

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:

We are writing on behalf of the National Women's Law Center in response to the Department of Education's (the Department) Notice of Proposed Rulemaking ("NPRM" or "proposed rules") to express our strong opposition to the Department's proposal to amend rules implementing Title IX of the Education Amendment Act of 1972 (Title IX) as published in the Federal Register on November 29, 2018.

The National Women's Law Center ("the Center") is a nonprofit organization that has worked since 1972 to combat sex discrimination and expand opportunities for women and girls in every facet of their lives, including education. Founded the same year as Title IX of the Education Amendments of 1972 was enacted, the Center has participated in all major Title IX cases before the Supreme Court as counsel¹ or amici. The Center is committed to eradicating all forms of sex discrimination in school, specifically including discrimination against pregnant and parenting students, LGBTQ students, and students who are vulnerable to multiple forms of discrimination, such as girls of color and girls with disabilities. This work includes a deep commitment to eradicating sexual harassment (including sexual violence) as a barrier to educational success. We equip students with the tools to advocate for their own Title IX rights at school, assist policymakers in enforcing Title IX and strengthening protections against sexual harassment and other forms of sex discrimination, and litigate on behalf of students whose schools fail to adequately address their reports of sexual harassment in violation of Title IX.

As attorneys representing those who have been harmed by sexual violence and other forms of sexual harassment, we know that too often when students seek help from their schools to address the harassment, they are retaliated against or pushed out of school altogether. For example, one of our current plaintiffs, Jane Doe, was fourteen years old when she was repeatedly subjected to sexual harassment, including three sexual assaults in schools bathrooms by multiple older male peers.² When Jane and her friends reported the assaults and other harassment to the school, instead of investigating the incidents, a school resource officer coerced her into revising her previous written statement to say she was a "willing participant" in her own assaults.³ The school then suspended Jane for so-called "sexual misconduct" and offered no counseling, tutoring, or other accommodations to address the impacts of the harassment and help her again feel safe at school.⁴ Terrified of returning to school, Jane, who was previously a

¹ *E.g.*, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005); *Davis v. Monroe Cnty Bd. of Educ.*, 526 U.S. 629 (1999).

² Compl. at ¶ 1, *Doe v. Sch. Bd. of Miami-Dade Cnty.*, No. 1:19-cv-20204 (S.D. Fla. Jan. 15, 2019).

³ *Id.* at ¶¶ 2, 49-51.

⁴ *Id.* at ¶¶ 2-3.

conscientious and ambitious student, was absent for more than three months and now has a full academic quarter of failing grades on her high school transcript.⁵ She was forced to transfer to another school when it became clear that no meaningful steps would be taken to protect her.

DarbiAnne Goodwin, another current client of the Center’s, was a high school sophomore when she was sexually assaulted by a male classmate over winter break.⁶ When they returned to school, he and his friends spread sexual rumors about her, subjected her to sexual slurs, and threatened to physically attack her.⁷ However, her school refused to conduct an adequate investigation or otherwise take steps to provide a safe educational environment for her.⁸ As a result, Darbi developed post-traumatic stress disorder (PTSD) and was effectively pushed out of school not once, but twice—once into homebound instruction, and a second time into cyber school, an inferior alternative school where she was forced to withdraw from two of her courses and retake a third course she had already completed the previous year.⁹ Once an A-student who had been active in extracurricular activities, Darbi suffered a sharp decline in her grade point average and had to leave the student council and turned down a nomination to be its president.¹⁰

Jane and Darbi’s experiences are just two examples of how a school’s failure to address sexual harassment can result in a very real loss of educational opportunities for survivors. Rather than working to ensure that fewer students face such experiences and that schools take more effective steps to address sexual harassment, the Department’s proposed rules would make it more likely that those who experience sexual assault and other forms of harassment confront the same types of inadequate school responses as Jane and Darbi. In a reversal of longstanding Department policy, schools would be encouraged—and in many cases, required—to do less to address sexual harassment. There is simply no valid justification for the Department’s proposal.

The Department proposes to remove significant protections for students and employees who experience sexual assaults and other forms of sexual harassment, apparently motivated by unlawful sex stereotypes that women and girls are likely to lie about sexual assault and other forms of harassment and by the perception that sexual harassment has a relatively trivial impact on those who experience it. Just weeks before rescinding two important Title IX guidances on sexual violence and issuing “interim guidance” in advance of these proposed rules, Secretary DeVos diminished the full range of sexual harassment that deprives students of equal access to educational opportunities, claiming, “if everything is harassment, then nothing is.”¹¹ Former Acting Assistant Secretary Candice Jackson reinforced the myth of false accusations, claiming that “90 percent” of her office’s Title IX investigations were the result of “drunk[en]” sexual encounters and regret.¹² Neomi Rao, the Administrator of the Office of Information and Regulatory Affairs, presaged Ms. Jackson’s rhetoric about false accusations stemming from regret, when she claimed that “casual sex for women often leads to regret” and causes them to “run from their

⁵ *Id.* at ¶ 3.

⁶ *Goodwin v. Pennridge Sch. Dist.*, 309 F. Supp. 3d 367, 371 (E.D. Pa. 2018); *see also* Pl.’s Mot. for Summ. J. at 1, *Goodwin v. Pennridge Sch. Dist.*, No. 17-cv-3570-TR (E.D. Pa. Jan. 14, 2019).

⁷ *Goodwin*, 309 F. Supp. 3d at 372; Pl.’s Mot. for Summ. J. at 1, *Goodwin*, No. 17-cv-3570-TR.

⁸ *Goodwin*, 309 F. Supp. 3d at 372; Pl.’s Mot. for Summ. J. at 1, *Goodwin*, No. 17-cv-3570-TR.

⁹ *Goodwin*, 309 F. Supp. 3d at 372, 374; Pl.’s Mot. for Summ. J. at 1, *Goodwin*, No. 17-cv-3570-TR.

¹⁰ *Goodwin*, 309 F. Supp. 3d at 373; Pl.’s Mot. for Summ. J. at 5, 9, *Goodwin*, No. 17-cv-3570-TR.

¹¹ Dep’t of Educ., *Secretary DeVos Prepared Remarks on Title IX Enforcement* (Sept. 7, 2017) [hereinafter *DeVos Prepared Remarks*], available at <https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement>.

¹² Erica L. Green & Sheryl Gay Stolberg, *Campus Rape Policies Get a New Look as the Accused Get DeVos’s Ear*, N.Y. TIMES (July 12, 2017), <https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html>.

choices,” leading to assault allegations.¹³ And President Trump himself has repeatedly publicly dismissed and disputed allegations of sex-based harassment and violence made by women.¹⁴ Tellingly, these officials have not expressed the same skepticism of the denials made by men and boys accused of sexual harassment, including sexual assault.

The harm of the Department’s proposal to both students and schools cannot be overstated. The proposed rules would make schools more dangerous for all students, with especial risk to students experiencing sexual harassment who are students of color, pregnant and parenting students, LGBTQ students, and/or students with disabilities, as they are more likely to experience sexual harassment and more likely to be ignored, punished, and pushed out of school entirely. Simultaneously, schools would be forced to adopt inflexible, costly, and ineffective procedures that would expose them to more litigation and that create less inclusive and equitable communities.¹⁵

The proposed rules ignore the devastating impact of sexual violence and other forms of sexual harassment in schools. Instead of effectuating Title IX’s purpose of protecting students and school employees from sexual abuse and other forms of sexual harassment—that is, from unlawful sex discrimination—they make it harder for individuals to report abuse, allow (and sometimes require) schools to ignore reports when they are made, and unfairly tilt the investigation process in favor of respondents, to the direct detriment of survivors. For the reasons discussed at length in this comment, the Center unequivocally opposes the Department’s proposed rule and calls for its immediate withdrawal.

¹³ Neomi Rao, “*The Feminist Dilemma*”, YALE FREE PRESS (Apr. 1993), <https://afj.org/wp-content/uploads/2019/01/02-The-Feminist-Dilemma.pdf>.

¹⁴ When White House officials Rob Porter and David Sorensen resigned amidst reports that they had committed gender-based violence, the president tweeted: “Peoples [sic] lives are being shattered and destroyed by a mere allegation. . . . There is no recovery for someone falsely accused—life and career are gone. Is there no such thing any longer as Due Process?” Donald Trump (@realDonaldTrump), TWITTER (Feb. 10, 2018, 7:33 AM), <https://twitter.com/realDonaldTrump/status/962348831789797381>. See also Jacey Fortin, *Trump’s History of Defending Men Accused of Hurting Women*, N.Y. TIMES (Feb. 11, 2018), <https://www.nytimes.com/2018/02/11/us/trump-sexual-misconduct.html> (about harassment claims against former Fox News host, Bill O’Reilly, Trump said: “I don’t think Bill did anything wrong,” adding, “I think he’s a person I know well. He is a good person,” and about sexual harassment claims against former chairman of Fox News, Roger Ailes, Trump said he “felt very badly” for him and that “I can tell you that some of the women that are complaining, I know how much he’s helped them.”); Lisa Bonos, *Trump asks why Christine Blasey Ford didn’t report her allegations sooner. Survivors answer with #WhyIDidntReport*, WASH. POST (Sept. 21, 2018), https://www.washingtonpost.com/news/soloish/wp/2018/09/21/trump-asks-why-christine-blasey-ford-didnt-report-her-allegation-sooner-survivors-answer-with-whyididntreport/?utm_term=.3ca0d0017c36 (about sexual assault claims against Justice Brett Kavanaugh, Trump doubted Dr. Ford’s account, stating “if the attack on Dr. Ford was as bad as she says, charges would have been immediately filed with local Law Enforcement Authorities”); Allie Malloy, et al., *Trump Mocks Christine Blasey Ford’s Testimony, Tells People to ‘Think of Your Son’*, CNN (Oct. 3, 2018), <https://www.cnn.com/2018/10/02/politics/trump-mocks-christine-blasey-ford-kavanaugh-supreme-court/index.html> (reporting on Trump mocking Dr. Ford’s testimony before the Senate Judiciary Committee);

¹⁵ See Letter from Ass’n of Am. Univs. (AAU) to Brittany Bull at 4 (Jan. 24, 2019) [hereinafter AAU Letter], <https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Higher-Education-Regulation/AAU-Title-IX-Comments-1-24-19.pdf> (discussing “higher costs associated with the regulation’s prescribed quasi-court models”); Letter from Ass’n of Indep. Colls. and Univs. (AICUM) to Sec’y Elisabeth DeVos at 2 (Jan. 23, 2019) [hereinafter AICUM Letter], <http://aicum.org/wp-content/uploads/2019/01/AICUM-public-comments-on-Notice-of-Proposed-Rulemaking-%E2%80%9CNPRM%E2%80%9D-amending-regulations-implementing-Title-IX-of-the-Education-Amendments-of-1972-Title-IX%E2%80%9D-Docket-ID-ED-2018-OCR-0064.pdf> (“[s]uch financial costs and administrative burdens may be overwhelming”); Letter from The School Superintendents Ass’n (AASA) to Sec’y Elisabeth DeVos at 1, 2, 3 (Jan. 22, 2019) [hereinafter AASA Letter], [http://aasa.org/uploadedFiles/AASA_Blog\(1\)/AASA Title IX Comments Final.pdf](http://aasa.org/uploadedFiles/AASA_Blog(1)/AASA%20Title%20IX%20Comments%20Final.pdf) (discussing “new and unaccounted for costs in changing current policies and procedures, . . . increased litigation costs,” “a real cost in terms of training and professional development to changing practices and policies,” and “much costlier redirection of district resources towards addressing Title IX complaints and violations in court”).

Part I illustrates the prevalence, underreporting, and pernicious effects of sexual harassment and assault on students' equal access to educational opportunities. Part II describes how the proposed rules would permit or require schools to ignore reports of sexual harassment and assault. Part III details how the students would be denied necessary supportive measures and remedies under the Department's proposal. Part IV details how the proposed grievance procedures would permit or require schools to unlawfully favor respondents over complainants and retraumatize survivors and other harassment victims. Part V describes how the proposed rules would weaken the ability of the Department to remedy sex discrimination and broaden the ability of schools to engage in sex discrimination. Part VI explains that the proposed rules exceed the Department's authority to effectuate Title IX's nondiscrimination mandate. Parts VII-IX describe how the proposed rules would conflict with Title VII, the Clery Act, and many state laws. Part X explains how the Department's actions in conducting its cost-benefit analysis violated the Administrative Procedure Act, the Information Quality Act, Executive Orders 13563 and 12866. Part XI details how the Department failed to follow other procedural requirements in violation of numerous laws, including Title IV, the Regulatory Flexibility Act, and Executive Orders 12250, 13132, 13175, and 13272. Part XII responds to the Department's Directed Questions by explaining how various provisions of its proposal are unworkable and fail to take into account the unique circumstances of various parties and/or schools.

I. Sexual harassment, including sexual assault, is a pervasive problem in school but is chronically underreported and has severe consequences for a student's education.

A. Sexual harassment, including sexual assault, is pervasive in schools across the country.

Students experience high rates of sexual harassment. In grades 7-12, 56 percent of girls and 40 percent of boys are sexually harassed in any given school year.¹⁶ More than one in five girls ages 14 to 18 are kissed or touched without their consent.¹⁷ During college, 62 percent of women and 61 percent of men experience sexual harassment,¹⁸ and more than one in five women and nearly one in 18 men are sexually assaulted.¹⁹ Historically marginalized and underrepresented groups are more likely to experience sexual harassment than their peers. Native, Black, and Latina girls are more likely than white girls to be forced to have sex when they do not want to do so.²⁰ Fifty-six percent of girls ages 14-18 who are pregnant or parenting are kissed or touched without their consent.²¹ More than half of LGBTQ students ages 13 to 21 are sexually harassed at school.²² Nearly one in four transgender and gender-nonconforming students are

¹⁶ Am. Ass'n of Univ. Women (AAUW), *Crossing the Line: Sexual Harassment at School 2* (2011) [hereinafter *Crossing the Line*], <https://www.aauw.org/files/2013/02/Crossing-the-Line-Sexual-Harassment-at-School.pdf>.

¹⁷ Nat'l Women's Law Ctr., *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/>.

¹⁸ AAUW, *Drawing the Line: Sexual Harassment on Campus* 17, 19 (2005) [hereinafter *Drawing the Line*], <https://history.aauw.org/files/2013/01/DTLFinal.pdf> (noting differences in the types of sexual harassment and reactions to it).

¹⁹ E.g., AAU, *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, 13-14 (Sept. 2015) [hereinafter *AAU Campus Climate Survey*], https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU_Campus_Climate_Survey_12_14_15.pdf.

²⁰ *Let Her Learn: Sexual Harassment and Violence*, *supra* note 17, at 3.

²¹ Nat'l Women's Law Ctr., *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/>.

²² GLSEN, *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* 26 (2018) [hereinafter 2017 National School Climate Survey], available at <https://www.glsen.org/article/2017-national-school-climate-survey-1>.

sexually assaulted during college.²³ Students with disabilities are 2.9 times more likely than their peers to be sexually assaulted.²⁴

Sexual harassment and assault occurs both on-campus and in off-campus spaces closely associated with school. Nearly nine in ten college students live off campus.²⁵ Forty-one percent of college sexual assaults involve off-campus parties.²⁶ Many fraternity and sorority houses are located off campus. Students are far more likely to experience sexual assault if they are in a sorority (nearly one and a half times more likely) or fraternity (nearly three times more likely).²⁷ When schools fail to provide effective responses, the impact of sexual harassment and assault can be devastating.²⁸ Too many individuals who experience sexual assault or other forms of sexual harassment end up dropping out of school because they do not feel safe on campus; some are even expelled for lower grades in the wake of their trauma.²⁹ For example, 34 percent of college student survivors of sexual assault drop out of college.³⁰

B. Sexual harassment, including sexual assault, is consistently and vastly underreported.

Reporting sexual harassment can be hard for most victims, and the proposed rules would further discourage students from coming forward to ask their schools for help. Already, only 12 percent of college survivors who experience sexual assault,³¹ and only 7.7 percent of college students who experience sexual harassment, report to their schools or the police.³² Only 2 percent of girls ages 14 to 18³³ report sexual assault or harassment. Students often choose not to report for fear of reprisal, because they believe their abuse was not important enough,³⁴ because they are “embarrassed, ashamed or that it would be too emotionally difficult,”³⁵ because they think no one would do anything to help,³⁶ and because they fear that reporting would make the situation even worse.³⁷ Common rape myths, such as those perpetuated in statements made by officials in this Administration, that a victim could have prevented their assault if they had only acted differently, wore something else, or did not consume alcohol, only exacerbate underreporting.

²³ *AAU Campus Climate Survey*, *supra* note 19 at 13-14.

²⁴ Nat'l Women's Law Ctr., *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>.

²⁵ Rochelle Sharpe, *How Much Does Living Off-Campus Cost? Who Knows?*, N.Y. TIMES (Aug. 5, 2016), <https://www.nytimes.com/2016/08/07/education/edlife/how-much-does-living-off-campus-cost-who-knows.html> (87 percent).

²⁶ United Educators, *Facts From United Educators' Report - Confronting Campus Sexual Assault: An Examination of Higher Education Claims* (2015), https://www.ue.org/sexual_assault_claims_study.

²⁷ 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 percent of females and 23.6 percent of males in Fraternity and Sorority Life (FSL) have experienced non-consensual sexual contact, compared with 33.1 percent of females and 7.9 percent of males not in FSL).

²⁸ *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.

²⁹ *E.g.*, Alexandra Brodsky, *How much does sexual assault cost college students every year?*, WASH. POST (Nov. 18, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/11/18/how-much-does-sexual-assault-cost-students-every-year>.

³⁰ 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>.

³¹ *Poll: One in 5 women say they have been sexually assaulted in college*, WASH. POST (June 12, 2015) [hereinafter Washington Post Poll], <https://www.washingtonpost.com/graphics/local/sexual-assault-poll>.

³² *AAU Campus Climate Survey*, *supra* note 19 at 35.

³³ *Let Her Learn: Sexual Harassment and Violence*, *supra* note 17 at 2.

³⁴ *AAU Campus Climate Survey*, *supra* note 19 at 36.

³⁵ *Id.*

³⁶ RAINN, *Campus Sexual Violence: Statistics*, <https://www.rainn.org/statistics/campus-sexual-violence>.

³⁷ 2017 National School Climate Survey, *supra* note 22, at 27.

Survivors of sexual assault may also be unlikely to make a report to law enforcement because, in many instances, criminal reporting often does not serve survivors' best interests. Police officers are concerned with investigating crimes and catching perpetrators; they are not in the business of providing supportive measures to survivors and making sure that they feel safe at school. And some students—especially students of color, undocumented students,³⁸ LGBTQ students,³⁹ and students with disabilities—can be expected to be even less likely than their peers to report sexual assault to the police due to increased risk of being subjected to police violence and/or deportation. Survivors of color also may not want to report to the police if their assailant is non-white, in order to avoid exacerbating the overcriminalization of men and boys of color.

C. Students who do report sexual harassment are often ignored or even punished by their schools.

Unfortunately, students who reasonably choose not to turn to the police often face hostility from their schools when they try to report. Reliance on common rape myths that blame individuals for the assault and other harassment they experience⁴⁰ can lead schools to minimize and discount sexual harassment reports. An inaccurate perception that false accusations of sexual assault are common⁴¹—despite the fact that men and boys are far more likely to be victims of sexual assault than to be falsely accused of it⁴²—can also lead schools to dismiss reports of assault and assume that complainants are being less than truthful. Indeed, many students who report sexual assault and other forms of sexual harassment to their school face discipline as the result of speaking up, for engaging in so-called “consensual” sexual activity⁴³ or premarital sex,⁴⁴ for defending themselves against their harassers,⁴⁵ or for merely talking about their assault with other students in violation of a “gag order” or nondisclosure agreement imposed by their school.⁴⁶ The Center regularly receives requests for legal assistance from student survivors across the country who have been disciplined by their schools after reporting sexual assault.⁴⁷

³⁸ See Jennifer Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation*, N.Y. TIMES (April 30, 2017), <https://www.nytimes.com/2017/04/30/us/immigrants-deportation-sexual-abuse.html?mcubz=3>.

³⁹ 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*], <https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf>.

⁴⁰ See e.g., Bethonie Butler, *Survivors of sexual assault confront victim blaming on Twitter*, WASH. POST (Mar. 13, 2014), <https://www.washingtonpost.com/blogs/she-the-people/wp/2014/03/13/survivors-of-sexual-assault-confront-victim-blaming-on-twitter>.

⁴¹ David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16(12) VIOLENCE AGAINST WOMEN 1318–1334 (2010), available at <https://doi.org/10.1177/1077801210387747>.

⁴² 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.

⁴³ See, e.g., Brian Entin, *Miami Gardens 9th-grader says she was raped by 3 boys in school bathroom*, WSVN-TV (Feb. 8, 2018), <https://wsvn.com/news/local/miami-gardens-9th-grader-says-she-was-raped-by-3-boys-in-school-bathroom>; Nora Caplan-Bricker, *“My School Punished Me”*, SLATE (Sept. 19, 2016), <https://slate.com/human-interest/2016/09/title-ix-sexual-assault-allegations-in-k-12-schools.html>; Aviva Stahl, *‘This Is an Epidemic’: How NYC Public Schools Punish Girls for Being Raped*, VICE (June 8, 2016), https://broadly.vice.com/en_us/article/59mz3x/this-is-an-epidemic-how-nyc-public-schools-punish-girls-for-being-raped.

⁴⁴ Sarah Brown, *BYU Is Under Fire, Again, for Punishing Sex-Assault Victims*, CHRONICLE OF HIGHER EDUC. (Aug. 6, 2018), <https://www.chronicle.com/article/BYU-Is-Under-Fire-Again-for/244164>.

⁴⁵ NAACP Legal Defense and Educ. Fund, Inc. & Nat’l Women’s Law Ctr., *Unlocking Opportunity for African American Girls: A Call to Action for Educational Equity* 25 (2014) [hereinafter *Unlocking Opportunity*], https://nwlc.org/wp-content/uploads/2015/08/unlocking_opportunity_for_african_american_girls_report.pdf.

⁴⁶ See, 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.

⁴⁷ As of this writing, NWLC is litigating on behalf of three student survivors who were punished or otherwise unfairly pushed out of their high schools when they reported sexual harassment, including sexual assault. Nat’l Women’s Law Ctr., *Miami School*

Women and girls of color already face discriminatory discipline due to race and sex stereotypes.⁴⁸ Schools are also more likely to ignore, blame, and punish Black and Brown women and girls who report sexual harassment due to harmful race and sex stereotypes that label them as “promiscuous,”⁴⁹ and less deserving of protection and care.⁵⁰ For example, Black women and girls are commonly stereotyped as “Jezebels,” Latina women and girls as “hot-blooded,” Asian American and Pacific Islander women and girls as “submissive, and naturally erotic,” and Native women and girls as “sexually violable” due to the legacy of colonization.⁵¹

With respect to Black girls specifically, studies show that adults view Black girls as more adult-like and less innocent than their white peers, a phenomenon referred to as “adulthoodification,” and that Black girls are stereotyped as “hypersexualized”; as a result, schools are likely to treat their reports of sexual harassment with less seriousness, and more likely to place blame on Black girls for their victimization.⁵² Indeed, Black women and girls are especially likely to be punished by schools for their behaviors. For example, The Department’s 2013-14 Civil Rights Data Collection (CRDC) shows that Black girls are five times more likely than white girls to be suspended in elementary and secondary school, and that while Black girls represented 20 percent of all preschool enrolled students, they were 54 percent of preschool students who were suspended.⁵³ Schools are also more likely to punish Black women and girls by labeling them as the aggressor when they defend themselves against their harassers or when they respond in age-appropriate ways to traumatic experience because of stereotypes that they are “angry” and “aggressive.”⁵⁴

Schools may rely on many other stereotypes to ignore, blame, and/or punish students who report sexual harassment. For example, students who are pregnant or parenting are more likely to be blamed for sexual harassment than their peers, due in part to the stereotype that they are more “promiscuous” because they have engaged in sexual intercourse in the past. Similarly, LGBTQ students are less likely to be believed and more likely to be blamed due to stereotypes that they are more “promiscuous,” “hypersexual,” “deviant,” or bring the “attention” upon themselves.⁵⁵ Students with disabilities, too, are

Board Pushed Survivor of Multiple Sexual Assaults Out of School, Says NWLC (Jan. 15, 2019), <https://nwlc.org/press-releases/miami-school-board-pushed-survivor-of-multiple-sexual-assaults-out-of-school-says-nwlc>; Nat’l Women’s Law Ctr., *Pennridge School District Consistently Pushes Survivors of Sex-Based Harassment Out of School, Says NWLC* (Aug. 9, 2017), <https://nwlc.org/press-releases/pennridge-school-district-consistently-pushes-survivors-of-sex-based-harassment-out-of-school-says-nwlc>; Nat’l Women’s Law Ctr., *NWLC Files Lawsuit against PA School District for Failing to Address Sexual Assault of High School Student* (May 31, 2017), <https://nwlc.org/press-releases/nwlc-files-lawsuit-against-pa-school-district-for-failing-to-address-sexual-assault-of-high-school-student>.

⁴⁸ Nat’l Women’s Law Ctr., *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>.

⁴⁹ 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 16, 24-29 (forthcoming), available at <https://ssrn.com/abstract=3168909>.

⁵⁰ Georgetown Law Center on Poverty and Inequality, *Girlhood Interrupted: The Erasure of Black Girls’ Childhood*, 1 (2018) [hereinafter *Girlhood Interrupted*], <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf>.

⁵¹ Cantalupo, *supra* note 49, at 24-25.

⁵² *Girlhood Interrupted*, *supra* note 50, at 2-6.

⁵³ U.S. Dep’t of Education, Office for Civil Rights, *A First Look: Key Data Highlights on Equity and Opportunity Gaps in Our Nation’s Public Schools*, at 3 (June 7, 2016; last updated Oct. 28, 2016), <https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf>.

⁵⁴ *Unlocking Opportunity*, *supra* note 45, at 5, 18, 20, 25. See also Sonja C. Tonnesen, *Commentary: “Hit It and Quit It”: Responses to Black Girls’ Victimization in School*, 28 BERKELEY J. GENDER, L. & JUST. 1 (2013), <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1312&context=bglj>.

⁵⁵ See, e.g., Gillian R. Chadwick, *Reorienting the Rules of Evidence*, 39 CARDOZO L. REV. 2115, 2118 (2018), <http://cardozo.lawreview.com/heterosexism-rules-evidence>; Laura Dorwart, *The Hidden #MeToo Epidemic: Sexual Assault Against Bisexual Women*, MEDIUM (Dec. 3, 2017), <https://medium.com/@lauramdorwart/the-hidden-metoo-epidemic-sexual-assault-against-bisexual-women-95fe76c3330a>.

less likely to be believed because of stereotypes about people with disabilities being less credible⁵⁶ and because they may have greater difficulty describing or communicating about the harassment they experienced, particularly if they have a cognitive or developmental disability.⁵⁷

The changes to Title IX enforcement that the NPRM proposes must be considered against the backdrop of underreporting and a pervasive culture in which those who do report sexual harassment, including sexual assault, are likely to be blamed and disbelieved. Unfortunately, and as explained in great detail throughout this comment, rather than seeking to remedy that culture, the NPRM reinforces false and harmful stereotypes about those who experience sexual harassment and proposes rules that would further discourage reporting and make it harder for schools to adequately respond to complaints.

II. The proposed rules would hobble Title IX enforcement, discourage reporting of sexual harassment, and prioritize protecting schools over protecting survivors and other harassment victims.

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 assault or other forms of sexual harassment. The Department's 2001 Guidance, which went through public notice-and-comment and has been enforced in both Democratic and Republican administrations,⁵⁸ defines sexual harassment as "unwelcome conduct of a sexual nature."⁵⁹ 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 2001 Guidance requires schools to address harassment "whether or not the [school] has 'notice' of the harassment."⁶⁰ Under the 2001 Guidance, the Department would consider schools that failed to "take immediate and effective corrective action" to be in violation of Title IX.⁶¹ These standards have appropriately guided the Department's Office of Civil Rights' (OCR) enforcement activities for almost twenty years, effectuating 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 educational opportunities and enforcing students' civil rights.

⁵⁶ The Arc, *People with Intellectual Disabilities and Sexual Violence 2* (Mar. 2011), available at <https://www.thearc.org/document.doc?id=3657>

⁵⁷ E.g., Nat'l Inst. of Justice, *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>.

⁵⁸ 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], <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], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter: Sexual Violence* at 4, 6, 9, &16 (Apr. 4, 2011) [hereinafter 2011 Guidance], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; U.S. Dep't of Educ. Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* 1-2 (Apr. 29, 2014) [hereinafter 2014 Guidance], <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>; U.S. Dep't of Educ. Office for Civil Rights, *Questions and Answers on Campus Sexual Misconduct* (Sept. 2017) [hereinafter 2017 Guidance], <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

⁵⁹ U.S. Dep't 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], <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

⁶⁰ *Id.*

⁶¹ *Id.*

This standard appropriately differs from the higher bar erected by the Supreme Court in the particular and narrow context of a Title IX sexual harassment lawsuit seeking monetary damages from a school. To recover monetary damages, a plaintiff must show that the school was deliberately indifferent to known sexual harassment that was severe and pervasive and deprived a student of equal access to educational opportunities and benefits.⁶² But in establishing that standard, the Court recognized that it was *specific* to private suits seeking monetary damages, not to administrative enforcement. It explicitly 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’s direction to effectuate Title IX’s nondiscrimination mandate.⁶³ 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.⁶⁴ And it recognized that the liability standard for money damages does not limit the agency’s authority to “promulgate and enforce requirements that effectuate [a] statute’s nondiscrimination mandate.”⁶⁵ The 2001 Guidance likewise addressed the difference between suits for money damages and Department enforcement, 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.”⁶⁶ Yet, despite knowing that adopting such a standard creates higher burdens for students who are sexually harassed to get help from their schools, the Department nevertheless insists on importing those standards without adequate justification.

