

United States Senate

WASHINGTON, DC 20510

January 30, 2019

The Honorable Betsy DeVos
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, DC 20202

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

Dear Secretary DeVos,

We join students, survivors, educators, and families across this country in opposing the Trump Administration's proposed regulation detailing the responsibilities of schools, colleges, and universities for addressing sexual harassment and assault under Title IX of the Education Amendments of 1972 ("Title IX"). The proposed rule is a significant step back from prior Administrations' issued guidance and regulations and would allow schools to violate the Congressional intent behind Title IX to ensure educational equity for all students, regardless of sex. We urge you to listen to students, schools, and survivors across this country, abandon this harmful proposal, and start over in order to draft a rule consistent with the requirements in Title IX that truly addresses the scourge of sexual assault in our classrooms, on our campuses, and wherever our students live and learn.

Congress passed Title IX to prohibit discrimination on the basis of sex in educational settings—and the Department's regulations should be designed to further, not undermine, that goal. Numerous studies have demonstrated that far too many of our students experience sexual assault and violence in school. In grades 7-12, over half of girls and two in five boys are sexually harassed in any school year,¹ and more than one in five girls ages 14-18 are kissed or touched without their consent.² One in five women experience sexual assault or sexual violence while enrolled in college, and nearly 1 in 18 men are sexually assaulted in college.³ Clearly, harassment and assault are pervasive problems across the country. This Administration's attempt to weaken schools' responsibilities to effectively respond to complaints under Title IX violates Congress' intention to protect equal educational access for all students.

For nearly 50 years, Title IX has improved access to educational programs and benefits by prohibiting schools from discriminating against individuals on the basis of sex. In order to comply with this landmark civil rights law, schools must respond promptly and effectively to

¹ Catherine Hill & Holly Kearl, *Crossing the Line: Sexual Harassment at School*, AAUW (2011), available at <https://www.aauw.org/research/crossing-the-line>.

² National Women's Law Center, *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence* 1 (Apr. 2017), available at <https://nwlc.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence>.

³ E.g., David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, ASSOCIATION OF AMERICAN UNIVERSITIES 13-14 (Sept. 2015) [hereinafter *AAU Campus Climate Survey*], available at <https://www.aau.edu/key-issues/aau-climate-survey-sexual-assault-and-sexual-misconduct-2015>.

sexual violence and sexual harassment. Over the past two decades, Administrations—both Republican and Democrat—constructively built upon Congressional intent by issuing guidance documents to encourage survivors to report incidents of harassment, discrimination, assault and violence and help schools understand their obligations to address those reports.⁴ These guidance documents have not only aided schools’ efforts to develop responsive campus disciplinary processes, but, crucially, have also helped students come forward and report. Since the issuance of the U.S. Department of Education’s Office for Civil Rights’ (OCR) 2011 guidance and 2014 Q&A document, there has been a sharp increase in the number of Title IX complaints filed with the Department.⁵ Between FY2011 and FY2016, there was a 277 percent increase at the K-12 level and 831 percent increase at the postsecondary level in reports regarding sexual violence received by OCR.⁶

Unfortunately, the Trump Administration has created a tremendous amount of uncertainty and confusion for schools and survivors. On September 22, 2017, the Department revoked the 2011 guidance and 2014 Q&A, suggesting it required schools to adopt procedures that “lack the most basic elements of fairness and due process, and are overwhelmingly stacked against the accused,” which drastically understates the procedural and due process protections that were emphasized in the revoked guidance. We strongly object to the proposed regulation, issued on November 29, 2018, which would significantly weaken existing protections for students and make it easier for K-12 schools, colleges, and universities to shirk their responsibility to keep students safe.

The proposed rule significantly narrows the definition of sexual harassment, inappropriately reducing the situations in which schools must act to address sexual misconduct

The Department’s current definition of sexual harassment that constitutes discrimination under Title IX was described by the 2001 guidance as “unwelcome conduct of a sexual nature.”⁷ Section 106.30 of the proposed regulation would significantly narrow this definition to include “unwelcome conduct on the basis of sex that is so *severe, pervasive, and objectively offensive* that it effectively *denies a person equal access to the recipient’s education program or activity*” or conduct that is considered sexual assault as defined in Clery Act regulations.⁸ This narrow

⁴ In 2001, President Bush issued guidance to set a floor for Title IX protections for students (2001 guidance), and in 2011 the Obama Administration further clarified schools’ obligation to address sexual assault and sexual violence under Title IX. U.S. Department of Education, Office for Civil Rights. Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties. January, 19, 2001.

