, in contrast to Title VII case law and regulations, which recognize employer responsibility for harassment enabled by supervisory authority, and in contrast to the 2001 Guidance, the proposed rules do not recognize any higher obligation by schools to address harassment of students by school employees who are exercising authority over students. The 2001 Guidance imposed liability when an employee "is acting (or . . . reasonably appears to be acting) in the context of carrying out these responsibilities over students" and engages in sexual harassment.[34] By abandoning this standard, the Department would free schools from liability in many instances even when their employees use the authority they exercise as school employees to harass students. Under the proposed rules, for example, schools would not be held responsible for serious, serial harassment like that committed by Larry Nassar, who assaulted hundreds of student athletes in his role as a school doctor, unless each survivor could show that she gave actual notice of the harassment to a person with the authority to take corrective action and that her access to an educational program was completely denied. Setting the bar this low serves no one.

b. The proposed notice requirement undermines Title IX's discrimination protections by making it harder to report sexual harassment and assault (§§ 106.44(a) & 106.30).

Sexual assault is very difficult to discuss. Proposed sections 106.44(a) and 106.30 would mean that, even when students find the courage to talk to the adult school employees they trust, schools would frequently have no obligation to respond. Under the proposed rules, schools would only be responsible for addressing sexual harassment when one of a small subset of school employees actually knew about the harassment. Schools would not be required to address sexual harassment unless there was "actual knowledge" of the harassment by (i) a Title IX coordinator, (ii) a K-12 teacher (but only for student-on-

[32] *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 759 (1998); *See also* Equal Employment Opportunities Commission, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 18, 1999) [hereinafter EEOC Guidance] (An employer is automatically liable for harassment by "a supervisor with immediate (or successively higher) authority over the employee."), *available at* https://www.eeoc.gov/policy/docs/harassment.html.

[33] *Id.* at 765.

[34] 2001 Guidance, *supra* note 24, at 10. ("if an employee who is acting (or who reasonably appears to be acting) in the context of carrying out these responsibilities over students engages in sexual harassment – generally this means harassment that is carried out during an employee's performance of his or her responsibilities in relation to students, including teaching, counseling, supervising, advising, and transporting students – and the harassment denies or limits a student's ability to participate in or benefit from a school program on the basis of sex, the recipient is responsible for the discriminatory conduct").

student harassment, *not* employee-on-student harassment); or (iii) an official who has "the authority to institute corrective measures."[35] This is a dramatic change, as the Department has long required schools to address *student-on-student* sexual harassment if almost any school employee either knows about it or should reasonably have known about it.[36] The prior standard takes into account the reality that many students disclose sexual abuse to employees who may not have the authority to institute corrective measures, both because students seeking help turn to the adults they trust the most and because students do not know which employees have authority to address the harassment.[37]

The 2001 Guidance also requires schools to address all employee-on-student sexual harassment "whether or not the [school] has 'notice' of the harassment." The 2001 Guidance recognized the particular harms of students being preyed upon by adults, especially those in positions of authority or high status, and students' vulnerability to pressure to remain silent in those circumstances, and accordingly acknowledged schools' heightened responsibilities to address harassment by their employees.

In stark contrast to the 2001 Guidance, under the proposed regulations, if a K-12 student tells a trusted non-teacher school employee – such as a guidance counselor, teacher aide, or athletic coach – that they had been sexually assaulted by another student, the school would have no obligation to help the student.[38] Moreover, if a K-12 student tells any teacher that she has been sexually assaulted by another teacher or other school employee, the school would have no obligation to help her.[39] Perversely, the proposed rules thus provide a more limited duty for K-12 schools to respond to a student's allegations of sexual harassment by a school employee than by a student. And, if a college student told their professor or Residential Advisor ("RA") that they had been raped by another student, by a professor, or by another employee at the university, the university would have no obligation to help that student.

For example, at ERA, we received a call through our advice and counseling program from the mother of an autistic student who had been sexually assaulted (repeatedly) by another student who was the victim's "best and only" friend at school. The student had a full-time aide who was employed by the school, but was not a teacher. When the victim finally confided in the aide and told her about the groping, forced oral sex, and finally rape that occurred almost daily in the restroom, the trusted aide's only response was to advise that the student not to go to the bathroom with their friend anymore, and to tell the victim's mother that "maybe [the two students] shouldn't be friends anymore." Nobody at the school took action to investigate or stop the harassment; in fact, the victim's mother only learned what happened many months later, when her child began engaging in a pattern of self-harm and run-away attempts that ultimately led to confiding in their parents about what had been happening to them at school. Under the proposed rules, this student would have no recourse under Title IX through the school or OCR.

The Department's proposal to absolve universities of any responsibility to act on a college student's report to an RA, professor, or other employee also defies logic and common sense. Many American

[35] Proposed rule § 106.30.
[36] See 2001 Guidance, *supra* note 24, at 13-14 (explaining that the duty to respond to a report of sexual harassment applies to "any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility.")
[37] *Id.* at 10.
[38] *See* proposed rule § 106.30 (83 Fed. Reg. 61496) (for K-12, limiting notice to "a teacher in the elementary and secondary context with regard to student-on-student harassment).
[39] *Id.*

universities are huge.[40] The vast majority of college students are in their late teens and early twenties, living on their own for the first time. Most schools assign professor-mentors, department guides, and especially housing aides, such as RAs, to help students navigate these huge campuses and this new stage of life. Students are placed in proximity to these employees precisely to develop bonds and confidences with people who represent the institution and can serve as channels of information between various departments, campus leadership, and student services. Of the college-aged clients ERA serves, over 95% of students report that they confided in or sought the assistance of a program director, professor, coach, or RA to navigate a sexual trauma that happened to them that is negatively affecting their access to an education. By telling schools that they only have to investigate or respond to reports of harassment and assault that are made to employees with the authority to take corrective action, the proposed rules ignore the realities of student life and undermine school safety.

If the proposed rules had been in place, colleges like Michigan State and Penn State would have had no responsibility to stop Larry Nassar and Jerry Sandusky because their victims reported their experiences of harassment and abuse to school employees like athletic trainers and coaches, who are not school officials with the "authority to institute corrective measures." These proposed provisions would absolve some of the worst Title IX violators of legal liability and leave students in the lurch.

c. The proposed definition of harassment interferes with schools' ability to provide a safe learning environment.

The proposed rule defines sexual harassment as "unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the [school's] education program or activity,"[41] and mandates dismissal of complaints of harassment that do not meet this standard. Under this definition, even if a student reports sexual harassment to the "right person," their school would still be *required* to ignore the student's Title IX complaint if the harassment hasn't yet advanced to a point that it is actually denying a student access to education. Even if it involved harassment of a minor student by a teacher or other school employee, the school would have no obligation to investigate it as a Title IX matter. The Department's proposed definition is out of line with Title IX's purpose and precedent, discourages reporting, and excludes many forms of sexual harassment that interfere with access to educational opportunities.

If schools are mandated to wait until a student has been effectively pushed out of school before acting, it will already be too late to get that student back and on track to complete their education. Some estimates show that upwards of 60 percent of K-12 girls who have been pushed out of school are the victims of rape or threat of rape.[42] Preventing and interrupting pushout is already a herculean task for communities all over the country, especially communities of color whose girls face the highest and most disproportionate pushout rates.[43] The NPRM effectively mandates pushout, destroying the prospects of generations of girls in search of equal access to their education.[44]

[40] The largest 31 public universities in the United States each have upwards of approximately 30,000 enrolled on-campus undergraduates in their programs. The top three public universities by on-campus undergraduate enrollment have over 50,000 such students each. *See*, *e.g.*, https://blog.prepscholar.com/the-biggest-colleges-in-the-united-states.
[41] Proposed rule § 106.30.
[42] MONIQUE W. MORRIS, PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS 136 (2016).
[43] *Id.* at 68-69.
[44] *Id.* at 144-145.