Indeed, under proposed § 106.30, the Department seeks to import into the agency’s enforcement effort a standard that is *more stringent* than the Supreme Court’s standard for monetary damages in Title IX harassment cases. The Court defined sexual harassment as conduct that “effectively denie[s] [a person] equal access to an institution’s *resources* and *opportunities*” or its “*opportunities and benefits*.”⁶⁷ The Department proposes a standard requiring a showing that the harassment *denies* a student of access to a school’s “program or activity”⁶⁸—a significantly more burdensome threshold than *effective denial of equal access* to a school’s resources, opportunities, or benefits, which requires a student to have to be far more harmed in their education before a school must intervene.

In seeking to impose this liability standard to cabin the Department’s enforcement of Title IX, the Department ignores key distinctions that the Supreme Court has specifically recognized between the practical realities of agency enforcement and court action. For instance, under the proposed rules a school would not be required to respond to reports of sexual harassment unless a school official “with the authority to institute corrective measures” had “actual knowledge” of the harassing conduct. This notice standard is drawn from the Court’s opinion in *Gebser v. Lago Vista Independent School District*.⁶⁹ But in

⁶² *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).

⁶³ *Gebser*, 524 U.S. at 291-92 (citing 20 U.S.C. § 1682).

⁶⁴ *Davis*, 526 U.S. at 639.

⁶⁵ *Gebser*, 524 U.S. at 292 (citing 20 U.S.C. § 1682).

⁶⁶ 83 Fed. Reg. at 61468, 61469.

⁶⁷ *Davis*, 526 U.S. at 631.

⁶⁸ Proposed § 106.30.

⁶⁹ See *Gebser*, 524 U.S. at 290. The Department further misstates the law by claiming that the proposed rules adopt the “*Gebser/Davis* standard” of notice. See 83 Fed. Reg. at 61467. The Court in *Davis* did not require a plaintiff alleging student-on-student harassment to prove actual knowledge by an appropriate person with the “authority to institute corrective measures.” See e.g., Brian Bardwell, *No One Is an Inappropriate Person: The Mistaken Application of Gebser’s “Appropriate Person” Test to Title IX Peer-Harassment Cases*, 68 Case W. Res. L. Rev. 1343, 1347-48. Moreover, nine circuit courts do not require plaintiffs to prove actual knowledge by an “appropriate person” in any of their peer-harassment cases that cite *Davis*. See, e.g., *L. L. v.*

Gebser, the Court reasoned that this actual notice standard is appropriate for suits seeking monetary relief by analogy to the Department’s enforcement mechanism for withdrawing federal funding. The Court observed that before a school could be deprived of federal funding for a Title IX violation, it must receive notice of that violation, because the Department’s enforcement mechanism *requires that OCR provide notice* to a school by advising the school about its failure to comply with Title IX requirements and giving it an opportunity to come into voluntary compliance *before* initiating enforcement proceedings.⁷⁰ Thus, *Gebser* recognizes (and nowhere questions) OCR’s authority to initiate Title IX enforcement proceedings whether or not school officials had prior notice of the violation; it is *OCR* that puts the official with authority to institute corrective measures on notice of sexual harassment, if such an official did not have notice before the complaint was filed. *Gebser*’s notice requirement in money damages lawsuits was explicitly designed to mirror the effect of this pre-enforcement notice by OCR, which is already built into the Department’s administrative enforcement mechanisms. Importing the *Gebser* notice requirement into this administrative enforcement mechanism serves no purpose other than sheltering schools from Title IX enforcement proceedings. While the Department asserts that it is “mindful of the difference”⁷¹ between private litigation for damages and agency enforcement, the proposed rules ignore these differences.

The Department also ignores important distinctions between suits seeking different remedies. Although proof of a school’s deliberate indifference is required in Title IX suits for money damages, *lawsuits for equitable relief* do not require a showing of deliberate indifference.⁷² It has been the position of the United States for 20 years, since its amicus brief in *Davis*, that the standards currently enforced by the Department are the same as those applied in lawsuits for equitable relief.⁷³ Given that the *Gebser* standard does not apply in lawsuits seeking only equitable relief, it is especially perverse to apply that standard to agency enforcement efforts to secure such relief. The Department’s proposal to apply the liability standard for money damages in the administrative context is arbitrary and capricious, as it threatens to create significant asymmetries between equitable remedies pursued through administrative means and the courts.

As set out in further detail below, the notice requirement, definition of harassment, and deliberate indifference standard set out by the Supreme Court for the unique circumstances of determining schools’ monetary liability have no place in the far different context of administrative enforcement, with its iterative process and focus on voluntary corrective action by schools. By choosing to import those liability standards, the Department threatens devastating effects on students.

Evesham Twp. Bd. of Educ., 710 F App’x 545 (3d Cir. 2017); *Yan Yan v. Penn State Univ.*, 529 F. App’x 167 (3d Cir. 2013); *Whitfield v. Notre Dame Middle Sch.*, 412 F. App’x 517 (3d Cir. 2011); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008); *Doe v. Bellefonte Area Sch. Dist.*, 106 F. App’x 798 (3d Cir. 2004); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001); *Dawn L. v. Greater Johnstown Sch. Dist.*, 614 F. Supp. 2d 555, 568 (W.D. Pa. 2008) (explaining that *Davis* “prohibit[s] student on student sexual discrimination when ‘the harasser is under the school’s disciplinary authority’”).

⁷⁰ *Gebser*, 524 U.S. at 288-89.

⁷¹ 83 Fed. Reg. at 61480.

⁷² See *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979). See also *Frederick v. Simpson College*, 160 F. Supp. 2d 1033, 1035-36 (S.D. Iowa 2001) (deciding that the heightened *Gebser* standard for claims seeking monetary damages does not apply to claims requesting equitable relief).

⁷³ See, e.g., Brief for the United States as Amici Curiae Supporting Petitioner, *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999) (No. 97-843), <https://www.justice.gov/osg/brief/davis-v-monroe-county-bd-educ-amicus-merits> (explaining “requirement of actual knowledge and deliberate indifference responds to concerns about subjecting a fund recipient to potential liability for money damages” but “petitioner may establish a violation of Title IX and *entitlement to equitable relief* if she can show [petitioner] was subjected to a hostile environment in the school’s programs or activities, respondent’s officials knew or should have known of the harassment, and they failed to take prompt, appropriate corrective action”) (emphasis added).

A. The proposed rules’ definition of sexual harassment and standards for when schools are responsible for addressing harassment create inconsistent rules for students versus employees.

Under Title VII, the federal law that addresses workplace harassment, a school 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.”⁷⁴ If the employee is harassed by a coworker or other third party, the school is liable if (1) it “knew or should have known of the misconduct” and (2) failed to take immediate and appropriate corrective action.⁷⁵ If the employee is harassed by a supervisor, the school is automatically liable if the harassment resulted in a tangible employment action such as firing or demotion, and otherwise unless the school can prove that the employee unreasonably failed to take advantage of opportunities offered by the school to address harassment.⁷⁶ Schools are liable for harassment of employees under Title VII if the harassment occurs in a work-related context outside of the regular place of work⁷⁷ or outside of work but results in an impact on the work environment.⁷⁸ However, under the proposed Title IX rules, a school would only be held responsible 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 equal access to the school’s program or activity; (3) the harassment occurred within the school’s program or activity; and (4) a school employee with “the authority to institute corrective measures” had “actual knowledge” of the harassment. In other words, under the proposed rules, schools would be held to a far lesser standard in addressing the harassment of students—including the sexual harassment and abuse of children under its care—than in addressing harassment of adult employees.

Moreover, in contrast to the Title VII approach, which recognizes employer responsibility for harassment enabled by supervisory authority, and 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, without regard to whether school officials had notice of this behavior.⁷⁹ By jettisoning this standard, the Department would free schools

⁷⁴ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (emphasis added).

⁷⁵ *Meritor Savings Bank v. Vinson*, 477 US 57, 63 (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.”), <https://www.eeoc.gov/policy/docs/harassment.html>.

⁷⁶ *Meritor*, 477 US at 63.

⁷⁷ *Nichols v. Tri-Nat’l Logistics, Inc.*, 809 F.3d 981, 985-86 (8th Cir. 2016) (holding that district court erred in analyzing hostile work environment claim by plaintiff, a truck driver, by excluding alleged sexual harassment of plaintiff by her driving partner during mandatory rest period); *Lapka v. Chertoff*, 517 F.3d 974, 983 (7th Cir. 2008) (concluding that Title VII covered sexual harassment during course of employer-mandated training, where training facility was controlled by a third party); *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 967 (9th Cir. 2002) (concluding that potential client’s rape of female manager at business meeting outside her workplace was sufficient to establish hostile work environment since having out-of-office meetings with potential clients was job requirement); *Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128, 135 (2d Cir. 2001) (concluding that “work environment” included short layover for flight attendants in foreign country where employer provided block of hotel rooms and ground transportation).

⁷⁸ *Lapka*, 517 F.3d at 983 (explaining that, to be actionable, harassment need only have consequences in the workplace); *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 409-10 (1st Cir. 2002) (stating that harasser’s intimidating conduct outside workplace helped show why complainant feared him and why his presence around her at work created a hostile work environment); *Duggins v. Steak ‘N Shake, Inc.*, 3 F. App’x 302, 311 (6th Cir. 2001) (stating that employee may reasonably perceive her work environment as hostile if forced to work for someone who harassed her outside the workplace).

⁷⁹ 2001 Guidance, *supra* note 59. (“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,

from liability in many instances even when their employees use the authority they exercise as school employees to harass students. Under the proposed rules, for example, schools would bear no responsibility for the harms inflicted by serial abusers like Larry Nassar, George Tyndall, and Richard Strauss, who assaulted hundreds of students in their roles as school doctors, leaving survivors too embarrassed or afraid to report.

The drastic differences between Title VII and the proposed rules 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.⁸⁰ And when they are not affirmatively prohibited from taking action, the proposed rules still create a more demanding standard for children in schools than for adults in the workplace to get help in ending sexual harassment.

B. The proposed definition of harassment improperly prevents schools from providing a safe learning environment.

Proposed §§ 106.30 and 106.45(b)(3) define sexual harassment as (1) “[a]n employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct”; (2) “[u]nwelcome 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”; or (3) “[s]exual assault, as defined in 34 CFR 668.46(a).” The proposed rules mandate dismissal of all complaints of harassment that do not meet this standard. Thus, if a complaint did not allege quid pro quo harassment or sexual assault, a school would be *required* to dismiss a student’s Title IX complaint if the harassment has not yet advanced to a point that it is actively harming a student’s education. A school would be required to dismiss such a complaint even if it involved harassment of a minor student by a teacher or other school employee. A school would be required to dismiss such a complaint even if the school would typically take action to address behavior that was not based on sex but was similarly harassing, disruptive, or intimidating. The Department’s proposed definition is out of line with Title IX purposes and precedent, discourages reporting, unjustifiably creates a higher standard for sexual harassment than other types of harassment and misconduct, and excludes many forms of sexual harassment that interfere with equal access to educational opportunities.

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.”⁸¹ The current definition rightly charges schools with responding to harassment before it escalates to a point that students suffer severe harm. But under the Department’s proposed, narrower definition of harassment, students would be forced to endure repeated and escalating levels of abuse, from a student or teacher, before their schools would be permitted to take steps to investigate and stop the harassment. As the School Superintendents Association (AASA) states, the proposed definition would “move [schools] in the opposite direction of what ... the federal government should be encouraging school personnel to do today.”⁸² Similarly, the National Association of Secondary School Principals (NASSP) opposes the proposed definition because it “completely ignores the fact that students excel at a

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”).

⁸⁰ Of course, as set out in greater detail in Part VII. below, school employees are also protected by Title IX from sex discrimination in the workplace, but the proposed rules fail to grapple with how schools are to navigate the conflicting requirements of Title VII and the proposed rules in addressing workplace sexual harassment.

⁸¹ *Id.*

⁸² AASA Letter, *supra* note 15, at 3-4.

higher level when there are fewer distractions or outside influences that negatively impact their learning, such as bullying or harassment”⁸³

Schools are already escaping liability for money damages in the courts under this demanding standard even when they fail to address harassment that harms students. For example, in one particularly troubling case from the 11th Circuit, three second-grade girls reported that a male classmate was repeatedly touching their chests, rubbing his body against them, chasing them, and using highly explicit and graphic language about the sex acts he wanted to subject them to (e.g., “suck [their] breasts till the milk came out” and have them “suck the juice from his penis”).⁸⁴ Although two of the girls were so upset that they faked being sick four or five times to avoid going to school, the court found that the school was not liable for money damages because there was “no concrete, negative effect on either the ability to receive an education or the enjoyment of equal access to educational programs or opportunities.”⁸⁵ The proposed rules would not only ensure that schools also escape administrative enforcement in such cases, but would also actually prohibit schools from being more responsive to harassment complaints to ensure students are able to learn in a safe educational environment. In other words, under the proposed rules, the school would not only not face consequences for failing to respond to the girls in a case like the 11th Circuit’s, it would also be *required* to ignore them. This would particularly harm elementary and secondary school students, who are often forced to be in close proximity to their harassers because they are legally required to attend school and have less autonomy than students in higher education to make decisions about where they go and what they do at school.

In addition, the proposed rules are inconsistent with the Supreme Court’s liability standard for money damages, which holds schools liable for sexual harassment that, *inter alia*, “effectively denie[s] [a person] equal access to an institution’s resources and opportunities” or its “opportunities or benefits.”⁸⁶ Setting aside for a moment the fact that agency enforcement standards need not—and should not—be as demanding as litigation standards for money damages, the proposed rule is nonetheless still more burdensome than the Supreme Court’s standard because denial of equal access to a school’s “program” or “activity” is a more burdensome threshold than denial of equal access to a school’s “resources,” “opportunities,” and “benefits.”

The Department’s proposed definition is also vague and complicated. Administrators, employees, and students would struggle to understand which complaints meet the standard. These difficulties would be significantly compounded for elementary and secondary school students and students with developmental disabilities. Students confronted with this lengthy, complicated definition of sexual harassment would have a hard time understanding whether the harassment they endured meets the Department’s narrow standard. How would these students know what allegations and information to put in their formal complaint in order to avoid mandatory dismissal? A student may believe that she suffered harassment that was both severe and pervasive, but does she know whether it was also “objectively offensive” and whether it “effectively denied” her of “equal access” to a “program or activity?” This definition was created with the legal process in mind, contemplating trained lawyers and judges carefully weighing whether conduct meets each element of the standard. It was not intended to be applied as a threshold for determining whether any action can be taken in response to the requests made by students—many of them minors—in their own words for help from the school officials they trust. Students are not equipped to understand the complexities of this definition, nor should they be asked to carefully measure

⁸³ Letter from Nat’l Ass’n of Secondary School Principals (NASSP) to Ass’t Sec’y Kenneth L. Marcus at 2 (Jan. 18, 2019) [hereinafter NASSP Letter], https://www.nassp.org/wordpress/wp-content/uploads/2019/01/NASSP_Title_IX_Comments_-_1.17.19_V2.pdf.

⁸⁴ *Hawkins v. Sarasota Cty. Sch. Bd.*, 322 F.3d 1279, 1289 (11th Cir. 2003).

⁸⁵ *Id.*

⁸⁶ *Davis*, 526 U.S. at 631 (emphasis added).

and parse their complaints when all they are asking for is their school to stop their sexual harassment and ensure that they can learn in a safe environment.

The Department's proposed definition would discourage students from reporting sexual harassment. Already, the most commonly cited reason for students not reporting sexual harassment is the fear that it is "insufficiently severe" to yield a response.⁸⁷ Moreover, if a student is turned away by her school after reporting sexual harassment because it does not meet the proposed narrow definition of sexual harassment, the student is even more unlikely to report a second time when the harassment escalates. Similarly, if a student knows of a friend or classmate who was turned away after reporting sexual harassment, the student is unlikely to make even a first report. By the time a student reports sexual harassment that the school can or must respond to, it may already be too late: because of the impact of the harassment, the student might already be ineligible for an important AP course, disqualified from applying to a dream college, or derailed from graduating altogether.

In addition, the proposed definition excludes many forms of sexual harassment, including some that schools are required to report under the Clery Act's requirements. Under the proposed rules, schools would be required to dismiss some complaints of stalking, dating violence, and domestic violence, while also being required to report those complaints to the Department under Clery.⁸⁸ These inconsistent requirements would cause confusion among school administrators struggling to make sense of their obligations under federal law and demonstrate the perverse nature of sharply limiting schools' ability to respond to harassment complaints.

Finally, the Department's harassment definition and mandatory dismissal requirement would create inconsistent rules for sexual harassment as compared to other misconduct. Harassment based on race or disability, for example, would continue to be governed by the more inclusive "severe or pervasive" standard for creating a hostile educational environment.⁸⁹ And schools could address harassment that was not sexual in nature even if that harassment was not "severe and pervasive" while, at the same time, being required to dismiss complaints of similar conduct if it is deemed sexual. This would create inconsistent and confusing rules for schools in addressing different forms of harassment. It would send a message that sexual harassment is less deserving of response than other types of harassment and that victims of sexual harassment are inherently less deserving of assistance than victims of other forms of harassment. It would also force students who experience multiple and intersecting forms of harassment to slice and dice their requests for help from their schools in order to maximize the possibility that the school might respond, carefully excluding reference to sexual taunts and only reporting racial slurs by a harasser, for example.⁹⁰ Further, it would also make schools vulnerable to litigation by students who rightfully claim that being subjected to more burdensome requirements in order to get help for sexual harassment than their peers who experience other forms of student misconduct, is discrimination based on their sex, in direct violation of Title IX. In other words, schools would be hard-pressed to figure out how to comply with Title IX when they are instructed to follow a new set of rules that demands responses that violate Title IX.

⁸⁷ Kathryn J. Holland & Lilia M. Cortina, "It Happens to Girls All the Time": Examining Sexual Assault Survivors' Reasons for Not Using Campus Supports", 59 AM. J. COMMUNITY PSYCHOL. 50, 61 (2017), available at <https://doi.org/10.1002/ajcp.12126>.

⁸⁸ See 20 U.S.C. § 1092(f)(6)(iii); 20 U.S.C § 1092(f)(6)(iv); 34 C.F.R. § 668.46(a).

⁸⁹ See e.g., *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002) (applying "severe or pervasive" standard to racial discrimination hostile work environment claim).

⁹⁰ 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), 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>.

The Department’s repeated attempts to justify its proposed definition by citing “academic freedom and free speech”⁹¹ are unpersuasive. Harassment is not protected speech when it creates a “hostile environment”⁹² that limits a student’s ability to participate in or benefit from a school program or activity.⁹³ The Supreme Court made clear nearly a half century ago 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.”⁹⁴ There is no conflict between Title IX’s regulation of sexually harassing speech in schools and the First Amendment.

C. The proposed notice requirement undermines Title IX’s discrimination protections by making it harder to report sexual harassment, including sexual assault.

Under proposed §§ 106.44(a) and 106.30, schools would only be responsible for addressing sexual harassment when one of a small subset of school employees actually knew about the harassment. Schools would not be required to address sexual harassment unless there was “actual knowledge” of the harassment by (i) a Title IX coordinator, (ii) an elementary or secondary school 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.”⁹⁵ This is a dramatic change, as the Department has long required schools to address *student-on-student* sexual harassment if almost any school employee⁹⁶ either knows about it or should reasonably have known about it.⁹⁷ This 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 whatever adult they trust the most, regardless of that adult’s official role, and because students are likely not informed about which employees have authority to address the harassment. The 2001 Guidance also requires schools to address all employee-on-student sexual harassment, “whether or not the [school] has ‘notice’ of the harassment.”⁹⁸ The 2001 Guidance recognized the particular harms of students being preyed on by adults in positions of authority, and students’ vulnerability to pressure from adults to remain silent, and accordingly acknowledged schools’ heightened responsibilities to address harassment by their employees.

In contrast, under the proposed rules, schools would not be required to address any sexual harassment unless one of a small subset of school employees had “actual knowledge” of it. The proposed rule also unjustifiably limits the set of school employees who are able to receive actual notice that triggers the school’s Title IX duties. For example, if a college or graduate student told their professor, residential advisor, or teaching assistant that they had been raped by another student or by a professor or other university employee, the university would have no obligation to help them. If an elementary or secondary school student told a non-teacher school employee they trust—such as a guidance counselor, teacher aide, playground supervisor, athletics coach, bus driver, cafeteria worker, or school resource officer—that they

⁹¹ 83 Fed. Reg. at 61464, 61484. *See also* proposed § 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.”

⁹² *See* Grossman & Brake, *supra* note 90 (“There is no legitimate First Amendment or academic freedom protection afforded to unwelcome sexual conduct that creates a hostile educational environment.”).

⁹³ 2001 Guidance, *supra* note 59.

⁹⁴ 393 U.S. 503, 513, 514 (1969).

⁹⁵ Proposed § 106.30.

⁹⁶ 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 59 at 13.

⁹⁷ *Id.* at 14.

⁹⁸ *Id.* at 10.

had been sexually assaulted by another student, the school would have no obligation to help the student.⁹⁹ And if an elementary or secondary school student told a teacher that she had been sexually assaulted by another teacher or other school employee, the school would again have no obligation to help her.¹⁰⁰

Perversely, the proposed rules thus provide a more limited duty for elementary and secondary schools to respond to a student's allegations of sexual harassment by a school employee than by a student, an outcome that is especially concerning given that one in three employee-respondents in elementary and secondary schools sexually abuse multiple student victims.¹⁰¹ The proposed rules are also particularly unworkable for elementary and secondary school students who are very young, students with physical or intellectual disabilities, and English Language Learners, who not only may struggle with describing their harassment, but who may have closer relationships with their teacher aides, members of their Section 504 team or Individualized Education Program (IEP) team, school psychologists, and other school employees who are not their teachers or the Title IX coordinator.

Because the proposed rules do not define who employees with “authority to institute corrective measures” are, many students at all levels of education who want to be sure they will receive help from their schools would need to report harassment directly to their Title IX coordinator—even though school district and university Title IX coordinators are usually central office administrators who do not work in students’ school buildings and are usually strangers to the student body.

Sexual assault is very difficult to talk about. Proposed §§ 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. For example, if the proposed rules had been in place, colleges like Michigan State and Penn State would have had no responsibility to stop Larry Nassar and Jerry Sandusky—even though their victims reported their experiences to at least 14 school employees over a 20-year period—including athletic trainers, coaches, counselors, and therapists¹⁰²—because those employees are not considered to be school officials who have the “authority to institute corrective measures.” These proposed provisions would absolve some of the worst Title IX offenders of legal liability. It is therefore unsurprising that the AASA objects to these proposed rules as “an unconscionable attack” on student safety,¹⁰³ and that NASSP fears they will “lead to even more nonreporting from victims, which could lead to prolonged harassment and suffering.”¹⁰⁴

The Department incorrectly relies on two Circuit cases that mis-cite *Gebser* in order to support its position in proposed § 106.30 that “the mere ability or obligation to report sexual harassment does not qualify an employee ... as one who has authority to institute corrective measures” on behalf of the school.¹⁰⁵ One of the cases, *Plamp v. Mitchell*, cites a passage from *Gebser* that merely explains why it is necessary for *the Department* to provide notice to an official with “authority to institute corrective measures” before the Department can initiate an “administrative enforcement proceeding”; the quoted *Gebser* passage says nothing about what type of notice is required before a *school* can initiate an

⁹⁹ See proposed § 106.30 (83 Fed. Reg. at 61496) (for elementary and secondary schools, limiting notice to “a teacher in the elementary and secondary context with regard to student-on-student harassment).

¹⁰⁰ See *id.*

¹⁰¹ Magnolia Consulting, *Characteristics of School Employee Sexual Misconduct: What We Know from a 2014 Sample* (Feb. 2018), <https://magnoliaconsulting.org/news/2018/02/characteristics-school-employee-sexual-misconduct>.

¹⁰² Julie Mack & Emily Lawler, *MSU doctor's alleged victims talked for 20 years. Was anyone listening?*, MLIVE (Feb. 8, 2017), https://www.mlive.com/news/index.ssf/page/msu_doctor_alleged_sexual_assault.html.

¹⁰³ AASA Letter, *supra* note 15, at 2-3.

¹⁰⁴ NASSP Letter, *supra* note 83, at 1.

¹⁰⁵ 83 Fed. Reg. at 61497.

investigation into a sexual harassment complaint.¹⁰⁶ The second case, *Santiago v. Puerto Rico*, in turn relies on *Plamp*.¹⁰⁷ Neither case's incorrect citation of *Gebser* supports the Department's effort to restrict schools' obligation to respond to reports of sexual harassment.

D. The proposed rules would require schools to dismiss reports of harassment that occurs outside of a school activity, even when it creates a hostile educational environment.

Proposed §§ 106.30 and 106.45(b)(3) would require schools to dismiss 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 harasser at school every day and the harassment directly impacts their education as a result. To understand why Title IX requires schools to respond to out-of-school harassment, one only need 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 out-of-school sexual assault, which the Department described as “serious and pervasive violations under Title IX.”¹⁰⁸ In one case, a tenth-grade student was forced to perform oral sex in an abandoned building by a group of 13 boys, eight of whom she recognized from school. In the other case, another tenth-grade student was given alcohol and sexually abused by a teacher in his car. If the proposed rules become final, school districts would be required to dismiss complaints of similarly egregious behavior simply because they occurred off-campus outside a school program, even if they result in a hostile educational environment.

The proposed rules conflict with Title IX's statutory language, which does not depend on where the *underlying conduct* occurred but instead prohibits 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”¹⁰⁹ 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,”¹¹⁰ regardless of where it occurs.¹¹¹ No student who experiences out-of-school harassment should be forced to wait until they are sexually harassed again on school grounds or during a school activity in order to receive help from their school. Nor has the Supreme Court ever suggested that a school must ignore harassment that occurs off school grounds under Title IX. In *Gebser*, for example, the harassment at issue included multiple instances in which a teacher had sexual intercourse with a middle school student, though “never on school property.”¹¹² In considering whether the school had actual notice of the “sexual relationship”

¹⁰⁶ *Id.* (quoting *Plamp v. Mitchell Sch. Dist. No. 17-2*, 565 F.3d 450, 459 (8th Cir. 2009) (quoting *Gebser*, 524 U.S. at 289 (“Presumably, a central purpose of requiring notice of the violation ‘to the appropriate person’ and an opportunity for voluntary compliance before *administrative enforcement proceedings* can commence is to avoid diverting education funding from beneficial uses where a recipient was unaware of discrimination in its programs and is willing to institute prompt corrective measures.”) (emphasis added))).

¹⁰⁷ *Id.* (quoting *Santiago v. Puerto Rico*, 655 F.3d 61, 75 (1st Cir. 2011) (citing *Plamp*, 565 F.3d at 458)).

¹⁰⁸ 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>.

¹⁰⁹ 20 U.S.C. § 1681(a).

¹¹⁰ 2001 Guidance, *supra* note 59.

¹¹¹ 2017 Guidance, *supra* note 58 at 1 n.3 (“Schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities”); 2014 Guidance, *supra* note 58 (“a school must process all complaints of sexual violence, regardless of where the conduct occurred”); 2011 Guidance, *supra* note 58 (“Schools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school's education program or activity”); 2010 Guidance, *supra* note 58 at 2 (finding Title IX violation where “conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school,” regardless of location of harassment).

¹¹² *Gebser*, 524 U.S. at 278.

sufficient to subject it to liability for money damages,¹¹³ the Court never suggested that the fact that the sexual encounters occurred outside of school somehow rendered them irrelevant under Title IX. If off-campus harassment, including assault, lies beyond the reach of Title IX, *Gebser* would be a case in which the question of the school’s actual notice of harassment made no legal difference and thus a very strange vehicle for the Court to establish the rule of actual notice as a prerequisite to money damages.

Nevertheless, under the proposed rules, if an elementary or secondary school student is being sexually harassed by her classmates on Instagram or Snapchat outside of school, or on the way to/from school in a private carpool, her school would be forbidden from investigating the complaint or ending the harassment—even if as a result of the harassment she has become too afraid to attend class and face her harassers. Similarly, if a middle school student is raped at a classmate’s house, the school would not be allowed to take action to remedy the impact of the assault—even if seeing the rapist every day in their classes, hallways, or cafeteria leaves her unable to function in school. Even if a parent reports that a school employee is sending their child sexually explicit messages via text or social media, or, as in *Gebser*, that a teacher has initiated a sexual relationship with their child outside of school, the school would still be required to dismiss those complaints—an especially concerning result given that mobile devices are the most common method of communications between school employees, including child sexual abusers, and students.¹¹⁴ Not only do the proposed rules prohibit elementary and secondary schools from responding appropriately and adequately to these harrowing examples of sexual harassment, they fail to take into account the unique circumstances of elementary and secondary school students with disabilities, who are often segregated from their peers and even removed to off-site educational and day services, where they are isolated and more vulnerable to child sexual abuse.¹¹⁵

Similar harm would accrue to students at institutions of higher education. According to a 2014 U.S. Department of Justice report, 95 percent of sexual assaults of female students ages 18-24 occur outside of school.¹¹⁶ In a leaked version of the proposed rules, the Department itself cited a study finding that 41 percent of college sexual assaults occur off campus.¹¹⁷ But under the proposed rules, if a college or graduate student is sexually assaulted by a classmate in off-campus housing, their university would be required to dismiss their complaint—even though almost nine in ten college students live off campus.¹¹⁸ If a student is assaulted off-campus by a professor, his college would be required to ignore his complaints—even if he would be required to continue attending the professor’s class. Although the preamble briefly mentions one case where a Kansas State college fraternity was considered an “education program or activity” for the purposes of Title IX, the Department fails to explain conclusively whether all fraternities and sororities are covered by Title IX.¹¹⁹ Many schools may therefore interpret the proposed rules to prevent them from addressing any sexual harassment that occurs in fraternities, sororities, and other social clubs not recognized by the school (*e.g.*, the Harvard final clubs¹²⁰)—a particularly troubling outcome given that students are more likely to be sexually assaulted if they belong to a fraternity or sorority.¹²¹

¹¹³ *Id.* at 291.

