



January 30, 2019

Submitted Via the Federal eRulemaking Portal at www.regulations.gov

Kenneth L. Marcus
Assistant Secretary for Civil Rights
U.S. Department of Education
400 Maryland Avenue SW, Room 6E310
Washington, DC 20202

Re: Notice of Proposed Rulemaking (NPRM) Title IX regulations at 34 CFR 106.
[Docket ID ED-2018-OCR-0064-0001] RIN 1870-AA14

Dear Mr. Marcus:

The Women's Law Project strongly opposes the adoption of the proposed amendments to the regulations implementing Title IX of the Education Amendments set forth in the NPRM published on November 29, 2018.

The Women's Law Project is a Pennsylvania-based public interest legal advocacy organization that seeks to advance the status and rights of women through impact litigation, policy reform, and public education. Our perspective on the currently proposed regulations is based on decades of work representing and assisting students who have been subjected to serious sexual misconduct in K-12 schools and higher education institutions and developing an appreciation for the trauma resulting from a sexual assault in school,¹ the challenges faced by the victims in seeking remedial assistance to preserve their access to education, and the further victimization they experience as they pursue these efforts.

We commenced our advocacy on sexual harassment in educational programs prior to the issuance of the 2011 Dear Colleague Letter (DCL) and know from first-hand experience how educational programs failed to meet their obligations under the law to respond to sexual misconduct. Before the 2011 DCL, schools ignored the sexual harassment in their midst and disbelieved complainants, deprived victimized students of accommodations necessary for them to access their education, and elevated the interests of the accused over the interests of the complainant when assessing complaints. The 2011 DCL was issued to remind schools of their obligations under Title IX to respond to sexual harassment impacting their students and their access to education and to provide them with guidance to fulfill those responsibilities, consistent with the equity required by Title IX. Through the efforts of the Office for Civil Rights, significant work was done following issuance of the 2011 DCL to help schools develop fair and equitable procedures for investigating and adjudicating sexual harassment and misconduct in violation of their required Title IX policies. While schools did not achieve perfection in their

¹ These comments use "school" to encompass all levels and types of educational programs subject to Title IX.

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implementation of the guidance and may have made some mistakes, the guidance addressed the needs of victims and balanced the rights of students and much improvement was accomplished.

The rescission of the 2011 DCL and the proposed amendments to the Title IX regulations set forth in the NPRM would, if adopted, undo not only the 2011 DCL and the reforms undertaken by schools in response to it to comply with Title IX, but also the 2001 Guidance which was adopted after notice and comment almost two decades ago.² They would take us back to inequality and disregard of sexual harassment and Title IX that persisted before 2011. The proposed rules would narrow the responsibility of schools to effectively respond to students seeking relief from sexual harassment, restrict the conduct to which schools must respond, narrow the scope of the required school response, mandate specific procedures and standards that favor accused students and impose hurdles on victims, and exceed or conflict with both Title IX and Constitutional mandates.

The proposed amended regulations would allow schools and the Department of Education Office for Civil Rights (OCR), in its enforcement capacity, to ignore much of the sexual harassment that occurs in schools and make it significantly harder for victims to obtain relief necessary to maintain access to their education and deter reporting. The elevation of the interests of schools and accuseds over the interests of complainants in safety and access to education and resulting insulation of schools from liability will eviscerate Title IX as far as sexual harassment is concerned. It will make schools less safe in contravention of the purpose of Title IX to protect student access to education.

These proposed rules, if adopted, will potentially negatively impact vast numbers of students. More than half of 7th-12th grade girls have experienced some form of sexual harassment.³ One in 5 women and one in 16 men are sexually assaulted while in college.⁴ The harm will fall disproportionately on girls of color, pregnant and parenting students, girls with disabilities, and LGBTQ students, who suffer disproportionately from sexual harassment and whose complaints are ignored due to stereotypes that blame the victim.⁵ College campuses must

² 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), available at <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>.

³ AAUW, *Crossing the Line: Sexual Harassment at School* (2011).

⁴ Christopher P. Krebs, et al., *The Campus Sexual Assault (CSA) Study* (2007), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>.

⁵ 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), available at <https://nwlc.org/resources/let-her-learn-a-toolkit-to-stop-school-pushout-for-girls-of-color>; 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-of-adolescent-pregnancy-and-motherhood-2375-4494-1000249.pdf>; David Pinosof, et al., *The Effect of the Promiscuity Stereotype on Opposition to Gay Rights* (2017), available at <https://doi.org/10.1371/journal.pone.0178534> National Women's Law Center, *Let Her Learn: Stopping School Pushout for: Girls With Disabilities* 7 (2017), available at <https://nwlc.org/resources/stopping-school-pushout-for-girls-with-disabilities>; The 2015 National School Climate Survey, GLSEN, 2016, available at <https://www.glsen.org/article/2015-national-school-climate-survey>.

be places where all students feel safe and where all victims know they will be heard and taken seriously.