<https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>. U.S. Department of Education, Office for Civil Rights. Dear Colleague Letter: Sexual Violence. April 4, 2011.

<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

⁵ U.S. Department of Education, Office for Civil Rights. "Securing Equal Educational Opportunity; Report to the President and Secretary of Education." December 2016. <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf>.

⁶ Id.

⁷ "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, Title IX." January 19, 2001. Office for Civil Rights, Department of Education.

<https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>.

⁸ Proposed Rule. “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.” November 29, 2018. Office for Civil Rights, Department of Education.

<https://www.regulations.gov/document?D=ED-2018-OCR-0064-0001>; 34 CFR 668.46(a).

standard for what behaviors or actions qualify as sexual harassment would require schools to dismiss students' reports of harassment because they do not meet the very restrictive definition set in the proposed rule. In the context of an educational setting, discriminatory behavior can interfere with someone's access to education before it rises to the level of severe or pervasive. Preventing schools from investigating less severe or pervasive behavior, and requiring schools to turn away students who bring such behavior to a school official's attention, will decrease the likelihood a student reports that behavior again in the future. This narrow standard could discourage schools from addressing concerning behaviors early, create confusion and doubt for survivors or victims of harassment about speaking out, and significantly reduce the number of cases that would be considered, let alone addressed, through a disciplinary proceeding.

Though the Department claims a need to change the definition in order to protect free speech, the narrowing of the definition is unnecessary for its expressed purpose. The Supreme Court has found that student speech can be regulated if school officials can reasonably expect "substantial disruption of or material interference with school activities" or if the speech involves "invasion of the rights of others."⁹ Rather than unduly narrow the definition of harassment and set aside the rights of students to have equal access to education regardless of their sex, the Department instead should use its regulations to help schools better understand how to respect students' rights to free speech while also defining harassment in a manner consistent with the goals of Title IX.

Additionally, by requiring that sexual harassment result in a person being denied access to an education program or activity, the new definition would prevent action under Title IX by a school prior to a student dropping a program or activity, or dropping out of school entirely before action could be taken. In the cases of Dr. George Tyndall, a campus gynecologist at the University of Southern California (USC), and Dr. Larry Nassar, an athletic doctor at Michigan State University (MSU), the harassment of students occurred during the course of medical treatment.¹⁰ These actions were unwelcome and of a sexual nature, but potentially the students would not be considered victims of sexual harassment under the proposed, narrow definition since many of the students and athletes continued with their course of study. By allowing schools to dismiss less severe or pervasive behavior and turn away students who bring such behavior to a school official's attention, the proposed regulations run counter to the purpose of Title IX by discouraging students from reporting and facilitating the continuation of discriminatory behavior.

The proposed rule reduces the obligation for schools to respond when students do not report to the right staff member

Reporting sexual harassment or assault is often a difficult decision for students, who may not know who to turn to for immediate assistance or long term supports. Section 106.44(a) of the proposed regulation would only require colleges and universities to respond if the institution has "actual knowledge" of the allegations of sexual harassment, defined as complaints reported to "an official with the authority to take corrective action." In a K-12 setting, the proposed regulation means that reporting to a teacher about student-on-student sexual harassment, is

⁹ *Tinker v. Des Moines*, 393 U.S. 503, 513, 514 (1969).

¹⁰ LA Times. "A USC doctor was accused of bad behavior with young women for years. The university let him continue treating students." May 16, 2018. <http://www.latimes.com/local/california/la-me-usc-doctor-misconduct-complaints-20180515-story.html#>.

considered actual knowledge, but reporting to other employees with whom a student has a close relationship such as a coach, paraprofessional educator, or recess monitor is not. It is especially troubling that under the proposed rule, reporting to a teacher about harassment from another teacher does not trigger a school's obligation to investigate or respond. On a college campus, the proposed rule means that only student complaints reported to the school's Title IX Coordinator or an official with the authority to institute corrective measures would require colleges to investigate the complaint.