The Department provides no persuasive justification for changing the definition of sexual harassment from that in the 2001 Guidance, which defines sexual harassment as "unwelcome conduct of a sexual nature."[45] The 2001 Guidance definition rightly charges schools with responding to harassment before it escalates to a point that students suffer severe harm. But, under the Department's proposed, narrower definition of harassment, students would be forced to endure repeated and escalating levels of abuse from another student or a teacher before their schools would be required to investigate and stop the harassment. What's more, if a student is turned away by their school after reporting sexual harassment, the student is extremely unlikely to report a second time when the harassment escalates. The proposed rules will have especially devastating consequences for young children: by prohibiting schools from taking appropriate action when young children who are still learning how to behave towards each other engage in harmful conduct, the rules will not only allow the harms to go unaddressed; they will cause schools to lose the opportunity to redirect harmful behavior and prevent children from engaging in more severe harassment or other violent behavior in the future.

The Department repeatedly attempts to justify its proposed definition by citing "academic freedom and free speech."[46] But harassment is not protected speech if it creates a "hostile [or abusive] environment,"[47] i.e., if the harassment limits a student's ability to participate in or benefit from a school program or activity.[48] Moreover, schools have the authority to regulate harassing speech; the Supreme Court held in *Tinker v. Des Moines* that school officials can regulate student speech if they reasonably forecast "substantial disruption of or material interference with school activities" or if the speech involves "invasion of the rights of others."[49] There is no conflict between Title IX's regulation of sexually harassing speech in schools and the First Amendment.

d. Proposed rules §§ 106.30 and 106.45(b)(3) would *require* schools to ignore harassment that occurs outside of a school activity, even when it creates a hostile educational environment.

The proposed rules would require schools to ignore all complaints of off-campus or online sexual harassment that happen outside of the school-sponsored program – even if the student is forced to see their harasser on campus every day and the harassment directly impacts their education as a result. To understand why it is crucial to maintain Title IX protections for off-campus activity, one need only look at the Department's own recent decision to cut off partial funding to the Chicago Public Schools for failing to address two reports of off-campus assault, which the Department described as "serious and pervasive violations under Title IX."[50] In one case, a 10th grade student was forced to perform oral sex in

[45] 2001 Guidance, *supra* note 24, at 2.
[46] 83 Fed. Reg. 61464, 61484. *See also* § 106.6(d)(1), which states that nothing in Title IX requires a school to "[r]estrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution."
[47] *See* Joanna L. Grossman & Deborah L. Brake, *A Sharp Backward Turn: Department of Education Proposes to Protect Schools, Not Students, in Cases of Sexual Violence,* VERDICT (Nov. 29, 2018) [hereinafter *A Sharp Backward Turn*], *available at* https://verdict.justia.com/2018/11/29/a-sharp-backward-turn-department-of-education-proposes-to-protect-schools-not-students-in-cases-of-sexual-violence. ("There is no legitimate First Amendment or academic freedom protection afforded to unwelcome sexual conduct that creates a hostile educational environment.").
[48] 2001 Guidance, *supra* note 24, at 2.
[49] 393 U.S. 503, 513 - 514 (1969).
[50] *See* David Jackson et al., *Federal Officials Withhold Grant Money from Chicago Public Schools, Citing Failure to Protect Students from Sexual Abuse,* CHICAGO TRIBUNE (Sept. 28, 2018), https://www.chicagotribune.com/news/local/breaking/ct-met-cps-civil-rights-20180925-story.html.

an abandoned building by a group of 13 boys, 8 of whom she recognized from school. In the other case, another 10th grade student was given alcohol and sexually abused by a teacher in his car. If the proposed rules are implemented, school districts would be required to dismiss similarly egregious complaints simply because they occurred off campus, even if they result in a hostile educational environment.

The proposed rule also conflicts with Title IX's statutory language, which does not prohibit discrimination based on *where* the underlying conduct occurred but on whether it "exclude[s a person] from participation in, [. . .] denie[s a person] the benefits of, or [. . .] subject[s a person] to discrimination under any education program or activity [. . .]."[51] For almost two decades, the Department's guidance documents have agreed that schools are responsible for addressing sexual harassment if it is "sufficiently serious to deny or limit a student's ability to participate in or benefit from the education program,"[52] regardless of where it occurs.[53] This guidance is consistent with Title IX's express language as well as case law establishing that sexual assault itself (no matter where it happened) and the risk of encountering your assailant, alone, can create a hostile environment.[54]

The Department's proposed rules ignore the reality that sexual harassment that happens off campus and/or outside of a school activity is no less traumatic than on-campus harassment.[55] The negative impact on the student victim's education is typically the same if they are forced to see their harasser regularly at school. For example, if a middle school student is being sexually harassed by her classmates on Instagram or Snapchat, or on the way to or from school in a private carpool, her school would be forbidden from doing anything under Title IX, according to the proposed rules – even if she starts missing class or not attending school to avoid facing her harassers.

At ERA, we know that "off-campus" harassment is equally as likely to create an unsafe and hostile educational environment as harassment that takes place during a school activity. One of our clients was

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[51] 20 U.S.C. § 1681(a).

[52] 2001 Guidance, *supra* note 24, at v.

[53] 2017 Guidance, *supra* note 23, at 1 n.3 ("Schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off campus activities"); 2014 Guidance, *supra* note 23 ("a school must process all complaints of sexual violence, regardless of where the conduct occurred"); 2011 Guidance, *supra* note 23 ("Schools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school's education program or activity"); 2010 Guidance, *supra* note 23 at 2 (finding Title IX violation where "conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school," regardless of location of harassment).

[54] *See, e.g.*, *Roe v. Gustine Unified Sch. Dist.*, 678 F. Supp. 2d 1008, 1027 (E.D. Cal. 2009) ; *T.Z. v. City of N.Y.* 364 F.Supp.2d 263, 270 (E.D.N.Y. 2009); *Brzonkala v. Virginia Polytechnic Inst. State Univ.*, 132 F.3d 949, 959(4th Cir. 1997) (reversed in part on other grounds in *Brzonkala v. Va Polytechnic Inst. & State Univ.*, 169 F.3d 820 (4th Cir. 1999)) (noting that "the rapes themselves created a hostile environment" that defendant institute had a duty to remedy); *Doe v. Coventry Board of Edu*., 630 F. Supp. 2d 226, 233 (D. Conn. 2009) (holding that "a reasonable jury could determine a risk of encountering the perpetrator was enough to create a hostile environment"); *Kelly v. Yale Univ.*, 2003 U.S. Dist. LEXIS 4543, at *3 (D.Conn. March 26, 2003) (finding that a reasonable jury could conclude that "further encounters, of any sort, between a rape victim and her attacker could create an environment sufficiently hostile to deprive the victim of access to educational opportunities provided by a university.")

[55] The Department admitted in the previous leaked draft of the NPRM that 41% of college sexual assaults occur off campus. *See* Letter from Anne C. Agnew to Paula Stannard et al., *HHS Review: Department of Education Regulation - Noon September 10,* U.S. DEP'T OF HEALTH & HUMAN SERVICES at 78 n.21 (Sept. 5, 2018) [*hereinafter* Draft NPRM], *available at* https://atixa.org/wordpress/wp-content/uploads/2018/09/Draft-OCR-regulations-September-2018.pdf.

gang-raped at an off-campus party by high school classmates, who took pictures of her body immediately after the rape and posted them on social media. When the School Resource Officer learned about the rape, he called the victim out of class to ask her irrelevant and traumatizing questions (such as, "Were you a virgin?"). After this interview, he escorted her off campus, advising her not to return for the rest of that academic year because her presence was distracting to other students and "everyone was talking about what happened." When the Assistant Vice Principal learned about the rape, he reportedly asked another employee to "make sure we don't have to do anything for [the student]." The Department's proposed rules tell administrators like this Assistant Vice Principal that the answer is simple: they don't.