¹¹⁴ Magnolia Consulting, *supra* note 101.

¹¹⁵ Nat’l Council on Disability, *The Segregation of Students with Disabilities* 18-19 (Feb. 2018), https://ncd.gov/sites/default/files/NCD_Segregation-SWD_508.pdf.

¹¹⁶ U.S. Dep’t of Justice, Bureau of Justice Statistics, *Rape and Sexual Assault Victimization Among College-Age Females, 1995–2013* at 6 (Dec. 2014), <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf>.

¹¹⁷ 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 SERVS. 79 n.21 (Sept. 5, 2018), <https://atixa.org/wordpress/wp-content/uploads/2018/09/Draft-OCR-regulations-September-2018.pdf>.

¹¹⁸ Sharpe, *How Much Does Living Off-Campus Cost?*, *supra* note 25.

¹¹⁹ 83 Fed. Reg. at 61468.

¹²⁰ *E.g.*, Harvard University, *Unrecognized Single-Gender Social Organizations*, (Dec. 5, 2017), <https://www.harvard.edu/president/news/2017/unrecognized-single-gender-social-organizations>.

¹²¹ Freyd, *supra* note 27.

Although the proposed rules' preamble explains that an incident is considered to have occurred "within" a school program or activity if the school "owned the premises; exercised oversight, supervision, or discipline; or funded, sponsored, promoted, or endorsed the event or circumstance," the Department fails to include this explanation in the language of the proposed rules themselves, making it even more difficult for students and schools to understand their rights and obligations under this already-confusing multi-factor test.¹²²

The proposed rules would also pose particular risks to students at community colleges and vocational schools. Approximately 5.8 million students attend community college (out of 17.0 million total undergraduate students),¹²³ and 16 million students attend vocational school.¹²⁴ But because none of these students live on campus, harassment they experience by faculty or other students is especially likely to occur outside of school, and therefore outside of the protection of the proposed Title IX rules.

Finally, proposed § 106.8(d) would create a unique harm to the 10 percent of U.S. undergraduate students who participate in study abroad programs. If any of these students report experiencing sexual harassment during their time abroad, including within their study abroad program, their schools would be required to dismiss their complaints—even if they are forced to see their harasser in the study abroad program every day, and even if they continue to be put into close contact with their harasser when they return to their home campus.

Representatives of school leaders like the AASA¹²⁵ and NASSP¹²⁶ oppose mandatory dismissal of complaints alleging out-of-school harassment. They recognize that out-of-school conduct "often spill[s] over into the school day and school environment" and this is why it is already "common practice" for school districts across the country to "discipline students for off-campus conduct[,] whether it's the use of drugs or alcohol at a house party, cyberbullying, hazing, physical assault, etc."¹²⁷ By forcing schools to dismiss complaints of out-of-school sexual harassment, the proposed rules would "unduly tie the hands of school leaders who believe every child deserves a safe and healthy learning environment."¹²⁸ It would also require schools to single out complaints of sexual harassment by treating them differently from other types of student misconduct that occur off-campus, perpetuating the pernicious notion that sexual harassment is somehow less significant than other types of misconduct and making schools vulnerable to litigation by students claiming unfairness or discrimination in their school's policies treating harassment based on sex differently from other forms of misconduct.

E. The Department's suggestion that schools conduct parallel "non-Title IX" proceedings for complaints that would be mandatorily dismissed under the proposed rules is confusing, impractical, and unlikely to be followed.

The Department notes that if conduct does not meet the proposed rule's definition of harassment or occurs outside of school, schools could still process the complaint under a different conduct code, but not Title IX. This "solution" to its required dismissals for Title IX investigations is confusing and impractical. Students and school employees do not make complaints "under Title IX": they make

¹²² 83 Fed. Reg. at 61468.

¹²³ Statista, *Community colleges in the United States - Statistics & Facts*, <https://www.statista.com/topics/3468/community-colleges-in-the-united-states>; National Center for Education Statistics, *Fast Facts*, <https://nces.ed.gov/fastfacts/display.asp?id=372> (about 17.0 million students enrolled in undergraduate programs in fall 2018).

¹²⁴ David A. Tomar, *Trade Schools on the Rise*, THE BEST SCHOOLS (last visited Jan. 20, 2019), <https://thebestschools.org/magazine/trade-schools-rise-ashes-college-degree> (an estimated 16 million students were enrolled in vocational schools in 2014).

¹²⁵ AASA Letter, *supra* note 15, at 5-6.

¹²⁶ NASSP Letter, *supra* note 83, at 1.

¹²⁷ AASA Letter, *supra* note 15, at 5-6.

¹²⁸ *Id.* at 5.

complaints of sexual harassment. Schools faced with determining when to have a non-Title IX proceeding to address sexual harassment allegations that do not meet the proposed rules' standard, as opposed to one "under Title IX," have little guidance on how to proceed. Would any such alternative proceeding have to exclude any reference to, or consideration of, the sexual nature of the harassment or assault complained of? Would the initial complaint carefully avoid making any reference to the sexual nature of the harassment or assault in order to have access to such non-Title IX proceedings? 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 with such parallel proceedings would no doubt be forced to contend with respondents' complaints that the school had failed to comply with the requirements set out in the proposed rules and thus violated respondents' rights as therein described. Schools are therefore likely to err on the side of taking no action at all on complaints that must be dismissed under the proposed rules.

F. The proposed "deliberate indifference" standard would allow schools to do virtually nothing in response to complaints of sexual assault and other forms of sexual harassment.

The "deliberate indifference" standard adopted by the proposed rules is a much more lax standard for measuring schools' response to sexual harassment than that set out by the current guidance, which requires schools to act "reasonably" and "take immediate and effective corrective action" to resolve harassment complaints.¹²⁹ Under the proposed rules, by contrast, schools would simply have to not be deliberately indifferent; in other words, their response to harassment would be deemed to comply with Title IX as long as it was not *clearly* unreasonable. The deliberate indifference standard would exacerbate the problem that survivors and other harassment victims who are met with "indifference" or "blame" from authority figures suffer increased symptoms of post-traumatic stress and depression in addition to the trauma of the underlying assault.¹³⁰

The Department's proposed "safe harbors" within this deliberate indifference standard weaken it still further, allowing schools to avoid liability even if they unreasonably handled a Title IX complaint. As long as a school follows the requirements set out in proposed § 106.45, the school's response to harassment complaints could not be challenged, effectively insulating them from any review as long as they check various procedural boxes.¹³¹ NASSP opposes this standard precisely because it would allow schools to "treat survivors poorly as long as the school follows various procedures in place, regardless of how those procedures harm or fail to help survivors."¹³² And by codifying the rule that the Department would not find a school deliberately indifferent based on a school's erroneous determination regarding responsibility, the Department further provides a safe harbor for schools that erroneously determine that sexual harassment *did not occur*, but does not provide a corresponding rule protecting schools from liability if they erroneously decide that sexual harassment *did* occur.¹³³ This means it would always be safer for a school to make a finding of non-responsibility for sexual harassment. Indeed, such a rubber stamp finding would be completely permissible under the proposed rules as long as the school went through the motions of the required process.

¹²⁹ 2001 Guidance, *supra* note 59.

¹³⁰ Letter from 903 Mental Health Professionals and Trauma Specialists to Ass't Sec'y Kenneth L. Marcus at 3 (Jan. 30, 2019) [hereinafter Mental Health Professionals Letter], <https://nwlc.org/wp-content/uploads/2019/01/Title-IX-Comment-from-Mental-Health-Professionals.pdf>.

¹³¹ See proposed § 106.44(b)(2) ("If the Title IX Coordinator files a formal complaint in response to the reports, and the recipient follows procedures (including implementing any appropriate remedy as required) consistent with proposed § 106.45 in response to the formal complaint, the recipient's response to the reports is not deliberately indifferent.").

¹³² NASSP Letter, *supra* note 83, at 2.

¹³³ See proposed § 106.44(b)(5), 83 Fed. Reg. at 61471 (explaining that proposed § 106.44(b)(5) is meant to clarify that OCR will not "conduct a de novo review of the recipient's investigation and determination of responsibility for a particular respondent").

The practical effects of this proposed rule would shield schools from any accountability under Title IX, even if a school mishandles a complaint, fails to provide effective supports for survivors and other harassment victims, and wrongly determines against the weight of the evidence that no sexual assault or harassment occurred.

III. The proposed rules impermissibly limit the supportive measures and remedies available to sexual harassment complainants.

A. The proposed rules do not contemplate restoring or preserving “equal” access to “educational opportunities”—only “access” to the “education program.”

The proposed rules refer repeatedly to supportive measures (§§ 106.30, 106.44(b)(3), and 106.45(b)(7)(ii)) and remedies (§§ 106.45(b)(1)(i), 106.45(b)(4)(ii)(E), 106.45(b)(5), 106.45(b)(7)(i)(A), and 106.45(b)(7)(ii)) that are “designed to restore or preserve *access* to the recipient’s *education program or activity*.”¹³⁴ This proposed language on supportive measures and remedies is problematic for a number of reasons. First, it is inconsistent with the Department’s own proposed definition of sexual harassment, which covers conduct that “effectively denies a person *equal access* to the recipient’s education program or activity.” Under the Department’s inconsistent proposal, even if a student or employee reports sexual harassment that satisfies the narrow definition in proposed § 106.30, their school would only be required to give them supportive measures or remedies that restore or preserve some “access,” not “equal access.”

Second, the proposed rules are inconsistent with the Supreme Court’s liability standard for money damages in two ways (again, setting aside the fact that agency enforcement standards need not and should not be as demanding as litigation standards for money damages). First, restoration of “access” is an incomplete remedy for the harm and violation of Title IX created by denial of “equal access.” Second, as mentioned above in Part II.B, restoration of access to a school’s “program” or “activity” is not equivalent to the more demanding requirement of restoration of equal access to a school’s “resources,” “opportunities,” and “benefits.” The remedies required by the rule thus fail to correct the violation of Title IX that occurs when harassment “effectively denie[s] [a person] *equal access* to an institution’s *resources and opportunities*” or its “*opportunities or benefits*.”¹³⁵

These inconsistencies would have significant implications on the ability of complainants to enjoy equal, nondiscriminatory access to educational opportunities. For example, under the proposed rules a high school addressing sexual assault could simply enroll a student survivor in an alternative program, such as a cyber or evening school, thereby restoring “access” to the school district’s “education program” without ensuring the student’s ability to attend her brick-and-mortar day school (the educational “opportunity”) on “equal” terms with her classmates who have not suffered sexual harassment. “Restoring or preserving access” to a program is a minimal standard and an insufficient metric for determining what supportive measures and remedies are necessary or appropriate.

B. Complainants would not be entitled to the full range of “supportive measures” necessary to ensure equal access to educational opportunities.

Under proposed § 106.30, even if a student suffered harassment that occurred on campus and made a complaint that properly alleged it was “severe, pervasive, *and* objectively offensive,” the school

¹³⁴ Proposed § 106.45(b)(7)(ii) (recordkeeping of actions, including supportive measures, as a result of reports or formal complaints).

¹³⁵ *Davis*, 526 U.S. at 631 (emphasis added).

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 respondent to another class or dorm because it may “unreasonably burden” him, thereby forcing a harassment victim to change all of her own classes and housing assignments in order to avoid her harasser. In addition, schools may interpret this proposed rule to prohibit issuing a *one-way* no-contact order against an assailant and require a survivor to agree to a *mutual* no-contact order, which implies that the survivor is at least partially responsible for her own assault. However, such a rule would be contrary to decades of expert consensus that *mutual* no-contact orders are harmful to victims, because abusers often manipulate their victims into violating the mutual order,¹³⁶ and would allow perpetrators to turn what was intended to be a protective measure for the student survivor into a punitive measure against the survivor. The proposed rule would also be 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.¹³⁷ And 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.”¹³⁸

The proposed rule also fails to contemplate any *restorative* supportive measures that are often necessary to ensure a complainant’s equal access to educational opportunities. Despite including a long list of examples of supportive measures in the preamble and in the language of proposed § 106.30, the Department makes no mention of restorative measures, such as the ability to retake a class, to remove a “Withdrawal” or failing grade from the harassment victim’s transcript, or to obtain reimbursement of lost tuition after being forced to withdraw and retake a course as a result of sexual harassment.

C. The proposed rules would steer students in higher education toward ineffective supportive measures and would bar some elementary and secondary school students from receiving any supportive measures at all.

Proposed §106.30 would require a “formal complaint” signed by a complainant or a Title IX coordinator, requesting initiation of the grievance procedures, in order for the student to receive help.¹³⁹ If a formal complaint is not submitted, institutions of higher education would be able to avoid Title IX liability under the safe harbor in § 106.44(b)(3) by simply providing “supportive measures.” This safe harbor may incentivize institutions of higher education to steer students away from filing a “formal complaint” and toward accepting “supportive measures” instead. However, because “supportive measures” are defined very narrowly in proposed § 106.30 (as detailed in Parts III.A-III.B), the interaction of proposed §§ 106.30 and 106.44(b)(3) may result in many students receiving ineffective “supportive measures.”

The proposed definition of “formal complaint” would also harm elementary and secondary school students in particular. Children in elementary and secondary schools are likely not equipped to draft a written, signed, formal complaint that alleges the very specific and narrow definition of harassment under the proposed rules. Unlike college and graduate students, who are guaranteed at least some supportive measures in the absence of a formal complaint under the safe harbor in proposed § 106.44(b)(3),

¹³⁶ E.g., Joan Zorza, *What Is Wrong with Mutual Orders of Protection?* 4(5) DOMESTIC VIOLENCE REP. 67 (1999), available at <https://www.civresearchinstitute.com/online/article.php?pid=18&iid=1005>.

¹³⁷ 2001 Guidance, *supra* note 59, at 16.

¹³⁸ Ass’n for Student Conduct Admin., *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*], <https://www.theasca.org/Files/Publications/ASCA%202014%20White%20Paper.pdf>.

¹³⁹ The Department does not justify its requirement that a formal complaint be signed.

elementary and secondary school students would not be guaranteed any supportive measures if they do not sign a formal complaint, and accordingly, may not get any help at all because of their inability to sufficiently describe the harassment allegations in their written complaint.

IV. The grievance procedures required by the proposed rules would impermissibly tilt the process in favor of respondents, retraumatize complainants, and conflict with Title IX’s nondiscrimination mandate.

Current Title IX regulations require schools to “adopt and publish grievance procedures that provide for a prompt and equitable resolution of student and employee complaints” of sexual misconduct.¹⁴⁰ The proposed rule at § 106.8(c) purports to require “equitable” processes as well. However, the proposed rules are also riddled with language that would require schools to conduct their grievance procedures in a fundamentally *inequitable* way that favors respondents.

The Department repeatedly cites the purported need to increase protections of respondents’ “due process rights” to justify weakening Title IX protections for complainants, such as proposing § 106.6(d)(2), which specifies that nothing in the rules would require a school to deprive a person of their due process rights. But the current Title IX regulations already provide more rigorous due process protections than are required under the Constitution. The Supreme Court has held that students facing short-term suspensions from public schools¹⁴¹ require only “some kind of” “oral or written notice” and “some kind of hearing.”¹⁴² 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.”¹⁴³ Furthermore, the Department’s 2001 Guidance already instructs schools to protect the “due process rights of the accused.”¹⁴⁴ Adding proposed § 106.6(d)(2) provides no new or necessary protections and inappropriately pits Title IX’s civil rights mandate against the Constitution when no such conflict exists.¹⁴⁵ As Liberty University notes:

“Institutions need not create and operate trial court systems in order to prevent sex discrimination from blocking student access to federally supported higher education programs. A smaller and less prescriptive approach is all that is required—one that recognizes that there is a criminal justice system with all its due process for those who seek to access an adversarial system for their day in court.”¹⁴⁶

Further, there is no evidence to support the Department’s claim that schools have somehow abandoned due process in order to comply with current Title IX rules and guidances. While it may be true that students disciplined for sexual assault have been litigating more frequently since the 2011 Guidance and 2014 Guidance were issued, the simpler explanation for any such uptick in legal claims is that these guidances improved schools’ policies and procedures, made it easier for survivors to report sexual assault, and therefore made warranted disciplinary outcomes for respondents more likely. Respondents today are

¹⁴⁰ 34 C.F.R. § 106.8(b).

¹⁴¹ Constitutional due process requirements do not apply to private institutions.

¹⁴² *Goss v. Lopez*, 419 U.S. 565, 566, 579 (1975).

¹⁴³ *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).

¹⁴⁴ 2001 Guidance, *supra* note 59 at 22.

¹⁴⁵ The odd phrasing of the proposed rules also suggests that the Department may be seeking to extend Due Process Clause obligations to private entities covered by Title IX, but of course any such imposition of Constitutional obligations on private actors is well beyond the Department’s power.

¹⁴⁶ Letter from Liberty University to Sec’y Elisabeth DeVos at 2 (Jan. 24, 2019) [hereinafter Liberty University Letter], <http://www.liberty.edu/media/1617/2019/jan/Title-IX-Public-Comments.pdf>.

likely “just as litigious as they were prior to the [2011 Guidance],” but “there are simply more of them today. This is not because of problems that the [2011 and 2014 Guidances] caused; rather, it is because of the problems [they] corrected.”¹⁴⁷

We note that some have welcomed the proposed rule changes by erroneously claiming that the proposed rules would protect Black men and boys from being unfairly disciplined for false allegations; these arguments have effectively erased the experiences of Black women and girls, who are not only more likely than white women and girls to be sexual harassed,¹⁴⁸ but are also often ignored, blamed,¹⁴⁹ pressured to stay silent,¹⁵⁰ suspended by their schools,¹⁵¹ and/or pushed into the criminal justice system¹⁵² (i.e., the “sexual abuse-to-prison pipeline”).¹⁵³ There is no data to substantiate the claim that Black men and boys are disproportionately disciplined by schools for sexual misconduct; in fact, the Department’s own elementary and secondary school data shows that 0.3 percent of Black boys and 0.2 percent of white boys are disciplined for *sexual harassment*, a minor difference compared to the wide disparity between the proportion of Black boys (18 percent) and white boys (6 percent) who are disciplined for *any type of student misconduct*.¹⁵⁴ While we continue to strongly advocate against discriminatory discipline practices and policies in schools, we note that any claim that these proposed rules are motivated by such concern is sharply undercut by the fact this administration rescinded—without adequate justification—the Department’s 2014 Guidance addressing unfair discipline of students of color in December 2018,¹⁵⁵ during the public comment period for the proposed Title IX rules.

Finally, there is no evidence that Title IX has been in any way “weaponized” against respondents. A 2018 report studying more than 1,000 reports of sexual misconduct in institutions of higher education found that “[f]ew incidents reported to Title IX Coordinators resulted in a formal Title IX complaint, and fewer still resulted in a finding of responsibility or suspension/expulsion of the responsible student.”¹⁵⁶ Despite the Department’s unsubstantiated concern for respondents, the study found that “[t]he primary outcome of reports were victim services, not perpetrator punishments.”¹⁵⁷ Moreover, any argument that focuses on the false narrative that respondents’ due process rights have been increasingly violated over the years because of current and rescinded OCR guidance completely ignores complainants who are still treated unfairly in violation of Title IX and are often pushed out of schools from inadequate and unfair responses to their reports.

¹⁴⁷ Erin E. Buzuvis, *Title IX and Procedural Fairness: Why Disciplined-Student Litigation Does Not Undermine the Role of Title IX in Campus Sexual Assault*, 78 MONTANA L. REV. 71, 72 (2017), <https://scholarship.law.umt.edu/cgi/viewcontent.cgi?article=2416&context=mlr>.

¹⁴⁸ *Unlocking Opportunity*, *supra* note 45, at 24-25.

¹⁴⁹ E.g., Cantalupo, *supra* note 49, at 1, 16, 24, 29.

¹⁵⁰ Lauren Rosenblatt, *Why it's harder for African American women to report campus sexual assaults, even at mostly black schools*, LOS ANGELES TIMES (Aug. 28, 2017), <https://www.latimes.com/politics/la-na-pol-black-women-sexual-assault-20170828-story.html>.

¹⁵¹ See *supra* notes 43-46 and accompanying text.

¹⁵² Nia Evans, *Too Many Black Survivors Get Jail Time, Not Justice*, NAT’L WOMEN’S LAW CTR. (Dec. 14, 2018), <https://nwlc.org/blog/too-many-black-survivors-get-jail-time-not-justice>.

¹⁵³ Human Rights Project for Girls, Georgetown Law Ctr. on Poverty and Inequality, and Ms. Found. for Women, *The Sexual Abuse to Prison Pipeline: The Girls’ Story* (2015), https://rights4girls.org/wp-content/uploads/r4g/2015/02/2015_COP_sexual-abuse_layout_web-1.pdf.

¹⁵⁴ U.S. Gov’t Accountability Office, *K-12 Education: Discipline Disparities for Black Students, Boys, and Students with Disabilities* (Mar. 2018), <https://www.gao.gov/assets/700/690828.pdf>.

¹⁵⁵ Dep’t of Justice & Dep’t of Educ., *Dear Colleague Letter* (Dec 21, 2018), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201812.pdf>.

¹⁵⁶ Tara N. Richards, *No Evidence of “Weaponized Title IX” Here: An Empirical Assessment of Sexual Misconduct Reporting, Case Processing, and Outcomes*, L. & HUMAN BEHAVIOR (2018), available at <http://dx.doi.org/10.1037/lhb0000316>.

¹⁵⁷ *Id.*

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

Under proposed § 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. This presumption would also exacerbate the rape myth upon which many of the proposed rules are based—namely, the myth that women and girls often lie about sexual assault.¹⁵⁸ The presumption of innocence is a criminal law principle, inappropriately imported into this context.¹⁵⁹ 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 generally or civil rights proceedings specifically, and Title IX is a civil rights law that ensures that sexual harassment is never the end to anyone’s education. As NASSP notes, this proposed rule would result in schools being “required[]to deny harassment victims of due process.”¹⁶⁰

The proposed non-responsibility presumption is inconsistent with the Department’s own explanation of why it is proposed. The Department explains that the requirement “is added to ensure impartiality by the recipient until a determination is made,” but requiring a presumption *against the complainant’s account* that harassment occurred is anything but impartial. In fact, the presumption ensures partiality to the named harasser, particularly because officials in this Administration have spread false narratives about survivors and other harassment victims being untruthful and about the “pendulum swinging too far” in school grievance proceedings against named harassers. This undoubtedly will influence schools to conclude this proposed rule means that a higher burden should be placed on complainants. The presumption of non-responsibility may also discourage schools from providing crucial supportive measures to complainants, in order to avoid being perceived as punishing respondents.¹⁶¹

Proposed § 106.45(b)(1)(iv) would only encourage schools to ignore or punish historically marginalized groups that report sexual harassment for “lying” about it.¹⁶² As explained above in Part I.C., schools may be more likely to ignore or punish harassment victims who are women and girls of color,¹⁶³ pregnant and parenting students,¹⁶⁴ LGBTQ students,¹⁶⁵ and students with disabilities because of harmful stereotypes that label them as less credible and in need of protection by their schools.

This presumption conflicts with the current Title IX rules¹⁶⁶ and other proposed rules,¹⁶⁷ which require that schools provide “equitable” resolution of complaints. A presumption in favor of one party

¹⁵⁸ 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 42.

¹⁵⁹ *See also* the Department’s reference to “inculpatory and exculpatory evidence” (proposed § 106.45(b)(1)(ii)), the Department’s assertion that “guilt [should] not [be] predetermined” (83 Fed. Reg. at 61464), and Secretary DeVos’s discussion of the “presumption of innocence” (Elisabeth DeVos, *Betsy DeVos: It’s time we balance the scales of justice in our schools*, WASH. POST (Nov. 20, 2018), https://www.washingtonpost.com/opinions/betsy-devos-its-time-we-balance-the-scales-of-justice-in-our-schools/2018/11/20/8dc59348-ecd6-11e8-9236-bb94154151d2_story.html).

¹⁶⁰ NASSP Letter, *supra* note 83, at 2.

¹⁶¹ *See* Michael C. Dorf, *What Does a Presumption of Non-Responsibility Mean in a Civil Context*, DORF ON LAW (Nov. 28, 2018), <https://dorfonlaw.org/2018/11/what-does-presumption-of-non.html>.

¹⁶² *See, e.g.,* Kingkade, *supra* note 46.

¹⁶³ *E.g.,* Cantalupo, *supra* note 49 at 1, 16, 24, 29; *Let Her Learn: Girls of Color*, *supra* note 48 at 1.

¹⁶⁴ Chambers & Erausquin, *The Promise of Intersectional Stigma to Understand the Complexities of Adolescent Pregnancy and Motherhood*, JOURNAL OF CHILD ADOLESCENT BEHAVIOR (2015), <https://www.omicsonline.org/open-access/the-promise-of-intersectional-stigma-to-understand-the-complexities-of-adolescent-pregnancy-and-motherhood-2375-4494-1000249.pdf>.

¹⁶⁵ *See e.g.,* 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>.

¹⁶⁶ 34 C.F.R. § 106.8(b).

¹⁶⁷ Proposed §§ 106.8(c) and 106.45(b).

against 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.”

B. The proposed rules would require live cross-examination by the other party’s advisor of choice in higher education and would permit it in elementary and secondary schools.

Proposed § 106.45(b)(3)(vii) requires colleges and graduate schools to conduct a “live hearing,” and requires parties and witnesses to submit to cross-examination by the other party’s “advisor of choice”—often an attorney who is prepared to grill a survivor about the traumatic details of an assault, or possibly an angry parent or a close friend of the respondent, or a teacher, coach, or other adult in a position of authority over the complainant or witness. Proposed § 106.45(b)(3)(vi) would allow elementary and secondary schools to use this process, even when children, who are likely to be easily intimidated under hostile questioning by an adult, are complainants and witnesses.¹⁶⁸ The adversarial and contentious nature of cross-examination would further traumatize those who seek help through Title IX to address assault and other forms of harassment—especially where the named harasser is a professor, dean, teacher, or other school employee. Being asked detailed, personal, and humiliating questions often rooted in gender stereotypes and rape myths that tend to blame victims for the assault they experienced¹⁶⁹ 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.¹⁷⁰ The requirement that schools must provide each party “an advisor aligned with that party to conduct cross-examination” would not account for the existence of multiple complainants and/or multiple respondents, who may not have mutually aligned interests and whose interests may not be served by a single advisor conducting cross-examination on their collective behalf. Nor would the proposed rules entitle the individual who experienced harassment to the procedural protections that witnesses have during cross-examination in the criminal court proceedings that apparently inspired this requirement. Schools would not be required to apply general rules of evidence or trial procedure;¹⁷¹ would not be required to make an attorney representing the interest of the complainant available to object to improper questions; and would not be required to make a judge available to rule on objections. The live cross-examination requirement would also lead to sharp inequities, due especially to the “huge asymmetry” that would arise when respondents are able to afford attorneys and complainants cannot.¹⁷² According to the president of Association of Title IX Administrators (ATIXA), the live cross-examination provision

¹⁶⁸ See, e.g., Gail S. Goodman et al, *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, MONOGRAPHS OF THE SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT, Serial no. 229, Vol. 57, No. 5, at p.85 (1992).

¹⁶⁹ 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).

¹⁷⁰ See, e.g., Eliza A. Lehner, *Rape Process Templates: A Hidden Cause of the Underreporting of Rape*, 29 YALE J. OF LAW & FEMINISM 207 (2018) (“rape victims avoid or halt the investigatory process” due to fear of “brutal cross-examination”); Michelle J. Anderson, *Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 VILL. L. REV. 907, 932-936-37 (2001) (decision not to report (or to drop complaints) is influenced by repeated questioning and fear of cross-examination); As one defense attorney recently acknowledged, “Especially when the defense is fabrication or consent—as it often is in adult rape cases—you have to go at the witness. There is no way around this fact. Effective cross-examination means exploiting every uncertainty, inconsistency, and implausibility. More, it means attacking the witness’s very character.” Abbe Smith, *Representing Rapists: The Cruelty of Cross-Examination and Other Challenges for a Feminist Criminal Defense Lawyer*, 53 AM. CRIM. L. REV. 255, 290 (2016).

¹⁷¹ The proposed rules impose only mild restrictions on what it considers “relevant” evidence. See proposed § 106.45(b)(3)(vi) (excluding evidence “of the complainant’s sexual behavior or predisposition, unless such evidence about the complainant’s sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged” or to prove consent). The problems inherent in the evidence restrictions the Department chooses to adopt (and those it chooses not to) are discussed in Part IV.E.