This change from the 2001 and 2011 guidance documents significantly curtails the number of campus staff who could receive and act on reports of sexual harassment and violence. The proposed rule would result in schools not being responsible for reports given to professors, school law enforcement, athletic trainers, coaches, administrators, counselors, health professionals, and resident advisors. This limitation on who can receive reports would mean that Michigan State University and Ohio State University would have no responsibility under Title IX for having addressed the sexual assaults that occurred in the recent high-profile cases for the students who reported to their coaches or athletic trainers.¹¹ In the case of the USC gynecologist, there were numerous complaints about the doctor starting in the 1990's and throughout his time on campus, yet he was permitted to continue seeing patients until 2017.¹² Under the new regulation, it is unclear if USC would be held accountable for the numerous complaints against Dr. Tyndall during his almost thirty-year tenure. The ambiguity that would now be created by the new regulation is unacceptable. The Department cannot intend to implement a system that could find those institutions had no responsibility for the grave incidents of assault that happened at those institutions, but that is the very effect this proposed rule could have. We are particularly concerned that the rule seems to disregard the reality of how hard reporting sexual harassment is for survivors, and that students often are more comfortable reporting to someone they trust, not necessarily to the "official with authority to institute corrective measures."

The Department claims the Supreme Court's decision in *Gebser v. Lago Vista Ind. Sch. Dist.* limits its ability to hold schools accountable for sexual assault or harassment to situations in which the schools have actual knowledge or control.¹³ Not only has the *Gebser* decision created harmful burdens on students in recovering damages under Title IX, it is also an improper precedent for the Department to use to determine whether a student's rights under Title IX have been violated, as the decision clarified that the Department can still take administrative action in order to fulfill congressional intent around Title IX's nondiscrimination goals.¹⁴ The actual notice standard in *Gebser* is meant to clarify that OCR, rather than a direct student report, can put a school on notice of sexual harassment, but it does not make sense in the context of

¹¹ CNN. "Michigan State University reaches \$500 million settlement with Larry Nassar victims." May 17, 2018. <https://www.cnn.com/2018/05/16/us/larry-nassar-michigan-state-settlement/index.html>; USA Today. "Ohio State: More than 100 former students allege sexual abuse by ex-team doctor Richard Strauss." <https://www.usatoday.com/story/sports/college/2018/07/20/ohio-state-over-100-allege-sexual-abuse-doctor-richard-strauss/807699002/>.

¹² Los Angeles Times, "A USC doctor was accused of bad behavior with young women for years. The university let him continue treating students." May 16, 2018. <http://www.latimes.com/local/california/la-me-usc-doctor-misconduct-complaints-20180515-story.html#>.

¹³ 524 U.S. 274 (1998).

¹⁴ Fatima Goss Graves, "Restoring Effective Protections for Students against Sexual Harassment in Schools: Moving Beyond the *Gebser* and *Davis* Standards." <https://www.nwlc.org/wp-content/uploads/2015/08/ACS-Article-Moving-Beyond-Gebser-and-Davis-Final.pdf>.

determining when schools otherwise have a responsibility to act under Title IX. In issuing the 2001 guidance, the Bush Administration clarified that schools' actual knowledge is the improper standard for determining compliance with Title IX because the determination for whether a school is liable for monetary damages is different from whether they are protecting students' rights. By limiting a school's duty to respond, the Department would make it possible for schools to avoid taking responsibility for harassment they should have known about, even if they would not be found to owe damages under *Gebser*.

Additionally, by limiting reporting to a single official or office, the Department is placing an increased burden on the students to determine the appropriate person to whom they should report, particularly since the proposed rule is silent on clarifying any actions that a school would have to take to help ensure students understand which officials to whom they are expected to report. The proposed rule will also likely create confusion for schools with mandatory reporting requirements under state laws.

The proposed rule allows schools to escape liability when they do not respond effectively or quickly

Relying on the holding in *Davis v. Monroe Cty. Bd. Of Educ.*, the proposed rule states that a school must only show that it is not "deliberately indifferent" in order to show that it has met its Title IX obligations to respond.¹⁵ According to *Davis*, a school is not deliberately indifferent if it takes actions that are not "clearly unreasonable in light of the known circumstances."¹⁶ This is a markedly lower standard than both the 2001 guidance requiring that schools take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from recurring again, and the 2011 guidance, which requires schools to act "reasonably... [and] take immediate and corrective action" to resolve student complaints.¹⁷ The Department itself articulates in the preamble to the rule that it is not required to follow *Davis* in terms of the deliberately indifferent standard but believes the standard to be the appropriate policy choice.¹⁸ In effect, the Department is setting a much lower bar for what survivors can expect from schools regarding the quality of investigations or a specific timeline, and shields schools from any accountability under Title IX, even if a school mishandles a student's complaint, fails to provide adequate supports for a survivor, delays its response, or develops a campus disciplinary system that fails to respond to the needs of survivors.

