January 25, 2019

Submitted via email and regulations.gov

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

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

Dear Mr. Marcus:

As state legislators, we write in response to the Department of Education's Notice of Proposed Rulemaking, to express our strong opposition to the Department's proposal to amend rules implementing Title IX of the Education Amendment Act of 1972. The Department's proposed rules would endanger students targeted by sexual harassment and undermine state laws protecting student rights.

As elected state officials, we work to ensure that our constituents are able to thrive and are protected from discrimination in their workplaces, communities, and schools. Title IX is a crucial federal civil rights law that addresses the far-reaching impact of sexual harassment, including sexual assault, on students' education by ensuring that schools respond appropriately and effectively to sexual harassment. Far too many students throughout this country experience sexual harassment, often with devastating impacts on their ability to successfully complete their educations.

Unfortunately, the Department's proposed Title IX rules fail to respond to the realities of sexual harassment in schools and if finalized, would make schools less safe for students. Instead of effectuating Title IX's purpose of keeping students safe from sexual abuse and other forms of sexual harassment—that is, from unlawful sex discrimination—they would make it harder for students to report abuse, allow (and sometimes require) schools to ignore reports when they are made, and unfairly tilt the grievance process in favor of respondents to the direct detriment of survivors. Under the proposed rules, for example, schools would only be responsible for addressing sexual harassment that is known by a small subset of school employees—those with "authority to institute corrective measures." If a middle school student told a school counselor that she was experiencing sexual abuse at the hands of a teacher, or a college student told her professor that she was being targeted by severe sexual harassment, the school would have no responsibility under the proposed rules to take any action whatsoever. Schools would also be required to ignore harassment that occurs outside of a school activity, including most off-campus and online harassment, even when a student must sit in her assailant's classroom each day. In the rare cases when schools would be required to respond to a complaint of sexual harassment, the proposed rules allow—or even require—schools to deny harassment victims a fair process by encouraging use of the improper clear and convincing evidence standard, which stacks the deck

against complainants, and by requiring schools to presume that no harassment occurred. Under the proposed rules, schools would have far lower obligations to protect children from sexual harassment than employers have to protect adult employees from harassment.

For many years, particularly after the Department issued sexual harassment guidance in 2011 and 2014 and stepped up enforcement of Title IX, students in our states have relied on Title IX protections and, in many cases, protections under our state laws, to be able to continue their education despite experiencing sexual harassment. But the Department's proposed Title IX rules ignore the significant efforts states have made to increase student protections from sexual violence. In at least 10 states, current statutory provisions do not align with the Department's proposed Title IX rules in some way.[1] In a few of those states, compliance with the proposed rules may put institutions' access to state funding in jeopardy because those states' institutions of higher education are required to create sexual harassment policies that include provisions that appear to directly conflict with those required by the Department's proposed Title IX rules. In other states, laws diverge from the Department's proposed Title IX rules by mandating that schools use different standards of proof, covering students both on and off campus, providing more robust supportive measures to victims, or laying out different procedures for cross examination or mediation. The consequences of these conflicts could be wide ranging, posing problems for enforcement, leading to confusion for schools and students, imposing additional cost burdens, and prompting lengthy litigation battles.

The longstanding Title IX rules currently in place properly balance federal interests in regulating civil rights compliance and states' interests in regulating education and public health and safety – areas traditionally reserved to the states.[2] They create a floor of protections upon which states are free to build. But the proposed rules threaten to upset that balance by directing educational institutions to ignore some complaints of harassment, even if state law requires a response, and by purporting to limit the procedural protections that schools can provide survivors of sexual assault and other forms of harassment, even if state law says otherwise. Under Executive Order 13132, the Department should have consulted with state and local officials before issuing the proposed rules because it is "undertaking to formulate policies that have federalism implications" and because, if finalized, these regulations could draw into question different requirements under some state laws for educational institutions addressing sexual harassment.[3] It failed to do so. By seeking to reinterpret Title IX in a manner that limits a state's ability to protect the safety of its constituents without first consulting those elected by the people to legislate for the states, the Department has failed to respect the principles of federalism upon which our nation is built

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[1] *See e.g.,* California (Cal. Educ. Code § 67386, Cal. Educ. Code § 66290.1); Connecticut (Conn. Gen. Stat. Ann. § 10a-55m); Hawaii (Haw. Rev. Stat. Ann. § 304A-120), Illinois (110 Ill. Comp. Stat. Ann. 155); Maryland (Md. Code Ann., Educ. § 11-601); New Jersey (N.J. Stat. Ann. § 18A:61E-2); New York (N.Y. Educ. Law §§ 6439-49); Oregon (Or. Rev. Stat. Ann. § 350.255, Or. Rev. Stat. Ann. § 342.704); Texas (Tex. Educ. Code Ann. § 51.9363); and Virginia (Va. Code Ann. § 23.1-806).

