January 30, 2019

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

Submitted via www.regulations.gov

**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,

The following comment is submitted on behalf of End Rape on Campus to the Department of Education in response to the proposed rule regarding the enforcement of Title IX in cases of campus sexual violence. We are providing this comment because, based on our extensive experience working with and advocating for student survivors of sexual violence at the campus, state, and national level, we are certain that several facets of the proposed rule threaten survivors' educational rights.

**Who We Are:**
End Rape on Campus (EROC) is a national non-profit organization working to ensure the rights of students who experience sexual violence in an educational context. EROC was founded by survivors of campus sexual violence who experienced violations of their Title IX rights as students. The voices and experiences of survivors and students continue to lead our work today.

**What We Do:**
EROC has three pillars to its work: education, policy, and survivor support.

*Education*: Through our education-based initiatives, EROC trains and develops resources for staff, students, groups, and individuals on how to prevent sexual assault and support survivors, as well as the rights of students under applicable federal and state laws.[1]

*Policy*: Our policy initiatives include advocating for fair and equitable sexual assault and interpersonal violence policies and legislation on the campus, local, state, and federal levels. We support reforms that ensure holistic support for all survivors, statewide affirmative consent standards, and federal accountability for Title IX, Title II, and Clery Act enforcement.[2]

*Survivor Support*: EROC directly assists student survivors and their communities. Our work includes, but is not limited to, establishing support networks, connecting to resources such as lawyers and victim advocates, providing information to students about their civil rights to help them navigate campus Title

[1] http://endrapeoncampus.org/our-team-1/
[2] Id.

IX proceedings filing federal complaints with the Office for Civil Rights, and mentoring student activists. We help students organize for change on campuses, and assist students in working with administrators to ensure best practices are in place and enforced.[3]

EROC unapologetically believes that no individual's education should suffer due to sexual violence. We believe in ensuring fair processes for investigating and adjudicating complaints of sexual violence. We believe in ensuring that these policies are representative of all students including students of color, students of all genders, students of all immigration statuses, students of all abilities, students of all sexualities, and students of all beliefs.

EROC recognizes that this rule will impact survivors' educational opportunities for years to come. We appreciate the opportunity to participate in this process and offer our recommendations for revisions to the proposed rule.

**The Importance of Title IX**

Sexual violence is a pervasive problem which impacts the lives of students across the country. The Association of American Universities' Campus Climate Survey on Sexual Assault and Sexual Misconduct illustrates the epidemic of campus sexual violence. The survey found 16.5% of college seniors experienced sexual contact involving penetration or sexual touching as a result of physical force or incapacitation. Among college seniors, females and transgender, queer, and gender non-conforming (TGQN) are most likely to experience sexual violence. Over 11% of senior females and over 12% of senior TGQN reported being a victim of non-consensual penetration since first enrolling at the university or college. Senior males are at a lower risk (6.3%).[4]

Another study conducted from 2011 to 2013, found when looking at gender identity, sexual assault was highest among transgender people (20.9%), followed by cisgender women (8.6%), and cisgender men (3.6%). Furthermore, bisexual people and people unsure of their identity[5] face high rates of sexual assault (15.7% and 12.6%, respectively). Black students and students of color faced the greatest amount of sexual violence (8.7% and 8.6%, respectively).[6]

Studies on campus sexual violence have primarily been focused on general campus populations, however, more attention should be given to students living with disabilities. An exploratory study was conducted to learn the rates of abuse among university students who have identified as having a disability. Twenty-two percent of participants reported some form of abuse over the last year and nearly 62% had experienced some form of physical or sexual abuse before the age of 17.40% of students who reported abuse in the past year said they had little or no knowledge of abuse-related resources and only 27% reported the incident.[7]

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[3] Id.

[4] David Cantor, Bonnie Fisher, Susan Chibnall, Reanna Townsend, et. al. Association of American Universities (AAU), Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct (September 21, 2015).

[5]The language here is reflective of the study cited. End Rape on Campus is supportive of language that is more inclusive of a variety of sexualities and acknowledges the fluidity of gender identities such as "gender non-binary," "gender fluid," or "genderqueer." It is the belief of End Rape on Campus that the language in this report invalidates those who hold these identities.

[6] Coulter, R. W. S., Mair, C., Miller, E., Blosnich, J. R., Matthews, D. D., & McCauley, H. L. (2017). Prevalence of past-year sexual assault victimization among undergraduate students: Exploring differences by and intersections of gender identity, sexual identity, and race/ethnicity. Prevention Science, 18, 726–736. Advanced online publication.

[7] Findley, P.A., Plummer, S.B., McMahon, S.: Exploring the experiences of abuse of college students with disabilities. J. Interpers. Violence. 31(17):2801–2823 (2015)

Research has been conducted to understand the significant physical and mental health risks that can occur after exposure to sexual violence. Survivors on college campuses often identify "shock, confusion, agitation, fear, and social withdrawal" after an incident of sexual violence.[8] Other long term mental health risks are also prevalent, such as posttraumatic stress disorder (PTSD), depression, acute fear, and suicidality.[9] These short- and long-term effects also take a toll on students' educations. Studies have found the GPA of students who experience both sexual and physical/verbal victimization are negatively affected. In this study, students who experienced sexual violence were more likely to leave school compared with students who experienced physical/verbal violence. Furthermore, the dropout rate for students who had been sexually victimized (34.1%) was higher than the overall university dropout rates (29.8%).[10] Universities need to know how to address these issues which interfere with the fundamental goal of institutions of higher education.

Title IX states that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[11] While early application of this law focused mostly on providing equal facilities, athletic opportunities, and resources for female students, it soon became clear that sexual harassment[12] impacted sex and gender equality in the classroom. In *Gebser v. Lago Vista Independent School District*[13], the Supreme Court held that under Title IX, educational institutions had a responsibility to address and respond to sexual violence. In *Davis v. Monroe County*,[14] the Supreme Court held that this obligation extended to student-on-student sexual harassment (including assault) that was so "severe, pervasive, and offensive objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."[15]

Since Title IX became law in 1972, the Department of Education (ED) has issued rules and guidance to clarify educational institutions' responsibilities under the law. Secretary DeVos rescinded the guidance given in the 2011 Dear Colleague Letter[16] and the 2014 Questions and Answers[17], both propagated by the Department of Education under the previous administration. Despite the rescission of these guidance documents, universities are still obligated to address "severe, pervasive, and objectively offensive harassment." We believe that this proposed rule does not meet this legal obligation, because it does not adequately and equitably protect the rights of all students in the disciplinary process.

**Our Concerns**

The Department of Education's proposed rule is yet again another example of how rape culture has permeated our political institutions and further validates rhetoric rooted in historical and institutional systems of oppression. Polling data shows that there is overwhelming public support for survivors of sexual violence. In 2017, the National Women's Law Center (NWLC) found 94% of voters in the U.S.

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[8] Mengo, C., & Black, B. M. (2015). Violence victimization on a college campus: Impact on GPA and school dropout. Journal of College Student Retention. Advance online publication. http://dx.doi.org/10.1177/ 1521025115584750

[9] Id.

[10] Id.

[11] 20 U.S.C.A. § 1681 (West)

[12] *Alexander v. Yale Univ.*, 631 F.2d 178 (2d Cir. 1980)

[13] *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 118 S.Ct. 1989, 141 L.Ed.2d 277

[14] *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 652, 119 S. Ct. 1661 143 L. Ed. 2d 839 (1999)

[15] Id. at 1675

[16] U.S. Dep't of Educ. Office of 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

[17] U.S. Dep't of Educ. Office of Civil Rights, *Questions 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

agree K-12 schools, colleges, and universities have a responsibility to address campus sexual assault.[18] The poll also illustrated sexual violence is not a partisan issue: 87% of voters, including 85% of Trump voters, support the Department's now-rescinded 2011 Guidance, which outlines schools' responsibilities to promptly investigate reports of sexual assault and provide accommodations and services to students who have been sexually assaulted.[19]

We believe that the proposed rule is a departure from the sole purpose of Title IX: protecting people's access to education free from discrimination based on sex. This proposed rule prioritizes the rights of schools and respondents at the expense of, rather than in equal or equitable support of, complainants' rights. We believe this is due to an incorrect focus placed on concerns exclusively about respondents' rights and fear of the potential for "false accusations." In truth, only 2%-10% of reported cases of sexual assault are false.[20] Given that male college students are statistically more likely to experience sexual violence than be falsely accused of it, a rule that provides the best protection to students of all genders is one which affords both complainants and respondents with rights and opportunities that are equitable.

The Department's disproportionate focus in this regulation on respondent's rights, despite far more students experiencing inequality due to sexual violence than due to issues of fair process, are based on rape myths and sex stereotyping, examples of which are detailed extensively in this comment. Title IX case law has found that sex stereotyping prevents equal access to education. We assert that policymaking based on sex stereotyping also prevents equal access to education, and is in and of itself a direct contradiction of Title IX.

Furthermore, the rule has failed to provide sufficient guidelines for schools regarding the investigation and adjudication of campus sexual violence, creates safe harbors for schools from being found in violation of Title IX, and has inappropriately altered the administrative Title IX hearing processes to mirror criminal law proceedings.

The below section details our grave concerns about the proposed rule and its inevitable disastrous effect on students.

**Our Concerns:**
Our concerns regarding the proposed rule are as follows:

1. **Discouraging of reporting of sexual harassment and, prioritizes protecting schools over protecting survivors of sexual violence**
2. **Implementing the "preponderance of the evidence" standard as the mandatory burden of proof in campus adjudication.**
3. **Severely limiting the definition of sexual harassment to a new definition that is unnecessarily burdensome on complainants.**

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[18] Polling Results: Voters Nationwide Overwhelmingly Support Title IX, Other Protections for Survivors of College and K-12 Sexual Assault, National Women's Law Center, https://nwlc.org/resources/voters-nationwide-overwhelmingly-support-title-ix-other-protections-for-survivors-of-college-and-k-12-sexual-assault/

[19] Id.