The NPRM's failure to require schools to respond effectively to known sexual harassment will be devastating. 34% of student sexual harassment survivors already drop out of school because they feel unsafe, are subjected to retaliation, or are expelled due bad grades caused by the trauma of harassment.⁶ More survivors will drop out if the NPRM is adopted and schools comply and refuse to respond effectively to sexual harassment.

A. Limiting the scope of school responsibility to investigate sexual harassment makes schools unsafe and harms students.

1. Limiting school responsibility to investigate hostile environment sexual harassment to only conduct that is “severe, pervasive, and objectively offensive” and mandating dismissal of complaints that fail to meet this high standard require schools to ignore additional sexual harassment that also impedes access to education and prevents schools from stopping harassment before it escalates. (Proposed §§106.30 (“sexual harassment,” 106.445(b)(7), 106.45(b)(3)).

The proposed rules depart from Supreme Court rulings and DOE guidance requiring schools to respond to students subjected to “unwelcome conduct of a sexual nature.” The proposed rule, however, limits the harassment to which a school must respond to sexual harassment that is “so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the [school’s education program or activity” before a school must respond to it. Not only must the school ignore the harassment, the proposed rule requires the school to dismiss any complaints who do not meet the high threshold set forth in the proposed rule. These complaints will be dismissed because the harassment is not assessed as severe enough or because it has not advanced to the point that it completely deprives student access to education, even where it is serious and interferes in the student’s educational experience and is the kind of harassment to which a significant number of victimized students are subjected. Students would be left to endure repeated and escalating levels of abuse and the consequences to their emotional health without redress until it was too late and the student had no choice but to drop out. The better practice is to stop the harassment at the earliest time possible and prevent future more severe harassment. Forbidding schools from investigating all sexual harassment about which it knows or should know will harm students and schools.

The Department erroneously justifies its proposal to establish a high threshold to establish sexual harassment based on the First Amendment and academic freedom. Harassment is not protected speech, however, if it creates a “hostile environment,”⁷ *i.e.*, if the harassment

⁶ 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>.

⁷ 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

limits a student's ability to participate in or benefit from a school program or activity.⁸ Moreover, schools have the authority to regulate harassing speech; the Supreme Court held in *Tinker v. Des Moines* that school officials can regulate student speech if they reasonably forecast "substantial disruption of or material interference with school activities" or if the speech involves "invasion of the rights of others."⁹ There is no conflict between the current Title IX regulation of sexually harassing speech in schools and the First Amendment.

2. Depriving students of redress from sexual harassment because they are assaulted outside the school "program or activity" or outside the United States will harm many students (Proposed §§ 106.45(b)(3), 106.44(a)).

Many students live off campus,¹⁰ socialize off campus, and travel abroad with fellow students for a semester or longer. Hundreds of thousands of college students study abroad.¹¹ And many college sexual assaults occur in off-campus parties.¹² They also engage in online sexual harassment. Prohibiting schools from responding to and investigating sexual assaults involving their students because they did not occur in a school program or activity or it did not occur in the United States will encourage ongoing sexual misconduct in places in which student sexual harassment occurs, including in unrecognized fraternities, student "clubs," off-campus housing, and independent study abroad programs.

Sexual harassment and misconduct that occurs in locations outside the parameters set by the proposed regulations most certainly impact the victimized students within the educational program or activity. Trauma impedes concentration and fear results in victims restricting their participation in campus life and in classes to avoid the harasser. Sometimes the accused and/or other students harass the victim-complainant on campus. Similarly students who remain students and receive credit in their home institution for an independent study abroad program not under their school's control but are sexually assaulted while studying in that program are similarly affected and harmed. They may need to come home and lose credit from the study abroad. The harassing student may return home to the same institution, resulting in ongoing contact with the harasser and potential ongoing harassment on campus. The negative impact on participation in education by a student assaulted outside school by other students or teachers can be as harmful as the impact of a sexual assault occurring in the school. These students should have the option of accessing procedures which will hold the harasser accountable and deter that person from committing assaults in the future.

academic freedom protection afforded to unwelcome sexual conduct that creates a hostile educational environment.").

⁸ 2001 Guidance, *supra* note 2.

⁹ The Supreme Court held in *Tinker v. Des Moines* that school officials can regulate student speech if they reasonably forecast "substantial disruption of or material interference with school activities" or if the speech involves "invasion of the rights of others." 393 U.S. 503, 513, 514 (1969).

