January 30, 2019

Submitted via: www.regulations.gov

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

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

Dear Mr. Marcus,

I am writing on behalf of the Illinois Coalition Against Sexual Assault ("ICASA") in response to the Department of Education's ("the Department") Notice of Proposed Rulemaking ("proposed rules") to express our strong opposition to the Department's proposal to amend the rules implementing Title IX of the Education Amendment Act of 1972 ("Title IX") as published in the Federal Register on November 29, 2018.

INTRODUCTION

ICASA is a not-for-profit corporation comprised of the 30 community-based sexual assault crisis centers in Illinois working together to end sexual violence. Each center provides 24-hour crisis intervention services, counseling and advocacy for victims of sexual assault and their significant others. Each center also presents prevention education programs in Illinois schools and communities. ICASA's sexual assault crisis centers support survivors throughout Illinois, from the large metropolitan area of Chicago to the very rural areas in the southern part of the state.

Our advocates, counselors and prevention educators work with victims of sexual assault and sexual harassment in schools, community colleges, colleges and universities throughout Illinois. We also work with our state and local lawmakers to improve legal and systemic responses to sexual violence. Illinois has a law that addresses sexual assault and harassment on campus: the Illinois Preventing Sexual Violence in Higher Education Act ("Illinois PSVHE Act").[1]

[1] 110 ILCS 155/1 et seq.

ICASA's experience working with students and lawmakers places us in a unique position to understand the importance of Title IX for protecting survivors' rights to full participation in federally-supported education programs and activities. We are very concerned that the proposed rules will undermine the protections of Title IX and lead to the denial of the benefits of education to survivors of sexual assault and sexual harassment. For the reasons discussed in detail in this comment, ICASA opposes the Department's proposed rules.

I. The proposed rules fail to respond to the realities of sexual assault and sexual harassment in schools.

The proposed rules ignore the devastating impact of sexual violence in schools. Instead of effectuating Title IX's purpose of providing equal access to education and keeping students safe from unlawful discrimination, including sexual abuse and sexual harassment,[2] the proposed rules make it more difficult for students to report abuse, allow (and may arguably require) schools to ignore reports when they are made, and unfairly weigh the investigation process in favor of respondents to the direct detriment of survivors.

a. Sexual harassment and sexual assault are far too common in our schools.

Far too many students experience sexual assault and sexual harassment:

- In grades 7-12, 56% of girls and 40% of boys are sexually harassed in any given school year.[3]
- More than one in five girls ages 14-18 are kissed or touched without their consent.[4]
- During college, 62% of women and 61% of men experience sexual harassment.[5]
- More than one in five women and nearly 1 in 18 men are sexually assaulted in college.[6]

[2] *Franklin v. Gwinnet Cty. Pub. Schs.*, 503 U.S. 60 (1992), recognizing sexual harassment as sex discrimination under Title IX.

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

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

[5] Catherine Hill & Elena Silva, *Drawing the Line: Sexual Harassment on Campus*, AAUW 17, 19 (2005) [hereinafter *Drawing the Line*], available at https://history.aauw.org/aauw-research/2006-drawing-the-line (noting differences in the types of sexual harassment and reactions to it).

[6] *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.

- 20% - 25% of college women and 15% of college men are victims of forced sex during their time in college.[7]
- Men and boys are far more likely to be victims of sexual assault than to be falsely accused of it.[8]

Historically marginalized and underrepresented groups are more likely to experience sexual harassment and sexual assault than their peers:

- 56% of girls ages 14-18 who are pregnant or parenting are kissed or touched without their consent.[9]
- More than half of LGBTQ students ages 13-21 are sexually harassed at school.[10]
- Nearly 1 in 4 transgender and gender-nonconforming students are sexually assaulted during college.[11]
- "Approximately 60% of Black girls experience sexual abuse by age 18," and "Black women students in various academic settings reported experiencing rape: 16.5% in a high school sample and 36% in a college sample."[12]
- Students with disabilities are 2.9 times more likely than their peers to be sexually assaulted.[13]

Sexual harassment occurs both on-campus and in off-campus spaces associated with school:

- Nearly 9 in 10 college students live off campus.[14]

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[7] Cullen, F., Fisher, B., & Turner, M., *The sexual victimization of college women* (NCJ 182369) (2000). Retrieved from the U.S. Department of Justice, Office of Justice Programs, National Institute of Justice: https://www.ncjrs.gov/pdffiles1/nij/182369.pdf.