[20] Lisak, D., Gardinier, L., Nicksa, S. C., & Cote, A. M. (2010). False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases. Violence Against Women,16(12), 1318-1334. doi:10.1177/1077801210387747.

4. **Allowing religiously affiliated schools to invoke a religious exemption puts the education and safety of survivors in lesbian, gay, bisexual, transgender, queer, intersex, and asexual communities at risk.**
5. **Allowing informal mediation practices as an acceptable means of resolving student complaints involving sexual harassment or assault.**
6. **Requiring direct cross-examination in live hearings leads to retraumatization of survivors of sexual violence.**
7. **Requiring schools to limit their investigations of sexual misconduct to acts that take place in a "program or activity" of the school.**
8. **Lacking acknowledgment of the barriers historically and currently marginalized communities face.**
9. **Limiting of "supportive measures" available to complainants.**
10. **Inconsistencies with the requirements under the Clery Act.**

We would welcome the opportunity to discuss this further with the Department, and to provide any clarification or additional information. Our organization has repeatedly requested that the Secretary meet with survivors, and as we submit this comment, we again urge the Department to delay implementation of this regulation until Secretary DeVos goes on a cross-country listening tour of student survivors. She has only spent, to our knowledge, 90 minutes with survivors of sexual violence during a July 2017 listening session on this issue. We believe this to be a woefully inadequate amount of time. As our concerns with the proposed rule demonstrate, we believe the Department lacks basic understanding of survivors' needs and experiences, and believe the Title IX rule can only account for survivors' experiences after further in-person listening to their first-person narratives. We would be happy to put the Department in contact with thousands of survivors prepared to share their stories, needs, and alternatives to this proposed rule.

Further details on each of these concerns are provided below. We appreciate the opportunity to share our feedback and look forward to participating in similar opportunities in the future.

Sincerely,

End Rape on Campus

## I. <u>The proposed rule fails to respond to the prevalence of sexual harassment in schools.</u>

The proposed rule ignores the frightening prevalence of sexual violence in schools. The proposed rule strays from Title IX's purpose of keeping students safe from sexual abuse and other forms of sexual harassment _ that is, from unlawful discrimination on the basis of sex _ and instead makes it harder for students to report abuse, allows and requires schools to ignore reports when they are made, and unfairly tilts the investigation process in favor of respondents to the direct detriment of survivors. If the Department is seeking to make the Title IX process more fair, we do not believe that preventing reports and limiting investigations will accomplish the Department's stated goal. For the reasons discussed at length in this comment, End Rape on Campus unequivocally opposes the Department's proposed rule.

### a. Sexual violence is far too common in our schools.

Far too many students experience sexual violence:

- In grades 7-12, 56% of girls and 40% of boys are sexually harassed in any given school year.[21] More than 1 in 5 girls ages 14-18 are kissed or touched without their consent.[22]
- During college, 62% of women and 61% of men experience sexual harassment.[23] More than 1 in 5 women and nearly 1 in 18 men are sexually assaulted in college.[24]
- Men and boys are far more likely to be victims of sexual assault than to be falsely accused of it.[25]

Historically and currently disenfranchised and underserved communities 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.[26]
- More than half of LGBTQ students ages 13-21 are sexually harassed at school.[27]
- Nearly 1 in 4 transgender and gender-nonconforming students are sexually assaulted during college.[28]
- 78% of transgender or gender non-conforming individuals are sexually harassed during grades K-12.[29]
- Students with disabilities are 2.9 times more likely than their peers to be sexually assaulted.[30]

While sexual harassment occurs both on-campus and in off-campus spaces closely associated with school, sexual harassment occurs in off-campus spaces closely associated with school with far more frequency:

- Nearly 9 in 10 college students live off campus.[31]

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[21] 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.
[22] National Women's Law Center, *Let Her Learn: Stopping School Pushout for: Girls Who Have Suffered Harassment and Sexual Violence* 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.
[23] Catherine Hill & Elena Silva, *Drawing the Line: Sexual Harassment on Campus*, AAUW 17, 19 (2005) [hereinafter *Drawing the Line*], *available at* https://history.aauw.org/aauw-research/2006-drawing-the-line (noting differences in the types of sexual harassment and reactions to it).
[24] *E.g.*, David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, Association of American Universities 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.
[25] *E.g.*, 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], https://www.huffingtonpost.com/2014/12/08/false-rape-accusations_n_6290380.html.
[26] National Women's Law Center, *Let Her Learn: Stopping School Pushout for Girls Who Are Pregnant or Parenting* 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.
[27] Joseph G. Kosciw et al., *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools*, GLSEN 26 (2018) [hereinafter *2017 National School Climate Survey*], *available at* https://www.glsen.org/article/2017-national-school-climate-survey-1.
[28] *AAU Campus Climate Survey*, *supra* note 4 at 13-14.
[29] National Sexual Violence Resource Center and Pennsylvania Coalition Against Rape, *Sexual Violence & Individuals Who Identify as LGBTQ*, 3 (2012), https://www.nsvrc.org/sites/default/files/Publications_NSVRC_Research-Brief_Sexual-Violence-LGBTQ.pdf
[30] National Women's Law Center, *Let Her Learn: Stopping School Pushout for: Girls With Disabilities* 7 (2017) [hereinafter *Let Her Learn: Girls with Disabilities*], *available at* https://nwlc.org/resources/stopping-school-pushout-for-girls-with-disabilities.
[31] Rochelle Sharpe, *How Much Does Living Off-Campus Cost? Who Knows?*, New York Times (Aug. 5, 2016), https://www.nytimes.com/2016/08/07/education/edlife/how-much-does-living-off-campus-cost-who-knows.html (87%).

- 41% of college sexual assaults involve off-campus parties.[32] 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).[33]
- Only 8% of all sexual assaults occur on school property.[34]
- In instances where sexual assault occurs in off-campus spaces, it is still likely that the assault is taking place by another student. 7 out of every 10 sexual assaults are committed by someone the victim knows, often a peer or fellow student.[35]

**b. Survivors generally underreport instances of sexual harassment and assault.**

Sexual harassment and assault are disproportionately underreported compared to other kinds of misconduct. The proposed rule not only makes it more difficult for survivors to report, it also disincentivizes reporting by creating more legal and institutional barriers. Already, only 12% of college survivors[36] and 2% of girls ages 14-18[37] report sexual assault to their schools or the police. Students often choose not to report for fear of reprisal, because they believe their abuse was not important enough, or because they think the no one would do anything to help.[38] Some students—especially students of color, students who are undocumented,[39] students who are in LGBTQ communities,[40] and students with disabilities—are less likely than their peers to report sexual assault to the police due to increased risk of being subjected to discrimination, police violence and/or deportation.

When schools fail to provide effective responses, the impact of sexual harassment can be devastating.[41] Too many survivors, 34.1%[42], end up dropping out of school because they do not feel safe on campus; some are even expelled for receiving lower grades in the wake of their trauma.[43] This rule abandons survivors of sexual assault and harassment and denies students their civil rights.

## II. <u>The proposed rule encumbers Title IX enforcement, discourages reporting of sexual harassment, and prioritizes protecting schools over protecting survivors.</u>

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

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[32] United Educators, *Facts From United Educators' Report - Confronting Campus Sexual Assault: An Examination of Higher Education Claims*, https://www.ue.org/sexual_assault_claims_study.
[33] 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 have experienced non-consensual sexual contact, compared with 33.1% of females and 7.9% of males not in FSL).
[34] RAINN, *Scope of the Problem: Statistics*, https://www.rainn.org/statistics/scope-problem.
[35] National Crime Victimization Survey (NCVS), The Concise Dictionary of Crime and Justice, 2010-2014 (2015).
[36] *Poll: One in 5 women say they have been sexually assaulted in college*, Washington Post (June 12, 2015), https://www.washingtonpost.com/graphics/local/sexual-assault-poll.
[37] *Let Her Learn: Sexual Harassment and Violence*, *supra* note 22 at 1.
[38] RAINN, *Campus Sexual Violence: Statistics*, https://www.rainn.org/statistics/campus-sexual-violence.
[39] *See* Jennifer Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation*, NY Times (April 30, 2017), https://www.nytimes.com/2017/04/30/us/immigrants-deportation-sexual-abuse.html?mcubz=3.
[40] 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.
[41] *E.g.*, Audrey Chu, *I Dropped Out of College Because I Couldn't Bear to See My Rapist on Campus*, Vice (Sept. 26, 2017), https://broadly.vice.com/en_us/article/qvjzpd/i-dropped-out-of-college-because-i-couldnt-bear-to-see-my-rapist-on-campus.
[42] Mengo, C., & Black, B. M. (2015). Violence victimization on a college campus: Impact on GPA and school dropout. Journal of College Student Retention. Advance online publication. http://dx.doi.org/10.1177/ 1521025115584750
[43] *E.g.*, Alexandra Brodsky, *How much does sexual assault cost college students every year?*, Washington Post (Nov. 18, 2014), https://www.washingtonpost.com/posteverything/wp/2014/11/18/how-much-does-sexual-assault-cost-students-every-year.

Department's 2001 Guidance, which went through public notice-and-comment and has been enforced in both Democratic and Republican administrations,[44] defines sexual harassment as "unwelcome conduct of a sexual nature."[45] 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."[46] Under the 2001 Guidance, schools that do not "take immediate and effective corrective action" violate Title IX. These standards have appropriately guided OCR's enforcement activities, honoring Title IX's nondiscrimination mandate by requiring schools to quickly and effectively respond to serious instances of harassment and fulfilling OCR's purpose of ensuring equal access to education by disallowing schools from using federal funding in a discriminatory manner.