¹⁰ Rochelle Sharpe, *How Much Does Living Off-Campus Cost? Who Knows?*, NEW YORK TIMES (Aug. 5, 2016), (87% of students live off-campus), available at <https://www.nytimes.com/2016/08/07/education/edlife/how-much-does-living-off-campus-cost-who-knows.html>.

¹¹ NAFSA, Trends in Study Abroad, available at https://www.nafsa.org/Policy_and_Advocacy/Policy_Resources/Policy_Trends_and_Data/Trends_in_U_S_Study_Abroad/

¹² 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.

The NPRM is inconsistent with the Title IX statutory language which is silent on location but clear on impact on participation in education. It is also inconsistent with the long-held position of the Department which recognized that the school is responsible for addressing student-on-student sexual harassment that limits access to education regardless of where it occurs.¹³

The Department's own recent decision to cut off partial funding to the Chicago Public Schools recognized the harm caused by two serious off-campus sexual assaults, one involving a 10th grader forced to perform oral sex in an abandoned building by a group of 13 boys, 8 of whom she recognized from school, another involving a teacher sexually abusing a 10th grader in his car.¹⁴

DOE's proposed rule wrongly abandons students victimized by other students or teachers based on narrow geographical parameters rather than the harm to educational access and should be withdrawn.

3. Limiting the mandate to investigate sexual harassment to only sexual harassment reported in a formal complaint to a small number of individuals will make it harder to report, prevent the investigation of serious sexual misconduct, and deprive students of access to their education. (Proposed §§ 106.30, 106.44(a) and (b), 106.45(b)(3)).

A significant number of students are victimized by other students at all levels of education. Far fewer report the victimization to schools to seek help. Only 12 percent of college survivors¹⁵ and 2 percent of girls ages 14-18.¹⁶ report sexual assault to their schools or the police. Reporting can be difficult for young people for a number of reasons including confusion about how to or to whom they should report and mistrust of the school procedures.¹⁷ Despite this

¹³ U.S. Dep't of Educ. *Office for Civil Rights, Questions and Answers on Campus Sexual Misconduct* 1 n.3 (Sept. 2017) ("Schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities"); 2014 Guidance, U.S. Dep't of Educ. Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* note 22 (Apr. 29, 2014) ("a school must process all complaints of sexual violence, regardless of where the conduct occurred"); U.S. Dep't of Educ. Office of Civil Rights, *Dear Colleague Letter: Sexual Harassment and Sexual Violence* at 4, 6, 9, &16 (Apr. 4, 2011) ("Schools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school's education program or activity"); U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter: Harassment and Bullying* 2 (Oct. 26, 2010) (finding Title IX violation where "conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school," regardless of location of harassment).

¹⁴ See David Jackson et al., *Federal officials withhold grant money from Chicago Public Schools, citing failure to protect students from sexual abuse*, CHICAGO TRIBUNE (Sept. 28, 2018), <https://www.chicagotribune.com/news/local/breaking/ct-met-cps-civil-rights-20180925-story.html>.

¹⁵ *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>.

¹⁶ National Women's Law Center, *Let Her Learn: Stopping School Pushout for: Girls Who Have Suffered Harassment and Sexual Violence* 1 (Apr. 2017), available at <https://nwlc.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence>.

¹⁷ Christopher P. Krebs, et al., *The Campus Sexual Assault (CSA) Study 2-4* (2007), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>.

data, the NPRM proposes to make reporting even harder by limiting to whom a student must report to only a small number of persons: (i) a Title IX coordinator, (ii) K-12 teacher, or (iii) higher education official with authority to take corrective action.

It is never easy to talk about a sexual assault. The NPRM's severe limitations on to whom a student must make a formal report places students at risk of being unable to identify the "right" person and, as a result, not getting the assistance they need. The limited list of approved recipients of a report also eliminates the option for students to report to people they trust, such as known resident assistants, teaching assistants or professors in a university or a school nurse, guidance counselor, or athletics coach in primary or secondary school, individuals who have been identified in many schools as responsible reporters. While students may certainly speak to such persons, those individuals have no obligation to make a report that, under current guidance, would start an investigation. Changing this process may create significant confusion and misunderstanding by students. Moreover, students who may distrust the designated "persons with authority," may not report, be deprived of an avenue for redress, and lose access to their education. When students are unable to access the complaint process, other students may learn about it and be deterred from reporting. The consequence will most certainly be fewer reports and increased unaddressed suffering and harm to students.