¹⁷² Andrew Kreighbaum, *New Uncertainty on Title IX*, INSIDE HIGHER EDUCATION (Nov. 20, 2018), <https://www.insidehighered.com/news/2018/11/20/title-ix-rules-cross-examination-would-make-colleges-act-courts-lawyers-say>.

alone—“even with accommodations like questioning from a separate room—would lead to a 50 percent drop in the reporting of misconduct.”¹⁷³

The Department assumes that cross-examination will improve the reliability of a decision-maker’s determinations of responsibility and allow them to discern “truth.”¹⁷⁴ But the reality is much more complicated, particularly in schools, where procedural protections against abusive, misleading, confusing, irrelevant, or inappropriate tactics are largely unavailable. Empirical studies show that adults give significantly more inaccurate responses to questions that involve the features typical of cross-examination, like relying on leading questions, compound or complex questions, rapid-fire questions, closed (i.e., yes or no) questions, questions that jump around from topic to topic, questions with double negatives, and questions containing complex syntax or complex vocabulary.¹⁷⁵ While these common types of questions are likely to confuse adults and result in inaccurate or misleading answers, these problems are compounded and magnified when such questions are targeted at children or youth.¹⁷⁶ Indeed, there is a large, consistent, and growing body of research that shows that children subject to cross-examination-style questioning are more likely to repudiate accurate statements and to reaffirm inaccurate ones.¹⁷⁷ And matters unrelated to whether the witness is telling the truth significantly influence the effects of cross-examination on a witness’ testimony. For example, children with low levels of self-esteem, self-confidence, and assertiveness—all of which are characteristics of children who have experienced sexual misconduct—are less likely to provide accurate statements during cross-examination.¹⁷⁸

¹⁷³ *Id.*

¹⁷⁴ 83 Fed. Reg. at 61476. The Department offers no evidence to support its assumption; it merely cites a case which relies on John Wigmore’s evidence treatise. *See id.* (citing *California v. Green*, 399 U.S. 149, 158 (1970) (quoting John H. Wigmore, 5 Evidence sec. 1367, at 29 (3d ed., Little, Brown & Co. 1940))).

¹⁷⁵ Emily Henderson, *Bigger Fish to Fry: Should the Reform of Cross-Examination Be Expanded Beyond Vulnerable Witnesses*, 19(2) INTERNATIONAL J. OF EVIDENCE AND PROOF 83, 84-85 (2015) (collecting studies of adults).

¹⁷⁶ Saskia Righarts, Sarah O’Neill & Rachel Zajac, *Addressing the Negative Effect of Cross-Examination Questioning on Children’s Accuracy: Can We Intervene?*, 37 (5) LAW AND HUMAN BEHAVIOR 354, 354 (2013) (“Cross-examination directly contravenes almost every principle that has been established for eliciting accurate evidence from children.”).

¹⁷⁷ Rhiannon Fogliati & Kay Bussey, *The Effects of Cross-Examination on Children’s Coached Reports*, 21 PSYCH., PUBLIC POLICY, & LAW 10 (2015) (cross-examination led children to recant their initial true allegations of witnessing transgressive behavior and significantly reduced children’s testimonial accuracy for neutral events); Saskia Righarts et al., *Young Children’s Responses to Cross-Examination Style Questioning: The Effects of Delay and Subsequent Questioning*, 21(3) PSYCH., CRIME & LAW 274 (2015) (cross-examination resulted in a “robust negative effect on children’s accuracy”; only 7% of children’s answers improved in accuracy); Fiona Jack and Rachel Zajac, *The Effect of Age and Reminders on Witnesses’ Responses to Cross-Examination-Style Questioning*, 3 J. OF APPLIED RESEARCH IN MEMORY AND COGNITION 1 (2014) (“adolescents’ accuracy was also significantly affected” by cross-examination-style questioning); Rhiannon Fogliati & Kay Bussey, *The Effects of Cross-Examination on Children’s Reports of Neutral and Transgressive Events*, 19 LEGAL & CRIM. PSYCHOL. 296 (2014) (cross-examination led children to provide significantly less accurate reports for neutral events and actually reduced the number of older children who provided truthful disclosures for transgressive events); Joyce Plotnikoff & Richard Woolfson, *‘Kicking and Screaming’: The Slow Road to Best Evidence*, in *Children and Cross-Examination: Time to Change the Rules?* 21, at 27 (John Spencer & Michael Lamb eds. 2012) (a hostile accusation that a child is lying “can cause a child to give inaccurate answers or to agree with the suggestion that they are lying simply to bring questioning to an end”); Rachel Zajac & Harlene Hayne, *The Negative Effect of Cross-Examination Style Questioning on Children’s Accuracy: Older Children are Not Immune*, 20 APPLIED COGNITIVE PSYCHOLOGY 3 (2006) (43% of older children changed their originally correct answers to incorrect ones under cross-examination); Rachel Zajac et al., *Asked and Answered: Questioning Children in the Courtroom*, 10 PSYCHIATRY, PSYCHOLOGY AND LAW 199 (2003); Rachel Zajac & Harlene Hayne, *I Don’t Think That’s What Really Happened: The Effect of Cross-Examination on the Accuracy of Children’s Reports*, 9(3) J. OF EXPERIMENTAL PSYCH.: APPLIED 187 (2003) (“Cross-examination did not increase the accuracy of children who made errors in their original reports. Furthermore, cross-examination actually decreased the accuracy of children whose original reports were highly accurate.”).

¹⁷⁸ Rachel Zajac et al., *Disorder in the Courtroom: Child Witnesses Under Cross-Examination*, 32 DEVELOPMENTAL REV. 181, 187 (2012).

The proposed rule's flat prohibition on reliance on testimony that is not subject to cross-examination¹⁷⁹ would force survivors to a "Hobson's choice" between being revictimized by their assailant's advisor or having their testimony completely disregarded, and would prohibit schools from simply "factoring in the victim's level of participation in [its] assessment of witness credibility."¹⁸⁰ It would also make no allowance for the unavailability of a witness and would not allow any reliance at all on previous statements, regardless of whether those statements have other indicia of reliability, such as being made under oath or against a party's own interest. This would require schools to disregard relevant evidence in a variety of situations in a manner that could pose harms to both parties and would hinder the school's ability to ensure that their findings concerning responsibility are not erroneous.

Neither the Constitution nor any other federal law requires live cross-examination in public school conduct proceedings. The Supreme Court has not required any form of cross-examination (live or indirect) in disciplinary proceedings in public schools under the Due Process clause. Instead, the Court has explicitly said that a 10-day suspension does not require "the opportunity ... to confront and cross-examine witnesses."¹⁸¹ 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.¹⁸² The Department itself admits that written questions submitted by students or oral questions asked by a neutral school official are fair, effective, and wholly lawful ways to discern the truth in elementary and secondary schools,¹⁸³ and proposes retaining that method for elementary and secondary school proceedings. It 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 inequitable or ineffective for 17- or 18-year-old students in college. Nor does it explain why it seeks to require live hearings and cross-examination of students in schools when such a process is rarely, if ever, required of employees in workplace sexual harassment investigations.

The proposed rules also ignore the reality that many survivors of sexual assault develop anxiety, depression, PTSD, or other mental illnesses as a result of their assault. Survivors with PTSD, as well as survivors with other disabilities, have the right to request accommodations under Section 504¹⁸⁴ and the Americans with Disabilities Act (ADA),¹⁸⁵ and elementary and secondary students have accommodation rights under the Individuals with Disabilities in Education Act (IDEA).¹⁸⁶ These disability accommodations include the right to answer questions in writing or through a neutral school employee instead of being subjected to live cross-examination by their assailant's advisor. By denying institutions

¹⁷⁹ See proposed § 106.45(b)(3)(vii) ("If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility.").

¹⁸⁰ Liberty University Letter, *supra* note 146, at 5.

¹⁸¹ *Goss*, 419 U.S. at 583. See also *Coplin*, 903 F. Supp. at 1383; *Fellheimer*, 869 F. Supp. at 247.

¹⁸² The Department cites to one case, *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018) to support its proposed cross-examination requirement. However, *Baum* is anomalous. See e.g., *Dixon*, 294 F.2d at 158, *cert. denied* 368 U.S. 930 (1961) (expulsion does not require a *full-dress judicial hearing, with the right to cross-examine witnesses.*"); *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993) (holding no due process violation in expulsion of college student without providing him right to cross-examination); *Winnick v. Manning*, 460 F.2d 545, 549 (2d Cir. 1972) ("The right to cross-examine witnesses generally has not been considered an essential requirement of due process in school disciplinary proceedings."); *Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 16 (1st Cir. 1988) (a public institution need not conduct a hearing which involves the right to confront or cross-examine witnesses). See also *A Sharp Backward Turn*, *supra* note 92 (*Baum* "is anomalous.").

¹⁸³ 83 Fed. Reg. at 61476.

¹⁸⁴ 29 U.S.C. § 794; 34 C.F.R. pt. 104.

¹⁸⁵ 42 U.S.C. §§ 12131-12134; 28 C.F.R. pt. 35.

¹⁸⁶ 20 U.S.C. §§ 1400-1419; 34 C.F.R. pt. 300. See also U.S. Dep't of Educ., Office for Civil Rights, *Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools* (2014) [hereinafter *Disability Guidance*], <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-faqs-effective-communication-201411.pdf>.

of higher education the ability to provide these accommodations to their students, proposed § 106.45(b)(3)(vii) would force these schools to violate Section 504 and the ADA.

Ironically, mandated live cross-examination also fails to meet the Department's own stated goal of flexibility. Indeed, it is in sharp conflict with that stated goal. Throughout the preamble, the Department repeatedly criticizes the 2011 and 2014 Guidances for lacking "flexibility" and requiring a "one-size-fits all" approach," and repeatedly claims that the proposed rules allow for such "flexibility."¹⁸⁷ Yet requiring all institutions of higher education to facilitate live, trial-like hearings with cross-examination to address any allegation of sexual harassment, whether employee-on-student, employee-on-employee, student-on-employee, student-on-student, other third party-on-student, or other third party-on-employee, and regardless of the type of behavior alleged, is the very definition of inflexibility. While this proposed requirement "is problematic for all institutions, regardless of size and resources available,"¹⁸⁸ it would fall particularly heavily on community colleges, vocational schools, online schools, and other educational institutions that lack the resources of a traditional four-year college or university. The difficulty and burden imposed by this mandate will also likely ensure that proceedings to address sexual harassment allegations are consistently delayed, harming all who seek prompt resolution of such matters and especially harming those who are depending on final determinations to address and remedy harassment.

Most fundamentally, in requiring institutions of higher education to conduct live, quasi-criminal trials with live cross-examination to address allegations of sexual harassment, when no such requirement exists for addressing any other form of student or employee misconduct at schools, the proposed rules communicate the message that those alleging sexual assault or other forms of sexual harassment are uniquely unreliable and untrustworthy. Implicit in requiring cross-examination for complaints of sexual harassment, but not for complaints of other types of student misconduct, is an extremely harmful, persistent, deep-rooted, and misogynistic skepticism of sexual assault and other harassment complaints. Sexual assault and sexual harassment are already dramatically underreported. This underreporting, which significantly harms schools' ability to create safe and inclusive learning environments, will only be exacerbated if any such reporting forces complainants into traumatic, burdensome, and unnecessary procedures built around the presumption that their allegations are false. This selective requirement of cross-examination harms complainants and educational institutions and is contrary to the letter and purpose of Title IX.

Unsurprisingly, superintendents, Title IX experts, student conduct experts, institutions of higher education, and mental health experts overwhelmingly oppose these proposed rules on live cross-examination. The AASA "strongly object[s]" to allowing elementary and secondary schools to submit their students to live cross-examination.¹⁸⁹ ATIXA also opposes live, adversarial cross-examination, instead recommending that investigators "solicit questions from the parties, and pose those questions the investigators deem appropriate in the investigation interviews."¹⁹⁰ ASCA agrees that schools should "limit[] advisors' participation in student conduct proceedings."¹⁹¹ The American Bar Association recommends that schools provide "the opportunity for both parties to ask questions through the hearing

¹⁸⁷ 83 Fed. Reg. at 61466, 61468, 61469, 61470, 61472, 61474 n.6, 61477.

¹⁸⁸ *E.g.*, Liberty University Letter, *supra* note 146, at 4.

¹⁸⁹ AASA Letter, *supra* note 15, at 4.

¹⁹⁰ ATIXA, *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.

¹⁹¹ *ASCA 2014 White Paper*, *supra* note 138 at 2 (2014).

chair.”¹⁹² The Association of Independent Colleges and Universities in Massachusetts (AICUM), representing 55 accredited, nonprofit institutions of higher education, oppose the cross-examination requirement because it would “deter complainants from coming forward, making it more difficult for institutions to meet Title IX’s very purpose—preventing discrimination and harassment, stopping it when it does occur, and remedying its effects.”¹⁹³ The Association of American Universities (AAU), representing 60 leading public and private universities, oppose the requirement because it can be “traumatizing and humiliating” and “undermines other educational goals like teaching acceptance of responsibility.”¹⁹⁴ And over 900 mental health experts who specialize in trauma state that subjecting a survivor of sexual assault to cross-examination in the school’s investigation would “almost guarantee[] to aggravate their symptoms of post-traumatic stress,” and “is likely to cause serious to harm victims who complain and to deter even more victims from coming forward.”¹⁹⁵

C. The proposed rules would allow schools to pressure survivors of sexual assault, and students victimized by school employees, into traumatizing and inequitable mediation procedures with their assailants.

Proposed § 106.45(b)(6) would allow schools to use “any informal resolution process, such as mediation” to resolve a complaint of sexual harassment, including sexual assault, as long as the school obtains the students’ “voluntary, written consent.” 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, even on a voluntary basis, because of the power differential between assailants and victims, the potential for re-traumatization, and the implication that survivors somehow share “partial” responsibility for their own assault.

Mediation can also be especially harmful in cases of employee-on-student harassment, where again a significant power differential means a teacher or faculty respondent can essentially coerce a student victim into “consenting” to mediation and to a harmful mediation outcome. The potential for harm is also greater in cases of adult-on-child sexual abuse, where both the adult abuser and adult mediator can coerce or manipulate the minor victim into “consenting” to mediation and any mediation outcomes. The dangers of mediation are also exacerbated at schools where mediators are untrained in trauma and sexual assault and at some religious schools, where mediators may be especially like to rely on harmful rape myths, such as “good girls forgive,” that retraumatize survivors.¹⁹⁶ Minor students may be especially likely to feel they have no choice other than to consent to mediation if adult school officials are encouraging them to participate in the process and are especially vulnerable to being pressured into whatever resolution is favored by the adult mediator, whether or not they believe such a resolution to be adequate or responsive to their needs. Furthermore, students with developmental disabilities—both complainants and respondents—are vulnerable to being pressured or manipulated into participating in mediation and agreeing to harmful mediation outcomes, including outcomes that unfairly remove a complainant or respondent with a disability from their current school and instead push them into an alternative school.

In contrast to the proposed rule, the Department recognized in its 2001 Guidance that students must always have “the right to end [an] informal process at any time and begin the formal stage of the

¹⁹² Am. Bar Ass’n, *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).

¹⁹³ AICUM Letter, *supra* note 15.

¹⁹⁴ AAU Letter, *supra* note 15.

¹⁹⁵ Mental Health Professionals Letter, *supra* note 130.

¹⁹⁶ E.g., Grace Watkins, *Sexual Assault Survivor to Betsy DeVos: Mediation Is Not a Viable Resolution*, TIME (Oct. 2, 2017), <http://time.com/4957837/campus-sexual-assault-mediation>.

complaint process.”¹⁹⁷ This right to end mediation or other informal processes at any time is a critical safeguard to ensure that participation in such processes remains fully voluntary and that those participating in such processes are not inappropriately pressured or coerced into inappropriate resolutions. In contrast, proposed § 106.45(b)(6) would allow schools to “preclude[] the parties from resuming a formal complaint” after starting an informal process—even if a survivor changes her mind and realizes that mediation is too traumatizing to continue, or even if someone participating in the process realizes she is being inappropriately pressured to accept a particular resolution. Such a rule would empower schools to lock students into the continuation of informal processes even if those processes reveal themselves to be ineffective or harmful, effectively denying students the ability to withdraw their consent to these processes. For those who have experienced sexual assault or other forms of harassment, this coercion would compound the harm of the underlying violation.

For all of these reasons, the Department recognized in its 2001 Guidance that even “voluntary” consent to mediation is never appropriate to resolve cases of sexual assault. Experts also agree that mediation is inappropriate for resolving sexual violence. For example, the National Association of Student Personnel Administrators (NASPA), representing student affairs administrators in higher education, stated in 2018 that it was concerned about students being “pressured into informal resolution against their will.”¹⁹⁸ Likewise, both the AASA¹⁹⁹ and NASSP²⁰⁰ oppose the use of mediation in a manner that would preclude a party from pursuing formal procedures in school Title IX proceedings. Mental health experts also oppose mediation for sexual assault because it would “perpetuate sexist prejudices that blame the victim” and “can only result in further humiliation of the victim.”²⁰¹

D. The proposed rules would allow and in some instances force schools to use a more demanding standard of proof to investigate sexual harassment than they use to investigate other types of misconduct.

The Department’s longstanding interpretation of Title IX requires that schools use a “preponderance of the evidence” standard—which means “more likely than not”—to decide whether sexual harassment occurred.²⁰² Proposed § 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 matters, while allowing all other student or employee misconduct investigations to be governed by the preponderance of the evidence standard, even if they carry the same maximum

¹⁹⁷ 2001 Guidance, *supra* note 59, at 21.

¹⁹⁸ Nat’l Ass’n of Student Personnel Administrators (NASPA), *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.

¹⁹⁹ AASA Letter, *supra* note 15 at 6.

²⁰⁰ NASSP Letter, *supra* note 83, at 2.

²⁰¹ Mental Health Professionals Letter, *supra* note 130 at 3.

²⁰² 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, 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, <http://www.ncherm.org/documents/202-GeorgetownUniversity--110302017Genster.pdf>.

penalties.²⁰³ Indeed in some instances, the proposed rules would require that schools utilize the “clear and convincing evidence” standard.²⁰⁴

The Department’s decision to allow schools to impose a more burdensome standard in sexual harassment matters than in any other investigations of student or employee misconduct appears to rely on the stereotype and false assumption that those who report sexual assault and other forms of sexual harassment (mostly women) are more likely to lie than those who report physical assault, plagiarism, or the wide range of other school disciplinary violations and employee misconduct. When this unwarranted skepticism of sexual assault and other harassment allegations, grounded in gender stereotypes, infect sexual misconduct proceedings, even the preponderance standard “could end up operating as a clear-and-convincing or even a beyond-a-reasonable-doubt standard in practice.”²⁰⁵ Previous Department guidance recognized that, given these pervasive stereotypes, the preponderance standard was required to ensure that the playing field, at least on paper, was as even as possible. The Department now ignores the reality of these harmful stereotypes by imposing a standard of evidence that encourages, rather than dispels, the stereotype that women and girls lie about sexual assault and other harassment, a result that is contrary to Title IX.

1. *The preponderance standard is the only appropriate standard for Title IX proceedings.*

The preponderance standard is used by courts in all civil rights cases—including Title IX cases brought by *respondents* claiming their schools wrongly disciplined them for committing sexual assault.²⁰⁶ It is also used for nearly all civil cases, including where the conduct at issue could also be the basis for a criminal prosecution.²⁰⁷ The preponderance standard is also used for people facing more severe deprivations than suspension, expulsion or other school discipline, or termination of employment or other workplace discipline, including in proceedings to determine paternity,²⁰⁸ competency to stand trial,²⁰⁹ enhancement of prison sentences,²¹⁰ and civil commitment of defendants acquitted by the insanity defense.²¹¹ The Supreme Court has only required something higher than the preponderance standard in a narrow handful of civil cases “to protect particularly important individual interests,”²¹² where consequences far more severe than suspension, expulsion, or firing are threatened, such as termination of

²⁰³ Proposed § 106.45(b)(4)(i) would permit 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.

²⁰⁴ Proposed § 106.45(b)(4)(i) (explaining that the clear and convincing evidence standard must be used if schools use that standard for complaints against employees, and whenever a school uses clear and convincing evidence for any other case of student misconduct).

²⁰⁵ Michael C. Dorf, *Further Questions About the Scope of the Dep’t of Education’s Authority Under Title IX*, DORF ON LAW (Dec. 3, 2018), <https://dorfonlaw.org/2018/12/further-questions-about-scope-of-dept.html#more>.

²⁰⁶ Katharine Baker et al., *Title IX & the Preponderance of the Evidence: A White Paper* (July 18, 2017), <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).

²⁰⁷ To take one famous example, O.J. Simpson was found responsible for wrongful death in civil court under the preponderance standard after he was found not guilty for murder in criminal court under the beyond-a-reasonable-doubt standard. *See* B. Drummond Ayres, Jr., *Jury Decides Simpson Must Pay \$25 Million in Punitive Award*, N.Y. TIMES (Feb. 11, 1997), <https://www.nytimes.com/1997/02/11/us/jury-decides-simpson-must-pay-25-million-in-punitive-award.html>.

²⁰⁸ *Rivera v. Minnich*, 483 U.S. 574, 581 (1987).

²⁰⁹ *Cooper v. Oklahoma*, 517 U.S. 348, 368 (1996).

²¹⁰ *McMillan v. Pennsylvania*, 477 U.S. 79, 91-92 (1986).

²¹¹ *Jones v. United States*, 463 U.S. 354, 368 (1983).

²¹² *Addington v. Texas*, 441 U.S. 418, 424 (1979) (civil commitment).

parental rights,²¹³ civil commitment for mental illness,²¹⁴ deportation,²¹⁵ denaturalization,²¹⁶ and juvenile delinquency with the “possibility of institutional confinement.”²¹⁷ In all of these cases, incarceration or a permanent loss of a profound liberty interest was a possible outcome—unlike in school sexual harassment proceedings. Moreover, in all of these cases, the government and its vast power and resources was in conflict with an individual—in contrast to school harassment investigations involving two students with roughly equal resources and equal stakes in their education, two employees who are also similarly situated, or a student and employee, where any power imbalance would tend to favor the employee respondent rather than the student complainant.²¹⁸ Preponderance is the only standard of proof that treats both sides equally and is consistent with Title IX’s requirement that grievance procedures be “equitable.”²¹⁹

For this reason, Title IX experts and school leaders alike support the preponderance standard, which is used to address harassment complaints at over 80 percent of colleges.²²⁰ The National Center for Higher Education Risk Management (NCHERM) Group, whose white paper *Due Process and the Sex Police* was cited by the Department,²²¹ 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.”²²² The white paper by four Harvard professors that is cited by the Department²²³ recognizes that schools should use the preponderance standard if “other requirements for equal fairness are met.”²²⁴ ATIXA takes the position that

²¹³ *Santosky v. Kramer*, 455 U.S. 745, 758 (1982).

²¹⁴ *Addington*, 441 U.S. at 432.

²¹⁵ *Woodby v. INS*, 385 U.S. 276, 286 (1966).

²¹⁶ *Chaunt v. United States*, 364 U.S. 350, 353 (1960); *Schneiderman v. United States*, 320 U.S. 118, 125 (1943).

²¹⁷ *In re Winship*, 397 U.S. 358, 367-68 (1970).

²¹⁸ Despite overwhelming Supreme Court and other case law in support of the preponderance standard, the Department cites just two state court cases and one federal court district court case to argue for the clear and convincing standard. 83 Fed. Reg. at 61477. The Department claims that expulsion is similar to loss of a professional license and that held that the clear and convincing standard is required in cases where a person may lose their professional license *Id.* However, even assuming expulsion is analogous to loss of a professional license, which is certainly debatable as it is usually far easier to enroll in a new school than to enter a new profession, this is a weak argument, as there are numerous state and federal cases that have held that the preponderance standard is the correct standard to apply when a person is at risk of losing their professional license. *See, e.g., In re Barach*, 540 F.3d 82, 85 (1st Cir. 2008); *Granek v. Texas State Bd. of Med. Examiners*, 172 S.W. 3d 761, 777 (Tex. Ct. App. 2005). As an example, the Department cites to *Nguyen v. Washington State Dep’t of Health*, 144 Wash.2d 516 (Wash. 2001), *cert. denied* 535 U.S. 904 (2002) for the contention that courts “often” employ a clear and convincing evidence standard to civil administrative proceedings. In that case, the court required clear and convincing evidence in a case where a physician’s license was revoked after allegations of sexual misconduct. But that case is an anomaly; a study commissioned by the U.S. Department of Health and Human Services found that two-thirds of the states use the preponderance of the evidence standard in physician misconduct cases. *See* Randall R. Bovbjerg et al., *State Discipline of Physicians* 14-15 (2006), <https://aspe.hhs.gov/sites/default/files/pdf/74616/stdisc.pdf>. *See also* Kidder, William, *(En)forcing a Foolish Consistency?: A Critique and Comparative Analysis of the Trump Administration’s Proposed Standard of Evidence Regulation for Campus Title IX Proceedings* (January 27, 2019), available at <http://ssrn.com/abstract=3323982> (providing an in depth comparative analysis of the many instances in which the preponderance standard is used instead of the clear and convincing evidence standard).

²¹⁹ The Department’s bizarre claim that the preponderance standard is the “lowest possible standard of evidence” (83 Fed. Reg. at 61464) is simply wrong as a matter of law. Courts routinely apply lower standard of proof in traffic stops (“reasonable suspicion”) and conducting searches (“probable cause”). *Terry v. Ohio*, 392 U.S. 1 (1968) (traffic stops); U.S. Const. amend. IV (searches).

²²⁰ Heather M. Karjane, et al., *Campus Sexual Assault: How America’s Institutions of Higher Education Respond* 120 (Oct. 2002), <https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf>.

²²¹ 83 Fed. Reg. at 61464 n.2.

²²² The NCHERM Group, *Due Process and the Sex Police* 2, 17-18 (Apr. 2017), available at <https://www.ncher.org/wp-content/uploads/2017/04/TNG-Whitepaper-Final-Electronic-Version.pdf>.

²²³ 83 Fed. Reg. at 61464 n.2.

²²⁴ Elizabeth Bartholet, Nancy Gertner, Janet Halley & Jeannie Suk Gersen, *Fairness For All Students Under Title IX* 5 (Aug. 21, 2017), <https://dash.harvard.edu/bitstream/handle/1/33789434/Fairness%20for%20All%20Students.pdf>.

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.*²²⁵

ASCA agrees that schools should “[u]se the preponderance of evidence (more likely than not) standard to resolve all allegations of sexual misconduct”²²⁶ because “it is the only standard that reflects the integrity of equitable student conduct processes which treat all students with respect and fundamental fairness.”²²⁷ Indeed, even the Department admits it is “reasonable” for a school to use the preponderance standard.²²⁸

2. *The Department’s proposed rules are inconsistent with other civil rights laws and impose double standards for sexual harassment versus other student and employee misconduct.*

By permitting and sometimes mandating the clear and convincing evidence standard in sexual harassment proceedings, the Department treats sexual harassment differently from other types of school disciplinary violations and employee misconduct, uniquely targeting and disfavoring sexual harassment complainants. First, the Department argues that Title IX harassment investigations are different from civil cases, and therefore may appropriately require a more burdensome standard of proof, because many Title IX harassment investigations do not use full courtroom procedures, such as active participation by lawyers, rules of evidence, and full discovery.²²⁹ However, the Department does not exhibit this concern for the lack of full-blown judicial proceedings to address other types of student or employee misconduct, including other examples of student or employee misconduct implicating the civil rights laws enforced by the Department. Schools have not as a general rule imposed higher evidentiary standards in other misconduct matters, nor have employers more generally in employee misconduct matters, to make up for the fact that the proceedings to address such misconduct fall short of full-blown judicial trials, and the Department does not explain why such a standard is appropriate in this context alone.

Second, although the proposed rules would require schools to use the “clear and convincing” standard for sexual harassment investigations if they use it for *any* other student or employee misconduct investigations with the same maximum sanction,²³⁰ and would require that it be used in student harassment investigations if it is used in *any* employee harassment investigations, the proposed rules would not prohibit schools from using the clear and convincing standard in sexual harassment proceedings *even if* they use a lower proof standard for *all* other student conduct violations.²³¹ School leaders agree that requiring different standards for sexual misconduct as opposed to other misconduct is inequitable. NASSP notes that by requiring schools to “use an inappropriate and more demanding standard of proof to investigate sexual harassment than to investigate other types of student misconduct,” the proposed rule would “deny harassment victims . . . due process.”²³² NASPA recommends the preponderance standard:

²²⁵ ATIXA, *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>.

²²⁶ ASCA 2014 White Paper, *supra* note 138.

²²⁷ ACSA, *The Preponderance of Evidence Standard: Use In Higher Education Campus Conduct Processes*, <https://www.theasca.org/files/The%20Preponderance%20of%20Evidence%20Standard.pdf>.

²²⁸ 83 Fed. Reg. at 61477.

²²⁹ *Id.*

²³⁰ Proposed § 106.45(b)(4)(i).

²³¹ See Grossman & Brake, *supra* note 90 (“It is a one-way ratchet.”).

²³² NASSP Letter, *supra* note 83, at 2.

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.²³³

By allowing and in some contexts requiring schools to impose higher evidentiary standards in sexual harassment proceedings than in comparable misconduct proceedings, the Department would allow disparate treatment targeting those who have experienced sexual harassment, in violation of Title IX and other laws against sex discrimination.

Further, many school employees have contracts that require using a more demanding standard of evidence than the preponderance standard for employee misconduct investigations.²³⁴ The proposed rules would force those schools to either (1) impose the same standard of proof for *all* cases of misconduct that carry the same maximum sanction as Title IX proceedings (and thereby eliminating any flexibility schools have to define how they handle misconduct of a nonsexual nature, completely exceeding the Department’s authority),²³⁵ or (2) maintain the clear and convincing evidence standard for only employee misconduct and student sexual misconduct proceedings. The latter choice would leave schools vulnerable to liability for sex discrimination, as schools cannot defend specifically disfavoring sexual harassment investigations, which is a form of sex discrimination, by pointing to collective bargaining agreements or other contractual agreements for employees that require a higher standard.²³⁶

3. *The proposed rules impose double standards for complainants versus respondents.*

By allowing schools to use a “clear and convincing evidence” standard, the proposed rule would permit schools to tilt investigations in favor of respondents and against complainants. The Department argues that sexual harassment investigations may require 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.²³⁷ But the Department ignores the reality that Title IX complainants face “heightened stigma” for reporting sexual harassment as compared to other types of student or employee misconduct, and that complainants suffer “significant, permanent, and far-reaching” consequences to their education or their career if the school fails to meaningfully address the harassment.²³⁸ In the context of peer sexual harassment, both the complainant and the respondent have an equal interest in obtaining an education. In matters involving the sexual harassment of a student by a school employee, the complainant’s educational interest is at least as strong as the respondent’s employment interest. And in matters involving sexual harassment between employees, both the complainant and the respondent have interests in ensuring that they can continue in their jobs. Catering only to the impacts on respondents in designing a grievance process to address sexual harassment is inequitable.