[2] *See e.g., United States v. Lopez*, 514 U.S. 549, 580 (1995) ("it is well established the education is a traditional concern of the States"); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (explaining that health and safety are traditional state powers).

[3] Executive Order 13132, *available at* https://www.govinfo.gov/content/pkg/FR-1999-08-10/pdf/99-20729.pdf.

For these reasons, we call on the Department of Education to immediately withdraw these proposed rules.

Sincerely,

Adline Clarke
Representative
Alabama

Scott Kawasaki
Senator
Alaska

Athena Salman
Minority Whip
Arizona

Buffy Wicks
State Assemblywoman, District 15
California

Connie M. Leyva
State Senator
California

Lorena Gonzalez
Assemblywoman
California

Nancy Skinner
State Senator
California

Wendy Carrillo
Assemblymember, 51st District
California

Daneya Esgar
State Representative
Colorado

Jillian Gilchrest
State Representative
Connecticut

Valerie Longhurst
House Majority Leader
Delaware

Charles Allen
Councilmember, Ward 6
District of Columbia

David Grosso
Councilmember
District of Columbia

Anna V. Eskamani
State House Representative
Florida

Linda Stewart
Senator
Florida

David Dreyer
Representative
Georgia

Elena C. Parent
State Senator
Georgia

Matthew Wilson
Representative, District 80
Georgia

Nan Grogan Orrock
State Senator
Georgia

Park Cannon
Representative
Georgia

Renitta Shannon
State Representative
Georgia

Kim Schofield
State House Representative
Georgia

Mary Margaret Oliver
State Representative, House District 82
Georgia

Scott Holcomb
State Representative
Georgia

John McCrostie
State Representative
Idaho

Aaron M. Ortiz
1st District House of Representative
Illinois

Ann M. Williams
State Representative
Illinois

Anna Moeller
State Representative
Illinois

Celina Villanueva
State Representative, 21st District
Illinois

Daniel Didech
State Representative
Illinois

Diane Pappas
Representative
Illinois

Elizabeth Lisa Hernandez
State Representative, 24th District
Illinois

Emanuel "Chris" Welch
State Representative
Illinois

Frances Hurley
State Representative
Illinois

Fred Crespo
State Representative, Asst. Majority Leaders
Illinois

Greg Harris
House Majority Leader
Illinois

Jaime M. Andrade
Chairman: Cybersecurity, Data Analytics & IT
Illinois

Jay C. Hoffman
Assistant Majority Leader
Illinois

Jennifer Gong-Gershowitz
Representative
Illinois

John C. D'Amico
State Representative
Illinois

John Connor
State Representative, 85th District
Illinois

Jonathan Carroll
State Representative, 57th District
Illinois

Joyce Mason
State Representative
Illinois

Kam Buckner
State Representative, 26th District
Illinois

Karina Villa
State Representative
Illinois

Kathleen Willis
State Representative, 77 District
Illinois

Katie Stuart
112th District Representative
Illinois

Kelly Burke
State Representative
Illinois

Kelly Cassidy
IL State Representative
Illinois

Lamont J. Robinson
State Representative, 5th District
Illinois

LaToya Greenwood
State Rep
Illinois

Lawrence M. "Larry" Walsh, Jr.
Representative, 86th District
Illinois

Mark L. Walker
State Representative
Illinois

Mary Edly-Allen
State Representative
Illinois

Maurice West
State Representative
Illinois

Michael Halpin
State Representative
Illinois

Michael J. Madigan
Speaker of the House
Illinois

Thaddeus Jones
State Representative
Illinois

Deb Conroy
Representative
Illinois

Robert Martwick
State Representative, 19th District
Illinois

Robyn Gabel
Representative
Illinois

Stephanie Kifowit
State Representative, 84th District
Illinois

Sue Scherer
State Representative, 96th District
Illinois

Terra Costa Howard
State Representative, 48th District
Illinois

William Q. Davis