This narrow actual notice requirement which DOE seeks to impose on students reporting sexual harassment is erroneously imported from Supreme Court decisions that do not apply in the context of school responses to sexual harassment or OCR analysis of the school's response. This standard, as enunciated in *Gebser v. Lago Vista Independent School District*¹⁸ and *Davis v. Monroe County Board of Education*¹⁹ is applicable only to a court determination of whether money damages should be assessed against a school for violations of Title IX. The Court wanted to make sure damages resulted only from *official* action. Schools and OCR do not mete out damages. Therefore, the NPRM's narrow actual notice requirement is not an appropriate standard to circumscribe a school's actions to eliminate sexual harassment and its impact. Nor does it make sense to apply it to OCR when it assesses a school's actions and requires corrective action to a school's policies, procedures, and responses to sexual harassment.

Corrective action is the key to student safety and access to education in the context of sexual harassment. OCR has consistently required schools to respond to sexual violence it has notice of directly or indirectly from a broad number of sources without imposing structural barriers. Restricting the circle of persons who must receive a report of sexual harassment puts process over safety and making it harder for students to report sexual harassment harms students in contravention of Title IX's obligation to protect students from actions that deprive them of equal access to education.

4. The NPRM's failure to prohibit retaliation will impair victim safety and access to education.

The NPRM provides no protection for retaliation. The word "retaliation does not even occur in the NPRM. Yet, in reality, it is common for students who complain of sexual

¹⁸ 524 U.S. 274 (1998).

¹⁹ 526 U.S. 629 (1999).

harassment to be subjected to retaliation by the accused and other students in the form of bullying and threats that prevents complainants from attending class, taking exams, and otherwise participating in campus life. Sometimes the university itself will retaliate against the complainant by charging the complainant with violations of the code of conduct and even suspending or expelling the complainant. Our clients have experienced all of these forms of retaliation. Failure to require schools to prevent and address retaliation will most certainly result in deprivation of access to education and dropping out.

5. The proposed rules would allow schools to claim a “religious” exemption with no warning to students, prior notification to the Department, or accountability (Proposed §106.8(b)(1)).

The current rules allow religious schools to claim religious exemptions by notifying the Department in writing and identifying which Title IX provisions conflict with their religious beliefs. The proposed rules remove that requirement and permit schools to opt out of Title IX without notice or warning to the Department or students. This would allow schools to conceal their intent to discriminate, even after providing assurance that it does not 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.

B. The NPRM severely narrows how an educational institution must respond to sexual harassment and will make schools unsafe.

1. The deliberate indifference standard is a high bar for liability that requires only a minimal school response to sexual harassment that harms students. (Proposed § 106.44).

In addition to importing the actual notice requirement from the damages standard set forth in *Gebser* and *Davis*, the NPRM also imports the Supreme Court’s deliberate indifference standard for monetary damages to measure a school’s response to sexual harassment, knowing full well it is not required to do so.²⁰ The imposition of such a standard to school and OCR response is inconsistent with Supreme Court authority and the purpose of Title IX.

As with the actual notice requirement, the Supreme Court established the deliberate indifference standard for the imposition of damages on a school in order to ensure damages only applied if the institution officially refused to take steps to bring the school into compliance. The rationale for the standard in the context of money damages is inapplicable to the context of administrative enforcement and voluntary corrective action by schools. Schools and OCR are not imposing damages on schools. Their obligation is to take or require schools to take steps to come into compliance with Title IX through actions.

The OCR 2001 Revised Sexual Harassment Guidance states, “The Court was explicit in *Gebser* and *Davis* that the liability standards established in those cases are limited to private

²⁰ 83 Fed. Reg. 61649.

actions for monetary damages. ²¹The Court acknowledged, by contrast, the power of Federal agencies, such as the Department, to “promulgate and enforce requirements that effectuate [Title IX’s] nondiscrimination mandate,” even in circumstances that would not give rise to a claim for money damages. *See, Gebser*, 524 U.S. at 292.” (2001 Guidance at i-ii). In contrast to the damages that may be sought against an educational institution for violating Title IX, the role of OCR and the schools is to bring schools into compliance with Title IX through equitable remedies, not monetary damages.

Not only does the NPRM propose a rule that minimizes the response required by schools, but the rule also *specifically immunizes* schools from liability for their response by specifying that taking the following minimal responses would *per se* not be deliberately indifferent:

- The school followed the regulatory procedures in the regulations in response to a formal complaint;
- The Title IX officer filed a formal complaint and followed procedures when it has actual knowledge of multiple complainants by the same respondent;
- For institutions of higher education, in the absence of a formal complaint, the college or university offered supportive services.

(Proposed § 106.44(b)).