²³³ NASPA *Title IX Priorities*, *supra* note 198 at 1-2.

²³⁴ See Grossman & Brake, *supra* note 90 (clear and convincing evidence is “the standard the [American Association of University Professors] has urged on colleges and universities for faculty discipline and which some unionized institutions have incorporated in collective bargaining agreements with institutions”).

²³⁵ Although the Department claims that it wants to give schools “flexibility” in choosing their standard of proof,²³⁵ Proposed § 106.45(b)(4)(i) would effectively force schools to use “clear and convincing evidence” for student sexual harassment investigations if “clear and convincing evidence” is used by that school in *employee* sexual harassment investigations. Given that most schools already use the preponderance standard in student Title IX proceedings, many of them would be forced to change their procedures—hardly the “flexibility” that the Department claims it wishes to provide.

²³⁶ See 34 C.F.R. § 106.51 (“A recipient shall not enter into a contractual or other relationship which directly *or indirectly* has the effect of subjecting employees or students to discrimination....”).

²³⁷ 83 Fed. Reg. at 61477.

²³⁸ For example, 34 percent of college students who are sexually assaulted drop out of school. Mengo & Black, *supra* note 30, at 234, 244.

4. *The shift in treatment of the standard for sexual misconduct matters appears to stem from the Department's belief that individuals alleging sexual misconduct are not credible.*

All in all, the Department's justifications for allowing and in some instances imposing the clear and convincing evidence standard are without merit. Although claiming otherwise, the Department is not proposing this change to give schools flexibility, because in many instances schools would be forced to apply the clear and convincing evidence standard regardless of their judgment as to the appropriateness of the standard. The Department is not proposing this change because it is recommended by the experts who engage with and work at schools, as most experts oppose use of the clear and convincing evidence standard. Nor is the Department proposing this change in order to ensure equity for all parties, as the proposed rules would actually make Title IX proceedings more *inequitable*, violating Title IX's mandate for equitable grievance procedures. And finally, the Department is not proposing this change because it is consistent with most legal actions that involve civil rights complaints or wherein similar losses are at stake, as those civil actions uniformly use the preponderance of the evidence standard. Thus, in an arbitrary and capricious fashion, the Department proposes this rule that effectively mandates an inappropriate standard of proof, impacting thousands of students and employees at schools, without any adequate justification, apparently based on nothing more than the harmful myth that those alleging sexual assault and other forms of sexual harassment are inherently less credible than those alleging other forms of misconduct.

E. The proposed rules would allow schools to consider irrelevant or prejudicial evidence, including irrelevant or prejudicial sexual history evidence, in sexual harassment investigations.

Despite adding numerous procedural requirements to the proposed rules, the Department fails to include a rule that evidence must be excluded in a sexual harassment investigation if it is irrelevant,²³⁹ or if it is relevant but its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the factfinder, undue delay, wasting time, and/or needlessly presenting cumulative evidence.²⁴⁰

One particularly troubling consequence of this omission is that the proposed rules at §§ 106.45(b)(3)(vi)-(vii) improperly allow schools to consider any evidence related to the sexual history between the parties if it is “offered to prove consent”—even if such evidence relies on victim-blaming and “slut-shaming” myths that cause unfair prejudice to the complainant, mislead the investigator(s) or decisionmaker(s), or render the evidence entirely irrelevant to the investigation. In contrast, the 2014 Guidance instructed schools to “recognize that the mere fact of a current or previous consensual dating or sexual relationship between the two parties does not itself imply consent or preclude a finding of sexual violence.”²⁴¹ The proposed rules not only provide no such instruction, but by explicitly allowing consideration of a previous sexual relationship in these circumstances, it invites schools to improperly conclude that such sexual history demonstrates consent.

The Department cites Federal Rule of Evidence 412 to support its proposed rules without mentioning that Rule 412 contains different restrictions on the admissibility of sexual history evidence in criminal versus civil proceedings.²⁴² In criminal cases, such evidence may be offered by the defendant without restriction.²⁴³ But in civil cases, sexual history evidence is admissible to prove consent only if “its

²³⁹ See Fed. R. Evid. 401, 402.

²⁴⁰ See Fed. R. Evid. 403.

²⁴¹ 2014 Guidance, *supra* note 58, at 31.

²⁴² 83 Fed. Reg. at 61476.

²⁴³ Fed. R. Evid. 412(b)(1)(B).

probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party.”²⁴⁴ The Department fails to explain why it seeks to import the criminal rule rather than its civil counterpart to school sexual harassment proceedings, which, to the extent they are properly analogized to trials in a court of law at all (a dubious proposition), are self-evidently civil rather than criminal in nature.

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

Proposed § 106.45(b)(1)(v) would require schools to have “reasonably prompt timeframes,” but does not define what constitutes “reasonably prompt.” This provision would also allow schools to create a “temporary delay” or “limited extension” of timeframes for “good cause,” where “good cause” may be “concurrent law enforcement activity” or the “need for language assistance or accommodation of disabilities.” In practice, these delays, particularly in combination with the delays likely to be created by the rules’ burdensome requirements of live trial-like proceedings in all harassment investigations, are likely to result in violations of Title IX’s promptness requirement under current § 106.8(b) and proposed § 106.8(c). In contrast, the 2011 and 2014 Guidances recommended that schools finish investigations within 60 days,²⁴⁵ and the 2001 Guidance continues to prohibit schools from delaying a Title IX investigation merely because of a concurrent law enforcement investigation.²⁴⁶ All of these guidances recognized that while criminal investigations seek to punish an abuser for misconduct, Title IX investigations are intended to preserve or restore complainants’ equal access to any educational opportunities that have become inaccessible as a result of harassment.

Many schools may wrongly interpret proposed § 106.45(b)(1)(v) to allow them to delay Title IX investigations indefinitely if there is any concurrent law enforcement activity. This is especially concerning for students in elementary and secondary schools, as well as adult students with developmental disabilities, whose reports of sexual abuse may automatically trigger a law enforcement investigation under state mandatory reporting laws. As a result, these students would have no way to secure a timely school investigation and resolution, as the mere act of reporting could trigger an automatic delay.

Schools may also wrongly interpret proposed § 106.45(b)(1)(v) to allow for effectively unlimited delays if any party or witness requires a disability accommodation. As discussed in Part IV.B, individuals who develop anxiety, depression, PTSD, or other mental disabilities as a result of sexual harassment or assault, as well as students with preexisting disabilities, are entitled to reasonable disability accommodations under Section 504, the ADA, and the IDEA.²⁴⁷ However, many schools require documentation in order for a student to receive disability accommodations, and documentation for certain diagnoses, such as PTSD, are often unavailable for a period of time due to persistence-based diagnostic criteria.²⁴⁸ Schools may believe that the proposed rules would allow them to indefinitely delay harassment or assault proceedings while they wait for diagnoses that necessarily take time to make, rather than moving forward in promptly accommodating an individual’s emergent needs. In addition, because institutions of higher education are not required to accept an incoming student’s documentation of their disability from their IEP in secondary school, complainants and respondents with disabilities in higher education may encounter delays in simply obtaining new documentation of their disability. Survivors with disabilities already face many barriers to obtaining relief, including long distances between their

²⁴⁴ Fed. R. Evid. 412(b)(2).

²⁴⁵ 2014 Guidance, *supra* note 58, at 31; 2011 Guidance, *supra* note 58, at 12.

²⁴⁶ 2001 Guidance, *supra* note 59, at 21. *See also* 2014 Guidance, *supra* note 58, at 27-28; 2011 Guidance, *supra* note 58, at 10.

²⁴⁷ *See supra* notes 184-186 and accompanying text.

²⁴⁸ Taylor S. Parker, *The Less Told Story: The Intersection of Title IX and Disability* at 14-16, at <https://www.stetson.edu/law/academics/highered/home/media/Title%20IX%20and%20Disability%20Taylor%20S%20Parker.pdf>.

school's Title IX and disability offices,²⁴⁹ inaccessible sexual assault training programs and materials, inaccessible sexual assault services, and service providers who lack disability training.²⁵⁰ They should not be forced to endure additional delays in obtaining the accommodations they need to meaningfully participate in their Title IX investigations. Likewise, the proposed rules should not allow schools to delay Title IX proceedings based on the school's failure to provide disability accommodations promptly in violation of existing disability civil rights laws. Rather, the need for prompt proceedings to address harassment allegations is an additional reason that schools must promptly provide the disability accommodations to which an individual is entitled.

For the same reasons, schools should not be allowed to rely on proposed § 106.45(b)(1)(v) to impose unreasonable delays if any party or witness requires language assistance. Students and guardians are already entitled to language assistance under Title VI.²⁵¹ A school's failure to provide language assistance in a timely manner in violation of Title VI should not be a valid basis for delaying a Title IX investigation. Rather, the need for a timely sexual harassment investigation should require a school to promptly provide any necessary language assistance.

School leaders and experts alike agree that proposed § 106.45(b)(1)(v) would cause unacceptable delays in investigations. NASSP opposes this standard because it would allow schools to “deny harassment victims . . . due process . . . if there is also an ongoing criminal investigation.”²⁵² ATIXA agrees that a school that “delay[s] or suspend[s] its investigation” at the request of a prosecutor creates a safety risk to a survivor of sexual assault and to “other students, as well.”²⁵³

G. The proposed rules may require schools to provide respondents appeal rights that they deny complainants.

Although Secretary DeVos has claimed that the proposed rules make “[a]ppeal rights equally available to both parties,”²⁵⁴ they may not in fact provide equal *grounds for appeal* to both parties. In proposed §§ 106.45(b)(1)(i), 106.45(b)(1)(vi), 106.45(b)(4)(ii)(E), 106.45(b)(5), and 106.45(b)(7)(i)(A), the Department's repeatedly draws a distinction between “remedies” and “sanctions,” implying that sanctions are not a category of remedies. Proposed § 106.45(b)(5) also explicitly affirms the right of complainants to appeal their remedies while stating that “a complainant is not entitled to a particular sanction.” As a result, schools are likely to conclude that the proposed rules would bar complainants from appealing a school's resolution of a harassment complaint based on inadequate sanctions imposed on a respondent, while allowing respondents to appeal their sanctions. Allowing only the respondent the right to appeal a sanction decision would be both unfair and a violation of the requirement of “equitable” procedures, because complainants are also affected by sanction decisions. For example, in instances of sexual assault, if their assailant is still allowed to live in the same dorm as the survivor, or to teach a class that is required for the survivor's major, the survivor may experience further trauma from repeated encounters with their assailant and be exposed to the risk of further harassment or assault.

²⁴⁹ *Id.* at 2.

²⁵⁰ National Council on Disability, *Not on the Radar: Sexual Assault of College Students with Disabilities* 33-58 (Jan. 30, 2018), available at <https://ncd.gov/publications/2018/not-radar-sexual-assault-college-students-disabilities>.

²⁵¹ 42 U.S.C. § 2000d to d-7; U.S. Dep't of Educ., Office for Civil Rights, *Dear Colleague Letter: English Learner Students and Limited English Proficient Parents* 37-38 (2015) [hereinafter *Language Guidance*], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf>.

²⁵² NASSP Letter, *supra* note 104, at 2.

²⁵³ ATIXA, *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), <https://atixa.org/wordpress/wp-content/uploads/2015/03/ATIXA-POSITION-STATEMENT-ON-PROSPER-ACT-Final.pdf>.

²⁵⁴ DeVos, *supra* note 159.

Experts and school leaders alike 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).”²⁵⁵ 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.”²⁵⁶ Even the white paper by four Harvard professors that is cited by the Department²⁵⁷ recognizes that schools should allow “[e]ach party (respondent and complainant) [to] request an impartial appeal.”²⁵⁸ NASSP notes that by requiring schools to give unequal appeal rights with respect to sanctions, the proposed rule would “deny harassment victims . . . due process.”²⁵⁹

Additionally, the Department mischaracterizes court precedent to support its position that complainants should not be permitted to appeal a respondent’s sanction.²⁶⁰ While the Department asserts that *Davis*²⁶¹ and *Stiles ex rel. D.S. v. Grainger County, Tennessee*²⁶² support its proposed rule preventing complainants from appealing particular sanctions, those cases merely explain that that “courts should refrain from second-guessing the disciplinary decisions made by school administrators.”²⁶³ These cases do not prohibit students, whether complainants or respondents, from appealing their school’s disciplinary decisions through their school’s Title IX grievance process. Similarly, the third case cited by the Department, *Sanches*, merely explains that “[s]chools are not required to . . . accede to a [complainant’s] remedial demands”²⁶⁴—it does not prohibit complainants from appealing a school’s determination as to what remedies or sanctions are appropriate.

H. The proposed rules would allow and would in some instances require schools to violate individuals’ privacy rights.

The proposed rules at § 106.45(b)(3)(viii) and 106.45(b)(4)(ii)(E)) would allow or even require schools to violate students’ privacy rights, making both complainants and respondents vulnerable to retaliation. Proposed § 106.45(b)(3)(viii) would require schools to allow both parties to inspect and review any evidence “directly related to the allegations” obtained as part of the investigation, even evidence upon which the school “does not intend to rely in reaching a determination regarding responsibility.” First, this proposed rule is confusing, as it suggests that schools may ignore relevant evidence without placing any limitations on their discretion to do so. Moreover, by allowing unfettered access to irrelevant or prejudicial evidence that the school does not intend to rely upon in making its decision, including sexual history evidence, this provision would open the door to retaliation against complainants, respondents, and witnesses.

Proposed § 106.45(b)(4)(ii)(E)) would require schools to disclose to both parties “any sanctions” on the respondent and “any remedies” for the complainant, even in cases where such a disclosure would violate the Family Educational Rights and Privacy Act (FERPA).²⁶⁵ This proposed rule would depart from twenty-two years of Department guidance, which recognized that while complainants could be informed

²⁵⁵ Am. Bar Ass’n, *supra* note 192, at 5.

²⁵⁶ ATIXA, *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>.

²⁵⁷ 83 Fed. Reg. at 61464 n.2.

²⁵⁸ Bartholet, et al., *supra* note 224.

²⁵⁹ NASSP Letter, *supra* note 83, at 2.

²⁶⁰ 83 Fed. Reg. at 61479.

²⁶¹ 526 U.S. at 648.

²⁶² 819 F.3d 834, 848 (6th Cir. 2016).

²⁶³ *Davis*, 526 U.S. at 648; *Stiles ex rel. D.S. v. Grainger Co., Tenn.*, 819 F.3d 834, 848 (6th Cir. 2016).

²⁶⁴ *Sances v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 167-68 (5th Cir. 2011) (emphasis added).

²⁶⁵ 20 U.S.C. § 1232g(b)(1) (generally forbidding disclosure from a student’s “education record,” which includes written information about the complaint, investigation, and outcome of a disciplinary proceeding, without consent of the student).

of the sanctions imposed on a respondent if (1) the sanction “directly relates” to the complainant or (2) the harassment involves sexual assault, stalking, dating violence, domestic violence, or other violent crime at a postsecondary institution,²⁶⁶ that respondents should not be informed of any remedies for complainants at all.²⁶⁷ Schools should not be forced to choose between violating their obligations under Title IX or violating students’ privacy rights under FERPA.

I. The proposed rules would allow schools to destroy records relevant to a student or employee’s Title IX lawsuit or administrative complaint and would allow repeat employee offenders to escape accountability.

Proposed § 106.45(b)(7) would require schools to keep records of sexual harassment proceedings for only three years, which would limit complainants’ ability to succeed in a Title IX lawsuit or OCR complaint. First, because the Title IX statute does not contain a statute of limitation, courts generally apply the statute of limitation of the “most analogous” state statute,²⁶⁸ such as a state’s civil rights statute or personal injury statute,²⁶⁹ the latter of which varies from one to six years depending on the state.²⁷⁰ As a result, proposed § 106.45(b)(7) would allow schools in many states to destroy relevant records before a student or employee has an opportunity to file a complaint or complete discovery in a Title IX lawsuit. Second, given that OCR complaints involving campus sexual assault have, in recent years, taken an average of more than four years to resolve,²⁷¹ proposed § 106.45(b)(7) could potentially allow the majority of schools undergoing an OCR investigation to destroy relevant records and thus escape liability.

The proposed rule would also make students vulnerable to school employees who are repeat offenders. Unlike students, school employees have the ability to harass numerous victims (students and fellow employees) during many years or decades at a school. But the proposed rule would permit schools to destroy records involving employee-respondents after three years, allowing repeat employee offenders to escape accountability despite multiple complaints, investigations, or findings against them.

J. The proposed rules fail to include a prohibition on retaliation against parties and witnesses.

Current Title IX rules prohibit retaliation through incorporation of Title VI rules.²⁷² But given the extensive and detailed explication of procedures and procedural rights in the proposed rules, it is not clear why the Department declined to include an explicit prohibition of retaliation against individuals for making a sexual harassment complaint or participating in a sexual harassment investigation. Proposed §§ 106.45(b)(1) (required grievance procedures) and 106.45(b)(2) (notice to parties) do not include prohibition of retaliation against parties and witnesses or any notice of the right to be free from retaliation. The Department’s failure to include clear prohibitions against retaliation is confusing and unjustifiable.

²⁶⁶ 2017 Guidance, *supra* note 58 at 6; 2014 Guidance, *supra* note 58 at 36-37; 2011 Guidance, *supra* note 58, at 13-14; 2001 Guidance, *supra* note 59, at vii; 1997 Guidance, 62 Fed. Reg. at 12034, 12038, 12051. *See also* 20 U.S.C. 1232g(b)(6)(C)(i).

²⁶⁷ 2014 Guidance, *supra* note 58, at 36.

²⁶⁸ Nat’l Women’s Law Ctr., *Breaking Down Barriers* at 91 n.354 (2015), https://nwlc.org/wp-content/uploads/2015/08/BDB07_Ch6.pdf.

²⁶⁹ *Id.* at 92 n.355-57.

²⁷⁰ Parker Waichman LLP, *Statutes of Limitations – A Legal Guide*, http://www.statutes-of-limitations.com/search?statutes_next_page=1&state_id=Choose%20Jurisdiction&case_type_id=7&year_limit=Year%20Limit&x=60&y=14.

²⁷¹ Jake New, *Justice Delayed*, INSIDE HIGHER ED (May 6, 2015), <https://www.insidehighered.com/news/2015/05/06/ocr-letter-says-completed-title-ix-investigations-2014-lasted-more-4-years>.

²⁷² 34 C.F.R. § 106.71 (incorporating 34 C.F.R. § 100.7, the Title VI regulation prohibiting “intimidatory or retaliatory acts”).

K. The proposed rules' suggestion that these inequitable grievance procedures are necessary in order to avoid sex discrimination against named harassers and assailants turns Title IX on its head.

Proposed § 106.45(a) asserts that a school's "treatment of the respondent" may constitute sex discrimination in violation of Title IX, implying that the inequitable, complainant-hostile procedures set out in the proposed rules are necessary to avoid sex discrimination against the respondent. This suggestion that Title IX's prohibition of sex discrimination entitles a respondent to particular rights and protections when being investigated for sexual harassment turns Title IX on its head. Title IX was enacted to protect individuals from discrimination on the basis of sex in educational programs and activities, with the recognition of the long and pernicious history of discrimination against women and girls in schools. This protection against sex discrimination necessarily includes ensuring that students who experience sexual harassment continue to have equal access to educational opportunities. Proposed § 106.45(a) threatens to invert that purpose by turning named harassers and rapists into a protected class.²⁷³

The proposed rules thus threaten to create a system in which it is easier to show that schools engaged in reverse "sex discrimination" against respondents than sex discrimination against students and employees who experienced sexual harassment. The proposed rules suggest a respondent might be able to claim a Title IX violation merely by showing that the school deviated from the procedural requirements set out in the rules.²⁷⁴ By contrast, nowhere in the proposed rules or preamble does the Department indicate that depriving a *complainant* of procedural protections would be a Title IX violation; due process for *respondents*, however, is explicitly mentioned repeatedly.²⁷⁵ Thus, it appears that the only way a complainant could prove a Title IX violation in the Department's judgment would be to show that (i) she suffered sexual harassment that was "so severe, pervasive, and objectively offensive that it denied [her] access to the [school's] education program or activity"²⁷⁶; (ii) the harassment "occur[red] within the [school's] program or activity"²⁷⁷; (iii) a school employee with "the authority to institute corrective measures on behalf of the [school]" had "actual knowledge" of the harassment;²⁷⁸ and (iv) their school's response was "deliberately indifferent" or "clearly unreasonable."²⁷⁹ This is a much, much higher bar than violating the procedural requirements for grievance procedures under the proposed rules. As a result, the proposed rules will likely incentivize schools to protect against allegations of reverse sex discrimination by respondents than allegations of sex discrimination by complainants claiming inadequate and unfair responses to their sexual harassment.²⁸⁰ This incentive would be exacerbated by proposed § 106.44(b)(5), which provides that a school could not be held to be deliberately indifferent to harassment "merely because" it decided there was no sexual harassment and the Department "reaches a different determination." The result is a system of rules that perversely, unfairly, and unlawfully creates fewer rights under Title IX for individuals who are sexually harassed than for individuals who are alleged to have sexually harassed others.

²⁷³ Grossman & Brake, *supra* note 90 (criticizing the Department's attempt to "traffic in a false equivalence that is supported by neither law nor logic").

²⁷⁴ Proposed § 106.45(a).

²⁷⁵ 83 Fed. Reg. at 61462, 61465, 61472 (three times), 61473, 61477, 61484, 61489 (twice), 61490.

²⁷⁶ Proposed § 106.30.

²⁷⁷ Proposed § 106.45(b)(3).

²⁷⁸ Proposed § 106.30.

²⁷⁹ Proposed § 106.44(a).

²⁸⁰ Grossman & Brake, *supra* note 90 ("If it is sex discrimination against the accused student to subject him to an unfair process, but only sex discrimination against the complainant if her complaint is met with deliberate indifference, then siding with respondents is the less perilous path toward Title IX compliance.").

V. **The proposed rules would weaken the ability of the Department to remedy sex discrimination and broaden the ability of schools to engage in sex discrimination.**

A. **The proposed rules would inappropriately shift the Department’s focus away from remedying sex discrimination.**

Like all civil rights laws, at the core of Title IX is its mandate against sex discrimination.²⁸¹ However, the Department’s proposed revision to § 106.3(a) would erase the word “discrimination” entirely from the provision setting out the remedial action that the Department may require. The current § 106.3(a) acknowledges that remedial action under Title IX flows from the Department’s determination that a school has “discriminated” on the basis of sex and authorizes the Department to order that a school take such action necessary “to overcome the effects of such discrimination.” In contrast, the proposed rule would omit any reference to “discrimination” from the regulation entirely, instead focusing on remedying “violations” of Title IX. These changes are troubling for a number of reasons. First, this amendment unjustifiably expands rights for respondents to challenge “violations” of their procedural rights under these proposed rules, shifting the Department’s enforcement efforts further away from protecting the right to equal access to educational opportunities for individuals who have been sexually harassed. Second, the proposed removal of the Department’s obligation to provide remedies that “overcome the effects of such discrimination” suggests a decision has been made to ignore the far-reaching effects of sexual harassment and other forms of discrimination on the victims and on others in the school community. We are therefore concerned that the proposed changes to § 106.6(a) not only reflect the Department’s goal of inappropriately narrowing its nondiscrimination mandate but also signal to schools that they will no longer be held fully accountable for permitting or engaging in illegal sex discrimination.

B. **The proposed rules do not make it clear whether students who have suffered sex discrimination in violation of Title IX would be entitled to monetary compensation through OCR enforcement.**

The Department fails to clearly explain whether monetary compensation would be available to a complainant who has suffered sex discrimination, including sexual harassment, in violation of Title IX. The proposed rule at § 106.3(a) would deny complainants of any “assessment of damages” against their schools for violations of Title IX. The Department claims this is because it is “mindful of the difference” between private litigation (where money damages are available) and agency enforcement (where money damages are not available).²⁸² However, the Department’s explicit goal in issuing the proposed rules is to make “[agency] standards . . . generally aligned with the standards developed by the Supreme Court” in cases of sexual harassment.²⁸³ An outright prohibition of money damages in cases of sexual harassment is indefensible and inconsistent with the Department’s own stated rationales; if the Department seeks to subject sexual harassment victims who seek agency enforcement to the same stringent standards as are imposed in private litigation for money damages, it cannot justify precluding those same students from obtaining money damages through agency enforcement.

The Department creates further confusion in the preamble when it explains that it could still require a school to “reimburse” a student for “reasonable and documented expenses,” “restor[e]” a student’s impermissibly revoked scholarship, “adjust” an employee’s salary or retirement credit,²⁸⁴ or otherwise require a “payment of money” to “bring[] a [school] into compliance with Title IX.”²⁸⁵ The Department, however, fails to explain the difference between impermissible “damages” and permissible

²⁸¹ 20 U.S.C. § 1681(a).

²⁸² 83 Fed. Reg. at 61480.

²⁸³ *Id.* at 61466.

²⁸⁴ *Id.* at 61480.

²⁸⁵ *Id.* at 61489.

“reimburse[ments],” “adjust[ments],” “expenses,” or “payment[s].” The result is that neither students nor schools would understand whether monetary compensation would be available if a student suffers sex discrimination in violation of Title IX and files a complaint with the Department.

C. The proposed rules would allow schools to publish materials that suggest disparate treatment of applicants, students, or employees on the basis of sex, and would inappropriately seek to reduce the amount of information available to parents and applicants about whether schools comply with Title IX.

Proposed § 106.8(a)(2)(ii) would prohibit schools from using or distributing a publication “*stating* that [it] treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this part (emphasis added).” In contrast, the current equivalent, § 106.9(b)(2), prohibits schools from using or distributing a publication that “*suggests*, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this part (emphasis added).” Under the proposed rules, only overt statements of discrimination would be prohibited, and schools would not be held responsible, for example, for publications that serve to steer students to particular courses of study or employees to particular roles on the basis of sex, as long as the school stopped short of overt discriminatory statements.

Further, proposed § 106.8(b)(1) would remove the requirement (currently in § 106.9(a)) that a recipient must notify “parents of elementary and secondary school students” that it does not discriminate on the basis of sex. Proposed § 106.8(b)(2) would remove the requirement (currently in § 106.9(b)) that a recipient include a non-discrimination statement in each “announcement, bulletin, ... or application form,” while adding the requirement for inclusion of the statement on its “website” and in “handbooks.” And the NPRM proposes deleting current § 106.9(c), which requires that a recipient not to discriminate in distributing its publications, to apprise its recruiters of its policy of non-discrimination, ensure that recruiters adhere to such a policy.²⁸⁶

The NPRM claims that proposed § 106.8(b)(1) “would streamline” the list of who has to be notified about the schools’ non-discrimination policy.²⁸⁷ But the NPRM does not give any reason why the list needs to be streamlined, or why, if it does, parents of elementary and secondary school students should be the ones deprived of information that they have received for over 40 years. Nor will this amendment actually reduce burden on school districts, as the requirement to notify parents that the recipient does not discriminate remains in the regulations of 25 other federal agencies, many of which (such as the United States Department of Agriculture (USDA) through its free and reduced price meals program) provide federal financial assistance to elementary and secondary schools.

The NPRM claims that proposed § 106.8(b)(2) likewise “streamlines” the list of publications that must include the non-discrimination statement “to reduce burden on recipients.”²⁸⁸ But again the NPRM offers no reason why it needs to be streamlined or why the particular items proposed to be dropped—such as application forms—are the appropriate ones to cut. Nor does the NPRM explain why it added “handbooks” to the list or how that item overlaps (or not) with the items deleted—such as announcements and bulletins. If handbooks are no different, then there is no reason for the change. If they are different from announcements and bulletins, then the practical effect will be to increase the burden on recipients because, as noted above, the requirement to include the non-discrimination statement in announcements, bulletin, and applications remains in the regulations of 25 other federal agencies, many of whom (such as

²⁸⁶ 83 Fed. Reg. at 61482.

²⁸⁷ *Id.* at 61481.

²⁸⁸ *Id.* at 61482.

the USDA through its free and reduced price meals program) provide federal financial assistance to elementary and secondary schools.

NPRM's only explanation for deleting current § 106.9(c) is again to reduce burden, suggesting that the availability of websites will suffice.²⁸⁹ This explanation makes no sense. Current § 106.9(c) does not require that the publications identified in proposed § 106.8(b)(2) (currently in § 106.9(b)) be distributed. It requires that when they are distributed, they must be distributed *without discrimination on the basis of sex*. That is, for example, a school district could not send school catalogs to parents of girls but ignore parents who have only boys. Nor does the NPRM even mention, much less justify the elimination of, the last portion of current § 106.9(c), which requires a recipient to train its recruiters on its non-discrimination policy and to ensure that its recruiters adhere to the policy. These are important requirements to ensure that a recipient's non-discrimination policy is not diluted in the field. They should not be deleted. These proposed changes are just more examples of the Department's efforts to weaken civil rights protection for students and school employees.

D. The proposed rules would allow schools to claim “religious” exemptions for violating Title IX with no warning to students or prior notification to the Department.

The current rules allow religious schools to claim religious exemptions from particular Title IX requirements by notifying the Department in writing and identifying which Title IX provisions conflict with their religious beliefs. The proposed rules remove that requirement and permit schools to opt out of Title IX without notice or warning to the Department or students. This would allow schools to conceal their intent to discriminate, exposing students to harm, especially women and girls, LGBTQ students, pregnant or parenting students (including those who are unmarried), and students who access or attempt to access birth control or abortion.²⁹⁰ 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. It allows schools to assert post facto religious justifications for discrimination in violation of Title IX, to the detriment of students.