This standard appropriately differs from the higher bar erected by the Supreme Court in the very specific and narrow context of a Title IX lawsuit seeking monetary damages against a school because of sexual harassment. To recover monetary damages, a plaintiff must show that their school was deliberately indifferent to known sexual harassment that was severe and pervasive and deprived a student of access to educational opportunities and benefits.[47] But in establishing that standard, the Court recognized that it was *specific* to private suits seeking monetary damages, *not to administrative enforcement*. It specifically noted that the standard it announced did not affect agency action: the Department was still permitted to administratively enforce rules addressing a broader range of conduct to fulfill Congress' direction to effectuate Title IX's nondiscrimination mandate.[48] It drew a distinction between "defin[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.[49]

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."[50] As set out in further detail below, the Supreme Court's notice requirement, definition of harassment, and deliberate indifference standard, designed to account for the unique circumstances that present themselves when determining monetary liability, have no place in the far different context of administrative enforcement with its focus on voluntary corrective action by schools. By choosing to import those liability standards, the Department

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[44] These standards have been reaffirmed time and time again, in 2006 by the Bush Administration, in 2010, 2011, and 2014 in guidance documents issued by the Obama Administration, and even in the 2017 guidance document issued by the current Administration. 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; 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; 2011 Guidance, 2014 Guidance, 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.

[45] 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.

[46] Id.

[47] *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).

[48] *Gebser*, 524 U.S. at 291-92 (citing 20 U.S.C. § 1682).

[49] *Davis*, 526 U.S. at 639.

[50] 83 Fed. Reg. 61468, 61469.

confuses its enforcement mechanisms with court processes than have no place in administrative proceedings, straying from the purpose of Title IX administrative enforcement, and threatening devastating effects on students.

**a. The proposed rule inappropriately adopts Supreme Court Precedent and promulgates a definition of sexual harassment that is unnecessarily burdensome on survivor/complainants.**

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"[51] 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 has not yet advanced to a point that it is effectively denies a student of their education. Though the guidance is silent about the specifics of this provision, it suggests that a school may even be required to dismiss such a Title IX complaint even if it involved harassment of a minor student by a teacher or other school employee.

The Department does not provide a persuasive justification to change the definition of sexual harassment from that in the 2001 Guidance, which defines sexual harassment as "unwelcome conduct of a sexual nature."[52] The current definition rightly charges schools with responding to harassment and protecting all students before the harassment escalates to obstructing students' access to their education. The Department's proposed definition would require students to be forced to endure severe, repeated and escalating levels of abuse before they are able to ask their schools for help. By the time their school would be legally required to intervene, it might be too late—the student might already be ineligible for an important course, disqualified from a dream college, or derailed from graduating altogether. The proposed definition is out of line with Title IX purposes and precedent, discourages reporting by putting complainants in a position where they must consider whether the harassment they faced "counts" enough for their school to intercede. 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.[53] This obfuscation of the definition of sexual harassment will lead to institutional distrust among survivors, and ultimately harm schools' relationships with their students.

The Department repeatedly attempts to justify its proposed definition by citing "academic freedom and free speech."[54] But harassment is not protected speech if it creates a "hostile environment,"[55] i.e., if the harassment limits a student's ability to participate in or benefit from a school program or activity.[56] And 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

[51] Proposed rule § 106.30 (138).
[52] 2001 Guidance, *supra* note 45.
[53] Campbell, Rebecca, *What Really Happened? A Validation Study of Rape Survivors Help-Seeking Experiences With the Legal and Medical Systems*, 20 Violence and Victims 55, 57 (2005).
[54] 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."
[55] *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.").
[56] 2001 Guidance, *supra* note 45.

rights of others."[57] There is no conflict between Title IX's regulation of sexually harassing speech in schools and the First Amendment.

**b. The proposed rule's notice and deliberate indifference standards and definition of sexual harassment create inconsistent rules for students versus employees.**

Under Title VII, the federal law that addresses workplace harassment, a workplace is potentially liable for harassment of an employee if the harassment is "sufficiently severe *or* pervasive to *alter* the conditions of the victim's employment" (emphasis added). If the employee is harassed by a coworker or other third party, the workplace is liable if (1) it "knew or should have known of the misconduct" and (2) failed to take immediate and appropriate corrective action.[58] If the employee is harassed by a supervisor, the workplace is automatically liable if the harassment resulted in a tangible employment action such as firing or demotion, and otherwise unless the workplace can prove that the employee unreasonably failed to take advantage of opportunities offered by the workplace to address harassment.[59]

Under the proposed rule, a school 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 rule, schools would be held to a far lesser standard in addressing the harassment of students—including minors—under its care than the standard for workplaces addressing harassment of adult employees.

Moreover, in contrast to the Title VII approach, which recognizes employer responsibility for harassment enabled by supervisory authority, as well as in contrast to the 2001 Guidance, the proposed rule does 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.[60] The 2001 Guidance language is consistent with the limited *in forma pauperis* status that post-secondary educations occupy, and is an appropriate standard for an institution that is responsible for its students in a manner that lies somewhere in between K-12 schools and workplace employees. Changing this language frees schools from liability in many instances, even when their employees use the authority they exercise as school employees to harass students. Under the proposed rule, for example, serial abusers like Larry Nassar, who assaulted hundreds of students in his role as a school doctor, would not be held responsible for using his status as an employee to abuse students.

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[57] 393 U.S. 503, 513, 514 (1969).
[58] *Meritor Savings Bank v. Vinson*, 477 US 57, 476, 477 (1986) (internal quotations and brackets omitted); Equal Employment Opportunity 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.
[59] *Meritor,* 477 US at 476, 477 (citing *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2270 (1998); *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2293 (1998)).
[60] 2001 Guidance, *supra* note 45. ("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").

The drastic differences between Title VII and the proposed rule would mean that in many instances schools are *prohibited* from taking the same steps to protect children in schools that they are *required* to take to protect adults in the workplace, as set out further below. And when they are not affirmatively prohibited from taking action, the proposed rule still creates a more demanding standard for children in schools than for adults in the workplace to get help in ending sexual harassment.

**c. 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 rule would require schools to ignore all complaints of off-campus or online sexual harassment that happen outside of a school-sponsored program—even if the student is forced to see their named harasser on campus every day and the harassment directly impacts their education as a result. To understand why it is crucial to maintaining Title IX protections for off-campus activity, one only need to 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 sexual assault, which the Department described as "serious and pervasive violations under Title IX." In one case, a 10th-grade student was forced to perform oral sex in an abandoned building by a group of 13 boys, 8 of which 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 rule becomes final, 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.[61]

The proposed rule conflicts with Title IX's statutory language, and shifts the focus of a report to where the underlying conduct occurred instead of keeping its statutorily required prohibition on discrimination that "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 . . . ." 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," regardless of where it occurs. The statute does not ask where the conduct occurred but instead requires that the conduct interferes with the harassed student's ability to participate or benefit from their own education. The Department's requirement that off-campus complaints be dismissed not only rewrites the history of the interpretation and purpose of Title IX but also requires students to divorce off-campus conduct from its on-campus repercussions. Students who are harassed off-campus are still required to attend classes, go to events, and participate in extra-curricular activities with their named harassers, but under the Department's proposed rule, students who are harassed off-campus cannot access the support and protections of Title IX simply because of the geography of where the assault occurs. This portion of the Department's proposed rule not only creates two classes of complainants, but it also shuts out the thousands of survivors who are assaulted at parties, bars, or online. [62]

The Department's proposed rule ignores the reality that the negative impact on the student's education is typically the same if they are forced to see their named harasser regularly at school. Under the proposed rule, schools are not required to investigate, and in fact, must dismiss assaults that take place in many off-campus settings. Nearly 9 in 10 college students live off-campus, and much of student life

[61] Id.

[62] The Department itself 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 79 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.

takes place outside of school-sponsored activities. Further, this part of the rule ignores students at community colleges, trade schools, cosmetology schools, and other higher education institutions that are not residential. These institutions would be required to do almost nothing since their students do not live on campus. If a community college student is assaulted off-campus by a professor, their college would be required to ignore their complaints—even if they have to continue taking the professor's class. If a college student is raped at an off-campus party, their college would not need to investigate—even if they see their named harasser every day in class, the dining hall, or residential hallways. If schools interpret the proposed rule to prevent them from addressing assault or harassment that occurs off-campus in fraternity and sorority houses, this is particularly troubling: students of all genders are more likely to be sexually assaulted if they belong to a fraternity or sorority.[63]

This portion of the proposed rule is particularly harmful to elementary and secondary school students. Many students, particularly K-12 students, are harassed online, and then have to see their fellow students in the halls at school. In the 2010-11 school year, 36% of girls, 24% of boys, and 30% of all students in grades 7-12 experienced sexual harassment online. 18% of them did not want to go to school, 13% found it hard to study, 17% had trouble sleeping, 8% stayed home from school. Under the proposed rule, school districts would have no obligation to protect those students facing online harassment from seeing their named-harasser at school.

The proposed rule only states a school is "only responsible for responding to conduct that occurs within its "education program or activity" which is defined as "all of the operations of" a school including "any academic, extracurricular, research, [or] occupational training." The proposed regulations provide some guidance about how schools would need to investigate, however, there is no explicit definition of what constitutes an education program or activity.