Almost 9 in 10 college students live off campus[56] and much of student life takes place outside of school-sponsored activities. Under the proposed rules, if a student were assaulted off campus by a professor, his college would have zero obligation to investigate that assault as a Title IX matter – even if the student has to continue taking the professor's class. If a college student were raped at an off-campus party, their school wouldn't need to investigate – even if they are forced to confront their rapist every day in class, the dining hall, or residential hallways. At ERA, we have received calls from students harassed by professors who insisted on going over required final papers and answering questions about upcoming finals at coffee shops off campus. We assisted a graduate student whose professor-mentor knew where she lived (off campus) and showed up unannounced at their apartment one night, then proceeded to drug and molest her. The proposed rule may even prevent schools from addressing assault or harassment that occurs in fraternity and sorority houses, which are usually off campus.[57] This is particularly troubling in light of the high rates of sexual assault associated with membership in a fraternity or sorority.[58] Moreover, living on campus is an expensive luxury. Many independent students, returning (older) students, low-income students, students of color, LGBTQI students, and former foster youth are struggling to make ends meet while making it through college. They need the civil rights protections promised to them by Title IX to follow them as they eat, work, and live in the surrounding community.

The proposed rule would pose particular risks to students at community colleges and vocational schools. Because none of these students live on campus, when they are harassed by other students or by faculty members, it is especially likely to occur off campus. Stripping protections from community college students will have an especially negative impact in California, home to the most diverse college student population in the nation, whose community college system educates over 2.1 million students and consists of 114 non-residential colleges. For example, in one case ERA worked on, a community college professor demanded that certain female students answer his calls after hours, meet him off campus to go over their coursework, and allow him to drive them home after class. Under the proposed rules,

[56] Sharpe, *How Much Does Living Off-Campus Cost?, supra* note 11.

[57] Although the preamble mentions one case where a Kansas State college fraternity was considered an "education program or activity" for the purposes of Title IX, the Department emphasizes that there are many "factors" and that the determination would be specific to each incident. For example, it would depend on whether the school "owned the premises; exercised oversight, supervision, or discipline; or funded, sponsored, promoted, or endorsed the event or circumstance" (83 Fed. Reg. 61468). This multi-factor test is not only unnecessarily unclear and confusing but also is not included in the proposed regulatory language, making it difficult for students and schools to understand their rights and obligations under Title IX. Schools might certainly conclude that § 106.30 and § 106.45(b)(3) mandates dismissal of complaints from all students who are sexually assaulted at unrecognized fraternities, sororities, and other unrecognized social clubs; at unaffiliated local bars and clubs; in non-residential housing; and through online channels in many instances.

[58] Freyd, *supra* note 13.

these students would have no recourse to hold their schools accountable because the harassment happened off campus.

Our organization hears and sees firsthand how prevalent off-campus sexual harassment is and how much it impacts students' access to educational programs and activities. We receive daily requests for assistance from victims of harassment who must face their harassers or assailants in class, on athletic teams, and in on-campus housing. It is simply unfathomable that the Department seeks to bar schools from investigating these matters and abandon their students in this way.

e. The Department's proposed "deliberate indifference" standard would allow schools to do virtually nothing in response to complaints of sexual harassment and assault.

The "deliberate indifference" standard adopted in the proposed rules is a significant change from the Department's current policy guidance, which requires schools to act "reasonably" and "take immediate and effective corrective action" to resolve harassment complaints.[59] Under the proposed rules, schools would merely have to refrain from being "deliberately indifferent" to harassment. In other words, any response to harassment would comply with Title IX as long as it was not *clearly* unreasonable. This will effectively preclude any challenge to a school's response to harassment if that response comports with the various procedural requirements set out in the proposed rules. The practical effect – and apparent purpose – of adopting a "deliberate indifference" standard for determining whether a school violated Title IX will be to shield schools from any accountability under Title IX, even when they mishandle complaints, fail to provide effective supports or safety measures for survivors, and wrongly determine against the weight of the evidence that an accused harasser was not responsible for sexual assault. In fact, as explained above and below, many of the requirements of the NPRM are themselves acts of deliberate indifference – ignoring off-campus harm even if it affects on-campus educational equity; allowing respondents and their attorneys to directly cross-examine survivors of sexual assault in on-campus proceedings; prohibiting accommodations for a survivor to be able to continue their education if those accommodations "unreasonably burden" the respondent; and allowing schools to pursue mediation in cases of sexual assault. Although these actions and failures to act clearly demonstrate deliberate indifference to the civil rights of sexual harassment victims, a school engaging in such conduct in response to a report of sexual harassment in order to comply with the proposed rule will be able to cite that effort at compliance to insulate itself from liability in a civil action. In this way, the proposed rules create a Catch-22 in which a complainant can never prevail – neither can s/he safely receive equal access to an education, nor can s/he hold the school legally responsible for failing to do so.

III. The Proposed Rules Impermissibly Limit the "Supportive Measures" Available to Complainants (§ 106.30).

Under the proposed rules, even if a student suffered on-campus harassment *and* it was "severe, pervasive, and objectively offensive," the school would still be able to deny the student the "supportive measures" needed to stay in school. The proposed rules allow schools to deny these requests on the grounds that the requested measures are "disciplinary," "punitive," or "unreasonably burden [] the other party." For example, if a school believed that transferring a named harasser to another class or dorm would "unreasonably burden" the harasser, it could force a survivor to change all of their own classes and housing assignments in order to avoid their harasser.

At ERA, we worked with a student whose high school acknowledged that another student likely trapped and violently groped her at an athletic event. The school had surveillance footage of the assailant

[59] 2001 Guidance, *supra* note 24, at 12.

stalking the victim at school and lying in wait behind lockers, around corners, outside of her classroom, for up to a year after the original assault. There was also reason to believe he had broken into her family's home when they were away. The school initially insisted that the only accommodations it could provide the victim were to suggest that she exit the school and walk around the outside perimeter to get from one classroom to the next rather than through the hallways in order to avoid her assailant-stalker and his friends, who would verbally harass and shove and trip her as she passed them. This is a public high school in an urban area that spans two full city blocks. The school later offered the victim alternative classes that were held off campus, some nearly a half-hour drive away from campus, with an accompanying on-campus class schedule that did not allow for transportation time between the distant class locations. Finally, the school acknowledged to the student that they owed her a duty to protect her, and that they feared for her safety, but because they had a policy of not altering the schedule or negatively impacting the convenience of a respondent, they suggested she leave the school and enroll in independent study from home. When the complainant tried to transfer to a neighboring district, her school refused to sign off on the transfer.

Under the new proposed rules, this school's response to recognized sexual harassment would not only be permissible, it might be required. By conflating "equitable" (meaning, fundamentally fair) with "equal" (meaning, the same), the proposed rules undermine the protections that Title IX is supposed to provide to sexual harassment complainants in direct contravention of the 2001 Guidance, which reiterates the importance of ensuring that interim measures are "designed to minimize, as much as possible, the burden on *the student who was harassed*," and that "steps to accord due process rights do not restrict or unnecessarily delay the protections provided by Title IX *to the complainant*."[60] As demonstrated by the example above and discussed in further detail below (*see* Section V), it is clearly "inequitable" (i.e., fundamentally unfair) to place the burden of adjustment and accommodation on the victim of harassment or assault, even where doing so is the consequence of providing "equal" remedies to both the complainant and respondent.