Additionally, the proposed rule allows a "safe harbor" from a finding of deliberate indifference for schools that establish and then follow their own grievance procedures or provide supportive measures to the complainant.¹⁹ The existence of a safe harbor means that schools will focus more

¹⁵ U.S. Department of Education. Notice of proposed rulemaking: 34 CFR Part 106. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance. November 29, 2018, at proposed 34 CFR 106.44(a). <https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal> 526 U.S. 629, 647, 652 (1999).

¹⁶ 526 U.S. 629 at 648.

¹⁷ U.S. Department of Education, Office for Civil Rights. Dear Colleague Letter: Sexual Violence <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

¹⁸ Notice of Proposed Rulemaking 34 CFR Part 106 page 27.

¹⁹ NPRM: 34 CFR Part 106, at 34 CFR 106.44(b)(1).

on compliance with particular procedures, rather than conducting a full investigation that reflects the issues raised by the individual complainant that reflects the rights of all individuals involved. In effect, the proposed rule would shield schools from accountability under Title IX, even if a school mishandles a complaint, fails to provide effective supports for survivors, or commits serious errors in weighing the evidence in a grievance procedure.

The proposed rule restricts instances where schools may act to respond to sexual harassment and assault to school grounds, activities, and programs

Even though nearly nine out of 10 college students reside off campus²⁰, the proposed rule only allows schools to investigate a report of sexual harassment if it occurred within a school's own program or activity. This means incidents in most off-campus housing would not be included nor would any incidents of online harassment. However, the statutory text of Title IX itself states that discrimination that affects a person's ability to participate in an education or program violates Title IX.²¹ It does not state the discriminatory conduct must occur during a school activity for there to be a discriminatory environment. The preamble of the proposed rule suggests that under *Davis*, a school cannot be responsible for actions that occur outside of its programs or activities because the fact pattern in *Davis* included misconduct that occurred on school grounds.²² In addition to being contrary to the underlying statute, this is a strikingly tone-deaf policy proposal, as students may still be forced to see their harasser on campus every day and that harassment directly impacts their education as a result. Additionally, the proposed rule fails to clarify what will or will not count as a "program or activity" creating additional uncertainty for schools and students alike.

There are numerous high profile instances of sexual harassment and sexual assault that occurred off-campus or after the end of the K-12 school days.²³ In the recently high-profile instances of gross sexual abuse perpetrated by an Ohio State University doctor, some of the 100 former students alleged that the abuse occurred in the doctor's home and personal off-campus office.²⁴ Surely Congress intended, and the Department should strive, to protect all of these students.

The proposed rule reduces schools' responsibility to provide supportive measures to survivors

Many students choose to pursue campus-based remedies to report sexual harassment or assault in order to receive supportive measures that enable them to stay in school and complete their degree. Under section 106.44(b)(3) of the proposed rule, a school may deny providing survivors with supportive measures on the grounds that the requested measures are "disciplinary,"

²⁰ New York Times. *How Much Does Living Off-Campus Cost? Who Knows?*, August 5, 2016, <https://www.nytimes.com/2016/08/07/education/edlife/how-much-does-living-off-campus-cost-who-knows.html>.

²¹ 20 U.S.C. § 1681(a).

²² NPRM 34 CFR Part 106.

²³ Chicago Tribune. "Hundreds of sexual misconduct complaints pour into new CPS Title IX office," November 29, 2018. <https://www.chicagotribune.com/news/local/breaking/ct-met-chicago-council-school-abuse-hearing-20181128-story.html>.

²⁴ New York Times. "More Than 100 Former Ohio State Students Allege Sexual Misconduct," July 20, 2018. <https://www.nytimes.com/2018/07/20/us/politics/sexual-misconduct-ohio-state.html>; CBS News. "Ohio State doctor who killed himself accused of decades-long sexual misconduct," July 6, 2018. <https://www.cbsnews.com/news/richard-strauss-ohio-state-doctor-accused-of-groping-men-for-years/>.