In some cases, an education program or activity is defined as all operations of a recipients school. The rule points to cases such as *Doe v Brown and Davis*. In *Doe v Brown* an education program or activity includes "university libraries, computer labs, and vocational resources… campus tours, public lectures, sporting events, and other activities at covered institutions"[64]

Based off the *Davis* case*,* misconduct that occurs during school hours and on school grounds is considered to be an education program or activity. Furthermore, *Farmer v Kansas State Univ.* held that a Kansas State University (KSU) fraternity is an educational program or activity even if it is located off-campus because the university "devotes significant resources to the promotion and oversight of the fraternity." It is clear from the cases that the Department cited in support of the "program or activity" restriction that fraternities and sororities *can* count but not that they *must* count. The proposed rule clearly states that the parameters of what is considered "off-campus" for the sake of Title IX will be less stringent than the Clery Act parameters, seeking to bring in more conduct than would be counted under Clery geography alone.

Beyond those few cases, the regulations provide no insight on what is considered to be an "education program or activity" for the purpose of Title IX. Based on the holdings in the cases that the Department cited in this part of the rule, some factors that may be considered include taking into account if the program or activity is:

- owned by the school.
- has oversight from the school.

[63] Freyd, *supra* note 33.
[64] Id.

- supervised by the school.
- subject to discipline by the school.
- funded by the school.
- sponsored or promoted by the school.
- endorsed by the school.

The vagueness around what constitutes a "program or activity" for Title IX eligibility will certainly lead to increased confusion for schools and students. This lack of clarity creates gaps in policy for both school administrators and students leading to possible inaction on the part of universities and underreporting by students. It is impossible to know, without more guidance, how this change will affect university policies, greek life, student clubs and activities and more. Without further clarification on what this piece of the guidance means and how it should be enacted, schools and students are left to figure it out for themselves and survivors of all kinds are left in the dark about what their rights are and how they are protected.

**d. The proposed notice requirement undermines Title IX's discrimination protections by making it harder to report sexual harassment and assault.**

Under the proposed rule, schools would only be responsible for addressing sexual harassment when one of a small subset of school employees had actual knowledge of 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-student harassment, *not* employee-on-student harassment), or (iii) an official who has "the authority to institute corrective measures."[65] The new standard is a dramatic change, as the Department has long required schools to address *student-on-student* sexual harassment if almost *any* school employee[66] either knew about it or should reasonably have known about it.[67] The previous standard takes into account the reality that many students disclose sexual abuse to employees who do not have the authority to institute corrective measures, both because students seeking help turn to the adults they trust the most, like teachers and advisers, and because students are not informed about which employees have authority to address the harassment — they are simply seeking the help of a school official or an adult whom they can trust. The 2001 Guidance also requires schools to address all employee-on-student sexual harassment, "whether or not the [school] has 'notice' of the harassment."[68] The 2001 Guidance recognized the particular harms of students being preyed on by adults and students' vulnerability to pressure from adults to remain silent and accordingly acknowledged schools' heightened responsibilities to address harassment by their employees.

Under the proposed rule, in the K-12 setting, only teachers are mandated reporters for student-on-student harassment, eliminating the requirement for lunch monitors, classroom aids, and other school personnel to report this conduct. This eliminates many people who a child might consider "safe" to disclose to from having to report anything they learn about student-on-student harassment. Unless the student discloses to the "right" school employee, the school has no obligation to help the student.[69] If a

[65] Proposed rule § 106.30.
[66] This duty 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." 2001 Guidance, *supra* note 45 at 13.
[67] *Id* at 14.
[68] *Id.* at 10.
[69] *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).

K-12 student told a teacher that they had been sexually assaulted by another teacher or other school employee, the school would have no obligation to help them.[70] Perversely, the proposed rule thus provides 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. This could require K-12 students to have to repeatedly disclose before they find the "right" person to disclose to, a discouraging process that may prevent them from continuously asking until they find that "right" person. If a college student told their professor or Resident Assistant (RA) that they had been raped by another student, by a professor, or by another employee at the university, the school would have no legal obligation to help the student.

Survivors who come forward to report sexual assault or harassment are incredibly brave. Even though survivors typically know that they will likely be disbelieved, given an administrative runaround, and face the potential of confronting the person who assaulted them, many survivors muster up the courage to speak to someone they trust at their educational institution to receive support. Sections 106.44(a) and 106.30 would mean even when students find the courage to talk to the adult school employees they trust, schools would frequently have no obligation to respond. College students would have to go directly to their Title IX coordinator or another high-ranking university official rather than being able to talk to a teacher or mentor they trust. College students may even think they are making a report by speaking first to a teacher or mentor they trust, and receive no follow up or institutional action, again leading to students having to repeatedly disclose before they find the "right" person to disclose to.

If the proposed rule had been in place, colleges like Michigan State University (MSU) and Pennsylvania State University (Penn State) would have had no responsibility to stop Larry Nassar and Jerry Sandusky—just because their victims reported their experiences to school employees like athletic trainers and coaches, who are not considered to be school officials who have the "authority to institute corrective measures." Under the proposed rule, Ohio State University would have had no responsibility to investigate Jim Jordan and other coaches who ignored sexual violence. These proposed provisions would absolve some of the worst Title IX offenders of legal liability, and create an arbitrary vision for which adults and employees should be absolved of a responsibility to keep students and young people safe. Instead of creating an environment where students can trust their school and the adults around them to ensure their equal access to education, this drastically limits sexual assault survivors' ability to get help, particularly from someone they trust, chilling reporting and allowing those who assault and abuse students to remain unaccountable for their behavior.

**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 by the proposed rule is a much lower standard than that currently required of schools under current guidance, which requires schools to act "reasonably" and "take immediate and effective corrective action" to resolve harassment complaints.[71] Under the proposed rule, by contrast, schools would simply have to not be deliberately indifferent—which means that their response to harassment would be deemed to comply with Title IX as long as it was not *clearly* unreasonable.[72] As long as a school follows various procedural requirements set out in the proposed rule, the school's response to harassment complaints could not be challenged. The practical effects of this proposed rule would shield schools from any accountability under Title IX, even if a school gravely

[70] *See Id.*
[71] 2001 Guidance, *supra* note 45.
[72] Proposed rule § 106.44(b)(4)

mishandles a complaint, fails to provide effective supports for survivors, and wrongly determines against the weight of the evidence that an named harasser was not responsible for sexual assault.

In parsing what this heightened provision will mean in application, it is helpful to turn to Eighth Amendment jurisprudence. While the Eighth Amendment differs in that it provides Constitutionally protected rights to those who are incarcerated, it can be illuminating in that the deliberate indifference standard has long been enshrined in Eighth Amendment law and has therefore been highly litigated. The crucial case *Farmer v. Brennan*, the Supreme Court outlines the confines of the deliberate indifference standard as it applies to the Eighth Amendment.[73] The *Brennan* case sought to clarify what kind of evidence rises to a defendant having actual knowledge of the risk of harm to an incarcerated person. The Court ruled that a plaintiff presenting evidence that shows a substantial risk of person who is incarcerated attacks was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus 'must have known' about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk."[74] The *Brennan* case shows that actual knowledge can be ascertained by officials without the official needing to be told by the affected individual about the risk of harm or the harm itself. Prison officials are held to the deliberate indifference standard to prevent harm to person who is incarcerated. Though school officials are not Constitutionally required to act to protect their students, school officials have been held to be *in loco parentis*, particularly in secondary education settings.[75] Additionally, prison officials can be held liable for not preventing harm to an person who is incarcerated much like school officials can be held liable for not preventing harm to their students.

However, the deliberate indifference standard for this constitutional right is *less* stringent than the standard for students seeking to enforce their Title IX rights under this proposed rule. The proposed standard is so high, in fact, that it is difficult to imagine any scenario where an institution could be held liable for deliberate indifference.[76] In fact, since the proposed rule includes a safe harbor for schools which prescribes a response that, if enacted, will prevent a school from being held liable for violating a student's Title IX rights, this proposed standard effectively guts the enforcement mechanism previously afforded to students.[77] End Rape on Campus infers the use of the deliberate indifference standard to be an incentive for schools to take no action under Title IX, from the precise agency tasked with upholding Title IX. The Department gives almost no justification for this outrageous change in the deliberate indifference standard, and offers *Davis*, which as mentioned above, was a case dealing with a private right of action under Title IX, not administrative enforcement. Here, this case is again misapplied by the Department to justify a more rigorous standard for Title IX enforcement than the law demands.

Finally, Eighth Amendment deliberate indifference allows for liability in a situation where a prison official has knowledge about an environment that lends itself to harm for people who are incarcerated. A prison official can be held liable if they were aware that for a person who is incarcerated "'rape was so common and uncontrolled that some potential victims dared not sleep [but] instead ... would

[73] *Farmer v. Brennan*, 511 U.S. 825 (1994)
[74] Id.
[75] *See, e.g. Tinker vs. Des Moines*, 393 U.S. 503
[76] See *Farmer v. Brennan*, 511 U.S. 825 (1994) ("We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying any person who is incarcerated humane conditions of confinement unless the official knows of and disregards an excessive risk to person who is incarcerated health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.")
[77] Proposed rule § 106.44(b)(4)

leave their beds and spend the night clinging to the bars nearest the guards' station,' it would obviously be irrelevant to liability that the officials could not guess beforehand precisely who would attack whom."[78] Officials at schools and colleges are often made aware of a culture on campus much like the rape culture in jails and prisons that poses harm to people who are incarcerated. In these cases, as in jails and prisons, campus employee could be said to have "actual knowledge" of sexual violence without being directly told of such conduct or witnessing its population shielding itself from this kind of harm. The standard in the proposed rule does not lend itself to the inference that is allowed in Eighth Amendment cases employing the deliberate indifference standard, again running afoul of the purpose of Title IX and misapplying too high of a standard to vindicate students' rights.