In addition, schools may interpret this proposed rule as prohibiting *one-way* no-contact orders against an assailant and requiring survivors to agree to a *mutual* no-contact order, which effectively punishes them for reporting their rape.[61] This is a departure from longstanding practice under the 2001 Guidance, which instructed schools to "*direct[] the harasser to have no further contact with the harassed student*" but not vice-versa.[62] And groups such as the Association of Student Conduct Administration ("ASCA") agree that "[e]ffective interim measures, including . . . *actions restricting the accused*, should be offered and used while cases are being resolved, as well as without a formal complaint."[63]

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[60] *Id.* at 16-17 (emphasis added).

[61] Experts have recognized for decades that *mutual* no-contact orders are harmful to victims, for a multitude of reasons, including because abusers often manipulate their victims into violating the mutual order. *E.g.,* Joan Zorza, *What is Wrong with Mutual Orders of Protection?* 4(5) DOMESTIC VIOLENCE REP. 67 (1999), *available at* https://www.civicresearchinstitute.com/online/article.php?pid=18&iid=1005. Mutual no-contact orders also invite retaliatory and further harassing behavior. In particular, ERA has observed them being used to turn the tables against complainants and delay investigations of actual harassment or assault while claim after claim is leveled against the complainant for allegedly violating the no-contact order supposedly put in place to protect her, often leading to full investigations into facially spurious, retaliatory counter-claims. This creates an effective and vicious mechanism to push a complainant to drop her original complaint.

[62] 2001 Guidance, *supra* note 24, at 16.

[63] Association for Student Conduct Administration, *ASCA 2014 White Paper: Student Conduct Administration & Title IX: Gold Standard Practices for Resolution of Allegations of Sexual Misconduct on College Campuses* 2 (2014)

IV. The Proposed Rules Would Allow Schools to Claim "Religious" Exemptions for Violating Title IX with No Warning to Students or Prior Notification to the Department.

The current rules allow religious schools to claim religious exemptions by notifying the Department in writing and identifying which Title IX provisions conflict with their religious beliefs. The proposed rules remove that requirement and permit schools to opt out of Title IX without notice or warning to the Department or students. This would allow schools to conceal their intent to discriminate, exposing students to harm, especially women and girls, LGBTQI students, pregnant or parenting students (including those who are unmarried), and students who access or attempt to access birth control or abortion services.[64] It also allows schools to play a run-around game of proxy discrimination, in which they can discriminate first and claim a religious tenet later. This is especially problematic as ERA has seen that, upon receiving notice of an on-campus rape, religious schools swiftly punish the victim, often including suspension or expulsion, for "violating the institution's belief in abstinence before marriage," or violating the policies of a dry campus if alcohol or drugs were involved, while absolving the assailant. The NPRM would sanction and enable this behavior.

Further, the Department's proposed assurances directly conflict with the current[65] and proposed[66] rules requiring that each covered educational institution "notify" all applicants, students, employees, and unions "that it *does not* discriminate on the basis of sex." By requiring a school to tell students that it does not discriminate while simultaneously allowing it to opt out of anti-discrimination provisions whenever it chooses, the Department is creating a system that enables "religious" schools to actively mislead students. This bait-and-switch practice demonstrates that the Department is more interested in protecting "religious" schools from liability when they discriminate than protecting students from discrimination at these schools.

V. The Grievance Procedures Required by the Proposed Rules Would Impermissibly Tilt the Process in Favor of Named Harassers, Re-Traumatize Complainants, and Conflict with Title IX's Nondiscrimination Mandate.

Current Title IX regulations require schools to "adopt and publish grievance procedures that provide for a prompt and equitable resolution of student and employee complaints" of sexual misconduct.[67] The proposed rules purport to require "equitable" processes as well.[68] However, the proposed rules are riddled with language that would require schools to conduct their grievance procedures in a fundamentally *inequitable* way that favors respondents.

[hereinafter *ASCA 2014 White Paper*], *available at* https://www.theasca.org/Files/Publications/ASCA%202014%20White%20Paper.pdf.

[64] Transgender students are especially at risk because this proposed change threatens to compound the harms created by (i) the Department's decision in February 2017 to rescind Title IX guidance on the rights of transgender students; (ii) the Department's decision in February 2018 to stop investigating civil rights complaints from transgender students regarding access to sex-segregated facilities; and (iii) HHS's leaked proposal in October 2018 for the Department and other federal agencies to define "sex" to exclude transgender, non-binary, and intersex students. Erica L. Green et al., *'Transgender' Could Be Defined Out of Existence Under Trump Administration,* NEW YORK TIMES (Oct. 21, 2018), available at https://nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html.

[65] 34 C.F.R. § 106.9(a).

[66] Proposed rule § 106.8(b)(1).

[67] 34 C.F.R. §106.8(b).

[68] *See* proposed rule § 106.8(c).

The Department repeatedly uses the purported need to increase protections of respondents' "due process rights" to justify weakening Title IX protections for complainants and proposes a provision specifying that nothing in the rules would require a school to deprive a person of their due process rights.[69] ***But the current Title IX regulations already provide more rigorous due process protections than are required under the Constitution.*** The Supreme Court has held that students facing short-term suspensions from public schools require only "some kind of" "oral or written notice" and "some kind of hearing."[70] The Court has explicitly said that a 10-day suspension does not require "the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident."[71] Furthermore, the Department's 2001 Guidance already instructs schools to protect the "due process rights of the accused,"[72] and notes that while the rights established under Title IX must be interpreted consistent with any federally guaranteed due process rights involved in a complaint proceeding, schools and programs should ensure that "steps to accord due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant."[73] Adding section 106.6(d)(2) provides no new or necessary protections and inappropriately pits Title IX's civil rights mandate against the Constitution when no such conflict exists.

a. The proposed rule's requirement that a respondent be presumed not responsible for harassment is inequitable and inappropriate in school proceedings.

Under section 106.45(b)(1)(iv) of the proposed rules, schools would be required to presume that the reported harassment did not occur, which would ensure partiality to the respondent and conflict with the standard of evidence. This presumption would also exacerbate rape myths upon which many of the proposed rules are based – namely, the myth that women and girls often lie about sexual assault. The presumption of innocence is a criminal law principle, incorrectly imported into this context;[74] under which criminal defendants are presumed innocent until proven guilty because their very liberty is at stake. There is no such principle in civil proceedings or civil rights proceedings.

Section 106.45(b)(1)(iv) would only encourage schools to ignore or punish historically marginalized and underrepresented groups that report sexual harassment for "lying" about it.[75] Schools may be more likely to ignore or punish survivors who are women and girls of color,[76] pregnant and parenting

[69] Proposed rule § 106.6(d)(2).
[70] *Goss v. Lopez,* 419 U.S. 565, 566, 579 (1975).
[71] *Goss* at 583. *See also Gomes v. Univ. of Maine Sys.*, 365 F. Supp. 2d 6, 23 (D. Me. 2005); *B.S. v. Bd. Of Sch. Trs.*, 255 F. Supp. 2d 891, 899 (N.D. Ind. 2003); *Coplin v. Conejo Valley Unified Sch. Dist.,* 903 F. Supp. 1377, 1383 (C.D. Cal. 1995); *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 247 (D. Vt. 1994).
[72] 2001 Guidance, *supra* note 24, at 22.
[73] *Id.* at 22.
[74] *See also* the Department's reference to "inculpatory and exculpatory evidence" (§ 106.45(b)(1)(ii)), the Department's assertion that "guilt [should] not [be] predetermined" (83 Fed. Reg. 61464), and Secretary DeVos's discussion of the "presumption of innocence" (Betsy DeVos, *Betsy DeVos: It's time we balance the scales of justice in our schools,* WASHINGTON POST (Nov. 20, 2018), *available at* https://www.washingtonpost.com/opinions/betsey-devos-its-time-we-balance-the-scales-of-justice-in-our-schools/2018/11/20/8dc59348-ecd6-11e8-9236-bb94154151d2_story.html
[75] *E.g.,* Tyler Kingkade, *When Colleges Threaten To Punish Students Who Report Sexual Violence,* HUFFINGTON POST (Sept. 9, 2015), *available at* https://www.huffingtonpost.com/entry/sexual-assault-victims-punishment_us_55ada33de4b0caf721b3b61c.
[76] *E.g.,* Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color,* 42 HARVARD J.L. & GENDER 1, 16, 24-29 (forthcoming), *available at* https://ssrn.com/abstract=3168909; *See also* National Women's Law Center, *Let Her Learn: A Toolkit To Stop*

students,[77] and LGBTQI students[78] because of harmful race and sex stereotypes that label them as "promiscuous."