Further, the Department's proposed rule permitting religious schools to covertly opt out of Title IX requirements directly conflict with the current²⁹¹ and proposed²⁹² rules' requirements 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 in protecting students from discrimination.

²⁸⁹ *Id.*

²⁹⁰ See Jeremy W. Peters et al., *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html>; Moriah Balingit, *Education Department no Longer Investigating Transgender Bathroom Complaints*, WASH. POST (Feb. 12, 2018), <https://www.washingtonpost.com/news/education/wp/2018/02/12/education-department-will-no-longer-investigate-transgender-bathroom-complaints/>; Erica L. Green et al., *‘Transgender’ Could Be Defined Out of Existence Under Trump Administration*, N.Y. TIMES (Oct. 21, 2018), <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html>.

²⁹¹ 34 C.F.R. § 106.9(a).

²⁹² Proposed § 106.8(b)(1).

VI. The proposed rules would exceed the Department’s authority to effectuate Title IX’s nondiscrimination mandate.

As discussed above, proposed § 106.45(b)(3) *requires* schools to dismiss complaints of sexual harassment if they do not meet specific narrow standards. If the school determines that the complaint does not allege harassment that meets the improperly narrow definition of severe, pervasive, *and* objectively offensive, or that does not meet the other two proposed definitions of sexual harassment,²⁹³ it *must* be dismissed, per the command of the rule. If severe, pervasive, *and* objectively offensive conduct occurs outside of an educational program or activity, including most off-campus or online harassment, it *must* be dismissed. However, the Department lacks the authority to require schools to dismiss complaints of discrimination. Under Title IX, the Department is only authorized to issue rules “to effectuate the [anti-discrimination] provision of [Title IX].” Title IX does not delegate to the Department the authority to tell schools *when they cannot* protect students against sex discrimination.²⁹⁴ By requiring schools to dismiss certain types of complaints of sexual harassment, without regard to whether those forms of harassment deny individuals educational opportunities on the basis of sex, proposed § 106.45(b)(3) fails to effectuate Title IX’s anti-discrimination mandate and would force many schools that, for example, already investigate off-campus sexual harassment under their student conduct policies to abandon these anti-discrimination efforts. While the Department is well within its authority to require schools to adopt civil rights protections to effectuate Title IX’s mandate against sex discrimination, it does not have authority to cabin schools’ otherwise lawful responses to sex discrimination or to force schools to violate students’ and employees’ rights under Title IX and other civil rights laws by forcing schools to dismiss reports of sexual harassment.

VII. The proposed rules threaten to violate the Title VII rights of school employees, exposing employees to an increased risk of sexual harassment and schools to Title VII liability.

Although the regulations and the preamble indicate that the Department was primarily focused on peer sexual harassment in the rulemaking process, Title IX also protects school employees from sex discrimination, including sexual harassment.²⁹⁵ The proposed rules as drafted would apply to sexual harassment complaints and investigations involving the millions of employees who work for school districts, colleges, and universities covered by Title IX, including the disproportionately female workforce employed in elementary and secondary schools.²⁹⁶ While the proposed rules assert, “Nothing in this part shall be read in derogation of an employee’s rights under Title VII of the Civil Rights Act of 1964,”²⁹⁷ the rules make no attempt to grapple with the complexities created by the overlap and conflict posed by their mandates and employee protections under Title VII. As a result, they threaten employees’ Title VII rights to be free from sexual harassment in the workplace and place schools in the impossible position of being

²⁹³ Proposed § 106.30 also provides two other definitions of sexual harassment: (1) “An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct”; or (2) “Sexual assault, as defined in 34 CFR 668.46(a).”

²⁹⁴ 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>.

²⁹⁵ 34 C.F.R. § 106.51(a).

²⁹⁶ In 2011-2012, 76.3% of teachers in public elementary and secondary schools were female compared to 74.8% in private elementary and secondary schools. See Nat’l Ctr. for Educ. Statistics, *Table 209.10. Number and percentage distribution of teachers in public and private elementary schools, by selected characteristics: Selected years, 1987-88 through 2015-16*, https://nces.ed.gov/programs/digest/d17/tables/dt17_209.10.asp; In 2011, 48.2% of faculty in degree-granting postsecondary institutions were female. See Nat’l Ctr. for Educ. Statistics, *Table 315.10. Number of faculty in degree-granting postsecondary institutions, by employment status, sex, control, and level of institution: Selected Years, fall 1970 through fall 2016*, https://nces.ed.gov/programs/digest/d17/tables/dt17_315.10.asp.

²⁹⁷ Proposed § 106.6(f).

forced to choose which federal mandate they will violate when addressing workplace harassment complaints. For this reason, both advocates for employee interests (*e.g.*, the National Employment Lawyers Association) and advocates for employer interests (*e.g.*, the College and University Professors Association for Human Resources) have submitted comments harshly critiquing the proposed rules and their impact.

First, as set out in detail above, the proposed rules mandate both dismissal of complaints that allege conduct that does not meet the standard set out in the proposed rules and dismissal of most complaints alleging off-campus or online harassment. These standards, however, do not align with Title VII's protections. Under the proposed regulations, with certain limited exceptions, sexual harassment is defined as and limited to "[u]nwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity."²⁹⁸ In contrast, the relevant inquiry under Title VII is whether the harassment "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment."²⁹⁹ Although the proposed regulations require that the harassment be severe "and" pervasive, the Title VII standard requires only that the harassment be sufficiently severe "or" pervasive to create a hostile work environment.³⁰⁰ In addition, the question of whether the harassment denies "equal access to the recipient's education program or activity" is not directly relevant to the Title VII question of whether an individual's work performance is unreasonably interfered with or an intimidating, hostile, or offensive working environment has been created. Moreover, Title VII includes no categorical exception for harassment that takes place outside the workplace, asking instead whether the harassment "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment"³⁰¹ rather than the location in which the unlawful harassment occurred.³⁰² Yet the proposed rules squarely mandate that schools dismiss sexual harassment complaints, apparently including employee sexual harassment complaints, that do not conform to the cramped requirements of the proposed rules, whether or not they violate Title VII.

Similarly, the actual notice and deliberate indifference standard that the proposed regulations mandate for consideration of sexual harassment complaints differ sharply from applicable standards under Title VII. If an employee is harassed by a coworker, the employer is liable if it knew or should have known about the harassment and failed to take reasonable steps to address the harassment.³⁰³ If an employee is sexually harassed by his or her supervisor, the employer is ordinarily strictly liable, regardless of whether it had any notice of the harassment.³⁰⁴ If the harassment by a supervisor did not result in a tangible employment action, the employer may be able to establish an affirmative defense to a

²⁹⁸ Proposed § 106.30.

²⁹⁹ 28 C.F.R. § 1604.11(a). In its entirety, Section 1604.11(a) provides:

Harassment on the basis of sex is a violation of section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is sued as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect or unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

³⁰⁰ *Meritor*, 477 U.S. at 67 (describing harassment actionable under Title VII as that "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment"); *Harris*, 510 U.S. at 22 (actionable harassment is harassment that is "so severe or pervasive that it created a work environment abusive to employees because of their . . . gender . . .").

³⁰¹ 28 C.F.R. § 1604.11(a).

³⁰² See *supra* notes 77 and 78 and accompanying text.

³⁰³ *Faragher v. City of Boca Raton*, 524 U.S. 775, 799, 806 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 759 (1998).

³⁰⁴ *Faragher*, 524 U.S. at 792.; *Ellerth*, 524 U.S. at 765.

supervisor harassment claim if it can show that it took reasonable care to prevent sexual harassment and to correct sexual harassment and that the employee unreasonably failed to avail himself or herself of any avenues provided by the employer to correct or address harassment.³⁰⁵ All of this is sharply different from the *clearly* unreasonable/deliberate indifference standard set out in the proposed rule.

As set out in detail above, the proposed rules require procedurally burdensome processes to address sexual harassment, like cross-examination and live hearings, which would delay schools' prompt responses to employee complaints. And just as they subject students with sexual harassment complaints to uniquely hostile and burdensome proceedings, the proposed rules appear to require schools to institute more complainant-hostile processes for employee sexual harassment matters than other discrimination-related matters and other employee misconduct matters, opening them to possible Title VII liability for discrimination on the basis of sex. Moreover, courts might easily conclude that it would not be unreasonable for an employee to decline to avail himself or herself of these uniquely complainant-hostile proceedings, which would mean that employers relying on such proceedings to address employee complaints of sexual harassment would have no affirmative defense available in cases of sexual harassment by a supervisor.³⁰⁶

Most fundamentally, analysis of the numerous differences between the sexual harassment standards mandated in the proposed rules and the sexual harassment standards required by Title VII actually *understates* the mismatch between the proposed rules and the employment context, because (in sharp contrast to the approach taken by the proposed rules) Title VII in no way prohibits employers from taking action to address harassment that does not rise to a level that is not yet actionable under Title VII. To the contrary, employers are consistently encouraged, by the Equal Employment Opportunity Commission, by employment lawyers, and by human resources professionals, to intervene to address harassment long before it rises to such a level, in order to promote an inclusive and productive workplace culture, as well as to minimize the likelihood that harassment ever becomes so severe or pervasive as to alter an employee's workplace conditions and expose an employer to liability.³⁰⁷ The proposed rules are absolutely contrary to these principles.

While one might argue that the boilerplate language in the proposed rules indicating that nothing therein derogates employee Title VII rights means that schools may disregard the requirements set out in the proposed rules when considering employee complaints of sexual harassment, schools choosing this path would run significant risks. They would invite OCR complaints or lawsuits by harassment respondents alleging that their Title IX rights under the proposed regulations had been violated. Such a legal challenge by respondents would no doubt rely heavily upon the Department's suggestion that any deviation from the proposed rules may constitute sex discrimination against respondents in violation of Title IX.³⁰⁸ The confusion and potential litigation created by the proposed rules threatens harm to employees and employers, serving no one's interest.

³⁰⁵ *Faragher*, 524 U.S. at 805; *Ellerth*, 524 U.S. at 764-65.

³⁰⁶ *See, e.g., Minarsky v. Susquehanna County*, 895 F.3d 303, 313-14 & n.12 (3d Cir. 2018) ("If a plaintiff's genuinely held, subjective belief of potential retaliation from reporting her harassment appears to be well-founded, and a jury could find that this belief is objectively reasonable, the trial court should not find that the defendant has proven the second *Faragher-Ellerth* element as a matter of law. Instead, the court should leave the issue for the jury to determine at trial.")

³⁰⁷ *See, e.g., U.S. Equal Employment Opportunity Comm'n, Select Taskforce on the Study of Harassment in the Workplace* (June 2016), https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf; Chai R. Feldblum & Sharon P. Masling, *Convincing CEOs to Make Harassment Prevention a Priority*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (Nov. 19, 2018), <https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/convincing-ceos-to-make-harassment-prevention-a-priority.aspx>.

³⁰⁸ *See* proposed § 106.44(a).

VIII. The proposed rules are inconsistent with the Clery Act.

A number of the Department's proposed rules are inconsistent with the Clery Act, which the Department also enforces, and which also addresses the obligation of institutions of higher education to respond to sexual assault and other behaviors that may constitute sexual harassment, including dating violence, domestic violence, and stalking. First, the proposed rules prohibiting schools from investigating off-campus and online sexual harassment conflict with Clery's notice and reporting requirements. The Clery Act requires institutions of higher education 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."³⁰⁹ The Clery Act also requires institutions of higher education to report all sexual assault, stalking, dating violence, and domestic violence that occur on "Clery geography," which includes all property controlled by a school-recognized student organization (such as an off-campus fraternity); nearby "public property"; and "areas within the patrol jurisdiction of the campus police or the campus security department."³¹⁰ The proposed rules would undermine Clery's mandate and create a perverse system in which schools would be required to report instances of sexual assault that occur off-campus to the Department, yet would also be required by the Department to dismiss these complaints instead of investigating them.

Second, the Department's definition of "supportive measures" is inconsistent with Clery, which requires institutions of higher education to provide "accommodations" and "*protective measures*" if "reasonably available" to students who report sexual assault, dating violence, domestic violence, and stalking.³¹¹ The Clery Act does not prohibit accommodations or protective measures that are "punitive," "disciplinary," or "unreasonably burden[] the other party." Third, the proposed rules' unequal appeal rights conflict with the preamble to the Department's Clery rules stating that institutions of higher education are required to provide "an equal right to appeal if appeals are available," which would necessarily include the right to appeal a sanction.³¹²

Finally, Clery requires that investigations of sexual assault and other sexual harassment be "prompt, fair, and impartial."³¹³ But the proposed rules' indefinite timeframe for investigations conflicts with Clery's mandate that investigations be prompt. And the many proposed rules discussed above that tilt investigation procedures in favor of the respondent are anything but fair and impartial.

Although the Department acknowledges that Title IX and the Clery Act's "jurisdictional schemes ... may overlap in certain situations,"³¹⁴ 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.

IX. The proposed rules fail to consider federalism principles and ignore the obligations imposed on schools by state and local requirements.

The proposed rules seek to set a national standard on various matters related to the investigation and adjudication of claims of sexual assault and other forms of sexual harassment by school districts and public and private institutions of higher education. Those same topics are the subject of state, local, and

³⁰⁹ 20 U.S.C. § 1092(f)(8)(C).

³¹⁰ 20 U.S.C. § 1092(f)(6)(iii); 20 U.S.C. § 1092(f)(6)(iv); 34 C.F.R. § 668.46(a).

³¹¹ 20 U.S.C. § 1092(f)(8)(B)(vii); 34 C.F.R. § 668.46(b)(11)(v).

³¹² U.S. Dep't of Educ.; Violence Against Women Act; Final Rule, 79 Fed. Reg. at 62752, 62778 (Oct. 20, 2014) (codified at 36 C.F.R. Pt. 668), <https://www.gpo.gov/fdsys/pkg/FR-2014-10-20/pdf/2014-24284.pdf>.

³¹³ 20 U.S.C. § 1092(f)(8)(b)(iv)(I)(aa).

³¹⁴ 83 Fed. Reg. at 61468.

tribal laws. Yet, the proposed rules contain no discussion of preemption, contrary to both Executive Order 13132, Executive Order 12988, and the 2009 Presidential Preemption Memorandum, and provide no guidance to institutions bound by state, local, or tribal requirements that run contrary to the proposed rules.

Executive Orders have recognized the special federalism concerns when a federal agency regulates matters that are traditionally reserved to the states. The 2009 Presidential Memorandum requires that “preemption of State law by [federal] executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption.”³¹⁵ It is unclear whether by the proposed rules the Department intends to preempt contrary state requirements, but it appears the Department has engaged in no such consideration. The proposed rules ignore the significant efforts states have made to increase student protections from sexual harassment, including sexual assault; in at least 10 states, current statutory provisions do not align with the Department’s proposed rules in some way.³¹⁶ In fact, recently, 145 state legislators from 40 States plus the District of Columbia submitted a joint comment letter to the Department opposing the proposed rules because, among other things, they claim that the Department ignores the efforts of many states that passed laws addressing sexual harassment in schools.³¹⁷ And 48 members of the New York State Legislature, which recently passed strong laws designed to protect college students from sexual harassment, also submitted a letter opposing the proposed rules, calling them “a dangerous attempt to dismantle student protections that would undoubtedly create unnecessary hurdles to combat incidents of rape and sexual assault. . . .”³¹⁸ The Council of the District of Columbia also expressed opposition to the proposed rules, stating that they “represent a serious misstep in the ongoing effort to address safety and stop discrimination in education.”³¹⁹

For example, proposed § 106.45(b)(4)(i) identifies two—and only two—potential evidentiary standards that a recipient’s decision-maker may use to determine whether a respondent has engaged in sexual harassment, as the proposed rules define that term; a “clear and convincing evidence” standard must be used in resolving complaints against students if that standard is used in resolving complaints against employees and a “preponderance of the evidence” standard may only be used if the recipient uses that standard for other conduct code violations that carry the same maximum disciplinary sanction. The proposed rules thus conflict with state laws that require a decision maker to use the “substantial evidence” or “substantial and competent evidence” standard in resolving sexual harassment complaints.³²⁰ These

³¹⁵ Memorandum from the President for the Heads of Executive Agencies re: Preemption (May 20, 2009).

³¹⁶ 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).

³¹⁷ Letter from State Legislators to Ass’t Sec’y Kenneth L. Marcus at 2 (Jan. 25, 2019), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/01/State-Legislator-Comment-Letter-1.25.pdf>.

³¹⁸ Letter from Members of New York State Legislature to Sec’y DeVos (Jan. 28, 2019), available at <https://www.nystateofpolitics.com/2019/01/rozic-organizes-push-against-title-ix-changes/>.

³¹⁹ Comment from Council of District of Columbia to Sec’y Elisabeth DeVos (Jan. 30, 2019), submitted via [regulations.gov](https://www.regulations.gov).

³²⁰ Cal. Educ. Code § 48918(h) (“A decision of the governing board of the school district to expel shall be supported by substantial evidence showing that the pupil committed any of the acts enumerated in Section 48900,” including “an allegation of committing or attempting to commit a sexual assault . . . or to commit a sexual battery”); Kan. Stat. Ann. § 72-6116(a)(8) (student suspension of more than 10 days must be “based on substantial evidence”); *Bd. of Educ. of City Sch. Dist. of City of New York v. Mills*, 741 N.Y.S.2d 589, 591 (App. Div. 2002) (explaining that in New York the “substantial and competent” evidence standard for student suspension proceedings is “imposed by statute,” citing State Administrative Procedure Act § 306[1]); Minn. Stat. Ann. § 122A.40(14) (“substantial and competent evidence” before teacher may be terminated); Miss. St. § 37-9-1 (“The standard of proof in all [student] disciplinary proceedings shall be substantial evidence.”).

standards have been interpreted to be less burdensome than the “preponderance of evidence” standard.³²¹ The proposed regulations would also seem to conflict with state laws that require that schools *always* use of preponderance of the evidence standard for making determinations in sexual harassment matters.³²² Depending on whether that recipient uses the preponderance standard for other conduct code violations, the law could conflict or not.

Similarly, a state law provision granting a student the right to present the testimony of the student’s witnesses by affidavit appears to conflict with proposed § 106.45(b)(3)(vii)’s prohibition against relying on any statement of a person who does not submit to cross-examination.³²³

These are only a few examples. No doubt an exhaustive search of the statutes and regulations of every State, tribe, and locality would produce more. Yet the Department does not appear to have undertaken any such search. Executive Order 13132 anticipated precisely the problem of potential contradictory regulatory obligations by requiring the Department to consult with elected³²⁴ (not non-elected)³²⁵ state and local officials “early in the process of developing the proposed regulation,” and to publish a federalism summary impact statement. Executive Order 13175 imposes the same early consultation and impact statement requirements for preemption of Tribal laws.³²⁶ The burden to obtain the relevant information is the Department’s.

The proposed rules also fail to meet the requirements imposed on the Department regarding regulations that may have preemptive effect and give no guidance to schools that must navigate contradictory legal obligations. First, the proposed regulations fail to specify “in clear language the preemptive effect, if any, to be given the regulation[s],”³²⁷ in violation of Executive Order 12988. Second, the implicit regulatory preemption in the proposed regulations does not appear to be “restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated,”³²⁸ in violation of Executive Order 13132. Indeed, given that, as set out above, many of the proposed rules are outside of its regulatory authority to effectuate Title IX, these rules presumably cannot have preemptive effect. However, the lack of clarity the Department provides about the NPRM’s intended preemptive effects, if any, would create a source of confusion for schools that are attempting to ensure that they follow state, local, tribal, and federal law.

X. The Department’s actions in conducting its cost-benefit analysis violated the Administrative Procedure Act, the Information Quality Act, Executive Order 13563, and Executive Order 12866.

³²¹ *Mills*, 741 N.Y.S.2d at 591 (“the Court of Appeals has defined substantial evidence as ‘less than a preponderance of the evidence ...’” but “we are unconvinced that use of the competent and substantial evidence standard risks an erroneous deprivation of the student’s liberty and property interests”); Christine Ver Ploeg, *Terminating Public School Teachers for Cause Under Minnesota Law*, 31 WM. MITCHELL L. REV. 303, 313 (2004) (“substantial and competent evidence” standard is “typically viewed as less burdensome than the ‘preponderance’ standard”).

³²² Cal. Educ. Code § 67386(3) (requiring all institutions of higher education that accept state financial assistance to provide that “the standard used in determining whether the elements of the complaint against the accused have been demonstrated is the preponderance of the evidence”).

³²³ Kan. Stat. Ann. § 72-6116(a)(5) (student potentially subject to suspension of more than 10 days must be granted right “to present the pupil’s own witnesses in person or their testimony by affidavit”).

³²⁴ Executive Order 13132, §§ 1(d), 6(a), 6(c)(1)-(2).

³²⁵ Office of Management and Budget, *Guidance for Implementing E.O. 13132*, M-00-02, at 4 (Response to Question 8) (Oct. 28, 1999).

³²⁶ Executive Order 13175, § 5(c); Department of Education’s Consultation Plan, Part IV.A.1.d.

³²⁷ Executive Order 12988 § 3(b)(2)(A).

³²⁸ Executive Order 13132 § 4(c).

The Department claims that the proposed rules would reduce the number of sexual harassment investigations conducted by schools and accordingly would save \$286.4 million to \$367.7 million over the next 10 years.³²⁹ However, it failed to disclose the data it relied on, failed to assess the accuracy of this data, and failed to account for many significant costs to students and schools imposed by the proposed rules, in violation of the Administrative Procedure Act, the Information Quality Act, Executive Order 13563, and Executive Order 12866.

A. The Department failed to disclose the information it relied on in developing its proposed rules and failed to assess the quality of this information in violation of the Administrative Procedure Act, Executive Order 13563, and Information Quality Act.

Agencies engaged in rulemaking are required by the Administrative Procedure Act (APA) to disclose “for public evaluation” all reports, studies, and data they relied on,³³⁰ including information used for the Regulatory Impact Analysis required under Executive Order 12866,³³¹ so that the public can determine whether the agency may be drawing improper conclusions based on erroneous information.³³² Executive Order 13563 also requires agencies to provide the public an opportunity to view online and comment on “all pertinent parts of the rulemaking docket, including relevant scientific and technical findings.” The Department has failed to meet both of these requirements. For example, despite referring in the proposed rules’ preamble to “public reports of Title IX reports and investigations at 55 [institutions of higher education] nationwide”³³³ and a “sample of public Title IX documents”³³⁴ as sources relied upon in creating the proposed rules, the Department did not make these documents available or even identify which schools or reports were reviewed. Similarly, it failed to publish online the underlying data or statistical model used to estimate the number of Title IX investigations currently conducted by schools and the projected cost savings from reducing the number of investigations under the proposed rules.³³⁵ Nor were the “[p]rior analyses” it used in assessing regulatory flexibility made available in the rulemaking docket.³³⁶ As a result of the Department’s failures to disclose this information, the public has been denied the opportunity to assess the accuracy of the Department’s methodology and conclusions, in violation of the APA and Executive Order 13563.

The APA also requires all agencies to examine the data they use in rulemaking for inaccuracies.³³⁷ The Department is also required under its own Information Quality Act (IQA) guidelines to assess information quality for utility, objectivity, and integrity, where objectivity indicates “accuracy, reliability, and unbiased nature of information.”³³⁸ However, in estimating the number of sexual harassment cases that are currently being investigated and that would be investigated under the proposed rules, the Department relied almost exclusively on the Civil Rights Data Collection (CRDC) and the Clery Act,³³⁹ both of which contain serious inaccuracies. It is common knowledge that several portions of

³²⁹ 83 Fed. Reg. at 61463, 61484.

³³⁰ *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008).

³³¹ *See Owner-Operator Indep. Drivers Ass’n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 199, 201-202 (D.C. Cir. 2007).

³³² *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 737 F.2d 1095, 1121 (D.C. Cir. 1984).

³³³ 83 Fed. Reg. at 61485.

³³⁴ *Id.* at 61487.

³³⁵ *Id.* at 61485-89.

³³⁶ *Id.* at 61490-93.

³³⁷ *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 56-57 (D.C. Cir. 2015); *see also id.* (“agencies do not have free rein to use inaccurate data”); *New Orleans v. SEC*, 969 F.2d 1163, 1167 (D.C. Cir. 1992) (“an agency’s reliance on a report or study without ascertaining the accuracy of the data contained in the study or the methodology used to collect the data is arbitrary” (quotation marks omitted)).

³³⁸ U.S. Dep’t of Educ., *Information Quality Guidelines* (effective Oct. 1, 2002), <https://www2.ed.gov/policy/gen/guid/infoqualguide.html>.

³³⁹ 83 Fed. Reg. at 61485.

the CRDC contain errors,³⁴⁰ and, most relevant to the proposed rules, that many school districts consistently and inaccurately report that they receive zero complaints of sexual harassment from students or that no complaints of harassment result in student discipline.³⁴¹ Similarly, approximately 90 percent of colleges consistently report in their annual Clery statistics that they received zero reports of rape on their campuses³⁴²—part of a broader and alarming pattern of underreporting and misreporting of sexual assault that has been well-documented for more than a decade³⁴³ and that is consistent with the Department’s own enforcement findings.³⁴⁴ Yet the Department failed to identify any of these weaknesses in accuracy and reliability of the CRDC and Clery data, a clear violation of both the APA and the Department’s own IQA guidelines.

Moreover, statements by Department and Administration officials provide concern about the reliability and biased nature of the data, reports, and studies relied on by the Department in proposing changes to Title IX. Just a few weeks before rescinding two important Title IX guidances on sexual violence and issuing “interim guidance” in advance of these proposed rules, Secretary DeVos lamented that the “devastating reality of campus sexual misconduct” included the “lives of the accused” that had been “lost” and “ruined” and cited examples of purported “due process” failures caused by rescinded guidance, when such “due process” failures would actually have been in violation of the rescinded guidance.³⁴⁵ In that same speech, she diminished the full range of sexual harassment that deprives

³⁴⁰ See, e.g., Evie Blad, *How Bad Data from One District Skewed National Rankings on Chronic Absenteeism*, EDUCATION WEEK (Jan. 9, 2019) http://blogs.edweek.org/edweek/rulesforengagement/2019/01/chronic_absenteeism.html; Anya Kamenetz, *The School Shootings that Weren’t*, NATIONAL PUBLIC RADIO (Aug. 27, 2018), <https://www.npr.org/sections/ed/2018/08/27/640323347/the-school-shootings-that-werent>; Andrew Ujifusa & Alex Harwin, *There Are Wild Swings in School Desegregation Data. The Feds Can’t Explain Why*, EDUCATION WEEK (May 2, 2018), <https://www.edweek.org/ew/articles/2018/05/02/there-are-wild-swings-in-school-desegregation.html>.

³⁴¹ See, e.g., AAUW, *Three-Fourths of Schools Report Zero Incidents of Sexual Harassment in Grades 7-12* (Oct. 24, 2017), <https://www.aauw.org/article/schools-report-zero-incident-of-sexual-harassment>; Lisa Maatz, AAUW, *Why Are So Many Schools Not Reporting Sexual Harassment and Bullying Allegations?*, HUFFINGTON POST (October 24, 2016), https://www.huffingtonpost.com/lisa-maatz/why-are-so-many-schools-n_b_12626620.html; AAUW, *Two-Thirds of Public Schools Reported Zero Incidents of Sexual Harassment in 2013–14* (July 12, 2016), <https://www.aauw.org/article/schools-report-zero-sexual-harassment>.

³⁴² See, e.g., AAUW, *89 Percent of Colleges Reported Zero Incidents of Rape in 2015* (May 10, 2017), <https://www.aauw.org/article/clery-act-data-analysis-2017>; AAUW, *91 Percent of Colleges Reported Zero Incidents of Rape in 2014* (Nov. 23, 2015), <https://www.aauw.org/article/clery-act-data-analysis>.

³⁴³ See, e.g., California State Auditor, *Clery Act Requirements and Crime Reporting: Compliance Continues to Challenge California’s Colleges and Universities*, Report 2017-032 (May 2018); National Academies of Sciences, Engineering, and Medicine, *Innovations in Federal Statistics: Combining Data Sources While Protecting Privacy* 44 (2017) (“the data on sexual violence reported by many institutions in response to the [Clery] act’s requirements is of questionable quality”); Corey Rayburn Yung, *Concealing Campus Sexual Assault: An Empirical Examination*, 21 PSYCHOLOGY, PUBLIC POLICY, AND LAW 1 (Feb. 2015) (“[T]he ordinary practice of universities is to undercount incidents of [on-campus] sexual assault. Only during periods in which schools are audited [by the Department of Education for Clery Act compliance] do they appear to offer a more complete picture of sexual assault levels on campus. Further, the data indicate that the [Department audit] has no long-term effect on the reported levels of sexual assault, as those crime rates returned to previous level after an audit was completed.”); James Guffey, *Crime on Campus: Can Clery Act Data from Universities and Colleges be Trusted?*, 9 ASBBS EJOURNAL 51 (Summer 2013) (“under-reporting of burglary and rape among Clery Act required universities is significant”); Kristen Lombardi & Kristin Jones, *Campus Sexual Assault Statistics Don’t Add Up: Troubling Discrepancies in Clery Act Numbers*, CTR. FOR PUBLIC INTEGRITY (Dec. 2, 2009) [last updated Mar. 26, 2015] [hereinafter *Campus Sexual Assault Statistics Don’t Add Up*] (“But there’s little doubt that the differing interpretations of the law are sowing confusion — with one school submitting sexual assault statistics beyond what’s required and another the bare minimum. Ultimately, these loopholes, coupled with the law’s limitations, can render Clery data almost meaningless.”), <https://publicintegrity.org/education/sexual-assault-on-campus/campus-sexual-assault-statistics-dont-add-up>; Heather M. Karjane, et al., *Campus Sexual Assault: How America’s Institutions of Higher Education Respond* viii (Oct. 2002) (“Only 36.5 percent of schools reported crime statistics in a manner that was fully consistent with the Clery Act.”).