**f. The proposed rule allows a right of action for respondents to sue institutions under Title IX.**

In a deliberate misapplication of the purpose of Title IX, the rule allows named harassers to claim sex discrimination if the school opens an investigation into their conduct. This will drive schools back to sham Title IX investigations that do not take survivors' claims seriously, out of a fear the school will be sued for holding students accountable when they commit sexual assault. Essentially, this forces schools to consider potential harm to named harassers, rather than the existing harm survivors are experiencing. This reinforces narratives that survivors coming forward with reports of sexual assault are ruining men's lives. That narrative is one of many that chills reporting of sexual assault, and will certainly lead to chilled reporting on campuses.

Through our casework and survivor support, we have witnessed numerous Title IX cases where the presence of a respondent's private attorney, who states an intent to sue for due process violations before a case has even begun, causes an institution to deny a survivor a fair process. We have seen cases in which, because of fear of a respondent's lawsuit, Title IX coordinators have been instructed by university legal counsel to allow respondents access to information or accommodations not given to a survivor, and even cases where university legal counsel has instructed Title IX coordinators to deliberately mislead, or even lie to, complainants. We have seen concerning patterns of university legal counsel seeking to protect a university from a lawsuit, even at great harm to student survivors. We are extremely concerned that this unsubstantiated right of action for respondents under Title IX will cause risk-averse universities to fail to investigate properly, and that schools and university legal counsel will be incentivized to never find in a survivor's favor, even when the facts clearly indicate that sexual violence occurred.

Title IX is in place to prevent sex discrimination from obstructing equal access to education. There is no case law or sex stereotype to indicate that investigating an allegation of sexual violence is discrimination based on sex. This is yet another misapplication of the law.

Additionally, while the Department states that the proposed rule will save institutions money, this provision of the proposed rule does not align with that stated goal. Schools will be so afraid that their investigation of a respondent will lead to a Title IX suit that they will not investigate as rigorously and fully as they would otherwise, leading to sham investigations for complainants and respondents and obscuring justice for all parties involved. We believe that this will lead to an increase in complainant lawsuits. As an organization that provides survivors with their options, and advises them as to which options might best fit their case and needs, we can state comfortably that if this provision of the proposed rule went into effect, we would encourage more of our clients, who are complainants, to file civil lawsuits

[78] *Farmer v. Brennan* quoting *Hutto v. Finney*, 437 U. S. 678, 681-682, n. 3 (1978)

against their universities. The proposed rule is ripe for lawsuits from complainants who seek to simply have even footing with threatening respondents and to force universities to treat complainant cases as equal.

### g. The proposed rule fails to impose clear timeframes for investigations and allows impermissible delays.

The proposed rule eliminates the previously defined 60-day timeframe for the investigation of complaints. In its place, the new rule states schools must provide "reasonably prompt timeframes for completion of the grievance process"[79] and for filing and resolving appeals if the school offers an appeals process. Schools are allowed to implement a delay in the grievance process or an extension to timeframes if there is "good cause" which includes "absence of the parties or witnesses, concurrent law enforcement activity, or the need for language assistance or accommodation of disabilities."[80]

Prior to the release of this rule, the 60-day timeframe, while not always adhered to, was an important enforcement mechanism for survivors. With a clear rule about the length of time that investigations should take in place, survivors could check in with Title IX coordinators, investigators and hearing officers and have a rough timeline to use to help get information about their case. If the people responsible for investigating the case did not respond to the survivor, they could cite the lack of adherence to the 60-day timeline as a reason for the school's deliberate indifference in a Title IX complaint against their institution. Now, without a clear timeframe, cases can be drawn out indefinitely, affecting all parties involved. This creates a situation where schools can regularly tell survivors that they are "working" on the case or that the case needs to be delayed and survivors have no mechanism within the Title IX guidelines to hold their institution accountable to conducting a timely investigation. Cases could even be delayed until complainants or respondents graduate, effectively giving a school an easy way to do nothing and provide no remedy for a complainant while still saying that action is underway, shielding schools from legal liability at great risk to complainants' educations.

Additionally, under the proposed rule, if there is an ongoing criminal investigation the school would be allowed to delay its Title IX investigation for an unspecified length of time. While criminal investigations seek to punish a named harasser 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. The Association of Title IX Administrators (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."[81]

## III. The grievance procedures required by the proposed rule would impermissibly tilt the process in favor of named harassers, retraumatize complainants, and conflict with Title IX's nondiscrimination mandate.

[79] Proposed rule § 106.45(b)(1)(v)
[80] Id.
[81] 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.

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.[82] The proposed rule purports to require "equitable" processes as well.[83] However, the proposed rule is also riddled with language that would require schools to conduct their grievance procedures in a fundamentally *inequitable* way that favors respondents.

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 rule would require a school to deprive a person of their due process rights.[84] But the 2001, 2011, and 2014 Title IX Guidance 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[85] require only "some kind of" "oral or written notice" and "some kind of hearing."[86] 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."[87] The Court has also approved at least one circuit court decision holding that expulsion from a public school does not require "a full-dress judicial hearing."[88] Furthermore, the Department's 2001 Guidance already instructs schools to protect the "due process rights of the accused."[89] Adding § 106.6(d)(2) provides no new or necessary protections and inappropriately pits Title IX's civil rights mandate against the Constitution.

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

Under proposed rule § 106.45(b)(1)(iv), schools would be required to presume that the reported harassment did not occur, which would ensure partiality to the respondent, destroying any claims to equitability.[90] This presumption would also exacerbate rape myths upon which much of the proposed rule is based—namely, the myth that women and girls often lie about sexual assault.[91] The presumption of innocence is a criminal law principle, incorrectly imported into this context[92]; criminal defendants are presumed innocent until proven guilty because their very liberty is at stake—criminal defendants go to prison if they are found guilty. There is no such principle in civil proceedings or civil rights proceedings, and Title IX is a civil rights law that ensures that experiencing sexual harassment does not end anyone's education, or severely disrupt it to the point of failing to provide equal access. The rule repeatedly and

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[82] 34 C.F.R. § 106.8(b).
[83] *See* proposed rule § 106.8(c).
[84] Proposed rule § 106.6(d)(2).
[85] Constitutional due process requirements do not apply to private institutions.
[86] *Goss v. Lopez*, 419 U.S. 565, 566, 579 (1975).
[87] Id. 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).
[88] *E.g.*, *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 158 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).
[89] 2001 Guidance, *supra* note 45 at 22.
[90] Proposed rule § 106.45(b)(1)(iv) at 141.
[91] Indeed, the data shows that men and boys are far more likely to be victims of sexual assault than to be falsely accused of it. *See, e.g.,* Kingkade, *supra* note 25.
[92] 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), 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.

inappropriately inserts methods and practices used in criminal law into the civil process that is Title IX. Furthermore, these inappropriate misapplications of criminal law frequently lack explanation and disregard additional protections that are imperative to the functions of criminal law procedure, such as rules of evidence, rules of procedure, and the creation and maintenance of a record that can be reviewed and appeals can be based on. The presumption of evidence required by the proposed rule is just one such misapplied area of criminal law that not only confuses the purpose of civil, administrative Title IX hearings, but leaves all participants without the other historical protections that the criminal law provides.

Section 106.45(b)(1)(iv) would only encourage schools to ignore or punish historically and currently disenfranchised and underrepresented groups that report sexual harassment for "lying" about it.[93] Lying about or misreporting sexual assault is yet another myth that is often perpetuated by opponents of the campus Title IX process. As explained in a peer-reviewed article from 2010, false accusations of rape are extremely rare, and misreporting equally so.[94] However, this section of the proposed rule ignores those facts and adheres to the falsehood that is false reporting. This provision invites discrimination, and gives schools license to ignore or punish survivors who are women and girls of color,[95] pregnant and parenting students,[96] and LGBTQ students,[97] because of harmful race and sex stereotypes that label them as "promiscuous" and often result in them being less likely to be believed and more likely to be discriminated against throughout the process.

For example, LGBTQ students are more likely to experience sexual harassment than their peers. More than half of LGBTQ students ages 13-21 are sexually harassed at school,[98] and nearly 1 in 4 transgender and gender-nonconforming students are sexually assaulted during college.[99] 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.[100] They are also less likely to be believed due to stereotypes that they are more "promiscuous" or "invite the attention" upon themselves.

Additionally, as the Department notes in the preamble,[101] students with disabilities have different experiences, challenges, and needs." However, the proposed rule is especially harmful to students with disabilities, who already face additional barriers to equal access to education and are 2.9 times more likely

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[93] *E.g.*, Tyler Kingkade, *When Colleges Threaten To Punish Students Who Report Sexual Violence*, HUFFINGTON POST (Sept. 9, 2015), https://www.huffingtonpost.com/entry/sexual-assault-victims-punishment_us_55ada33de4b0caf721b3b61c.

[94] Lisak, D., Gardinier, L., Nicksa, S. C., & Cote, A. M. (2010). False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases. *Violence Against Women,16*(12), 1318-1334. doi:10.1177/1077801210387747 (Stating that "Of the 136 cases of sexual assault reported over the 10-year period, 8 (5.9%) are coded as false allegations. These results, taken in the context of an examination of previous research, indicate that the prevalence of false allegations is between 2% and 10%.")

[95] *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; National Women's Law Center, *Let Her Learn: A Toolkit To Stop 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.

[96] 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.

[97] *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.

[98] *2017 National School Climate Survey*, *supra* note 27 at 26.

[99] *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.

[100] *2015 U.S. Transgender Survey*, *supra* note 40 at 12.