Women and girls of color: Women and girls of color already face unfair discipline due to race and sex stereotypes.[79] Schools are also more likely to ignore, blame, and punish women and girls of color who report sexual harassment due to harmful race and sex stereotypes that label them as "promiscuous."[80] For example, Black women and girls are commonly stereotyped by schools as "Jezebels," Latina women and girls as "hotblooded," Asian American and Pacific Islander women and girls as "submissive, and naturally erotic," Native women and girls as "sexually violable," and multiracial women and girls as "vulnerable [and] historically products of sexual and racial domination."[81] Black women and girls are especially likely to be punished by schools. For example, the Department's 2013-14 Civil Rights Data Collection ("CRDC") shows that Black girls are five times more likely than white girls to be suspended in K-12 schools, and that while Black girls represented 20% of all preschool enrolled students, they were 54% of preschool students who were suspended.[82] The Department's 2015-16 CRDC again shows that Black girls are more likely to be suspended and expelled than other girls.[83] Schools are also more likely to punish Black women and girls by labeling them as the aggressor when they defend themselves against their harassers or when they respond to trauma because of stereotypes that they are "angry" and "aggressive."[84]

Pregnant or parenting students: Women and girls who are pregnant or parenting are more likely to experience sexual harassment than their peers, due in part to the stereotype that they are more "promiscuous" because they have engaged in sexual intercourse in the past. For example, 56% of girls ages 14-18 who are pregnant or parenting are kissed or touched without their consent.[85]

School Pushout for Girls of Color 1 (2016) [hereinafter *Let Her Learn: Girls of Color*], *available at* https://nwlc.org/resources/let-her-learn-a-toolkit-to-stop-school-push-out-for-girls-of-color.

[77] Chambers & Erausquin, *The Promise of Intersectional Stigma to Understand the Complexities of Adolescent Pregnancy and Motherhood,* JOURNAL OF CHILD ADOLESCENT BEHAVIOR (2015), *available at* https://www.omicsonline.org/open-access/the-promise-of-intersectional-stigma-to-understand-the-complexities-ofadolescent-pregnancy-and-motherhood-2375-4494-1000249.pdf

[78] *See, e.g.,* David Pinsof, et al., *The Effect of the Promiscuity Stereotype on Opposition to Gay Rights* (2017), *available at* https://doi.org/10.1371/journal.pone.0178534.

[79] *Let Her Learn: Girls of Color, supra* note 77 at 1.

[80] *See, e.g.* Cantalupo, *supra* note 77 at 16, 24-29.

[81] Cantalupo at 24-25 (internal quotations and brackets omitted).

[82] U.S. Dep't of Education, Office for Civil Rights, *A First Look: Key Data Highlights on Equity and Opportunity Gaps in Our Nation's Public Schools,* at 3 (June 7, 2016; last updated Oct. 28, 2016), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf.

[83] U.S. Dep't of Education, Office for Civil Rights, *School Climate and Safety: Data Highlights on School Climate and Safety In Our Nation's Public Schools* (Apr. 2018), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf.

[84] NAACP Legal Defense and Educational Fund, Inc. & National Women's Law Center, *Unlocking Opportunity for African American Girls: A Call to Action for Educational Equity* 5, 18, 20, 25 (2014), *available at* https://nwlc.org/wp-content/uploads/2015/08/unlocking_opportunity_for_african_american_girls_report.pdf. *See also* Sonja C. Tonnesen, *Commentary: "Hit It and Quit It": Responses to Black Girls' Victimization in School,* 28 BERKELEY J. GENDER, L. & JUST. 1 (2013), *available at* https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1312&context=bglj.

[85] *Let Her Learn: Pregnant or Parenting Students, supra* note 6 at 12.

LGBTQ students: LGBTQ students are more likely to experience sexual harassment than their peers. For example, more than half of LGBTQ students ages 13-21 are sexually harassed at school,[86] and nearly 1 in 4 transgender and gender non-conforming students are sexually assaulted during college.[87] However, LGBTQ students are also less likely to report sexual assault to school authorities or the police because they are rightfully concerned about further discrimination or retaliation due to their LGBTQ status.[88] They are also less likely to be believed due to stereotypes that they are more "promiscuous" or bring the "attention" upon themselves.

Students with disabilities: As the Department notes in the preamble to the proposed rules,[89] students with disabilities have different experiences, challenges, and needs. But the proposed rules are especially harmful to students with disabilities, who already face additional barriers to equal access to education and are 2.9 times more likely than their peers to be sexually assaulted.[90] They are also less likely to be believed due to stereotypes about people with disabilities and often have greater difficulty describing the harassment they experience.[91]

The proposed rule's presumption in favor of respondents conflicts with the current Title IX rules[92] and other proposed rules,[93] which require that schools provide "equitable" resolution of complaints. A presumption in favor of one party against the other is not equitable. This proposed presumption is also in significant tension with proposed section 106.45(b)(1)(ii), which states that "credibility determinations may not be based on a person's status as a complainant" or "respondent."

b. The proposed rules would improperly require survivors and witnesses in college and graduate school to submit to live cross-examination by their named harasser's advisor of choice, causing further trauma.

Section 106.45(b)(3)(vii) of the proposed rules requires colleges and graduate schools to conduct a "live hearing," and requires parties and witnesses to submit to cross-examination by the other party's "advisor of choice" – often an attorney who is prepared to grill the survivor about the traumatic details of the assault, or possibly an angry parent or a close friend of the named harasser. The adversarial and contentious nature of cross-examination would further traumatize college and graduate school survivors who seek help through Title IX. Being asked detailed, personal, and humiliating questions by a person of the respondent's choosing – questions often rooted in gender stereotypes and rape myths that tend to blame victims for the assault they experienced[94] – would understandably discourage many students, both parties and witnesses, from participating in a Title IX grievance process, chilling those who have experienced or witnessed harassment from coming forward. Nor would the proposed rules entitle the survivor to the procedural protections that witnesses have during cross-examination in the criminal

[86] 2017 National School Climate Survey, *supra* note 7 at 26.
[87] *AAU Campus Climate Survey, supra* note 4 at 13-14 (Sept. 2015), *available at* https://www.aau.edu/key-issues/aau-climate-survey-sexual-assault-and-sexual-misconduct-2015.
[88] *2015 U.S. Transgender Survey, supra* note 18 at 12.
[89] 83 Fed. Reg. 61483.
[90] *Let Her Learn: Girls with Disabilities, supra* note 9 at 7.
[91] *E.g.* Angela Browne, et al., *Examining Criminal Justice Responses to and Help-Seeking Patterns of Sexual Violence Survivors with Disabilities* 11, 14-15 (2016), *available at* https://www.nij.gov/topics/crime/rape-sexual-violence/Pages/challenges-facing-sexual-assault-survivors-with-disabilities.aspx.
[92] 34 C.F.R. § 106.8(b).
[93] Proposed rules §§ 106.8(c) and 106.45(b).
[94] Zydervelt, S., Zajac, R., Kaladelfos, A. and Westera, N., *Lawyers' Strategies for Cross-Examining Rape Complainants: Have we Moved Beyond the 1950s?*, BRITISH JOURNAL OF CRIMINOLOGY, 57(3), 551-569 (2016).

court proceedings that apparently inspired this requirement; schools would not be required to apply rules of evidence or make a prosecuting attorney available to object or a judge available to rule on objections. The live cross-examination requirement would also lead to sharp inequities if one party can afford an attorney and the other cannot.