The NPRM disingenuously states that the goal of these *per se* rules – described as “safe harbors” in the NPRM – are for the purpose of emphasizing and calling attention to the recipient’s obligations and to ensure a complainant’s access to education. More accurately, as further stated in the NPRM, the purpose of the safe harbors is to “shield the recipient from a finding by the Department that the recipient’s response . . . constituted sex discrimination under Title IX.”²² These *per se* rules accomplish only the shielding of recipients from findings of non-compliance by the DOE OCR to the detriment of students. They gut OCR of its enforcement obligations and deprive complainants of the ability to enforce school obligations to protect them from sexual harassment. In doing so, the NPRM elevates process over meaningful responses in pursuit of protecting the interests of schools over the interests of its students.

As the NPRM recognizes and the Court in *Gebser* stated, Title IX is designed to prevent the use of federal funds in a discriminatory manner.²³ OCR’s former guidance was consistent with this objective by requiring schools to promptly investigate and take effective actions reasonably calculated to end the sexual harassment, eliminate the hostile environment, prevent its recurrence, and remedy its effects.

The standard of deliberate indifference and the safe harbors proposed in the NPRM are inconsistent with prevention which requires proactive and effective action upon first learning of a problem and before it escalates. If schools only have an obligation to “not be *clearly unreasonable*” many students will suffer harm from sexual harassment and be deprived of access to their educational opportunities.

²¹ *See, e.g., Gebser*, 524 U.S. at 283; *Davis*, 526 U.S. at 639.

²² 83 Fed. Reg. 61470.

²³ 83 Fed. Reg. 61466.

2. The NPRM’s failure to require supportive measures and narrow definition of supportive measures will deprive victimized students of access to education. (Proposed § 106.30).

While acknowledging the importance of supportive measures to assist students to stay in school, the NPRM does not actually *require* the provision of *any* supportive measures. Rather, it only defines supportive measures, §106.30, makes the offer of such measures to a non-complainant not deliberately indifferent, §106.44(b)(3), and requires only notice in “written grievance procedures, describing examples of supportive measures that an institution may offer.” §106.45(b)(1). The NPRM does not make supportive measures mandatory; nor does it provide a process for obtaining them. These omissions will leave victims without measures they need to remain in school.

Defined as non-disciplinary, non-punitive and free measures that “may” include “counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures,” the definition not only fails to mandate supportive measures, it allows schools to deny such measures on the broad grounds that such measures could be viewed as “disciplinary,” “punitive,” or “unreasonably burdensome.” Such denials could be made without any consideration of their impact on the victim or their needs. Moreover, the proposed rule does not include one-way restrictions on contact but only include mutual no contact orders, suggesting the victim is somehow responsible for the assault and in need of restraint, as well as burdening the victim.

Whereas prior guidance required interim supportive measures for individuals who reported sexual harassment and required such measures to not burden the victim, the NPRM describes supportive measures as being for both reporters and accuseds. It appears to make such measures available to a victim only as an alternative to pursuing a formal complaint. And it only expresses concern about a measure burdening a party with respect to the other party (the accused).

Effective notice and provision of interim measures are particularly essential while a victim is assessing how to proceed and awaiting a school response. The proposed rule will leave victims vulnerable to further harassment and retaliation by the accused and friends and allies of the accused that will prevent them from accessing their education.

C. The NPRM mandates specific procedures that would harm victims by favoring the accuseds, deterring victim reporting, and making it harder for victims to obtain necessary relief.

The DOE has justified many of the proposed rules set forth in the NPRM on the ground that they add important due process requirements necessary to protect students accused of sexual harassment.²⁴ However, Title IX has always protected due process in this arena and have consistently provided due process beyond what is required under the Constitution in school

²⁴ 83 Fed. Reg. at 61465, 61472.

proceedings. The Supreme Court has held that students facing short-term suspensions from public schools²⁵ require only “some kind of” “oral or written notice” and “some kind of hearing.”²⁶ 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.”²⁷ 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.”²⁸ Furthermore, the Department’s 2001 Guidance already instructs schools to protect the “due process rights of the accused.”²⁹ The requirements imposed by the NPRM, by adding new procedural requirements intended for the protection of accused students are inequitable and exceed legal requirements.

1. Cross-examination (Proposed §§ 106.45(b)(3 (vi)- (vii)).

The NPRM’s proposed requirement that higher education students be available for and subject to direct cross examination by an advisor of a party in a live hearing will criminalize the proceeding, cause retraumatization of victims, and deter reporting of sexual harassment. Although the NPRM does not require a live hearing or cross-examination of students in K-12 grades, it does not prohibit it. (§106.45(b)(3 (vi)- (vii)). The consequences of live cross examination will be particularly problematic for these young children.