[8] *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.

[9] National Women's Law Center, *Let Her Learn: Stopping School Pushout for Girls Who Are Pregnant or Parenting* 12 (2017) [hereinafter *Let Her Learn: Pregnant or Parenting Students*], available at https://nwlc.org/resources/ stopping-school-pushout-for-girls-who-are-pregnant-or-parenting.

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

[11] *AAU Campus Climate Survey*, *supra* note 6 at 13-14.

[12] End Rape on Campus *Prevalence Rates: Sexual Assault Statistics and Facts*, available at http://endrapeoncampus.org/new-page-3 (January 2019).

[13] National Women's Law Center, *Let Her Learn: Stopping School Pushout for: Girls With Disabilities* 7 (2017) [hereinafter *Let Her Learn: Girls with Disabilities*], available at https://nwlc.org/resources/stopping-school-pushout-for-girls-with-disabilities.

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

- 41% of college sexual assaults involve off-campus parties.[15]
- Students are far more likely to experience sexual assault if they are in a sorority (nearly 1.5x more likely) or fraternity (nearly 3x more likely).[16]
- Only 8% of all sexual assaults occur on school property.[17]

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

Reporting sexual assault and sexual harassment is difficult, and the proposed rules would further discourage students from asking their schools for help. Already, only 12% of college survivors[18] and 2% of girls ages 14-18[19] report sexual assault to their schools or the police.

Students often choose not to report for fear of reprisal, because they believe their abuse was not important enough, or because they think the no one would do anything to help.[20] Some students—especially students of color, undocumented students,[21] LGBTQ students,[22] and students with disabilities—are less likely than their peers to report sexual assault to the police due to increased risk of being subjected to police violence and/or deportation. Survivors of color may not want to report to the police and add to the criminalization of men and boys of color. For these students, schools are often the only avenue for relief.

When schools fail to provide effective responses, the impact of sexual harassment can be devastating.[23] Too many survivors end up dropping out of school because they do not feel safe

[15] United Educators, *Facts From United Educators' Report - Confronting Campus Sexual Assault: An Examination of Higher Education Claims*, https://www.ue.org/sexual_assault_claims_study.

[16] Jennifer J. Freyd, *The UO Sexual Violence and Institutional Betrayal Surveys: 2014, 2015, and 2015-2016* (Oct. 16, 2014), available at https://www.uwire.com/2014/10/16/sexual-assault-more-prevalent-in-fraternities-and-sororities-study-finds (finding that 48.1% of females and 23.6% of males in Fraternity and Sorority Life have experienced non-consensual sexual contact, compared with 33.1% of females and 7.9% of males not in FSL).

[17] RAINN, *Scope of the Problem: Statistics*, https://www.rainn.org/statistics/scope-problem.

[18] *Poll: One in 5 women say they have been sexually assaulted in college*, WASHINGTON POST (June 12, 2015), https://www.washingtonpost.com/graphics/local/sexual-assault-poll.

[19] *Let Her Learn: Sexual Harassment and Violence*, *supra* note 4 at 1.

[20] RAINN, *Campus Sexual Violence: Statistics*, https://www.rainn.org/statistics/campus-sexual-violence.

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

[22] National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey: Executive Summary* 12 (Dec. 2016) [hereinafter *2015 U.S. Transgender Survey*], available at https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf.

[23] *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.

on campus; some are even expelled for lower grades in the wake of their trauma.[24] For example, 34% of college survivors drop out of college.[25]

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

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 and sexual harassment. The Department's 2001 Guidance, which went through public notice-and-comment and has been enforced by both Democratic and Republican administrations,[26] defines sexual harassment as "unwelcome conduct of a sexual nature."[27] The 2001 Guidance requires schools to address student-on-student harassment if *any employee* "knew, or in the exercise of reasonable care should have known" about the harassment. In the context of employee-on-student harassment, the Guidance requires schools to address harassment "whether or not the [school] has 'notice' of the harassment."[28] Under the 2001 Guidance, schools that do not "take immediate and effective corrective action" would violate Title IX. These standards have appropriately guided OCR's enforcement activities, effectuating Title IX's nondiscrimination mandate by requiring schools to respond quickly and effectively to serious instances of harassment and fulfilling OCR's purpose of ensuring equal access to education and enforcing students' civil rights.