Neither the Constitution nor any other federal law requires live cross-examination in school conduct proceedings. The Supreme Court does not require any form of cross-examination (live or indirect) in disciplinary proceedings in public schools under the Due Process clause. Instead, the Court has explicitly said that a 10-day suspension does not require "the opportunity … to confront and cross-examine witnesses"[95] and has approved at least one circuit court decision holding that expulsion does not require "a full-dress judicial hearing, with the right to cross-examine witnesses."[96] The vast majority of courts that have reached the issue have agreed that live cross-examination is not required in public school disciplinary proceedings, as long as there is a meaningful opportunity to have questions posed by a hearing examiner.[97] The Department itself admits that written questions submitted by students or oral questions asked by a neutral school official are fair and effective ways to discern the truth in K-12 schools,[98] and proposes retaining that method for K-12 proceedings. The Department has not explained why the processes that it considers effective for addressing harassment in proceedings involving 17- or 18-year-old students in high school would be ineffective for 17- or 18-year-old students in college.

Not surprisingly, Title IX and student conduct experts oppose these proposed rules. The Association of Title IX Administrators ("ATIXA") announced in October, 2018 that it opposes live, adversarial cross-examination, instead stating, "investigators should solicit questions from the parties, and pose those questions the investigators deem appropriate in the investigation interviews."[99] The Association for Student Conduct Administration ("ASCA") agrees that schools should "limit[] advisors' participation in student conduct proceedings."[100] The American Bar Association recommends that schools provide "the opportunity for both parties to ask questions through the hearing chair."[101]

c. The proposed rules would allow schools to pressure survivors into traumatizing mediation procedures with their assailants.

Section 106.45(b)(6) of the proposed rules would allow schools to use "any informal resolution process, such as mediation" to resolve a complaint of sexual harassment, as long as the school obtains the students' "voluntary, written consent." Once consent is obtained and the informal process begins, schools may "preclude[] the parties from resuming a formal complaint."

Mediation is a strategy often used in schools to resolve peer conflict, where both sides must take responsibility for their actions and come to a compromise. Mediation is never appropriate for resolving

[95] *Goss*, 419 U.S. at 583. *See also Coplin*, 903 F. Supp. 1377 at 1383; *Fellheimer*, 869 F. Supp. 238 at 247.
[96] *See e.g.*, *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993) (holding no due process violation in expulsion of college student without providing him to right to cross-examination).
[97] *See A Sharp Backward Turn*, *supra* note 47 (*Baum* "is anomalous.").
[98] 83 Fed. Reg. 61476.
[99] Association of Title IX Administrators, *ATIXA Position Statement on Cross-Examining: The Urge to Transform College Conduct Proceedings into Courtrooms* 1 (Oct. 5, 2018), *available at* https://atixa.org/wordpress/wp-content/uploads/2018/10/ATIXA-Position-Statement_Cross-Examination-final.pdf.
[100] *ASCA 2014 White Paper*, *supra* note 63 at 2 (2014).
[101] American Bar Association, *ABA Criminal Justice Section Task Force On College Due Process Rights and Victim Protections: Recommendations for Colleges and Universities in Resolving Allegations of Campus Sexual Misconduct* 8-10 (June 2017).

sexual assault or harassment, even on a voluntary basis. Survivors should not be pressured to "work things out" with their assailant (as though they share responsibility for the assault) or be exposed to the risk of being re-traumatized, coerced, or bullied during the mediation process. As the Department recognized in the 2001 Guidance, students in both K-12 and higher education can be pressured into mediation without informed consent, and even "voluntary" consent to mediation is inappropriate to resolve cases of sexual assault. Experts also agree that mediation is inappropriate for resolving sexual violence. For example, NASPA - Student Affairs Administrators in Higher Education stated in 2018 that it was concerned about students being "pressured into informal resolution against their will."[102] The proposed rule increases pressure on survivors, including minors, to give their "consent" to engaging in mediation or other informal "dispute resolution" processes with their assailants and prevents them from ending an informal process and requesting a formal investigation – even if they change their mind and realize that mediation is too traumatizing to continue.

d. The proposed rules would force many schools to use a more demanding standard of proof to investigate sexual harassment than they would use to investigate other types of student misconduct.

The Department's longstanding practice requires that schools use a "preponderance of the evidence" standard – which means "more likely true than not true" – in Title IX cases to decide whether sexual harassment occurred.[103] Section 106.45(b)(4)(i) of the proposed rule departs from that practice, and establishes a system where schools could elect to use the more demanding "clear and convincing evidence" standard in sexual harassment cases, while allowing all other student misconduct cases to be governed by the preponderance of the evidence standard, even if they carry the same maximum penalties.[104] The Department's decision to allow schools to impose a more burdensome standard in sexual assault cases than in any other student misconduct case appears to rely on the unspoken stereotype and assumption that survivors (who are mostly women) are more likely to lie about sexual assault than students who report physical assault, plagiarism, or other school disciplinary violations.

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[102] NASPA - Student Affairs Administrators in Higher Education, *NASPA Priorities for Title IX: Sexual Violence Prevention & Response* 1-2 [hereinafter *NASPA Title IX Priorities*], *available at* https://www.naspa.org/images/uploads/main/NASPA_Priorities_re_Title_IX_Sexual_Assault_FINAL.pdf.

[103] The Department has required schools to use the preponderance standard in Title IX investigations since as early as 1995 and throughout both Republican and Democratic administrations. For example, its April 1995 letter to Evergreen State College concluded that its use of the clear and convincing standard "adhere[d] to a heavier burden of proof than that which is required under Title IX" and that the College was "not in compliance with Title IX." U.S. Dep't of Educ., Office for Civil Rights, *Letter from Gary Jackson, Regional Civil Rights Director, Region X, to Jane Jervis, President, The Evergreen State College* (Apr. 4, 1995), at 8, *available at* http://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed_ehd_1995.pdf. Similarly, the Department's October 2003 letter to Georgetown University reiterated that "in order for a recipient's sexual harassment grievance procedures to be consistent with Title IX standards, the recipient must … us[e] a preponderance of the evidence standard." U.S. Dep't of Educ., Office for Civil Rights, *Letter from Howard Kallem, Chief Attorney, D.C. Enforcement Office, to Jane E. Genster, Vice President and General Counsel, Georgetown University* (Oct. 16, 2003), at 1, *available at* http://www.ncherm.org/documents/202-GeorgetownUniversity--110302017Genster.pdf.

[104] Proposed rule § 106.45(b)(4)(i) permits schools to use the preponderance standard *only if* it uses that standard for all other student misconduct cases that carry the same maximum sanction *and* for all cases against employees. This is a one-way ratchet: a school would be permitted to use the higher clear and convincing evidence standard in sexual assault cases, while using a lower standard in all other cases.