“punitive,” or “unreasonably burden” the other party.²⁵ By putting the focus on whether there is a burden on the other party, the proposed rule would allow schools to interpret the regulation to mean that they cannot provide supportive measures to one student that would burden the other party at all, even if such measures are needed to ensure that the complainant is not denied equal access to their education due to sexual harassment. For instance, schools could view it as impermissible to have the respondent rather than the complainant move classes or dorms or issuing a no-contact order to only one of the two parties. Prior guidance made it clear that there are situations in which these sorts of distinctions are permissible.²⁶

While claiming to be about establishing ‘due process,’ the proposed rule tilts school disciplinary proceedings in favor of the respondent, creating inherent inequities and unfairness

Requires colleges to provide a live hearing where the respondent’s representative can cross-examine a survivor

Section 106.45(b)(3) of the proposed rule would require that institutions of higher education hold a live hearing, at which the parties can cross-examine each other and any witnesses through an advisor of the party’s choice. In contrast, elementary and secondary schools will have discretion to determine when a live hearing with cross-examination may be appropriate. We are deeply concerned that the Department’s proposal could re-traumatize survivors of sexual violence, would undermine fundamental principles of fairness, and will likely prove to be a significant disincentive to reporting incidents of sexual violence, harassment, and discrimination, undermining the very purpose of Title IX.

We believe institutions must have fair, neutral, and appropriate grievance procedures to address incidents of sexual violence. However, in our view, requiring institutions of higher education to hold live hearings with cross-examinations forces students to be subjected to court-like proceedings better designed for the justice system, not for institutions trying to ensure educational equity for their students. Court proceedings that appropriately include cross-examination also involve trained lawyers and judges, and rules of evidence and procedure designed to ensure that cross-examination is not misleading or abusive--none of which are provided for in the proposed rule.²⁷ The Department cites in support of its proposal *Doe v Baum*, a Sixth Circuit case that found procedural due processes requires parties be allowed cross-examination under Title IX.²⁸ However, a number of other courts have considered the question and found that cross-examination is not required and in fact may not be appropriate in some cases in educational settings.²⁹ In *Goss v. Lopez*, the Supreme Court said that a 10 day

²⁵ NPRM 34 CFR Part 106; 34 CFR 668.46(a).

²⁶ "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, Title IX." January 19, 2001. Office for Civil Rights, Department of Education. <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>.

²⁷ To justify the proposed new requirements, the Department references a quote from a Supreme Court case that cross-examination is the “greatest legal engine ever invented for the discovery of truth.” But that quote relates to what is appropriate in *criminal* cases, not what is appropriate to expect in grievance procedures in educational settings in which students are not in court or on trial.

²⁸ *Doe v. Baum* 903 F. 3d 575 (6th Cir. 2018).

²⁹ See, e.g., *Nash v. Auburn Univ.*, 812 F.2d 655 (11th Cir. 1987)(“Where basic fairness is preserved, we have not required the cross-examination of witnesses and a full adversary proceeding”); *Dixon v. Alabama State Bd. of Ed.*,

suspension does not require “the opportunity...to confront and cross-examine witnesses.”³⁰ And in *Doe v Baum* itself, a concurring judge specifically wrote an opinion to dissent to the proposition that parties must be afforded the opportunity to cross-examine each other through attorneys.³¹ In fact, the majority of courts that have addressed this issue have agreed that live cross-examination is not required in school disciplinary proceedings, as long as there is a meaningful opportunity for a hearing examiner to pose questions.³²

Being formally questioned in person by an advocate for another student is intimidating and stressful for any student, but in cases of survivors who have experienced sexual violence, it may be especially harmful, particularly since college students who are survivors of sexual assault suffer high rates of depression and PTSD, among other psychological impacts.³³ We are concerned about a requirement for institutions of higher education in all instances to subject survivors of rape and assault to live, in person-grilling by someone who may not be trained in trauma-informed questioning, and whose goal is to undermine their credibility and story. Such cross-examination is not only often wholly unnecessary to determine what happened in a particular incident, but could also do affirmative harm to the well-being of students who have already been abused, harassed, and discriminated against.³⁴

The Department claims its proposed policy mitigates any harm that would be caused by cross-examination to the complainant and the respondent because it allows institutions to physically separate the parties during a live hearing and includes provisions similar to a rape shield law. We believe the Department has fundamentally misjudged how traumatic facing live cross-examination may be for some survivors. In the case of elementary and secondary students, the Department leave the ultimate decision in the hands of schools, allowing them to select less traumatic ways of ensuring a fair process, for example by providing the parties the opportunity to provide each other with written questions. We strongly urge the Department to eliminate the requirement for institutions of higher education, and to require all schools to utilize grievance procedures that avoid re-traumatization of survivors in all cases.