Cross examination can be tremendously traumatic for a victim of sexual assault already traumatized by the assault. Cross-examination in a courtroom with trained lawyers and experienced judges who can properly regulate it can be traumatizing. However, in campus proceedings, which lack the safeguards of courtrooms, the adversarial process of direct cross-examination, whether by untrained non-lawyers (potentially parents, faculty advisers, or student representatives) or lawyers (not all students can afford a lawyer) without the supervision of experienced judges can be even more traumatizing. The prospect of cross-examination about very personal matters under such circumstances will deter students from filing complaints or pursuing a complaint to hearing.

Former guidance protected university level survivors from the trauma of potential intimidation from cross-examination by having students submit questions to the adjudicator to neutrally pose the questions to the witness, buffering the harshness of cross examination in these cases. Eliminating this process in the college setting will have adverse consequences.

Courts have long held that due process (a constitutional requirement imposed on public schools) and fairness (with respect to private schools) in a school setting does not include the right to cross-examine in education proceedings.³⁰

²⁵ Constitutional due process requirements do not apply to private institutions.

²⁶ *Goss v. Lopez*, 419 U.S. 565, 566, 579 (1975).

²⁷ *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).

²⁸ *E.g.*, *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 158 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

²⁹ 2001 Guidance, *supra* note 2 at 22.

³⁰ *Goss*, 419 U.S. at 583. *See also* *Coplin*, 903 F. Supp. at 1383; *Fellheimer*, 869 F. Supp. at 247.

Surprisingly while K-12 students, most of whom are minors, may be subject to cross-examination, the NPRM does not require notification of its sexual harassment policy and Title IX Coordinator to parents and guardians, depriving those parents of important knowledge about the procedures involved in reporting sexual harassment. (Proposed §106.8).

Sections 106.45(b)(3 (vi)- (vii) also include provisions applicable to both elementary/secondary students and higher education students that alarmingly provide a massive exception to the ban on presenting evidence of the complainant's sexual behavior or predisposition in hearings. The exception unqualifiedly permits use of evidence of the complainant's sexual behavior when it "is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or, if the evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent." This provision is in the nature of a rape shield law which is intended to be protective of sexual history evidence because of the prejudicial nature of the evidence. All such statutes have a provision lacking in the NPRM that requires a court to determine admissibility based on an assessment as to whether the "probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party." Such an assessment is essential because of the prejudicial nature of the evidence, including a potential erroneous conclusion that prior sexual history is evidence of consent in the instant matter. Prior sexual history is decidedly not evidence of consent. Just because someone had sex consensual sex with someone in the past does not mean they consented in the instance which is the subject of the hearing. To allow this evidence in for the reasons specified and without any process conflicts with Federal Rule of Evidence 412 and is extremely damaging to the victim.

2. Evidentiary standard (Proposed §106. 45(b)(4)(1)).

DOE's proposed regulation allows school grievance procedures to use either a preponderance of evidence standard or a clear and convincing standard but requires schools to use the same standard for sexual harassment that it applies in other disciplinary actions and in faculty discipline. Notably, the NPRM does not require the converse, i.e., that the use of the preponderance standard in other spheres requires its application in sexual harassment proceedings. In addition, because many schools use a clear and convincing standard for non-sexual harassment misconduct and/or for faculty discipline, the proposed rule, if adopted, will in effect result in the elimination of the preponderance of evidence standard now used by schools for sexual harassment complaints.

The clear and convincing standard is too high for a right arising out of a civil rights law that stands for equal treatment and which is assessed in a civil (as opposed to criminal) setting. Instead of treating the parties equally in terms of truthfulness and risk, this standard tilts investigations in favor of harassers and rapists and against survivors. The clear and convincing standard treats the risk faced by a complainant as less important than the risk faced by the respondent, even though both parties involved in the proceeding face the same ultimate risk of being unable to remain at their chosen school based on the outcome. The risk that a complainant faces of having to leave their school if the school does not respond in a way that protects their

safety in the school is very real. If they are forced to leave, victims will experience a sense of betrayal as well as long-lasting personal suffering and loss of educational opportunity.

3. Presumption of non-responsibility (Proposed §106.45)(b)(1)(iv)).

The NPRM proposes requiring a presumption that the accused is not responsible for misconduct with no comparable presumption for the complainant. 106.45)(b)(1)(iv). This requirement, a criminal law principle, has no place in a school proceeding. Moreover, schools may interpret and may be encouraged to interpret presumption as suggesting that survivors are lying and that the reported harassment did not occur.³¹ The presumption would therefore promote the stereotype that sexual assault complainants lie, when the evidence demonstrates otherwise. Moreover, a presumption favoring one party is not equitable and conflicts the Title IX principle of equal treatment.