State Representative, Assistant Majority Leader
Illinois

Debbie Meyers-Martin
State Representative, 38th District
Illinois

Natalie A Manley
State Representative
Illinois

Rep. Carol Ammons
Chair - Higher Education
Illinois

Sara Feigenholtz
State Representative
Illinois

Sue Errington
Representative
Indiana

Janet Petersen
Senate Minority Leader
Iowa

Mary Lou Marzian
Representative
Kentucky

Karen Carter Peterson
State Senator
Louisiana

Linda Sanborn
State Senator
Maine

Bill Pluecker
Representative
Maine

Cathy Breen
State Senator
Maine

Eloise Vitelli
Assistant Senate Majority Leader
Maine

Everett B Carson
State Senator
Maine

Geoff Gratwick
Senator
Maine

Kristen S. Cloutier
State Representative
Maine

Margaret O'Neil
Representative
Maine

Rebecca Millett
Senator
Maine

Richard Farnsworth
Representative
Maine

Troy Jackson
Senate President
Maine

Erin Herbig
Senator
Maine

Adrienne A. Jones
Speaker Pro Tempore
Maryland

Bill Ferguson
State Senator, District 46
Maryland

Dana Stein
Delegate
Maryland

Douglas J. J. Peters
Senator
Maryland

Jeff Waldstreicher
State Senator
Maryland

Joanne C. Benson
State Senator
Maryland

Maggie McIntosh
Delegate
Maryland

Delegate Eric Luedtke
Chair, Education Subcommittee
Maryland

Michelle Ciccolo
Representative, 15th Middlesex District
Massachusetts

Tram T. Nguyen
State Representative, 18th Essex District
Massachusetts

Jon Hoadley
Representative
Michigan

Vanessa Guerra
State Representative
Michigan

Kathy Sykes
Representative
Mississippi

Sonya Williams Barnes
State Representative
Mississippi

Diane Sands
Senator
Montana

Megan Hunt
Senator
Nebraska

Maggie Carlton
Assemblywoman
Nevada

Jan Schmidt
Representative
New Hampshire

Lisa Bunker
State Rep., Rockingham 18 (Exeter)
New Hampshire

Assemblywoman Valerie Vainieri Huttle
State Legislator, District 37
New Jersey

Loretta Weinberg
Majority Leader
New Jersey

Linda Greenstein
Senator
New Jersey

Shirley K. Turner
Senator
New Jersey

Elizabeth "Liz" Stefanics
State Senator, District 39
New Mexico

Elizabeth “Liz” Thomson
Representative
New Mexico

Jacob R. Candelaria
Senator
New Mexico

Senator Mimi Stewart
Senate Majority Whip
New Mexico

Aravella Simotas
Assembly Member
New York

Marcia Morey
State Representative
North Carolina

Rep. Joshua A. Boschee
House Minority Leader
North Dakota

Allison Ikley-Freeman
State Senator
Oklahoma

Laurie Monnes Anderson
Senator
Oregon

Sara Gelser
Senator
Oregon

Kathleen Taylor
State Senator, SD 21
Oregon

Malcolm Kenyatta
Representative
Pennsylvania

Maria Donatucci
Representative
Pennsylvania

Mary Jo Daley
State Representative
Pennsylvania

Mike Schlossberg
State Representative
Pennsylvania

Arthur Handy
State Representative
Rhode Island

Bridget Valverde
Senator
Rhode Island

Dawn Euer
State Senator
Rhode Island

Deborah Ruggiero
State Representative
Rhode Island

Gayle Goldin
Senator
Rhode Island

Lauren Carson
State Representative, House District 75
Rhode Island

Rebecca Kislak
State Representative
Rhode Island

Valarie J Lawson
Senator
Rhode Island

Gilda Cobb-Hunter
Representative
South Carolina

John Ray Clemmons
State Representative
Tennessee

Sara Kyle
State Senator
Tennessee

Mary González
State Representative
Texas

Jani Iwamoto
Senator
Utah

Laura Sibilia
Representative
Vermont

Mari Cordes, RN
State Representative, Vermont
Vermont

Sarah Copeland Hanzas
Representative
Vermont

Karen Keiser
Senate President Pro Tempore
Washington

Nicole Macri
State Representative, 43rd Distrct
Washington

Barbara Fleischauer
Delegate
West Virginia

Katrina Shankland
State Representative
Wisconsin

Lisa Subeck
State Representative
Wisconsin

Melissa Agard Sargent
Representative
Wisconsin