The Department’s proposed rule also substantially undermines the principle of fundamental fairness that we believe is a critical part of ensuring educational equity for all students. The Department’s proposed rule allows a party to choose to have an attorney to conduct the cross-examination, which benefits students and other parties who have the financial resources to afford a lawyer. It seems likely that students who can afford attorneys will have a clear advantage in the

294 F.2d 150, 159 (5th Cir. 1961)(“This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college’s educational atmosphere and impractical to carry out.”).

³⁰ *Goss v. Lopez*, 419 U.S. 565 at 583 (1975).

³¹ *Doe v. Baum* 903 F. 3d 575 (6th Cir. 2018) (Judge Gilman, dissenting).

³² See 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).

³³ National Task Force to End Sexual and Domestic Violence Against Women. July 2, 2016, <https://www.aauw.org/files/2017/01/NTF-Support-OCR-Letter-7.6.16-nsa.pdf>; Bureau of Justice Statistics, Campus Climate Survey Validation Study, January 2016, <https://www.bjs.gov/content/pub/pdf/ccsvsfr.pdf>.

³⁴ Jessica McCarrick et al., Men’s Experience of the Criminal Justice System Following Female Perpetrated Intimate Partner Violence, 31 J. FAM. VIOLENCE 203, 204 (2016); Jana Robinson, The Experience of the Child Witness: Legal and Psychological Issues, 42-43 INT’L J. OF L. & PSYCHIATRY 168, 173-74 (2015); Sarah M. Guerette & Sandra L. Caron, Assessing the Impact of Acquaintance Rape: Interviews with Women Who Are Victims/Survivors of Sexual Assault While in College, 22(2) J. OF C. STUDENT PSYCHOTHERAPY 31, 33, 42-44 (2007).

process over students who do not have the same range of options for advisors or who are unable to hire effective counsel. Recourse for survivors of sexual violence should not be based on their ability to pay for an attorney or obtain legal representation simply to access their schools' grievance procedures on the same terms as the person who abused, harassed, or raped them, just as accused students should not be disadvantaged based on their financial resources.

Given the underreporting of incidents of rape and battery on college campuses,³⁵ it is troubling the Department is proposing procedures that will increase the barriers to reporting, rather than seeking to decrease those barriers. Knowing that they will be forced to submit to live questioning by another party will discourage some survivors from coming forward.

Requires schools to tilt campus disciplinary procedures toward the accused rather than encourage a neutral process

Section 106.45(b)(1)(iv) of the proposed rule states that schools must establish a disciplinary procedure that begins with the presumption the respondent is innocent, which suggests that the school must also assume that the reporting student is not telling the truth. As most reports of sexual assault come from women and girls, the proposed rule furthers the myth that women and girls are lying or otherwise confused about incidents of sexual assault – myths that representatives of this Department have further sought to legitimize.³⁶ One of the main reasons that survivors of sexual assault do not come forward is the fear of not being believed.³⁷ By articulating a presumption in favor of the respondent, there is a perception that the respondent is to be believed over the complainant. For survivors who are already concerned about being believed, this perception may make them even less likely to report in the first place. While prior regulations and guidance under Title IX have focused on providing an equitable process for resolving complaints, this proposed rule explicitly attempts to shift from an equitable process to one that requires schools to automatically favor one party over the other. Rather than establishing such a presumption, the Department should make clear that schools should conduct fair and equitable investigations and grievance procedures, particularly given the focus from Department officials, including Secretary DeVos, on the rights of the respondents. The Department should make clear that schools are expected to conduct fair and equitable investigations and grievance procedures rather than suggest they will favor one student over another.

Allows schools to use a higher evidentiary standard for a school disciplinary proceeding; counter to any other civil rights law and recommendations from experts in the Title IX field

³⁵ Rates of reporting to any official were “3% of sexual battery incidents and 12.5% of rape incidents.” Department of Justice, Bureau of Justice Statistics Research and Development Series, “Campus Climate Survey Validation Study Final Technical Report (Jan. 2016), available at <https://www.bjs.gov/content/pub/pdf/ccsvsfr.pdf>.

³⁶ Violence Against Women. “False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases,” December 16, 2010, <https://journals.sagepub.com/doi/10.1177/1077801210387747>; New York Times. “Campus Rape Policies Get a New Look as the Accused Get DeVos’s Ear.” July 12, 2017. <https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html>.