³⁴⁴ *Campus Sexual Assault Statistics Don’t Add Up*, *supra* note 343 (“Nearly half of the 25 Clery complaint investigations conducted by the Education Department over the past decade [1999-2009] determined that schools were omitting sexual offenses collected by some sources or failing to report them at all.”).

³⁴⁵ *DeVos Prepared Remarks*, *supra* note 11.

students of equal access to educational opportunities, claiming, “if everything is harassment, then nothing is.”³⁴⁶ While heading the Department’s Office for Civil Rights and just a few months before the 2011 and 2014 guidance documents were rescinded, former Acting Assistant Secretary Candice Jackson, reinforced the myth of false accusations, claiming that “90 percent” of her office’s Title IX investigations were the result of “drunk[en]” sexual encounters and regret³⁴⁷ and requiring her staff to read excerpts from a book that baselessly labeled college campuses as “a secret cornucopia of accusation.”³⁴⁸

Other officials in this Administration have propagated rape myths about false accusations and victim-blaming, again raising questions about the integrity of the information relied on by government officials in developing proposed changes to the Title IX rules. Neomi Rao, Administrator of Office of Information and Regulatory Affairs when the office approved the Department’s proposed Title IX rules for publication, claimed in her college newspaper that “if [a woman] drinks to the point where she can no longer choose, well, getting to that point was part of her choice.”³⁴⁹ In another article, Ms. Rao questioned the “feminist chant that women should be free to wear short skirts or bright lipstick” and echoed Ms. Jackson’s rhetoric about false accusations stemming from regret, claiming that “casual sex for women often leads to regret” and causes them to “run from their choices.”³⁵⁰ Ms. Rao also wrote dismissively about “sexual and racial oppression,” framing them as merely “[m]yths” that “create hysteria” from “whining new group[s].”³⁵¹ While these statements were made years ago during Ms. Rao’s time in college, these remarks, particularly when paired with OIRA’s failure to take into account the costs that the proposed rules would impose on victims of harassment and assault (as detailed below) raise significant questions regarding her judgment on these matters.

Finally, the president himself has encouraged these harmful and false rape myths. Not only has he openly bragged about “grab[bing]” women by their genitalia,³⁵² but he also continues to deny the experiences of women and girls who have experienced sex-based harassment and violence. When at least 16 women alleged that he sexually harassed them, he claimed that “every woman lied”³⁵³ and later formalized his assertion into an official White House statement.³⁵⁴ When White House officials Rob Porter and David Sorensen resigned amidst reports that they had committed gender-based violence, the president tweeted: “Peoples [sic] lives are being shattered and destroyed by a mere allegation. ... There is no recovery for someone falsely accused—life and career are gone. Is there no such thing any longer as Due Process?”³⁵⁵

³⁴⁶ *Id.*

³⁴⁷ Green & Stolberg, *supra* note 12.

³⁴⁸ Democracy Forward, *Advocacy Groups Advance Legal Fight Against Secretary DeVos’s Unconstitution Rollback of Survivor Protections* (Jan. 14, 2019), <https://democracyforward.org/updates/advocacy-groups-advance-legal-fight-against-secretary-devoss-unconstitutional-rollback-of-survivor-protections>.

³⁴⁹ Neomi Rao, *Shades of Gray*, YALE HERALD (Oct. 14, 1994), <https://assets.documentcloud.org/documents/5684266/01-Shades-of-Gray-Neomi-Rao.pdf>.

³⁵⁰ Neomi Rao, “*The Feminist Dilemma*”, *supra* note 13.

³⁵¹ Neomi Rao, *Submission, Silence, Mediocrity*, YALE FREE PRESS (Nov. 1993), <https://www.documentcloud.org/documents/5684271-Rao-Submission-Silence-Mediocrity.html>.

³⁵² Derek Hawkins, *Billy Bush says there were 8 witnesses to Trump’s ‘Access Hollywood’ comments*, WASH. POST (Dec. 4, 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/12/03/he-said-it-billy-bush-reiterates-that-trumps-access-hollywood-tape-is-real>.

³⁵³ Ben Jacobs, *Trump Uses Gettysburg Address to Threaten to Sue Sex Assault Accusers*, THE GUARDIAN (Oct. 22, 2016), <https://www.theguardian.com/us-news/2016/oct/22/donald-trump-gettysburg-contract-with-america-sue-accusers-hillary-clinton>.

³⁵⁴ John Wagner, *All of the Women Who Have Accused Trump of Sexual Harassment Are Lying, the White House Says*, WASH. POST (Oct. 27, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/10/27/all-of-the-women-who-have-accused-trump-of-sexual-harassment-are-lying-the-white-house-says>.

³⁵⁵ Donald Trump (@realDonaldTrump), TWITTER (Feb. 10, 2018), <https://twitter.com/realDonaldTrump/status/962348831789797381>.

In the context of these and countless other biased, rape-apologist statements made by the Department and the Administration, it is even more troubling that the Department failed to disclose or assess the credibility of the data, reports, and studies it relied on during this rulemaking process.

B. The Department failed to identify significant costs that the proposed rules would inflict on students who experience sexual assault or other sexual harassment, in violation of Executive Order 12866.

Executive Order 12866 requires agencies to assess all costs and benefits of a proposed rule “to the fullest extent that these can be usefully estimated.” However, the Department failed to identify any costs of the proposed rules to students or employees who experience sexual harassment and failed to recognize that the proposed rules would not reduce costs but simply shift costs from schools to victims of sexual harassment.³⁵⁶ Nor did the Department acknowledge that it is inappropriate to prioritize cost savings at all over educational harm to students; after all, the Department, in enforcing Title IX, is charged with preventing and remedying sex discrimination in education, not reducing costs to schools.³⁵⁷ Contrary to the Department’s unjustified assumption that “the underlying rate of sexual harassment” would be reduced,³⁵⁸ the proposed rules would in fact allow bad actors to engage in repeated and persistent harassment with impunity, thereby increasing the underlying rate of harassment and its associated costs to those who experience it.

Sexual assault inflicts enormous costs on survivors. A single rape can cost a survivor between \$87,000 and \$240,776.³⁵⁹ Survivors are also three times more likely to suffer from depression, six times more likely to have PTSD, 13 times more likely to abuse alcohol, 26 times more likely to abuse drugs, and four times more likely to contemplate suicide.³⁶⁰ The lifetime costs of intimate partner violence, which can constitute sexual harassment in educational settings, including related health problems, lost productivity, and criminal justice costs, can total \$103,767 for women and \$23,414 for men.³⁶¹ The Centers for Disease Control and Prevention estimates that the lifetime cost of rape is \$122,461 per survivor, resulting in an annual national economic burden of \$263 billion and a population economic burden of nearly \$3.1 trillion over survivors’ lifetimes.³⁶² More than half of this cost is due to loss of workplace productivity, and the rest due to medical costs, criminal justice fees, and property loss and damage.³⁶³ About one-third of the cost is borne by taxpayers.³⁶⁴ None of these costs, nor the significant costs to those suffering sexual harassment short of sexual assault, are mentioned in the rulemaking docket.

The Department also ignores the specific costs that students face when they are sexually assaulted. Although it acknowledges that 22 percent of survivors seek psychological counseling, 11 percent move residence, and 8 percent drop a class, it declined to analyze whether the proposed rules

³⁵⁶ See Grossman & Brake, *supra* note 90 (“Costs are not saved, but shifted.”).

³⁵⁷ See Grossman & Brake, *supra* note 90 (“[t]he Department of Education is not a neutral beancounter.”).

³⁵⁸ 83 Fed. Reg. at 61485.

³⁵⁹ White House Council on Women and Girls, *Rape and Sexual Assault: A Renewed Call to Action* 15 (Jan. 2014), https://www.knowyourix.org/wp-content/uploads/2017/01/sexual_assault_report_1-21-14.pdf.

³⁶⁰ Feminist Majority Foundation, *Fast facts - Sexual violence on campus* (2018), <http://feministcampus.org/wp-content/uploads/2018/11/Fast-Facts.pdf>.

³⁶¹ Inst. for Women’s Policy Research, *Dreams Deferred: A Survey on the Impact of Intimate Partner Violence on Survivors’ Education, Careers, and Economic Security* 8 (2018), https://iwpr.org/wp-content/uploads/2018/10/C474_IWPR-Report-Dreams-Deferred.pdf.

³⁶² Cora Peterson et al., *Lifetime Economic Burden of Rape Among U.S. Adults*, 52(6) AM. J. PREV. MED. 691, 698, (2017), available at https://stacks.cdc.gov/view/cdc/45804/cdc_45804_DS1.pdf.

³⁶³ *Id.* at 691.

³⁶⁴ *Id.* at 691.

would detrimentally affect student survivors' need to access mental health services, seek alternative housing, or withdraw from a course or from school.³⁶⁵ Nor did the Department attempt to calculate any other incremental costs to those who experience sexual harassment, such as medical costs for physical and mental injuries; lost tuition and lower educational completion and attainment for those who are forced to withdraw from a class, change majors, or drop out, because their school refused to help them; lost scholarships for those who receive lower grades as a result of sexual violence or other sexual harassment; and defaults on student loans as a result of losing tuition and/or scholarships. Each of these omissions is a violation of Executive Order 12866. The harm to those affected by sexual harassment literally did not enter into the Department's calculations.

C. The Department inflated schools' estimated cost savings in violation of Executive Order 12866.

The Department significantly inflated the current number of Title IX investigations in order to inflate the "cost savings" of reducing these investigations. To estimate the number of Title IX investigations at institutions of higher education, the Department relied on a 2014 Senate report that allowed institutions of higher education to report whether they had conducted "0," "1," "2-5," "6-10," or ">10" investigations of sexual violence in the previous five years.³⁶⁶ Without justification or indeed any explanation whatsoever, the Department rounded up for each of these categories. If a school reported that it had conducted "2-5" or ">10" investigations, the Department inputted "5" and "50," respectively, into its model,³⁶⁷ far higher than the medians of 3.5 and 30 investigations for those two categories.³⁶⁸ Elsewhere, the Department inexplicably assumed that there are twice as many "sexual harassment investigations" as there are "sexual misconduct investigations," without defining what these terms mean.³⁶⁹ As a result, the "estimate" that each institution of higher education conducts 2.36 investigations per year is highly inflated. It follows that the Department's estimated "cost savings" from reducing the number of investigations at institutions of higher education is also significantly inflated.

A similar method is used to inflate the current number of Title IX investigations in elementary and secondary schools. The Department knows that many elementary and secondary schools fail to investigate known reports of sexual violence. In September 2017, it was investigating 135 school districts for failing to address 153 cases of sexual violence.³⁷⁰ In 2018, it withdrew partial funding from the Chicago Public Schools for Title IX violations, including failing to address nearly 500 complaints of student-on-student sexual violence in less than 3 months and 624 sexual assault complaints in a single semester.³⁷¹ Yet the Department assumed that the number of reports of sex-based harassment that each school reported in the CRDC was equal to the number of investigations conducted by each school district.³⁷² As a result, the "estimate" that each school district conducts 3.23 investigations per year and the "cost savings" of reducing this number are both significantly inflated.

Inflated estimates aside, the Department's goal of reducing costs to schools by reducing the number of Title IX investigations is contrary to the purpose of Title IX and would make schools more

³⁶⁵ 83 Fed. Reg. at 61487.

³⁶⁶ 83 Fed. Reg. at 61485.

³⁶⁷ *Id.* at 61485.

³⁶⁸ *Id.* at 61485 n.18.

³⁶⁹ *Id.* at 61485.

³⁷⁰ U.S. Dep't of Educ., Office for Civil Rights, *List of districts that have open Title IX sexual violence investigations at the elementary/secondary level* (Sept. 6, 2017),

<https://mediaassets.scrippsnationalnews.com/cms/dcbureau/SchoolSexAssaults/elementarysecondary.pdf>.

³⁷¹ Associated Press, *624 sex assault complaints at Chicago schools this semester* (Nov. 29, 2018),

<https://apnews.com/ad8c79d567ff461a94642373579bd588>.

³⁷² 83 Fed. Reg. at 61485.

dangerous for all students. As set out above, sexual assault and other forms of sexual harassment are already vastly underreported. Even when students do report sexual harassment, schools often choose not to investigate their reports. According to a 2014 Senate report cited by the Department,³⁷³ 21 percent of the largest private institutions of higher education conducted fewer investigations of sexual violence than reports received, with some of these schools conducting seven times fewer investigations than reports received.³⁷⁴ Instead of trying to reduce the number of investigations further, the Department should be working to combat the problems of underreporting and under-investigation.

D. The Department omitted significant costs to schools in violation of Executive Order 12866.

The Department also failed to consider many new costs to schools that the proposed rules would create. First, it greatly underestimated the total number of hours needed to change schools' internal policies and re-train employees and the associated cost of these hours. The Department assumed without justification that changing schools' internal policies and re-training administrators would require: (i) at the elementary and secondary school level, a total of 24.5 hours for a Title IX coordinator, 16 hours each for the investigator and decisionmaker, 24.5 hours for a lawyer, and two hours for a web developer in elementary and secondary schools; and (ii) in institutions of higher education, a total of 33 hours for a Title IX coordinator, 16 hours each for the investigator and decisionmaker, 49 hours for a lawyer, and two hours for a web developer.³⁷⁵ But school administrators and survivor advocates know that changing an internal policy can take many months and require the input of a task force comprised of a wide range of stakeholders. As the AASA stated in its comment opposing the proposed rules, "There is a real cost in terms of training and professional development to changing practices and policies that are so embedded into the fabric of the school district that we believe are functional and working."³⁷⁶

Second, the Department omitted the cost to schools of students' greater demand for psychological and medical services as a result of being ignored, retraumatized, and punished by their schools when they report sexual harassment. Institutions of higher education are already spending significant amounts of money on campus mental health services; imposing new barriers and creating new stressors would only exacerbate these rising costs.

Third, the Department failed to consider the reality that schools would incur greater litigation costs if they investigated fewer reports of sexual harassment. Even if the rules are finalized, they would not have a dispositive effect on how Title IX claims are decided in private litigation. In a United Educators (UE) study of 305 reports of sexual assault from 104 colleges and universities between 2011 and 2013, more than one in four reports resulted in legal action, costing schools about \$200,000 per claim, with 84 percent of costs resulting from claims brought by survivors and other harassment victims.³⁷⁷ A second UE study of reports of sexual assault during 2011-2015 found that schools lost about \$350,000 per claim, with some losses exceeding \$1 million and one reaching \$2 million.³⁷⁸ As the AASA explained in its comment, "If [the Department] no longer offers the same remedies and has more stringent standards for enforcing Title IX, then presumably students will find civil litigation to be the better avenue

³⁷³ *Id.* at 61485 n.17.

³⁷⁴ U.S. Senate Comm. on Homeland Sec. & Governmental Affairs, U.S. Senate Subcomm. on Fin. & Contracting Oversight, *Sexual Violence on Campus: How too many institutions of higher education are failing to protect students* 9 (July 9, 2014), <https://www.mccaskill.senate.gov/SurveyReportwithAppendix.pdf>.

³⁷⁵ 83 Fed. Reg. at 61486.

³⁷⁶ AASA Letter, *supra* note 15, at 2.

³⁷⁷ United Educators, *supra* note 26.

³⁷⁸ United Educators, *The High Cost of Student-Victim Sexual Assault Claims and What Institutions Can Do* 3 (2017), <https://static1.squarespace.com/static/53e530a1e4b021a99e4dc012/t/590501f74402431ac4900596/1493500411575/FN--RE-+2017.04--High+Cost+of+Student-Victim+SA+Claims.pdf>.

for addressing their grievances against schools, which could lead to a significant and much costlier redirection of district resources towards addressing Title IX complaints and violations in court.”³⁷⁹ In addition, as set out above, the proposed rules would also expose schools to significant potential Title VII liability due to the conflicts between Title VII and the rules’ requirements, and possible liability under contradictory state, local, or tribal standards.

Fourth, the Department failed to adequately consider the costs of mandating live hearings to resolve all formal complaints of sexual harassment that meet the standards set out in the proposed rules. Although the Department notes that 87 percent of institutions of higher education already use a hearing board,³⁸⁰ it does not describe what hearing procedures are currently implemented at these institutions and fails to consider the additional costs of adopting all of the burdensome and inflexible hearing procedures required by the proposed rules. Associations representing higher education institutions have recently submitted comments to the Department raising concern about mandating live hearings with cross-examination and the costs and burdens this would place on schools. For example, the AAU cited “higher costs associated with the regulation’s prescribed quasi-court models,”³⁸¹ the AICUM observed that “[s]uch financial costs and administrative burdens may be overwhelming,” and the AASA stated that this proposed rule would “place[] a new burden to districts as personnel will need to be trained in how to facilitate and monitor a live hearing and ensure appropriate participation by all parties involved in a live hearing and how to view the evidence that arises during a live hearing.”³⁸²

Finally, the proposed rules would likely cause a significant decrease in application and enrollment rates for both male and female students at schools that “reduce” their Title IX activities. Research shows that students are more likely to apply to and enroll at a school where they know sexual harassment is being addressed and not ignored. For example, a July 2018 study found that schools’ application and enrollment rates increased significantly in the one to three years after the Department launched a Title IX investigation.³⁸³ In contrast, the proposed rules seek to decrease the number of Title IX investigations at each school. This sends a signal to students that they will not be safe, and that neither their school nor the Department will intervene to ensure that sexual harassment is being addressed. As a result, schools would likely see a significant decrease in both application and enrollment rates if they adopt the minimal requirements in the proposed rules.

Because of the Department’s failure to disclose the data it relied on and failure to assess the accuracy of their data, the public is still unable to meaningfully comment on the cost-benefit analysis conducted by the Department, with the exception of noting all of the costs that the Department should have considered but failed to do.

XI. The Department failed to follow proper procedural requirements before issuing these proposed rules.

A. The Department has not complied with Title IV’s statutory requirement of delayed effective dates.

³⁷⁹ AASA Letter, *supra* note 15, at 2.

³⁸⁰ 83 Fed. Reg. at 61488.

³⁸¹ AAU Letter, *supra* note 15, at 4.

³⁸² AASA Letter, *supra* note 15, at 4.

³⁸³ Jason M. Lindo et al., *Any Press is Good Press? The Unanticipated Effects of Title IX Investigations on University Outcomes*, NAT’L BUREAU OF ECON. RES. 12-13 (July 2018), available at <http://www.nber.org/papers/w24852>.

The NPRM states that “the changes made in the regulatory action materially alter the rights and obligations of federal financial assistance under Title IV” of the Higher Education Act.³⁸⁴ But these regulatory changes are not being adopted in compliance with requirements that apply to all regulations “affecting” Title IV programs.

Title IV requires that “any regulatory changes initiated by the Secretary *affecting the programs under this subchapter* [Title IV] that have not been published in final form by November 1 prior to the start of the award year shall not become effective until the beginning of the second award year after such November 1 date.”³⁸⁵

Notably, this language is also not limited to regulations that rely on any Title IV provision as their authority for the proposed regulations, despite Congress’ use of such language elsewhere.³⁸⁶ As the NPRM itself acknowledges, these proposed regulations would materially alter the rights and obligations of federal financial assistance under Title IV and thus are plainly “affecting” the programs.³⁸⁷

The drafting history confirms Congress’s intent that this provision be read broadly. Initially, Section 1089(c)(1) was limited to “regulatory changes initiated by the Secretary affecting the *general administration of the programs*” under Title IV. But Congress struck out the term “general administration” in 1992, thus removing that limitation on coverage. The House Report explained that Congress removed that language because the Secretary had relied on it as an excuse not to engage in negotiated rulemaking on some regulations. The report explained that the Secretary had interpreted this language “too narrowly” so that “only those provisions affecting all programs” were subject to the effective date language. By removing that language, Congress “intend[ed] that the effective dates of *all regulations* on Title IV are driven by the Master Calendar requirements.”³⁸⁸

B. The Department failed to obtain approval from the Department of Justice or work with the Small Business Administration, contrary to executive orders and statute.

The Department appears to have made no effort to work with other federal agencies as required by law and executive order.

1. Executive Order 12250 requires approval of proposed regulations by the Attorney General prior to publication.

Executive Order 12250 requires any NPRM that addresses sex discrimination under Title IX to be reviewed and approved by the Attorney General prior to its publication in the Federal Register.³⁸⁹ That authority (although not the authority to approve final regulations) has been delegated to the Assistant Attorney General for Civil Rights.³⁹⁰ The Attorney General’s input and consideration is crucial, as the Department of Justice is regularly involved in interpreting and enforcing Title IX rules.

³⁸⁴ 83 Fed. Reg. at 61483.

³⁸⁵ 20 U.S.C. § 1089(c)(1).

³⁸⁶ *See, e.g.*, 20 U.S.C. §§ 1090(b) (governing regulations “promulgated pursuant to this subchapter”), 1090(e)(6) (“regulations prescribed under this subchapter”), 1091(e) (“regulations issued under this subchapter”), 1094(c)(1) & (c)(3)(B)(i)(I) (prescribed).

³⁸⁷ 83 Fed. Reg. at 61483.

³⁸⁸ Both quotations in this paragraph are from H.R. Rep. 102-447, 76-77, 1992 U.S.C.C.A.N. 334, 409-410. In the second quotation, emphasis was added.

³⁸⁹ Executive Order 12250 §§ 1-202, 1-402.

³⁹⁰ 28 C.F.R. § 0.51(a).

There is no indication in the proposed rules that this requirement was met. Indeed, there is no mention of this Executive Order in the NPRM at all. This omission may be one reason why, as we note later in this comment, there has been no attempt to address to how these proposed changes will interact with the Title IX regulations of other federal agencies, including when recipients receive financial assistance both from the Department and from other agencies and thus are simultaneously bound by inconsistent and contradictory Title IX regulations. As an example, the Department of Education’s proposed Title IX rules are inconsistent with the USDA’s Title IX rules.³⁹¹

Further, close coordination with the Department of Justice is crucial with regard to Title IX and sexual harassment in particular. For example, the Solicitor General of the United States previously informed the Supreme Court that it was the view of the United States that the deliberate indifference standard identified in *Gebser* did not apply to a federal agency enforcing Title IX administratively³⁹² and the Department of Justice has stated the same conclusion in its Title IX Legal Manual.³⁹³ As a further example, in the Title IX context, Department of Justice has also encouraged agencies to seek damages for victims of discrimination in agency enforcement proceedings, in contrast to the prohibition on assessment of damages in the proposed rule.³⁹⁴ The Department of Justice should necessarily be involved in any reversal of these and other positions by the proposed rule.

2. *The Regulatory Flexibility Act and Executive Order 13272 require notification of the Small Business Administration early in the regulatory process.*

The Regulatory Flexibility Act (RFA)³⁹⁵ and Executive Order 13272 are intended to ensure that federal agencies consider the effect of proposed regulations on small governmental and private entities. This consideration is particularly important for proposed rules like these, which would dramatically impact small schools and school districts. To further that goal, both the statute and executive order require the Department to involve the Chief Counsel for Advocacy (Chief Counsel) of the Small Business Administration at critical stages. (Other obligations of the RFA and Executive Order 13272 will be discussed later in this comment).

The NPRM contained an initial regulatory flexibility analysis (IFRA).³⁹⁶ But the NPRM did not say that the Department had shared a draft IFRA with the Chief Counsel when the Department submitted its draft rule to Office of Information and Regulatory Affairs of the Office of Management and Budget (OIRA) under Executive Order 12866 (i.e., August 31, 2018), as required by Executive Order 13272 § 3(b).

The NPRM also did not say that the Department was transmitting a copy of the IFRA to the Chief Counsel after it was published in the Federal Register, as required by the RFA.³⁹⁷ Absent such

³⁹¹See. 7 C.F.R. § 15a.110(b) (proposed § 106.3(a) is inconsistent with USDA rule on remedial action); 7 C.F.R. §§ 15a.135, 15a.140 (proposed § 106.8 is inconsistent with USDA rules on designation of responsible employee and adoption of grievance procedures); 7 C.F.R. § 15a.205 (proposed § 106.12(b) is inconsistent with USDA rule on religious exemptions).

³⁹² U.S. Amicus Brief, *Davis v. Monroe County Bd. of Educ.*, No. 97-843, at 19-25 (Nov. 1998).

³⁹³ Dep’t of Justice, *Title IX Legal Manual*, <https://www.justice.gov/crt/title-ix> (“Importantly, for purposes of administrative enforcement of Title IX and as a condition of receipt of federal financial assistance—as well as in private actions for injunctive relief—if a recipient is aware, or should be aware, of sexual harassment, it must take reasonable steps to eliminate the harassment, prevent its recurrence and, where appropriate, remedy the effects.”).

³⁹⁴ *Id.* (“[A]gencies are encouraged to identify and seek the full complement of relief for complainants and identified victims, where appropriate, as part of voluntary settlements, including, where appropriate, not only the obvious remedy of back pay for certain employment discrimination cases, but also compensatory damages for violations in a nonemployment context.”).

³⁹⁵ 5 U.S.C. § 601 et al.

³⁹⁶ See 83 Fed. Reg. at 61490-493.

³⁹⁷ 5 U.S.C. § 603(a).

transmission, the Chief Counsel had no formal notice of the NPRM and thus missed its opportunity to comment on behalf of affected smaller entities. This is more than a hypothetical possibility, given the Chief Counsel’s recent objections to other Department NPRMs.³⁹⁸ And while other commenters might be able to raise the same concerns (if they had been properly notified), the Department is required to give “every appropriate consideration” to the Chief Counsel’s views,³⁹⁹ and to issue a “detailed statement of any change made to the proposed rule in the final rule as a result of the comments.”⁴⁰⁰

C. The Department failed to engage in required consultation with Native American tribes and small entities.

The NPRM identified the types of stakeholders with whom it purportedly conducted listening sessions and discussion.⁴⁰¹ Notably absent from those lists were officials from Indian Tribes and small entities. Those omissions reflect a violation of Executive Order 13175 and the Regulatory Flexibility Act.

1. The Department failed to consult Indian Tribal Governments in violation of Executive Order 13175 and the Department’s consultation policy.

Title IX applies to any recipient that receives federal financial assistance for an education program or activity, including education programs or activities operated by Indian Tribes.⁴⁰² More than 25,000 students attend more than 125 school districts controlled by tribes and there are 17,000 students enrolled in more than 30 institutions of higher education controlled by tribes.⁴⁰³ Of these students, Native girls ages 14-18 are more than twice as likely as the average girl aged 14-18 (11 percent versus 6 percent) to be forced to have sex when they do not want to do so.⁴⁰⁴ The proposed rules would dictate how school districts and colleges operated by Indian Tribes would have to adjudicate allegations of sexual harassment, including sexual violence.

These proposed rules have tribal implications and thus require consultation with tribal officials under section 5(a) of Executive Order 13175. The Department does not appear to have met any of the requirements of its own Consultation Plan: there is no indication that the Department notified potentially affected Indian tribes in writing that the proposed rules have tribal implications and gave them at least 30 days to prepare for a consultation activity (IV.B.); that the Department engaged in any of the specified consultation mechanisms (IV.A.2 & C); or that the Department diligently and seriously considered tribal views (IV. preamble & D). Merely allowing comment on the NPRM now is plainly not sufficient to meet these obligations.

Further, as discussed previously, these proposed rules may conflict with Tribal laws, and thus the Department was required to consult with tribal officials “early in the process of developing the proposed regulation.”⁴⁰⁵ There is no evidence that the Department did so, to its detriment.

³⁹⁸ Letter from Small Bus. Admin. to Sec’y Elisabeth DeVos (Aug. 30, 2018), available at <https://www.sba.gov/advocacy/8-30-18-comments-general-provisions-federal-perkins-loan-program-federal-family-education>.

³⁹⁹ Executive Order 13272 § 3(c).

⁴⁰⁰ 5 U.S.C. § 604(a)(3).

⁴⁰¹ 83 Fed. Reg. at 61463-464.

⁴⁰² See Office of Legal Counsel, U.S. Dep’t of Justice, *Applicability of Section 504 of the Rehabilitation Act to Tribally Controlled Schools*, 28 Opinions of Office of Legal Counsel 276 (Nov. 16, 2004); U.S. Dep’t of Educ., Office for Civil Rights, *Office for Civil Rights Jurisdiction Over Tribally Controlled Schools and Colleges* and accompanying *Questions and Answers Regarding Tribally Controlled Schools and Colleges* (Feb. 14, 2014).

⁴⁰³ U.S. Dep’t of Educ., Office for Civil Rights, *Questions and Answers Regarding Tribally Controlled Schools and Colleges* (Response to Question 1) (Feb. 14, 2014).

⁴⁰⁴ *Let Her Learn: Sexual Harassment and Violence*, *supra* note 17, at 3.

⁴⁰⁵ Executive Order 13175 § 5(c)(2); Dep’t of Educ.’s Consultation Plan, Part IV.A.1.d.

Given the important government-to-government relationship that has been recognized by the United States with tribal sovereigns, it is particularly concerning that the Department would engage in such a significant matter without full consultation with tribal leaders. The NPRM should be withdrawn until such consultations can occur.