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

[25] 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.

[26] These standards have been reaffirmed time and time again, in 2006 by the Bush Administration, in 2010, 2011, and 2014 in guidance documents issued by the Obama Administration, and even in the 2017 guidance document issued by the current Administration. U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter: Sexual Harassment* (Jan. 25, 2006) [hereinafter 2006 Guidance], available at https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html; U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter: Harassment and Bullying* (Oct. 26, 2010) [hereinafter 2010 Guidance], available at https://ww2ed.gov/about/offices/ list/ocr/letters/colleague-201104.pdf; U.S. Dep't of Educ. Office of Civil Rights, *Dear Colleague Letter: Sexual Violence* at 4, 6, 9, &16 (Apr. 4, 2011) [hereinafter 2011 Guidance], available at https://ww2ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf; 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], available at 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], available at https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf.

[27] U.S. Department of Educ., Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001) [hereinafter 2001 Guidance], available at https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html.

[28] *Id.*

This standard appropriately differs from the higher bar erected by the Supreme Court in the very specific and narrow context of a Title IX lawsuit seeking monetary damages against a school because of sexual harassment. To recover monetary damages, a plaintiff must show that their school was deliberately indifferent to known sexual harassment that was severe and pervasive and deprived a student of access to educational opportunities and benefits.[29] But in establishing that standard the Court recognized that it was *specific to private suits seeking monetary damages*, not to administrative enforcement. It clearly 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.[30] 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.[31]

The 2001 Guidance directly addressed this, concluding that it was inappropriate for the Department to limit its enforcement activities to the narrower damages standard and that the Department would continue to enforce the broad protections provided under Title IX. Indeed, in the current proposed regulations, the Department acknowledges that it is "not required to adopt the liability standards applied by the Supreme Court in private suits for money damages."[32]

As set out in further detail below, the Supreme Court's notice requirement, definition of harassment, and deliberate indifference standard, designed to account for the unique circumstances that present themselves when determining monetary liability, have no place in the far different context of administrative enforcement with its iterative process and focus on voluntary corrective action by schools. By choosing to import those liability standards, the Department confuses its enforcement mechanisms with court processes, which have no place in administrative proceedings. This component of the proposed rules threatens devastating effects on students.

a. The proposed rules create inconsistent rules for students versus employees, providing far less protection for students than adult employees.

Under Title VII, the federal law that addresses workplace sexual 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" (emphasis added). If the employee is harassed by a coworker or other third party, the school is liable if (1) it "knew or should have

[29] *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).

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

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

[32] 83 Fed. Reg. 61468, 61469.

known of the misconduct" and (2) failed to take immediate and appropriate corrective action.[33] 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.[34]

However, under the proposed rules, a school would only be liable for harassment against a student if it is (1) deliberately indifferent to (2) sexual harassment that is so severe, pervasive, *and* objectively offensive that it *denied* the student access to the school's program or activity; (3) the harassment occurred within the school's program or activity; and (4) a school employee with "the authority to institute corrective measures" had "actual knowledge" of the harassment. In other words, under the proposed rules, schools would be held to a far lesser standard in addressing the harassment of students, including minors, under its care than 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.[35] By jettisoning this standard, the Department would free schools 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, the school would be held responsible for the acts of serial abusers like Larry Nassar, who used his position of authority as a school doctor to assault hundreds of students. Complaints about Nassar started as early as 1997 when two teens involved in a Michigan State University (MSU) junior gymnastics program told Kathie Klages, then MSU head gymnastics coach and the official running the program, that Nassar penetrated their vaginas with his fingers during treatments for sports injuries.[36] Klages was aware of the complaint and did nothing. If MSU had taken immediate and appropriate action based on this complaint to a

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[33] *Meritor Savings Bank v. Vinson*, 477 US 57, 476, 477 (1986) (internal quotations and brackets omitted); Equal Employment Opportunity Commission, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 18, 1999) [*hereinafter* EEOC Guidance] (An employer is automatically liable for harassment by "a supervisor with immediate (or successively higher) authority over the employee."), available at https://www.eeoc.gov/policy/docs/harassment.html.