³⁷ Journal of American College Health, Vol. 55, No. 3, “Barriers to Reporting Sexual Assault for Women and Men: Perspective of College Students.” http://www.middlebury.edu/media/view/240971/authentic/sable_article.pdf

Section 106.45(b)(4)(i) of the proposed rule would allow schools to choose to use a “clear and convincing” standard rather than a “preponderance of the evidence” standard in disciplinary proceedings. While the Department cites the decision in *Lee v. New Mexico* to justify allowing schools to use the clear and convincing standard, other cases support the use of the preponderance of the evidence standard as appropriate for Title IX enforcement.³⁸ Because the preponderance of the evidence standard is the only evidentiary standard that treats both sides equally, it is the standard that is appropriate for Title IX’s mandate for equal treatment according to national experts who work on Title IX.³⁹ In fact, the preponderance of the evidence standard is used to enforce other civil rights laws that prohibit discrimination. Title VII of the Civil Rights Act of 1964, which prohibits discrimination, including sexual harassment, in employment, and Title VI of the Civil Rights Act of 1964, which prohibits race-based discrimination by educational institutions, both use the preponderance of the evidence standard.⁴⁰ By deviating from the standard used in other civil rights cases, the proposed rule would make it harder for students to receive fair and equitable treatment and make it less likely that they decide to report a sexual assault.

The proposed rule permits schools to limit the appeals rights of the complainant

Section 106.45(b)(5) of the proposed rule allows schools to provide an appeals process to students as long as the appeal is offered to both parties, but limits the grounds on which a complainant may appeal. Specifically, the proposed rule would affect the right to appeal remedies accompanying decisions, such that a complainant could not appeal a situation in which there was a determination of responsibility on the part of the respondent, but a remedy viewed as inadequate by the complainant in terms of protections. This means that a sexual assault survivor who believes a resolution that allows for a respondent to continue to contact her is inappropriate and continues to fear for her safety would not have any ability to appeal. Limiting the grounds for appeal for one party does not allow for equal appeal rights, which is why the American Bar Association’s Task Force on College Due Process Rights and Victim Protections recommends

³⁸ *Doe v. Cummins*, 662 F. App’x 437, 449 (6th Cir. 2016) where the United States Court of Appeals for the Sixth Circuit found no due process violation with a university’s application of the preponderance standard; *Weiner v. Fleischman* (1991) 54 Cal.3d 476, 483, which states the preponderance of the evidence standard is appropriate for civil cases which Title IX cases are; “The Preponderance of Evidence Standard: Use In Higher Education Campus Conduct Processes,” Chris Loschiavo, JD and Jennifer L. Waller, PhD; *see also Grogan v. Garner*, 459 U.S. at 389..

³⁹ *J. Lee v. The University of New Mexico*, No. CIV. 17-1230 JB\LF/ <https://atixa.org/wordpress/wp-content/uploads/2017/09/ATIXA-Guide-to-Choosing-Between-Preponderance-of-the-Evidence-v.-Clear-and-Convincing-Evidence-9.22.17.pdf>; The NCHERM Group, *Due Process and the Sex Police 2*, 17-18 (Apr. 2017), available at <https://www.ncherm.org/wp-content/uploads/2017/04/TNG-Whitepaper-Final-Electronic-Version.pdf>; Association for Student Conduct Administration, *ASCA 2014 White Paper: Student Conduct Administration & Title IX: Gold Standard Practices for Resolution of Allegations of Sexual Misconduct on College Campuses 2* (2014) available at <https://www.theasca.org/Files/Publications/ASCA%202014%20White%20Paper.pdf>; and NASPA - Student Affairs Administrators in Higher Education, *NASPA Priorities for Title IX: Sexual Violence Prevention & Response 1-2* available at https://www.naspa.org/images/uploads/main/NASPA_Priorities_re_Title_IX_Sexual_Assault_FINAL.pdf.

⁴⁰ Feminist Law Professors, “Title IX& The Preponderance of the Evidence: A White Paper,” August 2018, <http://www.feministlawprofessors.com/wp-content/uploads/2016/08/Title-IX-Preponderance-White-Paper-signed-8.7.16.pdf>.

that grounds for appeal include situations in which the sanction is viewed as either too lenient or too severe in light of the findings in the case.⁴¹

The proposed rule allows for mediation in inappropriate situations, including for sexual assault cases

Section 106.45(b)(6) of the proposed rule allows an informal resolution process, including mediation, to occur before an investigation is complete for all complaints of sexual harassment and assault under Title IX.⁴² This presents two issues of primary concern. First, the proposed rule would result in students—both complainants and respondents—essentially waiving their due process rights, or potentially admitting wrongdoing, by agreeing to an informal resolution of a case without the benefit of all information, including from an investigation.