2. *The Department failed to consult small entities in violation of the RFA.*

Title IX applies to a diverse range of school districts and institutions of higher education. As required by the RFA,⁴⁰⁶ the NPRM contains an estimate of the number of small entities to which the proposed rule will apply. The NPRM estimates that the overwhelming majority of school districts (more than 99 percent) are small entities;⁴⁰⁷ and that 68 percent of all two-year institutions of higher education and 43 percent of all four-year institutions of higher education are small entities.⁴⁰⁸ The Department did not certify that the regulations, if promulgated, would not have a significant economic impact on small entities.⁴⁰⁹ Thus, the Department implicitly found that the regulations would have a significant economic impact. To the extent the Department did not expressly make such a finding because it estimated that small entities would experience a net cost savings, that would disregard the plain text of the statute; the statute does not require that the economic impact be adverse in order to trigger the RFA's requirements.⁴¹⁰ And it is clear from the proposed rules that small entities *will* have to invest significant resources to develop new processes required by the NPRM, like live hearings. Indeed, schools and member organizations representing school administrators and institutions have expressed concern about the costs inherent in the proposed rules' various procedural requirements.⁴¹¹ The fact that the NPRM does not address these perceived costs demonstrates that the Department did not meaningfully consult with small entities before publishing the proposed rules.

When a proposed rule has a significant economic impact on a substantial number of small entities, the RFA requires the promulgating agency to give those small entities “an opportunity to participate in the rulemaking for the rule through the reasonable use of techniques such as—

- (1) the inclusion in an advance notice of proposed rulemaking, if issued, of a statement that the proposed rule may have a significant economic effect on a substantial number of small entities;
- (2) the publication of general notice of proposed rulemaking in publications likely to be obtained by small entities;
- (3) the direct notification of interested small entities;
- (4) the conduct of open conferences or public hearings concerning the rule for small entities including soliciting and receiving comments over computer networks; and
- (5) the adoption or modification of agency procedural rules to reduce the cost or complexity of participation in the rulemaking by small entities.⁴¹²

The Department does not appear to have engaged in any such techniques. The NPRM itself is silent on any steps it took to notify small entities of the NPRM. Contrary to the mandatory requirements of the RFA, the Department did nothing special to notify and solicit comments from small entities. The

⁴⁰⁶ 5 U.S.C. § 603(b)(3).

⁴⁰⁷ 83 Fed. Reg. at 61490.

⁴⁰⁸ *Id.* at 61491.

⁴⁰⁹ *Cf.* 5 U.S.C. § 605(b).

⁴¹⁰ U.S. Small Bus. Admin., Office of Advocacy, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* 20 n.70, 23-24 (Aug. 2017).

⁴¹¹ *See supra* note 15.

⁴¹² 5 U.S.C. § 609(a).

Federal Register notice alone was not sufficient, otherwise Section 609(a) would have no meaning. This statutory violation requires, at a minimum, a second round of comments after the Department has used reasonable techniques to notify small entities of the opportunity to participate in the rulemaking.

D. The Department did not assess how these proposed rules would interact with other civil rights statutes enforced by the Department and the regulations enforced by other federal agencies.

The NPRM proposes significant changes to the Department’s Title IX regulations. But those regulations are part of a complicated web of non-discrimination obligations involving not only sex, race and disability discrimination provisions enforced by the Department but also involving sex discrimination regulations enforced by more than two dozen other federal agencies – many of which fund the same educational institutions as the Department.

1. Any proposed solution should not treat claims of sexual harassment differently than claims of racial or disability harassment.

The Department’s proposed rules solely address sex discrimination, including sexual harassment, under Title IX. But the Department previously has interpreted the protections under Title IX, Title VI of the Civil Rights Act (race, color, and national origin), and Section 504 of the Rehabilitation Act (disability) as a piece.⁴¹³ There is no reason, for example, why a named sexual harasser should be given more protections by the Department than a named anti-Semitic harasser, or why an employee who sexually harasses students enjoys greater protections than an employee who racially harasses students.

But the Department’s Assistant Secretary for Civil Rights Kenneth Marcus recently held, in his appellate role, that Title VI itself requires schools to respond to complaints of racial discrimination and harassment in a way significantly at odds with the obligations in the proposed rules.⁴¹⁴ The Assistant Secretary held that a school’s “failure to consider” relevant evidence “when presented” by a student (or, more precisely, when the student tried to discuss the evidence “or otherwise present their position”) “fall[s] short of an appropriate response to student complaints of harassment.” This was so even though the Department’s Title VI regulations do not expressly require the establishment of “prompt and equitable” grievance proceedings.

The Assistant Secretary also concluded that a school’s failure to respond appropriately to an act of race or national origin discrimination (in that case, at a single event, charging students who were perceived to be Jewish \$5 to attend a lecture, but waiving the fee for other students) could result in the creation of a hostile environment in violation of Title VI. The Assistant Secretary further held that it was “immaterial” whether the discriminatory activity was conducted by other students “or a third party outside group” because both “would have been arguably accountable to the University in the context of these facts.” And the Assistant Secretary, without mentioning the need to find deliberate indifference, remanded the case back for his staff to determine whether a hostile environment on the basis of national origin or race in violation of Title VI “existed” at the University at the time of the event (2011). Finally, the Assistant Secretary held that a school that is on notice of discriminatory conduct on campus must “take appropriate responsive action” to “eliminate any hostile environment.”

These legal standards—which Assistant Secretary Marcus apparently viewed as flowing from the statute, since no regulations are cited—are sharply distinct from the different standards proposed for Title

⁴¹³ See, e.g., 2001 Guidance, *supra* note 58.

⁴¹⁴ Letter from Kenneth L. Marcus, Assistant Secretary re: Appeal of OCR Case No. 02-11-2157 (Rutgers University) (Aug. 27, 2018).

IX, demonstrating the impropriety of the proposed rules, as Title VI has long been understood to be a key touchstone for the interpretation of Title IX.⁴¹⁵ The Department’s attempt to sharply divorce the standards schools are instructed apply in analogous circumstances of harassment and discrimination is inequitable, unjustified, and will sow confusion among those charged with enforcing these and complying with these inconsistent obligations.

2. *Any changes to the Title IX regulations should be done in coordination with the more than 20 other federal agencies that have Title IX regulations.*

The proposed rules ignore the fact that more than twenty federal agencies have promulgated Title IX regulations and most of those agencies all provide financial assistance to school districts, colleges, and universities, who are therefore bound by multiple agencies’ Title IX rules. Most of those other agencies adopted their virtually identical final Title IX regulations based on a single common NPRM. Those twenty-plus final regulations were themselves closely modeled on the Department’s regulation.

The Department acknowledges that the standards in its proposed rules around sexual harassment are not legally required and that it “could have chosen to regulate in a somewhat different manner.”⁴¹⁶ That necessarily means that other federal agencies are free to maintain their existing Title IX regulations and enforce them in a manner consistent with the Department’s earlier interpretations. If that happens, an educational institution could be subjected to conflicting obligations. And there is reason to think it is likely to happen, as the National Science Foundation has already publicly committed to focusing on sexual harassment by college and university grant recipients.⁴¹⁷

The Regulatory Flexibility Act requires the Department to identify and address “all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule,”⁴¹⁸ and Executive Order 12866 requires it to “avoid regulations that are inconsistent, incompatible, or duplicative with ... those of other Federal agencies.”⁴¹⁹ The Department has failed to comply with this mandate.

E. The Department provided an inadequately short time period for public comment despite repeated, reasonable requests for an extension.

Throughout the comment period, advocates, students, members of congress, and members of the public requested extensions to the comment period, with no response. The Center and over 100 organizations, as well as thousands of students and members of the public, noted that the 60-day comment period was opened in the midst of the holiday season. This was a particularly busy time for students, who were juggling final exams, preparations for winter break, and traveling home for the holidays. Teachers and school administrators were similarly overburdened. Due to the inopportune timing of the comment period and due to the sheer magnitude of the proposed changes, a meaningful extension of the comment period would have been the only way to ensure that the public had a real opportunity to comment.

Further still, in the middle of the comment period, this Administration began the longest government shutdown in our nation’s history. Starting on December 22, 2018 and ending on January 25, 2019, the partial government shutdown has impacted roughly a quarter of federal agencies. There was not

⁴¹⁵ See, e.g., *U.S. Dep’t of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 600 n.4 (1986); *Grove City Coll. v. Bell*, 465 U.S. 555, 566 (1984) (Title IX was patterned after Title VI).

⁴¹⁶ 83 Fed. Reg. at 61466 (actual knowledge), 61468 (deliberate indifference).

⁴¹⁷ Nat’l Science Found., *NSF Announces New Measures to Protect Research Community From Harassment* (Sept. 19, 2018), <https://www.nsf.gov/od/odi/harassment.jsp>.

⁴¹⁸ 5 U.S.C. § 603(b)(5).

⁴¹⁹ Executive Order 12866 § 1(b)(10).

a definitive statement from administration officials as to whether public comments, or requests for agency action were being accepted and considered by agency officials during the shutdown. It was unclear whether the main conduits for online public participation in rulemaking, [regulations.gov](https://www.regulations.gov) and [federalregister.gov](https://www.federalregister.gov), were operating during that time due to a lapse in appropriations. When visiting [federalregister.gov](https://www.federalregister.gov), visitors have been confronted with a message stating that the site is not being “supported.” On January 16, 2019, [regulations.gov](https://www.regulations.gov) was shut down completely⁴²⁰—with no notice or warning—leaving members of the public with no option to submit their comments electronically.⁴²¹ While assurances were given that the website would become operational within 24 hours, members of the public continued to be left with the distinct impression that neither site was operational or being updated, and there was significant confusion about whether both sites remained available for accepting public comments throughout the government shutdown. Such widespread confusion inevitably discouraged the public from submitting comments.

The Department of Education’s decision to extend the deadline by two days because of *regulations.gov*’s inaccessibility was woefully inadequate and did not sufficiently respond to the many requests for a *meaningful* extension to the comment period. Further still, because the online comment portals were not being updated due to the shutdown, the comment deadline is still listed as January 28th at both *federalregister.gov*⁴²² and as both January 28th and January 30th at *regulations.gov*,⁴²³ which is most certainly causing public confusion and uncertainty about when the comment period actually ends. The Department’s proposed “fix” did nothing to alleviate public confusion and provide interested parties with the opportunity to participate in the rulemaking process. The proposed rules should be withdrawn because the public was not able to meaningfully participate.

F. The proposed rules ignore the will of the American public and should be withdrawn.

The Department’s proposed rules are so far out of step with the general public’s views on sexual harassment, they are decidedly undemocratic. The American public overwhelmingly agrees that strong Title IX protections are necessary to ensure student survivors’ equal access to educational opportunities.

The majority of the American people support strong Title IX protections, including those in the 2011 Guidance and 2014 Guidance that the Department rescinded in September 2017. Last fall, when the Department asked the public for input on deregulation (i.e., which rules the Department should repeal, replace, or modify),⁴²⁴ over 12,000 people submitted comments about Title IX, with 99 percent of them supporting Title IX and 96 percent explicitly urged the Department to preserve its 2011 Guidance.⁴²⁵ They were joined by more than 150,000 other people who signed petitions and statements in support of the Department’s 2011 Guidance and 2014 Guidance.⁴²⁶ However, just one day after the public comment

⁴²⁰ The [regulations.gov](https://www.regulations.gov) landing page displayed a message stating that the site “is not operational due to a lapse in funding, and will remain unavailable for the duration of the government shutdown.”

⁴²¹ The Title IX rules specify that the Department of Education will not accept comments by email or fax. While [regulations.gov](https://www.regulations.gov) was down, the only options were to mail in comments or hand-deliver them.

⁴²² Federal Register, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance* (last visited Jan. 27, 2019), <https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.

⁴²³ [Regulations.gov](https://www.regulations.gov), *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance* (last visited Jan. 27, 2019), <https://www.regulations.gov/document?D=ED-2018-OCR-0064-0001>.

⁴²⁴ U.S. Dep’t of Educ., *Evaluation of Existing Regulations*, 82 Fed. Reg. at 28431 (June 22, 2017) <https://www.regulations.gov/contentStreamer?documentId=ED-2017-OS-0074-0001&contentType=pdf>.

⁴²⁵ Tiffany Buffkin et al., *Widely Welcomed and Supported by the Public: A Report on the Title IX-Related Comments in the U.S. Department of Education’s Executive Order 13777 Comment Call*, CAL. L. REV. ONLINE 2 (forthcoming) (Sept. 25, 2018) [last revised Dec. 31, 2018], available at <https://ssrn.com/abstract=3255205>.

⁴²⁶ *Id.* at 27-28 (48,903 people signed petitions and statements supporting Title IX and the 2011 Guidance); Caitlin Emma, *Exclusive: Education reform groups team up to make bigger mark*, POLITICO (Sept. 6, 2017),

period closed, the Department rescinded both the 2011 Guidance and the 2014 Guidance and issued the 2017 Guidance, when it could not possibly have finished reading and considering all of the comments it had received.⁴²⁷ The rescission was an anti-democratic move contrary to the APA, which was enacted to hold non-elected agency officials like Secretary DeVos accountable to constituents by requiring agencies to consider public comments during the rulemaking process.

The Department's proposed rules ignore the cultural milestones that have demonstrated the public's interest in eliminating sexual harassment, including sexual assault, from our schools and workplaces. In the past sixteen months, the #MeToo hashtag has used more than 19 million times on Twitter,⁴²⁸ the Time's Up Legal Defense Fund raised more than \$24 million to combat sexual harassment,⁴²⁹ and state legislators passed more than 100 bills strengthening protections against sexual harassment.⁴³⁰ In fall 2018, millions of people gathered across the country, online, and on the steps of the Supreme Court in solidarity with Dr. Christine Blasey Ford, Professor Anita Hill, and other survivors who have courageously come forward yet have been denied justice. In the face of this overwhelming support for survivors of sexual violence and those confronting other forms of sexual harassment, the Department's proposed Title IX rules contravene the basic notion that the right to be free from sexual harassment and violence is a human right and the right to not have one's education harmed by sexual harassment is a civil right.

More than 800 law professors, scholars, and experts in relevant fields have signed letters opposing the proposed regulations.⁴³¹ Similarly, survivors at Michigan State University, University of Southern California, and Ohio State University who were sexually abused by Larry Nassar, George Tyndall, and Richard Strauss expressed opposition to the Department's proposed rules.⁴³² In a letter to Secretary DeVos and Assistant Secretary Marcus, more than 80 of these survivors shared their concern that "[t]he proposed changes will make schools even less safe for survivors and enable more perpetrators to commit sexual assault in schools without consequence."⁴³³ They agreed that if these rules are finalized, "fewer survivors will report their assaults and harassment, schools will be more dangerous, and more survivors will be denied their legal right to equal access to educational opportunities after experiencing sexual assault."⁴³⁴ More than 900 mental health professionals submitted a comment condemning the proposed rules, claiming that the rule would "cause increased harm to students who report sexual harassment, including sexual assault, . . . [and] discourage students who have been victimized from

<https://www.politico.com/tipsheets/morning-education/2017/09/06/exclusive-education-reform-groups-team-up-to-make-bigger-mark-222139> (more than 105,000 petitions delivered to Department of Education supporting 2011 and 2014 Title IX Guidances).

⁴²⁷ Dep't of Educ., Office for Civil Rights, *Dear Colleague Letter rescinding 2011 Guidance and 2014 Guidance* (Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>.

⁴²⁸ Monica Anderson & Skye Toor, *How social media users have discussed sexual harassment since #MeToo went viral*, PEW RESEARCH CTR. (Oct. 11, 2018), <http://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral>.

⁴²⁹ Natalie Robehmed, *With \$20 Million Raised, Time's Up Seeks 'Equity And Safety' In The Workplace*, FORBES (Feb. 6, 2018), <https://www.forbes.com/sites/nalierobehmed/2018/02/06/with-20-million-raised-times-up-seeks-equity-and-safety-in-the-workplace/#f1425ca103c5>.

⁴³⁰ Andrea Johnson, Maya Raghu & Ramya Sekhran, *#MeToo One Year Later: Progress In Catalyzing Change to End Workplace Harassment*, NAT'L WOMEN'S LAW CTR. 1 (Oct. 19, 2018), <https://nwlc.org/resources/metoo-one-year-later-progress-in-catalyzing-change-to-end-workplace-harassment>.

⁴³¹ Letter from 201 Law Professors to the Sec'y Elisabeth DeVos and Ass't Sec'y Kenneth L. Marcus (Nov. 8, 2018), <http://goo.gl/72Aj1b>; Letter from 1,185 members of Nat'l Women's Studies Ass'n to Sec'y Elisabeth DeVos and Ass't Sec'y Kenneth L. Marcus, (Nov. 11, 2018), <https://sites.google.com/view/nwsa2018openletter/home>.

⁴³² Letter from 89 Survivors of Larry Nassar, George Tyndall, and Richard Strauss at Michigan State University, Ohio State University, and University of Southern California to Sec'y Elisabeth DeVos and Ass't Sec'y Kenneth Marcus (Nov. 1, 2018), at 2, <https://www.documentcloud.org/documents/5026380-November-1-Survivor-Letter-to-ED.html>.

⁴³³ *Id.* at 1

⁴³⁴ *Id.* at 2.

coming forward,” and that they would also “reinforce the shaming and silencing of victims, which has long prevailed in our society, and [] worsen the problem of sex discrimination in education.”⁴³⁵

Rather than listening to survivors, students, and mental health professionals who understand the impact of trauma, the Department has chosen to listen to education lobbyists that have spent tens of thousands of dollars asking the Trump administration on fewer Title IX requirements.⁴³⁶

XII. Directed Questions

A. Q1: The proposed rules are unworkable for elementary and secondary school students and fail to take into account the age and developmental level of elementary and secondary school students.

As set out in detail above, the following proposed rules are especially unworkable for elementary and secondary school students because they fail to take into account the age and developmental level of those students and fail to consider the unique aspects of addressing sexual harassment in elementary and secondary schools: the narrow definition of harassment, narrow notice standard, mandatory dismissal of out-of-school harassment, requirement of a formal complaint to trigger deliberate indifference liability, permitted use of live cross-examination, permitted use of mediation, and lack of a clear timeframe (see Parts II.B-II.D, III.C, IV.B-IV.C, and IV.F above for more detail).

B. Q2: Proposed §§ 106.44(b)(3) and § 106.45(b)(3)(vii) would subject students in both elementary and secondary schools and in higher education to different types of harm.

Proposed § 106.44(b)(3) would, as discussed in more detail in Part III.C, incentivize institutions of higher education to steer students who report sexual harassment away from filing a formal complaint and toward simply accepting “supportive measures.” This is harmful because “supportive measures” are defined narrowly in proposed § 106.30 to exclude many types of effective accommodations, including transferring the respondent out of the complainant’s classes or dorm, or obtaining a one-way no-contact order against the respondent. Moreover, schools are only required to provide supportive measures that preserve or restore a complainant’s “access” to the “education program or activity,” not measures that preserve or restore “equal access” to educational opportunities and benefits.

All schools, regardless of type or students’ age, should be required to provide supportive measures to students who report sexual harassment regardless of whether there is a formal complaint. However, no school should enjoy a safe harbor merely because it has provided supportive measures in the absence of a formal complaint, as schools should be considering the safety of all students and whether or not a failure to investigate or engage in disciplinary action against the respondent would subject the complainant and/or other students to harm.

Proposed § 106.45(b)(3)(vii) would also be unnecessarily traumatic for complainants in higher education and unnecessarily inflexible for institutions of higher education (see Part IV.B above for more detail). All students, regardless of age or type of school, should be allowed to answer questions through a neutral school official or through written questions—not through any type of live and adversarial cross-examination.

⁴³⁵ Mental Health Professionals Letter, *supra* note 130.

⁴³⁶ See Dana Bolger, *Betsy DeVos’s New Harassment Rules Protect Schools, Not Students*, N.Y. TIMES (Nov. 27, 2018), <https://www.nytimes.com/2018/11/27/opinion/betsy-devos-title-ix-schools-students.html>.

C. Q3: The proposed rules are unworkable in the context of sexual harassment by employees and fail to consider other unique circumstances that apply to processes involving employees.

The following proposed rules are especially unworkable in the context of sexual harassment of students by employees and fail to consider other unique circumstances that apply to processes involving employees: the deliberate indifference standard, narrow definition of sexual harassment, narrow notice standard, mandatory dismissal of out-of-school harassment, permitted use of live cross-examination in elementary and secondary schools, required use of live cross-examination in higher education, permitted use of mediation, and permitted (and in many cases, required) use of the clear and convincing evidence standard (see Parts II.A-II.D and IV.B-IV.D.2 above for more detail).

In addition, proposed § 106.45(b)(7) would allow schools to destroy records involving employee-respondents after three years, allowing repeat employee offenders to escape accountability despite multiple complaints, investigations, or findings against them (see Part IV.I above for more detail).

Furthermore, because of myriad conflicts with Title VII standards and purposes, the proposed rules are also unworkable when the harassment victim is an employee. Schools following the proposed rules in such circumstances would deny employees' Title VII rights and face significant risk of increased Title VII liability (see Part VII above for more detail).

D. Q4: Proposed § 106.45(b)(1)(iii) fails to ensure that schools would provide necessary training to all appropriate individuals, including those at the elementary and secondary school level.

Regardless of its content, proposed § 106.45(b)(1)(iii) is inadequate and effectively meaningless because the rest of the proposed rules create a definition of sexual harassment that is in conflict with Supreme Court precedent and incorrect as a matter of law. Even if a school followed all of the proposed rules meticulously, including proposed § 106.45(b)(1)(iii), it would still be training its employees on the wrong definition of sexual harassment.

Assuming for a moment the legitimacy of these rules, proposed § 106.45(b)(1)(iii) is still inadequate because it would not require training of all school employees. It is not enough for schools to only train coordinators, investigators, and adjudicators on sexual harassment. Many school employees—including teachers, guidance counselors, teacher aides, playground supervisors, athletics coaches, cafeteria workers, school resource officers, bus drivers, professors, teaching assistants, residential advisors, etc.—interact with students on a day-to-day basis and are better-positioned than the Title IX coordinator and other high-ranking administrators to respond to sexual harassment before it escalates. This is especially true at the elementary and secondary school level, where the age differential has a greater impact on students and where students are more susceptible to grooming by adult sexual abusers. However, while school employees are in the best position to know whether other employees are engaging in inappropriate behaviors with students, they cannot respond adequately to sexual harassment if they do not know how to identify it, how to recognize grooming behaviors, or how to report sexual harassment to the Title IX coordinator. In addition, these school employees are the ones who must help implement supportive measures, such as homework extensions, hall passes to see a guidance counselor, and no-contact orders. But they cannot effectively do so if they do not understand the grievance process and the mechanisms for protecting student safety. Furthermore, all school employees should be trained on employee-on-student sexual harassment so that they can identify inappropriate conduct and interactions with students.

Proposed § 106.45(b)(1)(iii) is also inadequate because it would not require trainings to be trauma-informed. Scientific, trauma-informed approaches are critical to sexual assault investigations. For example, in order to ensure that investigations are reliable in ascertaining what actually occurred between the parties in a complaint, investigators should be knowledgeable about common survivor responses to sexual assault, such as tonic immobility, an involuntary paralysis common among survivors during their assaults⁴³⁷ that has been recognized by psychiatrists⁴³⁸ and legal scholars⁴³⁹ in numerous peer-reviewed publications. Judges, too, have recognized the importance of trauma-informed training in properly adjudicating sexual assault cases. In fact, the National Judicial Education Program (NJEP), a project sponsored by the U.S. Department of Justice, produced a training manual written for judges by a nationwide survey of judges on what they wish they had known before they had adjudicated a sexual assault case.⁴⁴⁰ These judges agreed that many survivor responses that “appear counterintuitive to those not knowledgeable about sexual assault” are in fact quite common among survivors,⁴⁴¹ including tonic immobility, collapsed immobility, dissociation, delayed reporting, post-assault contact with the assailant, imperfect retrieval of memories, and a flat affect while testifying.⁴⁴²

Finally, proposed § 106.45(b)(1)(iii) is inadequate because it does not require employees to be trained on stereotypes and implicit biases impacting the full range of protected classes or on how to address the unique needs of harassment victims who are people of color, LGBTQ individuals, and/or people with disabilities. As explained above in more detail in Parts I.C and IV.A, schools are more likely to ignore or punish certain groups of students who report sexual harassment, including women and girls of color (especially Black women and girls), LGBTQ students, and students with disabilities because of stereotypes and implicit bias.

E. Q5: Parties with disabilities

The following proposed rules fail to take into account the needs of students with disabilities and fail to consider the different experiences, challenges, and needs of students with disabilities: the narrow definition of sexual harassment, narrow notice standard, mandatory dismissal of out-of-school harassment, required presumption of no harassment, permitted use of live cross-examination in elementary and secondary schools, required use of live cross-examination in institutions of higher education, permitted use of mediation, and lack of a clear timeframe (see Parts II.B-II.D, IV.A-IV.C, and IV.F above for more detail).

⁴³⁷ E.g., Francine Russo, *Sexual Assault May Trigger Involuntary Paralysis*, SCIENTIFIC AMERICAN (Aug. 4, 2017), <https://www.scientificamerican.com/article/sexual-assault-may-trigger-involuntary-paralysis>; James Hopper, *Why many rape victims don't fight or yell*, WASH. POST (June 23, 2015), <https://www.washingtonpost.com/news/grade-point/wp/2015/06/23/why-many-rape-victims-dont-fight-or-yell>.

⁴³⁸ E.g., Juliana Kalaf et al., *Sexual trauma is more strongly associated with tonic immobility than other types of trauma – A population based study*, 25 J. AFFECTIVE DISORDERS 71-76 (June 2017), available at <https://www.sciencedirect.com/science/article/pii/S0165032716317220>; Brooke A. de Heer & Lynn C. Jones, *Investigating the Self-Protective Potential of Immobility in Victims of Rape*, 32 VIOLENCE & VICTIMS 210-29 (2017), available at <http://connect.springerpub.com/content/sgrvv/32/2/210>; Kasia Kozłowska, et al., *Fear and the Defense Cascade: Clinical Implications and Management*, 23 HARVARD REV. PSYCHIATRY 263-87 (July/Aug. 2015), available at <https://journals.lww.com/hrjournal/toc/2015/07000>.

⁴³⁹ Melissa Hamilton, *The Reliability of Assault Victims' Immediate Accounts: Evidence from Trauma Studies*, 26 STAN. L. & POL'Y REV. 269, 298, 301-03 (2015), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2492785;

⁴⁴⁰ Nat'l Judicial Educ. Program, *Judges Tell: What I Wish I Had Known Before I Presided in an Adult Victim Sexual Assault Case*, LEGAL MOMENTUM (2010) [hereinafter *Judicial Manual on Sexual Assault*], available at https://victimsofcrime.org/docs/nat-conf-2013/judges-tell-8-15-12_handout.pdf.

⁴⁴¹ *Judicial Manual on Sexual Assault*, supra note 440, at 2.

⁴⁴² *Id.* at 6-9.

The proposed § 106.44(c) may also encourage schools to impose unfair or excessive discipline on respondents with disabilities. This risk is exacerbated by the fact that proposed § 106.45(b)(1)(iii) would not require training on least restrictive remedies for school employees, including school police.

F. Q6: Proposed § 106.45(b)(4)(i) should require all schools to use the preponderance of the evidence standard in all Title IX proceedings.

The preponderance of evidence standard is the only standard of evidence that should be used in Title IX cases in all schools, regardless of what standard is used in disciplinary proceedings for other student misconduct and regardless of what standard is used in faculty misconduct proceedings (see Parts IV.D and VII for more detail).

G. Q7: Proposed § 106.45(b)(3)(viii) is unclear and would facilitate prohibited retaliation.

Proposed § 106.45(b)(3)(viii) fails to provide clarification on the admissibility of irrelevant or prejudicial evidence and opens the door to retaliation against complainants, respondents, and witnesses (see Part IV.H for more detail).

H. Q8: Proposed § 106.45(b)(7) would allow schools to destroy records relevant to a student or employee's Title IX lawsuit or administrative complaint and would allow repeat employee offenders to escape accountability.

As discussed in more detail in Part IV.I above, proposed § 106.45(b)(7) would allow schools in many states to destroy relevant records before a student or employee complainant is able to file a complaint or complete discovery in a Title IX lawsuit; and would allow the average school in an OCR investigation to destroy relevant records before the investigation is completed. In addition, the proposed rule would allow schools to destroy records involving employee-respondents after three years, allowing repeat employee offenders to escape accountability despite multiple complaints, investigations, or findings against them.

I. Q9: Proposed § 106.45(b)(3)(vii) lacks flexibility and would be especially burdensome on schools that are not a traditional four-year college or university.

The proposed rule lacks flexibility and would be especially burdensome on community colleges, vocational schools, online schools, and other educational institutions that lack the resources of a traditional four-year college or university (see Part IV.B for more detail).

* * * * *

The Department's proposed rules import inappropriate legal standards into agency enforcement, rely on sexist stereotypes about individuals who have experienced sexual harassment, including sexual assault, and impose procedural requirements that force schools to tilt their Title IX investigation processes in favor of respondents to the detriment of survivors and other harassment victims. Instead of effectuating Title IX's prohibition on sex discrimination in schools, these rules serve only (1) to cabin schools' ability and obligation to address sexual harassment and (2) to protect named harassers and rapists from accountability for their actions. Twenty-eight of this Administration's 30 major regulatory actions have already been successfully challenged in federal court,⁴⁴³ and this NPRM, if finalized, is likely to be successfully challenged as well.

⁴⁴³ Margot Sanger-Katz, *For Trump Administration, It Has Been Hard to Follow the Rules on Rules*, N.Y. TIMES (Jan. 22, 2019), <https://www.nytimes.com/2019/01/22/upshot/for-trump-administration-it-has-been-hard-to-follow-the-rules-on-rules.html>.

For all of the above reasons, the National Women’s Law Center calls on the Department of Education to immediately withdraw this NPRM and instead focus its energies on vigorously enforcing the Title IX requirements that the Department has relied on for decades, to ensure that schools promptly and equitably respond to sexual harassment.

Sincerely,



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