There is no basis for that sexist belief and in fact men and boys are far more likely to be *victims* of sexual assault than to be *falsely accused* of sexual assault.[105]

The preponderance standard is used by courts in all civil rights cases.[106] It is the only standard of proof that treats both sides equally and is consistent with Title IX's requirement that grievance procedures be "equitable." By allowing schools to use a "clear and convincing evidence" standard, the proposed rule would tilt investigations in favor of respondents and against complainants. The Department argues that Title IX investigations may need a more demanding standard because of the "heightened stigma" and the "significant, permanent, and far-reaching" consequences for respondents if they are found responsible for sexual harassment.[107] But the Department ignores the reality that Title IX complainants face "heightened stigma" for reporting sexual harassment as compared to other types of misconduct, and that complainants suffer "significant, permanent, and far-reaching" consequences to their education (not to mention their lives) if their school fails to meaningfully address the harassment, particularly as 34% of college survivors drop out of college.[108] Both students have an equal interest in obtaining an education. Catering only to the impacts on respondents in designing a grievance process to address harassment is inequitable.

Moreover, Title IX experts support the preponderance standard, which is used to address harassment complaints at over 80% of colleges.[109] The NCHERM Group, whose white paper *Due Process and the Sex Police* was cited by the Department,[110] has promulgated materials that require schools to use the preponderance standard, because "[w]e believe higher education can acquit fairness without higher standards of proof."[111] The white paper by four Harvard professors that is cited by the Department[112] recognizes that schools should use the preponderance standard if "other requirements for equal fairness are met."[113] ATIXA's position is that "any standard higher than preponderance advantages those accused of sexual violence (mostly men) over those alleging sexual violence (mostly women). It makes it harder for women to prove they have been harmed by men. The whole point of Title IX is to create a level playing field for men and women in education, and the preponderance standard does exactly that. *No other evidentiary standard is equitable*."[114] NASPA - Student Affairs Administrators in Higher

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[105] *E.g.*, Kingkade, *supra* note **Error! Bookmark not defined.**.

[106] Katharine Baker et al., *Title IX & the Preponderance of the Evidence: A White Paper* (July 18, 2017), *available at* http://www.feministlawprofessors.com/wp-content/uploads/2017/07/Title-IX-Preponderance-White-Paper-signed-7.18.17-2.pdf (signed by 90 law professors).

[107] 83 Fed. Reg. 61477.

[108] Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18(2) J.C. STUDENT RETENTION: RES., THEORY & PRAC. 234, 244 (2015), *available at* https://doi.org/10.1177/1521025115584750.

[109] Heather M. Karjane, et al., *Campus Sexual Assault: How America's Institutions of Higher Education Respond* 120 (Oct. 2002), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf.

[110] 83 Fed. Reg. 61464 n.2.

[111] The NCHERM Group, *Due Process and the Sex Police* 2, 17-18 (Apr. 2017), *available at* https://www.ncherm.org/wp-content/uploads/2017/04/TNG-Whitepaper-Final-Electronic-Version.pdf.

[112] 83 Fed. Reg. 61464 n.2.

[113] Elizabeth Bartholet, Nancy Gertner, Janet Halley & Jeannie Suk Gersen, *Fairness For All Students Under Title IX* 5 (Aug. 21, 2017), *available at* https://dash.harvard.edu/bitstream/handle/1/33789434/Fairness%20for%20All%20Students.pdf.

[114] Association of Title IX Administrators, *ATIXA Position Statement: Why Colleges Are in the Business of Addressing Sexual Violence* 4 (Feb. 17, 2017), *available at* https://atixa.org/wordpress/wp-content/uploads/2017/02/2017February-Final-ATIXA-Position-Statement-on-Colleges-Addressing-Sexual-Violence.pdf.

Education recommends the preponderance standard: "Allowing campuses to single out sexual assault incidents as requiring a higher burden of proof than other campus adjudication processes make it – by definition – harder for one party in a complaint than the other to reach the standard of proof. Rather than leveling the field for survivors and respondents, setting a standard higher than preponderance of the evidence tilts proceedings to unfairly benefit respondents."[115] ASCA agrees that schools should "[u]se the preponderance of evidence (more likely than not) standard to resolve all allegations of sexual misconduct"[116] because "it is the only standard that reflects the integrity of equitable student conduct processes which treat all students with respect and fundamental fairness."[117]

e. The proposed rules fail to impose clear timeframes for investigations and allow impermissible delays.

The proposed rules require schools to have "reasonably prompt timeframes," but allows them to create a "temporary delay" or "limited extension" of timeframes for "good cause," which includes "concurrent law enforcement activity."[118] In contrast, Title IX guidance issued by the Obama administration recommended that schools finish investigations within 60 days, and prohibited schools from delaying a Title IX investigation just because there was an ongoing criminal investigation.

Under the proposed rules, if there is an ongoing criminal investigation, the school would be allowed to delay its Title IX investigation for an unspecified length of time. However, there is no logic to this policy. While criminal investigations seek to punish an abuser for their conduct, Title IX investigations should seek to ensure that complainants are able to access educational opportunities that become inaccessible due to harassment. Students should not be forced to wait months or years until after a criminal investigation is completed in order to seek resolution from their schools. ATIXA agrees that a school that "delay[s] or suspend[s] its investigation" at the request of a prosecutor creates a safety risk to the survivor and to "other students, as well."[119]

Almost all of the education cases that come to ERA involve students whose schools have granted themselves indefinite extensions, if the school has undertaken a Title IX investigation at all. It is not uncommon for colleges to take upwards of a year to investigate harassment and assault complaints. Schools frequently "lose" investigation files, change Title IX investigators multiple times in the course of a single complaint, or simply fail to devote adequate resources to the Title IX office and claim the investigator is overwhelmed. Drawn out processes do not serve either respondents or complainants, many of whom are yearning to move on with their lives. Complainants are forced to relive the worst moments of their lives, over and over again, while trying to stay focused in school, without a clear end in sight. Instead of pushing schools to recognize when their Title IX investigators need more resources or training so that their proceedings are in fact "prompt and equitable," the proposed rules make the

[115] *NASPA Title IX Priorities*, *supra* note 104 at 1-2.
[116] *ASCA 2014 White Paper, supra* note 63.
[117] Chris Loschiavo & Jennifer L. Waller, *The Preponderance of Evidence Standard: Use In Higher Education Campus Conduct Processes*, ASSOCIATION FOR STUDENT CONDUCT ADMIN, *available at* https://www.theasca.org/files/The%20Preponderance%20of%20Evidence%20Standard.pdf.
[118] Proposed rule § 106.45(b)(1)(v).
[119] Association of Title IX Administrators, *ATIXA Position Statement on the Proposed Legislation Entitled: Promoting Real Opportunity, Success, And Prosperity Through Education Reform (PROSPER) Act (Higher Education Act Reauthorization)* (Jan. 18, 2018), *available at* https://atixa.org/wordpress/wp-content/uploads/2015/03/ATIXA-POSITION-STATEMENT-ON-PROSPER-ACT-Final.pdf.

purgatory of an unending investigation the new normal. This sends the wrong message to schools and will have a further chilling effect on reports of sexual assault and harassment.

f. The proposed rules would require schools to give unequal appeal rights.

Although Secretary DeVos claims that the proposed rules make "[a]ppeal rights equally available to both parties,"[120] they do not in fact provide equal *grounds for appeal* to both parties, as complainants are barred from appealing a school's resolution of a harassment complaint based on inadequate sanctions imposed on a respondent. Allowing only the respondent the right to appeal a sanction decision is both unfair and a violation of the requirement of "equitable" procedures, because survivors are also impacted by sanction decisions. For example, if their abuser is still allowed to live in the same dorm as the survivor, or if they are still in the same classroom, the survivor may experience further trauma.