Second, it would allow for both the survivors of sexual violence and the accused students to be pressured into mediation. Both the 2001 and 2011 guidance made clear that mediation, a tool for addressing disputes between students, is never appropriate for addressing sexual violence and assault.⁴³ Allowing mediation to address these cases can give the clear implication that a sexual assault may simply be a misunderstanding between two people, which can exacerbate feelings of guilt or shame on the part of sexual assault survivors. While the rule purports to ensure that all parties must give their voluntary consent in order to agree to mediation, the rule does not include guidance on how that mediation should be conducted in order to ensure all parties understand and maintain their rights, as well as understand the consequences of informal mediation processes.⁴⁴ Unlike the 2001 guidance, which stated that complainants must be informed of their right to end an informal process at any time, the proposed rule does not require such information be given to complainants, but does allow schools to determine circumstances that prevent them from being able to resume a formal complaint.⁴⁵ The Department should reconsider making such a change, which could limit information about process and rights, particularly in a rulemaking process that claims to be about increasing due process rights.

⁴¹ American Bar Association, *ABA Criminal Justice Section Task Force On College Due Process Rights and Victim Protections: Recommendations for Colleges and Universities in Resolving Allegations of Campus Sexual Misconduct* 8-10 (June 2017).

⁴² Proposed Rule. “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.” November 29, 2018. Office for Civil Rights, Department of Education. <https://www.regulations.gov/document?D=ED-2018-OCR-0064-0001>; 34 CFR 668.46(a).

⁴³ U.S. Department of Education, Office for Civil Rights. Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties. January, 19, 2001. <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>; U.S. Department of Education, Office for Civil Rights. Dear Colleague Letter: Sexual Violence <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

⁴⁴ Proposed Rule. “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.” November 29, 2018. Office for Civil Rights, Department of Education. <https://www.regulations.gov/document?D=ED-2018-OCR-0064-0001>; 34 CFR 668.46(a); “Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, Title IX.” January 19, 2001. Office for Civil Rights, Department of Education. <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>.

⁴⁵ Proposed Rule. “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.” November 29, 2018. Office for Civil Rights, Department of Education. <https://www.regulations.gov/document?D=ED-2018-OCR-0064-0001>; 34 CFR 668.46(a).

The proposed rule eliminates the requirement that a school controlled by a religious organization notify the Department it is claiming an exemption from Title IX's nondiscrimination requirements

While Title IX permits certain institutions that are controlled by a religious organization an exemption from the nondiscrimination provisions in law, the exemption only applies to the extent Title IX is inconsistent with the religious tenets of the institution.⁴⁶ Section 106.12 of the proposed rule would no longer require educational institutions controlled by religious organizations to notify the Assistant Secretary for Civil Rights of provisions of Title IX and its implementing regulations that conflict with specific tenets of the organization. Instead of pursuing the changes listed in section 106.12, we encourage you to continue the current regulation that provides transparency to students and families by listing the institutions claiming exemptions from Title IX's protections against discrimination, including the specific exemptions, publicly on the website of the Department.


In totality, the proposed rule would not help schools understand their responsibilities under Title IX or better protect students. In fact, it would make it easier for schools to ignore sexual assault and harassment if implemented. We are deeply concerned the proposed rule would actively undermine the work of students, schools, and experts across the country to develop strong disciplinary proceedings and school processes to address the scourge of sexual harassment and assault on America's school campuses. We urge you to reverse course and rather than finalize this rule, work on a new rule that would better ensure the safety of students that is consistent with the Congressional intent behind Title IX.

Sincerely,


PATTY MURRAY
United States Senator


RICHARD BLUMENTHAL
United States Senator


ROBERT P. CASEY, JR.
United States Senator


DIANNE FEINSTEIN
United States Senator


MARGARET WOOD HASSAN
United States Senator


DEBBIE STABENOW
United States Senator

⁴⁶ Sec. 901(a)(3) of the Education Amendments of 1972; 34 C.F.R. 106.12.

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Tammy Baldwin

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Ben Cardin

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