[101] 83 Fed. Reg. 61483.

than their peers to be sexually assaulted.[102] 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.[103]

In addition to causing compounding and discriminatory harm to communities already at increased risk of sexual violence (the same communities that this Department is tasked with enforcing under other civil rights laws in its jurisd, this presumption, that the reported harassment did not occur, conflicts with the current Title IX rule[104] and other proposed rules,[105] which require that schools provide "equitable" resolution of complaints. A presumption that favors one party over the other is not equitable. This proposed presumption is also in significant tension with proposed § 106.45(b)(1)(ii), which states that "credibility determinations may not be based on a person's status as a complainant" or "respondent."[106]

**b. The proposed rule 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.**

Proposed rule § 106.45(b)(3)(vii) requires colleges and graduate schools to conduct a "live hearing,"[107] and requires parties and witnesses to submit to cross-examination by the other party's "advisor of choice"[108]_ often an attorney who is prepared to grill the survivor about the traumatic details of the assault or possibly an angry parent, professor, mentor, or close friend of the named harasser. Even worse, the proposed rule would not entitle the survivor to the procedural protections that witnesses have during cross-examination in criminal 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 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 often rooted in gender stereotypes and rape myths that tend to blame victims for the assault they experienced[109] would understandably discourage many students—parties and witnesses— from participating in a Title IX grievance process, chilling those who have experienced or witnessed harassment from coming forward. The live cross-examination requirement would also lead to sharp inequities if one party can afford an attorney and the other cannot.

Critics of previous Title IX Guidance claimed that the system under the 2001 regulation and 2011 and 2014 Guidance created a "kangaroo court." While we take many issues with that inaccurate statement (another falsehood that has been echoed by the Secretary herself), we feel that it would be remiss not to point out that allowing any person of the other party's choice, including a professor (who could currently or later have the person they cross-examine in their class), a peer who is wholly uneducated about Title IX and/or how to cross-examine someone, or an angry and clearly biased member of the student's choice, would unequivocally and unquestionably create the conditions of a so-called "kangaroo court."

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[102] *Let Her Learn: Girls with Disabilities*, *supra* note 30 at 7.
[103] *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.
[104] 34 C.F.R. § 106.8(b).
[105] Proposed rule §§ 106.8(c) and 106.45(b).
[106] Proposed rule § 106.45(b)(1)(ii)
[107] Proposed rule § 106.45(b)(3)(vii)
[108] Id.
[109] 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).

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.[110] Instead, the Court has explicitly said that a 10-day suspension does not require "the opportunity … to confront and cross-examine witnesses"[111] 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."[112] 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.[113] 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,[114] 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 this portion of proposed rule. The Association of Title IX Administrators (ATIXA) announced in October 2018 that it opposes live, adversarial cross-examination, stating that instead, "investigators should solicit questions from the parties, and pose those questions the investigators deem appropriate in the investigation interviews."[115] The Association for Student Conduct Administration (ASCA) agrees that schools should "limit[] advisors' participation in student conduct proceedings."[116] The American Bar Association recommends that schools provide "the opportunity for both parties to ask questions through the hearing chair."[117]

The idea that administrative hearings cannot themselves afford participants due process without the opportunity to cross-examine opposing parties is erroneous. Analogous Title VII proceedings conducted by human resources professionals (in both private and public workplaces) regularly investigate similar accusations with no cross-investigation.[118]

In fact, the Supreme Court has explicitly stated that due process is a flexible concept which can change as the context changes.[119] In determining the sufficiency of administrative procedures to provide due process, three major factors are considered:

(1) the private interest that will be affected by the official action;

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[110] Of course, private schools are not impacted by Constitutional due process requirements.
[111] *Goss*, 419 U.S. at 583. *See also Coplin*, 903 F. Supp. at 1383; *Fellheimer*, 869 F. Supp. at 247.
[112] *E.g.*, *Dixon*, 294 F.2d at 158, *cert. denied*, 368 U.S. 930 (1961). *See also 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).
[113] *See A Sharp Backward Turn*, *supra* note 55 (*Baum* "is anomalous.").
[114] 83 Fed. Reg. 61476.
[115] 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.
[116] 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) [hereinafter *ASCA 2014 White Paper*], *available at* https://www.theasca.org/Files/Publications/ASCA%202014%20White%20Paper.pdf.
[117] 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).
[118] Manela, Stewart S., Workplace Investigations, American Bar Association (2009) at 10, *available at* https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2009/ac2009/107.authcheckdam.pdf
[119] *Mathews v. Eldridge*, 424 U.S. 319, 321, 96 S. Ct. 893, 896, 47 L. Ed. 2d 18 (1976).

(2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and

(3) the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail. [120]

Considering all three factors, cross-examination should not be required for due process reasons in campus disciplinary proceedings. The government has a compelling and important interest to ensure education is available equally to individuals of all genders. The private interests of the parties in receiving an education is not more compelling than overall educational equality and public safety. Finally, the risk of erroneous deprivation is not significant as long as campuses engage in thoughtful student conduct processes that include appropriate notice and procedural safeguards.

Additionally, there are widespread, valid concerns that cross-examination can be traumatizing to complainants. Even today, cross-examination of sexual assault complainants is often based in gender stereotypes and rape myths which blame and shame individuals for the sexual violence they have experienced.[121]

**c. The proposed rule would allow schools to pressure survivors into traumatizing mediation procedures with their named harassers.**

Proposed § 106.45(b)(6) would allow schools to use "any informal resolution process, such as mediation"[122] to resolve a complaint of sexual harassment, as long as the school obtains the students' "voluntary, written consent."[123] Once consent is obtained and the informal process begins, schools may "preclude[] the parties from resuming a formal complaint."

A mediation model requires complainant and respondent to mutually engage and identify areas of personal responsibility for the conflict. This is not an acceptable approach to violent sexual behavior because it implies some mutuality of fault not present in situations of sexual violence. This reinforces victim-blaming narratives and can have a negative mental and emotional impact on individuals who have experienced sexual violence.[124]

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; however, mediation is never appropriate for resolving sexual assault or harassment, even on a voluntary basis. Survivors should not be pressured to "work things out" with their assailant (which would imply that both parties share responsibility for the assault) and be exposed to the risk of being retraumatized, 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, the National Association of Student Affairs Administrators in Higher Education, stated in 2018 that it was concerned about students being "pressured

[120] *Mathews v. Eldridge*, 424 U.S. 319, 321, 96 S. Ct. 893, 896, 47 L. Ed. 2d 18 (1976)
[121] Sarah Zydervelt et al., *Lawyers' Strategies for Cross-Examining Rape Complainants: Have we Moved Beyond the 1950s?*, British Journal of Criminology (2016).
[122] Proposed § 106.45(b)(6)
[123] Proposed § 106.45(b)(6)(C)
[124] Koss, M. P., Wilgus, J. K., & Williamsen, K. M. (2014). Campus sexual misconduct: Restorative justice approaches to enhance compliance with Title IX guidance. Trauma, Violence, & Abuse, 15, 242–257.

into informal resolution against their will."[125] The proposed rule would allow schools to pressure survivors, including minors, into giving "consent" to mediation and other informal processes with their named harassers and prevent them from ending an informal process and requesting a formal investigation—even if they change their mind and realize that mediation is too traumatizing, or insufficient for their needs, to continue.

Restorative justice approaches are often conflated with mediation, but restorative justice models are distinct in that they require the accused party to accept responsibility prior to participating in the process.[126] While early research regarding the use of restorative justice frameworks is promising,[127] the specific experiences of individuals who have experienced campus sexual violence have not been adequately studied. Without generalizable knowledge of the potential emotional and educational impacts on complainants, it is not appropriate to allow universities to proceed with mediation. Furthermore, universities currently lack the knowledge, frameworks, and resources needed to provide successful restorative justice processes, which require practitioners to obtain certification in order to successfully facilitate. The language contained in the rule does not adequately outline what a restorative justice-based procedure might look like and how universities should ensure that survivors are not or do not feel coerced to participate.

**d. The proposed rule 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 than not" _ in Title IX cases to decide whether sexual harassment occurred.[128] Proposed rule § 106.45(b)(4)(i) 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.[129] 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

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[125] 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.

[126] Id.

[127] Karp, D. R. (2009). Reading the scripts: The restorative justice conference and the student conduct hearing board. In J. M. Schrage & N. G. Giacomini (Eds.), Reframing campus conflict: Student conduct process through a social justice lens (155–174). Herndon, VA: Stylus.

[128] 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.

[129] 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.

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. 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.[130]

The idea that the burden should be stronger than preponderance of the evidence springs from a misunderstanding of the purpose of the Title IX complaint process. Unlike the criminal justice process (which uses a higher burden) the Title IX complaint process does not exist for the purpose of punishing accused students. Instead, it exists to ensure the complainant's right to an education.[131] In this framework both parties (respondent and complainant) face the same risk -- the loss of educational opportunity.[132] Where both parties face a similar loss, it is most fair to impose a burden of persuasion that requires similar production from both parties. The preponderance standard, which requires adjudicators to find for whoever's version of events is supported of 51% or more of the evidence, comes closest to placing the complainant and the respondent on a level playing field.[133]

The preponderance standard is used by courts in all civil rights cases.[134] 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, in yet another way, 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.[135] 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 if their school fails to meaningfully address the harassment, particularly as 34% of college survivors drop out of college.[136] 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.

Additionally, any student who experiences sexual violence also experiences significant, permanent, and far reaching consequences of Post-Traumatic Stress Disorder (PTSD), heightened risk for anxiety, depression, inability to focus, chronic pain, academic and social withdrawal, and the burdensome fiscal costs associated with being a survivor. The department ignores the consequences of experiencing violence for survivors by claiming that the party most at risk of stigma and significant, permanent, and far-reaching consequences is respondents.