4. Appeals (Proposed § 106.45(b)(5)).

The NPRM provides no right to appeal. To the extent it would allow schools to offer appeals, it requires they be provided to both parties but in an unequal manner, prohibiting complainants from appealing the sanctions imposed on the accused. (106.45(b)(5)).

5. Reverse discrimination (Proposed NPRM §106.45(a)).

The NPRM provides for reverse discrimination by stating that unfair process for a respondent/accused student is a violation of Title IX's prohibition on sex discrimination. (106.45(a)). Some courts may have found an accused student to have stated a due process or contract claim for alleged unfair process, but they have generally rejected claims of sex discrimination asserted by accused students. A respondent's claim of unfair process is not sex discrimination. It is not the same as a victim's claim of failure to respond to sexual harassment, which has been defined as sex discrimination. It is totally improper to claim unfair process as sex discrimination without evidence of disparate treatment based on sex.

6. False statements (Proposed §106.45(b)(2)((i)(B)).

The NPRM requires schools to inform parties of their code of conduct prohibition on false statements during the grievance process. This requirement also feeds into a myth that women falsely charge rape and sends victims the message that they will be disciplined for filing a complaint of sexual harassment. As stated above, research demonstrates that false reporting is minimal. Given that schools already retaliate by filing unmerited charges of false complaints against victims, and the NPRM is silent about retaliation, this requirement will also perpetuate the myth that women lie.

³¹ Only a fraction of sexual assault complaints are false (between 2% and 10%). *See* David Lisak et al., False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases, 16 *Violence Against Women* 1318-1334 (2010).

7. Informal resolution (Proposed § (106.45(b)(6)).

The NPRM's proposal to allow school to offer informal resolution, options, such as mediation, has the potential to harm victims who may be vulnerable to coercive tactics due to unequal bargaining power. Mediation in matters relating to violence against women always raises concerns of unequal bargaining power and risk of coercion and should not be permitted without *informed* consent, a full assessment of its appropriateness, and a facilitator to prevent coercion. While the proposed rule requires written consent of the parties, it fails to provide for *knowing* consent and fails to require notice to the parties explaining the informal process or the meaning of informed consent.

Moreover, it also proposes that complainants may be prevented from ending the informal process and starting a formal process. This latter proposal is inconsistent with all prior guidance on the subject of mediation in the context of sexual harassment, which has always allowed a party to leave the informal process and pursue a formal process at any time. The presence of a facilitator and one that is well-trained in mediation is essential to effective and fair mediation, and yet the proposed rule does not require either school oversight of the process or the presence of a facilitator. Nor does it specify the training required of a facilitator.

For good reason, previous guidance cautioned against requiring students complaining of sexual harassment to work it out directly by themselves without involvement of school. The Women's Law Project has seen what can go wrong when a school puts two students in a room to work it out by themselves and the accused bullies the victim into a settlement. In no way is this appropriate. Caution should be taken with mediation. Full disclosure about mediation, screening for appropriateness, required training and experience, required supervision, and required escape with the option of reverting to the formal process are essential.

It also appears that the proposed rule envisions mediation as an option for K-12 students, without any consideration of age appropriateness. The only reference to age is that it is a factor that may affect its outcome, not that it would preclude the process itself.

8. Maintaining records of investigations for only three years (Proposed Rule § 106.445(b)(7)).

Proposed rule § 106.445(b)(7), requiring schools to maintain records of sexual harassment investigations for only 3 years, will effectively bar many PreK–12 students from seeking a civil remedy against their harasser or their school. Records of Title IX investigations may be vital evidence for a student who wishes to file a civil action against their harasser or their school. However, young people are barred from filing such a claim on their own prior to reaching the age of majority.³² In the case of students who experience sexual harassment at a young age, the school could have ceased maintaining records of the investigation before the student even reaches the age of 18 and has the ability to vindicate their own rights.

³² See 23 Pa. Stat. and Cons. Stat. Ann. § 5101 (West) (barring minors from bringing most legal claims on their own behalf).

Young people who experience sexual harassment or assault are uniquely unequipped to alert others to potential legal claims because their coping mechanisms, such as “denial, repression, and amnesia”, make it more difficult to speak about the harassment or abuse.³³ Even those young people who do have the ability to speak about harassment or abuse may not have the benefit of a guardian who would bring a legal claim on their behalf. Federal and state laws have consistently recognized that it is inappropriate to punish minors for the failure of a guardian to file a claim on the minor’s behalf, and consequently toll the relevant statute of limitations periods until minors reach the age of majority and have the ability to vindicate their own rights.³⁴ While children benefit from minority tolling, much of the benefit of these lengthened deadlines would be lost if evidence surrounding the student’s harassment and their schools’ responses to it were unavailable many years later when the student is no longer a minor and can take action on their own.