[34] *Meritor*, 477 US at 476, 477 (citing *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2270 (1998); *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2293 (1998)).

[35] 2001 Guidance, *supra* note 27 ("if an employee who is acting (or who reasonably appears to be acting) in the context of carrying out these responsibilities over students engages in sexual harassment – generally this means harassment that is carried out during an employee's performance of his or her responsibilities in relation to students, including teaching, counseling, supervising, advising, and transporting students – and the harassment denies or limits a student's ability to participate in or benefit from a school program on the basis of sex, the recipient is responsible for the discriminatory conduct").

[36] "Who knew what and when about Larry Nassar at Michigan State University" by Julie Mack, Feb. 7, 2018. https://www.mlive.com/news/index.ssf/2018/02/who_knew_what_when_about_larry.html

management-level employee who exercised authority over the students, they school may have been able to stop hundreds of young women from being victimized by Nassar.

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. When they are not affirmatively prohibited from acting, the proposed rules still create a more demanding standard for children reporting sexual harassment in schools than for adults in the workplace trying to get help in ending sexual harassment.

b. The proposed notice requirement undermines Title IX's discrimination protections by making it harder to report sexual harassment and assault. (§§ 106.44(a) & 106.30)

Under the proposed rules, 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) a K-12 teacher (but only for student-on-student harassment, *not* employee-on-student harassment); or (iii) an official who has "the authority to institute corrective measures."[37] This is a dramatic change, as the Department has long required schools to address *student-on-student* sexual harassment if almost any school employee[38] either knows about it or should reasonably have known about it.[39] The 2001 Guidance recognized the particular harms of students being preyed on by adults and students' vulnerability to pressure from adults to remain silent and accordingly acknowledged schools' heightened responsibilities to address harassment by their employees.

While ICASA recognizes that it is valuable for students to have confidential advisors at the school for seeking assistance and resources without triggering an official investigation (similar to the confidential advisor requirement in Illinois PSVHE Act as described in Section V below), the proposed rules go too far in limiting when a report requires action by the school.

Under the proposed rules, if a K-12 student told a non-teacher school employee they trust (such as a guidance counselor, school nurse, teacher aide, or athletics coach) that they had been sexually assaulted by another student, the school would have no obligation to help the student.[40] Perversely, the proposed rules provide a more limited duty for K-12 schools to respond to a

[37] Proposed rule § 106.30.

[38] 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 27 at 13.

[39] *Id* at 14.

[40] *See* proposed rule § 106.30 (83 Fed. Reg. 61496) (for K-12, limiting notice to "a teacher in the elementary and secondary context with regard to student-on-student harassment).

student's allegations of sexual harassment by a school employee than by a student. If a K-12 student told a teacher that he had been sexually assaulted by another teacher or other school employee, the school would have no obligation to help him.[41] And if a college student told her professor or resident assistant (RA) that she had been raped by another student, by a professor or by another employee at the university, the school would have no obligation to help them.

Sexual assault is already very difficult to talk about. Sections 106.44(a) and 106.30 of the proposed rules 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—just because their victims reported their experiences to school employees like athletic trainers and coaches, who are not considered to be school officials who have the "authority to institute corrective measures." These proposed provisions would absolve some of the worst Title IX offenders of legal responsibility and liability.