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[130] *E.g.*, Kingkade, *supra* note 25
[131] 20 U.S.C.A. § 1681 (West)
[132] Respondent may lose educational opportunity if disciplined while complainant may face loss of educational opportunity if presence of a harasser or abuser inhibits their ability to learn or causes them to leave campus.
[133] Loschiavo, C. & Waller, J. L. Association for Student Conduct Administration. *The Preponderance of Evidence Standard: Use In Higher Education Campus Conduct Processes.*
[134] 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).
[135] 83 Fed. Reg. 61477.
[136] 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.

Moreover, Title IX experts support the preponderance standard, which is used to address harassment complaints at over 80% of colleges.[137] The National Center for Higher Education Risk Management (NCHERM Group), whose white paper *Due Process and the Sex Police* was cited by the Department,[138] 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."[139] The white paper by four Harvard professors that is cited by the Department[140] recognizes that schools should use the preponderance standard if "other requirements for equal fairness are met."[141] The Association of Title IX Administrators' (ATIXA) 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*."[142] NASPA - Student Affairs Administrators in Higher 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."[143] The Association for Student Conduct Administration (ASCA) agrees that schools should "[u]se the preponderance of evidence (more likely than not) standard to resolve all allegations of sexual misconduct"[144] because "it is the only standard that reflects the integrity of equitable student conduct processes which treat all students with respect and fundamental fairness."[145]

**e. The proposed rule would require schools to give unequal appeal rights.**

Although Secretary DeVos claims that the proposed rule makes "[a]ppeal rights equally available to both parties,"[146] 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 named harasser 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.

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[137] 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.
[138] 83 Fed. Reg. 61464 n.2.
[139] 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.
[140] 83 Fed. Reg. 61464 n.2.
[141] 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.
[142] 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.
[143] *NASPA Title IX Priorities*, *supra* note 134 at 1-2.
[144] *ASCA 2014 White Paper, supra* note 125.
[145] 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.
[146] DeVos, *infra* note 101.

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)."[147] 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."[148] Even the white paper by four Harvard professors that is cited by the Department (p.9-10 n.2) recognizes that schools should allow "[e]ach party (respondent and complainant) [to] request an impartial appeal."[149]

## IV. The proposed rule impermissibly limits the "supportive measures" available to complainants (§ 106.30).

Under the proposed rule, even if a student suffered harassment that occurred on campus, and it was "severe, pervasive, *and* objectively offensive," their school would still be able to deny the student the "supportive measures" they need to stay in school. In particular, the proposed rules allow schools to deny a student's request for effective "supportive measures" on the grounds that the requested measures are "disciplinary," "punitive," or "unreasonably burden[] the other party." For example, a school might feel constrained from transferring a named harasser to another class or dorm because it would "unreasonably burden" them, thereby forcing a survivor to be unreasonably burdened instead. This setup insists that the student who has experienced violence be responsible for changing all of their class and housing arrangements in order to avoid their named harasser. This sets up survivors to lose: if they do not take on the burden of changing these arrangements for themselves, they may experience increased PTSD and other negative impacts on their academic ability and mental health, and if they do take on this burden, they are further disrupting their lives after experiencing violence for which they are not at fault. In addition, schools may interpret this proposed rule to prohibit issuing a *one-way* no-contact order against a named harasser and require a survivor to agree to a *mutual* no-contact order, which implies that the survivor is at least partially responsible for their own assault.[150] 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.[151] Groups such as the Association for 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."[152]

Supportive measures allow affected students to continue with their education. At End Rape on Campus, we routinely see survivors accessing—and depending on—these informal, non-disciplinary measures to remain on campus and access their education. Especially lack of access to support creates so many inequitable and one-sided barriers to accessing the Title IX process for survivors, is imperative that the Department allow recipients to provide an array of non-punitive supportive measures for survivors to lower dropout rates, save schools money, and ultimately provide safety and support for survivors that is essential to the survivor's healing.

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[147] American Bar Association, *supra* note 126, at 5.
[148] 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.
[149] Bartholet, et al., *supra* note 150.
[150] Experts have recognized for decades that *mutual* no-contact orders are harmful to victims, 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.
[151] 2001 Guidance, *supra* note 45, at 16.
[152] *ASCA 2014 White Paper*, at 2.

Schools should ensure survivors have economic protections such as reimbursements for lost tuition and other related expenses. When survivors are denied economic support from their school, they are forced to spend thousands of dollars on counseling services, additional safety measures such as rent for off-campus housing. Furthermore, often survivors are forced to withdraw from classes which can lead to losing scholarships and an increase in student loan debt. In a study conducted on the estimated costs of various kinds of criminal victimization, including sexual assault and rape (excluding cases of childhood sexual abuse) found that each rape or sexual assault costs "$5,100 in tangible losses.[153] Tangible losses ranged from lost in productivity, medical care, mental health services to police services. Additionally, the research allocated $81,400 for "lost quality of life (based on jury awards for pain and suffering)" which means the total cost per victim (in 2012 dollars) to $125,684.[154] These costs are likely to be significantly higher and cause additional burdens to communities who do not have access to financial resources that can be critical to their recovery, such as funds for therapy or medication necessary for mental health issues that occur as a direct result of the assault.

All supportive measures and accommodations offered to students must also be accessible to students with disabilities. Research has shown students with disabilities experience sexual assault at two times the rate of students without disabilities.[155] Schools should ensure the counseling and mental health services available to students who have experienced sexual violence are not only trauma-informed and culturally humble but also in a location that is accessible to people who have physical disabilities or mobility issues (i.e., an automatic door opener, ramps).[156] Schools should ensure counseling services offered have a trauma-informed American Sign Language (ASL) interpreters or other aides for Deaf or hard of hearing students. Physical accessibility to buildings should also be taken into account when thinking about housing or classroom relocations, as well as access the physical location of the (newly-limited under this rule) school officials who can be considered to have "actual knowledge".

**a. The proposed rule would allow schools to claim "religious" exemptions for violating Title IX with no warning to students or prior notification to the Department.**

The current rule allows 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 rule removes that requirement and permits schools to opt out of Title IX without notice or warning to the Department or students. This would allow schools to retroactively conceal their intent to discriminate, exposing students to harm, especially women and girls, LGBTQ students, pregnant or parenting students (including those who are unmarried), and students who access or attempt to access birth control or abortion.[157]

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[153] Loya, R. M. (2012). Economic consequences of sexual violence for survivors: Implications for social policy and social change (Doctoral dissertation, Brandeis University, Waltham, MA). Available from ProQuest Dissertations and Theses database. (UMI No. 3540084)

[154] Id.

[155] David Cantor, Bonnie Fisher, Susan Chibnall, Reanna Townsend, et. al. Association of American Universities (AAU), Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct (September 21, 2015).

[156] National Council on Disability, *Not on the Radar: Sexual Assault of College Students With Disabilities* (Jan. 30, 2018), https://ncd.gov/sites/default/files/NCD_Not_on_the_Radar_Accessible_01292018.pdf.

[157] 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), https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html.

Further, the Department's proposed assurances directly conflict with the current[158] and proposed[159] rule 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 schools to actively mislead students. This bait-and-switch practice demonstrates that the Department is more interested in protecting schools from liability when they discriminate than protecting students from discrimination.

The way this rule will work in practice can be illustrated as follows: A queer student attends an institution that aligns with their religious denomination. The institution does not suggest in the admissions material or student handbook that LGBTQ students are not welcome. Yet, in classes, the student faces escalated harassment from other students for being queer. After filing a formal Title IX complaint, the student is denied support from their school due to the school citing a religious exemption, as allowed under the proposed rule. The student gets no relief from harassment, and no professors, students or administrators are disciplined for committing or allowing this conduct.

Consider another dangerous scenario: A student is assaulted by another student at a school which has a code of conduct explicitly prohibiting homosexuality. Their assault included a sexual act that would be considered homosexual conduct—even though was nonconsensual. Therefore, despite the survivor filing a complaint, the school can dismiss it, citing a religious exemption, and the survivor, who was victimized by non-consensual sexual conduct, could be disciplined while there is no discipline for their assailant. In situations like these, survivors must face not only the repercussions of violence, but the risk of being outed, disciplined and otherwise further traumatized.

Some students who attend religiously affiliated schools are not necessarily religious themselves. They could be attending because they are a legacy student, or because it is the only school that offered enough financial aid. Imagine that the student is in sixth grade, is transgender and is bullied for using the bathroom of their choice—when harassment occurs, this student is expelled for disclosing their gender identity. Alternatively, they are a queer athlete recruited to play on a Division I basketball team but lose their spot after their identity is revealed when filing a Title IX complaint. A student could be bisexual, and afraid to report their assault by a person of a different gender, for fear they will be more likely to be disciplined due to systemic homophobia.

These are only a few of the situations we can easily assume will arise under this section of the proposed rule. The proposed rule gives schools a free pass to discriminate and block access to civil rights protections for transgender and queer students. The Department's no-notice religious exemption is an escape hatch—schools claim the exemption after a report and evade any responsibility. This provision should be eliminated, and accountability for religious exemptions should remain in the form of a formal application for an exemption. This tried and true method allows students a modicum of accountability while not infringing on the religious freedom of schools or unfairly burdening recipients with needless paperwork.

## V. The Proposed Rule is Inconsistent with the Clery Act.

[158] 34 C.F.R. § 106.9(a).
[159] Proposed rule §106.8(b)(1).

A number of aspects of the Department's proposed rule are inconsistent with the Clery Act, 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 rule prohibiting schools from investigating off-campus and online sexual harassment would 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."[160] 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" (including off-campus private housing not owned by the institution but clearly close to the school community) ; and "areas within the patrol jurisdiction of the campus police or the campus security department", which differ by each campus and campus police or campus security department.[161] The proposed rule would undermine Clery's mandate and create a perverse system in which schools would be required to report instances of sexual assault that occur off-campus to the Department, but then would be required by the Department to dismiss these complaints and not investigate them.