9. Timeframes (Proposed § 106.45(b)(1)(v)).

While the NPRM calls for a prompt response, it also allows extensions and delays without providing a timeframe within which the school must complete an investigation or reach a determination on a complaint. The absence of a clear timeframe will allow procedures to drag on for unlimited time periods and exacerbate the harm to the complainant, who, in the absence of a remedy may be subjected to ongoing harassment and trauma and may be forced to leave her school of choice in the absence of a timely resolution of her complaint.

This lack of timeframe also applies to law enforcement activity which the NPRM cites as an example of good cause for a delay. Law enforcement activity could take a long time to reach a conclusion, and potentially result in a lengthy delay in the Title IX process. The 2011 DCL, however, recognized that Title IX procedures and law enforcement procedures have different purposes – law enforcement seeks to determine guilt for a crime while Title IX seeks to protect access to education for a student who has been sexually harassed – and the Title IX process should not be delayed to allow the criminal process to be completed. Instead, the 2011 DCL allowed only a time limited delay until law enforcement had completed its gathering of evidence, balancing the needs of both law enforcement and students. Allowing unlimited delays fails to appreciate the needs of victims and undermines Title IX.

E. Disparate treatment of students.

The NPRM proposes to apply different and higher standards for sexual harassment that will cause confusion. There can be no justification for doing so.

1. Harassment on the basis of grounds other than sexual harassment.

The NPRM proposes new rules only for claims of sexual harassment and will cause confusion for schools by forcing them to use different standards for different types of

³³ Gregory G. Gordon, *Adult Survivors of Childhood Abuse and the Statute of Limitations: The Need for Consistent Application of the Delayed Discovery Rule*, 20 PEPP. L. REV. 1359, 1366 (1993).

³⁴ See, e.g. *Varnell v. Dora Consol. Sch. Dist.*, 756 F.3d 1208, 1213 (10th Cir. 2014) (applying New Mexico’s minority tolling statute to the plaintiff’s Title IX claim).

harassment. For example, under Title VI, the law that bans discrimination in schools on the basis of race, national origin, and ethnicity, the law holds schools responsible when the educational institution knows or reasonably should know of possible racial or national origin discrimination.³⁵ A school would need to remember to use the right standard for racial harassment. Further confusion would arise if a complaint raised multiple types of harassment, such as racial and sexual harassment, which is not uncommon. It would be very difficult for a school to apply two different standards. The same confusion would arise with respect to the deliberate indifference standard, which applies in other contexts only to claims for damages and not to liability.³⁶

2. Sex discrimination in employment (Proposed §§ 106.44(a) & 106.30).

By establishing standards to prove sexual harassment and trigger a response that are more demanding than Title VII, the proposed regulations would have Title IX provide less protection for sexual harassment to students than Title VII provides to workers, including school employees. Title VII defines sexual harassment as “sufficiently severe *or* pervasive to *alter* the conditions of the victim’s employment”).³⁷ If an employee is harassed by a coworker or other third party, the employer is liable if (1) it “knew or should have known of the misconduct” and (2) failed to take immediate and appropriate corrective action.³⁸ If an employee is harassed by a supervisor, the school is automatically liable if the harassment resulted in a tangible employment action such as firing or demotion, and otherwise unless the school can prove that the employee unreasonably failed to take advantage of opportunities offered by the school to address harassment.³⁹ The standards proposed in the NPRM—“so severe, pervasive, *and* objectively offensive that it *denied* the student access to the school’s program or activity” and actual knowledge—are much stricter than those applied under Title VII and will make it harder for students (children), whose youth makes them more vulnerable and less able to understand sexual harassment or to take appropriate steps to access help. The NPRM would ironically, prohibit schools from responding to students while employers are required to respond to employees, and, when not prohibited, require them to impose a more demanding standard on children than the law applies to adult employees.

Thank you for the opportunity to present feedback on the NPRM and for your consideration of these comments. We request that the Department withdraw the NPRM and

³⁵ Frequently Asked Questions About Race and National Origin Discrimination - Racial Harassment, *available at* <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/race-origin.html>

³⁶ DOJ Title VI Manual at 31, *available at* <https://www.justice.gov/crt/case-document/file/923546/download>.

³⁷ *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>.

³⁸ *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>.

³⁹ *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)).

instead apply its efforts to enforcing the Title IX requirements that the Department has relied on for decades to ensure that our schools promptly and effectively respond to sexual harassment of students.

Very truly yours,



Terry L. Fromson
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