Experts support equal appeal rights. The American Bar Association recommends that the grounds for appeal include "a sanction disproportionate to the findings in the case (that is, too lenient or too severe)."[121] ATIXA announced in October, 2018 that it supports equal rights to appeal for both parties, "[d]espite indications that OCR will propose regulations that permit inequitable appeals."[122] Even the white paper by four Harvard professors that is cited by the Department (pp. 9-10, n.2) recognizes that schools should allow "[e]ach party (respondent and complainant) [to] request an impartial appeal."[123]

VI. The Proposed Rules are Inconsistent with the Clery Act.

A number of the Department's proposed rules are inconsistent with the Clery Act, as amended by the 2013 Violence Against Women Authorization Act, 20 U.S.C. § 1092, which the Department also enforces, and which also addresses the obligation of colleges and universities to respond to sexual assault and other behaviors that may constitute sexual harassment, including dating violence, domestic violence, and stalking. For example, the proposed rules prohibiting schools from investigating off-campus and online sexual harassment conflict with Clery's reporting requirements. The Clery Act requires colleges and universities to notify all students who report sexual assault, stalking, dating violence, and domestic violence of their rights, regardless of "whether the offense occurred on or off campus."[124] The Clery Act also requires colleges and universities to report all sexual assault, stalking, dating violence, and domestic violence that occur on "Clery geography," which includes all property controlled by a school-recognized student organization (such as an off-campus fraternity); nearby "public property"; and "areas within the patrol jurisdiction of the campus police or the campus security department."[125] The proposed rules would undermine Clery's mandate and create a perverse system in which schools would be required to report instances of sexual assault between school parties that occur off campus to the Department, but would have to dismiss these complaints and not investigate them as Title IX matters. An incident between school parties deemed to fall into a category of danger worthy of Clery reporting and campus notification will not be deemed dangerous enough to the victim and their access to education to

[120] DeVos, *supra* note 75.
[121] American Bar Association, *supra* note 103, at 5.
[122] Association of Title IX Administrators, *ATIXA Position Statement on Equitable Appeals Best Practices* 1 (Oct. 5, 2018), *available at* https://atixa.org/wordpress/wp-content/uploads/2018/10/2018-ATIXA-Position-Statement-Appeals.pdf.
[123] Bartholet, et al., *supra* note 115.
[124] 20 U.S.C. § 1092(f)(8)(C).
[125] 20 U.S.C. § 1092(f)(6)(iii); 20 U.S.C § 1092(f)(6)(iv)); 34 C.F.R. § 668.46(a)).

warrant investigation by the school, even though the institution has disciplinary authority over both parties by virtue of their membership in the campus community.

Clery also requires that investigations of sexual harassment and assault be "prompt, fair, and impartial."[126] But the proposed rules' unclear timeframe for investigations conflicts with Clery's mandate that investigations be prompt. And the many proposed rules discussed above that tilt investigation procedures in favor of the respondent are anything but fair and impartial.

Although the Department acknowledges that Title IX and the Clery Act's "jurisdictional schemes [. . .] may overlap in certain situations,"[127] it fails to explain how institutions of higher education should resolve the conflicts between two different sets of rules when addressing sexual harassment. These different sets of rules would likely create widespread confusion for schools.

VII. The Proposed Rules *Requiring* Schools to Dismiss Harassment Complaints Go Beyond the Department's Authority to Effectuate the Nondiscrimination Provisions of Title IX and Are Practically Unworkable.

Section 106.45(b)(3) of the proposed rules *requires* schools to dismiss complaints of sexual harassment if they don't meet specific narrow standards. If it's determined that harassment doesn't meet the improperly narrow definition of severe, pervasive, *and* objectively offensive harassment, it *must* be dismissed, per the command of the rule. If severe, pervasive, *and* objectively offensive conduct occurs outside of an educational program or activity, including most off-campus or online harassment, it *must* be dismissed. However, the Department lacks the authority to require schools to dismiss complaints of discrimination. Under Title IX, the Department is only authorized to issue rules "to effectuate the [anti-discrimination] provision of [Title IX]." Title IX does not delegate to the Department the authority to tell schools *when they cannot* protect students against sex discrimination.[128] By requiring schools to dismiss certain types of complaints of sexual harassment, without regard to whether those forms of harassment deny students educational opportunities on the basis of sex, section 106.45(b)(3) fails to effectuate Title IX's anti-discrimination mandate and would force many schools that already investigate off-campus conduct under their student conduct policies to abandon these anti-discrimination efforts. While the Department is well within its authority to require schools to adopt civil rights protections to effectuate Title IX's mandate against sex discrimination, it does not have authority to force schools to violate students' and employees' civil rights under Title IX by forcing schools to ignore sexual harassment.

The Department notes that if conduct does not meet the proposed rule's definition of harassment or occurs off campus, schools may still process the complaint under a different conduct code, but not Title IX. This "solution" to its required dismissals of Title IX complaints is confusing and impractical. The proposed regulations offer no guidance or safe harbor for schools to offer parallel sexual harassment proceedings that do not comply with the detailed and burdensome procedural requirements set out in the proposed rule. Schools that did so would no doubt be forced to contend with respondents' complaints that the school had failed to comply with the requirements set out in the NPRM and thus violated respondents' rights as described in the NPRM.

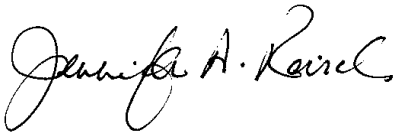
[126] 20 U.S.C. § 1092(f)(8)(b)(iv)(I)(aa).
[127] 83 Fed. Reg. 61468.
[128] *See* Michael C. Dorf, *The Department of Education's Title IX Power Grab*, VERDICT (Nov. 28, 2018), *available at* https://verdict.justia.com/2018/11/28/the-department-of-educations-title-ix-power-grab.

The Department's proposed rules import inappropriate legal standards into agency enforcement, rely on sexist stereotypes about survivors of sexual harassment and assault, and impose procedural requirements that force schools to tilt their Title IX investigation processes in favor of named harassers to the detriment of survivors. Instead of effectuating Title IX's prohibition on sex discrimination in schools, these rules serve only to shield schools from liability when they refuse to address complaints of sexual harassment and assault, and encumber schools that mean to protect their students by tying their hands in the face of obvious safety threats and gross conduct violations. These NPRM increase the liability of caring and conscientious schools to students who violently harm other students, and force all schools, except for those that preemptively exempt themselves from Title IX entirely on the grounds of a religious tenet, to become mini-courts instead of academic institutions enforcing student conduct policies in accordance with education civil rights laws to ensure equitable access to their programs and facilities. Equal Rights Advocates calls on the Department of Education to immediately withdraw this NPRM and instead focus its energies on vigorously enforcing the Title IX requirements that the Department has relied on for decades, to ensure that schools promptly and effectively respond to sexual harassment.

We oppose any changes that would diminish the purpose and spirit of Title IX. Women and girls have faced barriers to achieving equity in education throughout the history of our country. Now is not the time to weaken legal protections and create regulations that in fact further marginalize and silence the very populations Title IX exists to protect.

Thank you for the opportunity to submit comments on the NPRM. Please do not hesitate to contact Jennifer Reisch, Legal Director, at jreisch@equalrights.org or 415-621-2384, or Jessica Stender, Senior Counsel, Workplace Justice and Public Policy, at jstender@equalrights.org or 415-575-2394**,** to provide further information to you as to our comment or the work that we perform in this area of civil rights law.

Sincerely,



Jennifer A. Reisch
Legal Director