The Clery Act also requires that investigations of sexual harassment and assault be "prompt, fair, and impartial."[162] The proposed rule's unclear timeframe for investigations conflicts with Clery's mandate that investigations be prompt, and the many sections of the proposed rule 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,"[163] 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.

## VI. The proposed rule *requiring* schools to dismiss harassment complaints goes 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 rule *requires* schools to dismiss complaints of sexual harassment if they do not meet specific narrow standards. The rule states that if a school has determined that harassment does not meet the improperly narrow definition of severe, pervasive, *and* objectively offensive harassment, it *must* be dismissed, per the command of the rule. The rule also states that 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.[164] By requiring schools to dismiss certain types of complaints of sexual harassment,

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[160] 20 U.S.C. § 1092(f)(8)(C).
[161] 20 U.S.C. § 1092(f)(6)(iii); 20 U.S.C § 1092(f)(6)(iv)); 34 C.F.R. § 668.46(a)).
[162] 20 U.S.C. § 1092(f)(8)(b)(iv)(I)(aa).
[163] 83 Fed. Reg. 61468.
[164] *See* Michael C. Dorf, *The Department of Education's Title IX Power Grab*, VERDICT (Nov. 28, 2018), https://verdict.justia.com/2018/11/28/the-department-of-educations-title-ix-power-grab.

without regard to whether those forms of harassment deny students educational opportunities on the basis of sex, § 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.[165] 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 is 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 the proposed rule's required dismissals for Title IX investigations 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.

**a. The proposed rule fails to impose clear timeframes in compliance with the Clery Act for investigations and allows impermissible delays.**

The proposed rule requires 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."[166] 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 rule, if there is an ongoing criminal investigation, the school would be allowed to delay its Title IX investigation for an unspecified length of time. 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. The Association of Title IX Administrators (ATIXA) agrees that a school that "delay[s] or suspend[s] its investigation" at the request of a prosecutor creates a safety risk not only to the survivor but also to "other students, as well."[167]

## VII. The proposed rule fails to acknowledge populations that historically face barriers and provide protections for those populations.

### a. The proposed rule should commit to protecting undocumented complainants from retaliatory immigration action.

[165] Proposed rule § 106.45(b)(3)
[166] Proposed rule § 106.45(b)(1)(v).
[167] 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.

The new rule makes no commitment to protect undocumented students from retaliatory immigration action should they file a Title IX complaint. Anything less than explicit protection for undocumented students violates the rights afforded to these students under Title IX and Title VI.

In accordance with Title VI's protection for all students, regardless of national origin, the rescinded 2017 Q&A guidance[168] explicated the protections afforded to undocumented students, stating "The school should also be aware that threatening students with deportation or invoking a student's immigration status in an attempt to intimidate or deter a student from filing a Title IX complaint would violate Title IX's protections against retaliation."[169] The 2014 Q&A also made clear that schools were obligated to:

"(1) ensure that all students, including undocumented students and international students, are made aware of their Title IX rights, regardless of immigration status;
(2) ensure that trainings, reporting forms, and other information are accessible to English language learners;
(3) provide information about the "U" nonimmigrant status and the "T" nonimmigrant status;
(4) be mindful of the issues foreign students on student visas face when experiencing sexual violence as it pertains to accommodations (such as reducing course load while recovering);
(5) ensure that university employees who work with international students are trained in handling sexual assault and understand the schools' Title IX policies and procedures for students who have experienced violence."[170]

The proposed rule is entirely silent on the issue of immigration status and how it might intersect with a student's experience accessing the rights afforded by Title IX. The rescission removed these clarifications of schools' responsibility, without providing context for whether or not the administration interprets Title VI and Title IX to not include the above protections. Such an interpretation would be a clear violation of both Title VI and Title IX.

This is especially concerning given valid fears undocumented students have about deportation under the current administration.[171] Though the Title VI still offers students protection based on national origin[172], it is essential to outline these protections explicitly to ensure that universities understand their obligations to undocumented students.

We urge the Department to adopt the language from the rescinded Guidance around immigration status, as schools' obligations under Title VI have not changed. Furthermore, we urge the Department of Education to make explicit in this Guidance how complaints which implicate both Title IX and Title VI should be simultaneously handled by universities.

**b. The proposed rule should commit to ensuring culturally humble services for students of color.**

[168] 2017 Guidance, *supra* note 45.
[169] Davidson, Jessica, *Current Developments in Immigration Law: Changing Title IX Enforcement Under Secretary DeVos and the Impact on Immigrant and Undocumented Students*, 32 GEO. L.J 1 (2017).
[170] Id.
[171] Hinojosa–Ojeda, Raúl, *The Costs and Benefits of Immigration Enforcement*, Undecided Nation 163–187 (2018), https://www.civilrightsproject.ucla.edu/research/k-12-education/immigration-immigrant-students/u.s.-immigration-enforcement-policy-and-its-impact-on-teaching-and-learning-in-the-nations-schools.
[172] 42 U.S.C. § 2000d (2017) (stating that no one shall be discriminated against on the basis of national origin by an institution receiving federal funding)

The proposed rule is silent on ensuring culturally humble services for students of color, who experience disproportionately high rates of sexual violence and greater barriers to reporting than their white peers.

Cultural humility is the "ability to maintain an interpersonal stance that is other-oriented [focused on the other person] in relation to aspects of cultural identity that are most important to the [person]".[173] Cultural humility is important to include in Title IX investigations because it allows people to critically assess their own assumptions and values and understand how it affects their interaction with people from other cultures.

Varying systems of oppression, such as racism, sexism, homophobia, xenophobia, and others, affect the experiences of sexual assault survivors. Systematic oppression has affected disenfranchised communities in many ways. Cultural humility in sexual assault prevention and response programs is crucial to providing survivors with the proper resources they need.[174]

A study done on rape among Asian American college women found Asian American women tend to choose not to disclose about their experience with sexual violence due to both sociocultural and institutional themes. At an institutional level, nondisclosure referenced mental health and police services. Due to stereotypes of Asian women as passive and sexualized, Asian American women noted not wanting to go to police services or mental health services in fear of being blamed for rape.[175] In a sociocultural context, women reported not disclosing about their experiences because of negative consequences on their relationship with parents, and friendships. Having culturally sensitive rape education would make prevention and support more effective.

**c. The proposed rule should recognize the unique experiences of survivors in Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, and Asexual (LGBTQIA) communities.**

The new rule is silent on the experiences of LGBTQ students. These communities experience disproportionate rates of sexual violence and greater reporting barriers.

Last year, the Department of Education rescinded guidance on transgender student protections. According to Huffington Post, the Education Department has dismissed several cases filed by transgender students. In the Obama-era Guidance, it was clear that Title IX prohibits discrimination on the basis of sex and gender identity. The guidance that was put in place by Betsy DeVos only stated that Title IX prohibits discrimination on the basis of sex, not gender identity.[176]

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[173] Hook, J. N., Davis, D. E., Owen, J., Worthington Jr., E. L., & Utsey, S. O. (2013). Cultural humility: Measuring openness to culturally diverse clients. Journal of Counseling Psychology®. doi:10.1037/a0032595

[174]Nicholas, Caitlyn, *Incorporating Cultural Humility in Sexual Violence Prevention and Response*, Frontline (Fall 2017), https://www.mcasa.org/newsletters/article/incorporating-cultural-humility-in-sexual-violence-prevention-and-response.

[175] Koo, K.H., Nguyen, H.V., Andrasik, M.P., & George, W.H. (2015). The cultural context of nondisclosure of alcohol-involved acquaintance rape among Asian American college women: A qualitative study. *Journal of Sex Research*, 52, 55–68.

[176]Turner, Cory & Kamenetz, Anya, The Education Department Says It Won't Act On Transgender Student Bathroom Access NPR (2018), https://www.npr.org/sections/ed/2018/02/12/585181704/the-education-department-says-it-wont-act-on-transgender-student-bathroom-access

The Department has said under Title IX, it is considered sex discrimination when students are penalized, harassment, or bullied for failing to conform to sex-based stereotypes. However, access to accommodations (restrooms, locker rooms, etc) are not considered to be sex discrimination.[177]

Although most of the rollbacks by the department directly target transgender students, lesbian, gay, and bisexual students also face large amounts of discrimination in schools, both during K-12 and in higher educational settings. According to a study produced by NPR, the Robert Wood Johnson Foundation, and the Harvard T.H. Chan School of Public Health, 58% of LGBTQ respondents said are often discriminated against at college. 64% of transgender people reported also being discriminated against at college.[178] The Department of Education must take discrimination in these communities seriously to ensure access to equal educational opportunities for everyone.

## VIII. Conclusion

The Department of Education's proposed rule is a complete departure from the fundamental purpose of Title IX at the cost of students' educations. The sections mentioned above are a clear illustration that the Department continues to ignore the lived experiences of students, school administrators, Title IX coordinators, and most importantly, survivors, who are affected by Title IX everyday.

For all of the above reasons, we call on the Department to immediately withdraw this NPRM. It is inconsistent with federal case law, the Constitution, Title IX, previous guidance from the Department, and with the stated purpose of the Office for Civil Rights at the U.S. Department of Education altogether (a purpose which we would much rather see the Department expend its resources and time on)—to ensure equal access to education and to promote educational excellence through vigorous enforcement of civil rights in our nation's schools.

[177] Id.
[178] Mann, Elizabeth, LGBTQ students face discrimination while Education Department walks back oversight brookings.edu (2018), https://www.brookings.edu/blog/brown-center-chalkboard/2018/04/18/lgbtq-students-face-discrimination-while-education-department-walks-back-oversight/