Students often tell teachers and coaches or even other students about sexual abuse prior to notifying an entity in charge of formal reporting like police or other authorities. A 2005 study in Chicago demonstrated that while 80% of the women in the study told someone about their assault, of those women 97.6% told informal support sources and 60.7% told formal support sources.[42] Of women disclosing their assaults, 38.5% disclosed their assault *only* to informal support sources, and 59% disclosed both to informal and formal support sources.[43] The assaults of these women occurred at an average age of 19, and 54% percent of respondents also reported sexual abuse or assault before age 14.[44]

The collective experience of our coalition is that this Chicago study demonstrates the reality about to whom and how survivors, particularly school-aged survivors, report their sexual abuse. A Title IX response that is only triggered by a very specific formal report will allow sexual violence that occurs on college campuses and K-12 schools, to flourish. It will fail to create a safe environment for survivors to come forward and in turn hold abusers accountable

One of ICASA's sexual assault centers encountered a situation where a report to a coach resulted in evidence being destroyed instead of immediate and appropriate action being taken by the school. A student became aware that a coach was having sex with a 15-year-old. The student told the assistant coach and reported that he had seen sexual text messages between the coach and the minor girl. The assistant coach informed the coach of this conversation and failed to inform the school or make a mandated report. The coach who was sexually abusing the teenage girl was then able to contact her and direct her to destroy the text message evidence. The coach and assistant coach then met with the athletic director at the high school, and the following day the principal had the girl come to his office. Waiting there for her were her father, mother, step-

[41] *See id.*

[42] *Correlates of Women's Sexual Assault Disclosure to Informal and Formal Support Sources*, Starzynski, Laura L; Ullman, Sarah E; Filipas, Henrietta H; Townsend, Stephanie M.; Violence and Victims; Vol. 20, Iss. 4, 417-34 (2005).
[43] *Id.*
[44] *Id.*

mother, school resource officer, athletic director and the principal. The principal then asked the victim to explain what happened to her in front of all of these adults. This victim was brought into an environment that would be difficult for an adult let alone a young teen.

This example shows how important Title IX is to ensure that all complaints are taken seriously and that students receive appropriate responses and respectful treatment. Under the proposed rule, the complaint to the assistant coach would not require action by the school, and if the sexual abuse occurred off of school grounds, no investigation or intervention by the school would be required by Title IX. This type of situation is exactly why Title IX is needed to protect students. The proposed rules diminish those protections in ways that will seriously harm victims.

Finally, in a study done by David Lisak and Paul Miller in 2002,[45] 1,882 college age men were surveyed about whether or not they had committed acts that meet the legal definition of rape or attempted rape. Of the 1882 men surveyed, 120 men reported committing 483 rapes against women they knew. These rapes were all unreported to formal authorities. In just one study it was found that there were 483 unreported rapes by college students. In light of evidence like this, the Department should be proposing rules that make it easier and safer to report, but the opposite is the case here. The proposed rules would make it harder for victims to report sexual assault and harassment to their schools and make it less likely that schools will act to protect students who do report.

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

The proposed rule defines sexual harassment as "unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the [school's] education program or activity"[46] and mandates dismissal of complaints of harassment that do not meet this standard.

Even if a student reports sexual harassment to the "right person," their school would be *required* to ignore the student's Title IX complaint if the harassment has not yet actively harmed 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.

This proposed definition is so narrow that it offers students less protection than Title VII offers to employees in private workplaces. The Department's proposed definition is out of line with Title IX's purposes and precedent, discourages reporting, and excludes many forms of sexual harassment that interfere with students' access to educational opportunities.

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[45] *Repeat Rape and Multiple Offending Among Undetected Rapists*, Lisak, David; Miller, Paul M; Violence and Victims, Vol. 17, No.1 (2002); available at https://www.davidlisak.com/wp-content/uploads/pdf/RepeatRapeinUndetectedRapists.pdf

[46] Proposed rule § 106.30.

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."[47] 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 required to investigate and stop the harassment. If a student is turned away by their school after reporting sexual harassment the first time because the school dismissed it as not serious enough, that student is extremely unlikely to report a second time when the harassment escalates.

In 2008, the state of Illinois held public hearings in school districts across the state gauging the impact of sexual violence on K-12 students and adequacy of responses by schools in addressing sexual violence. Students, parents, educators, advocates and community leaders shared information about the impact of sexual violence on student survivors as it related to the inability to attend school, complete assignments on time or at all and participate in student life, which as a result, often ended up in suspensions, expulsions or truancy for student survivors or discontinuation of student participation in extra-curricular activities.

Creating a safe and supportive learning environment is key to keeping students from participating in behaviors that lead to suspension and expulsions.[48] Specifically for sexual assault survivors, who are already more likely not to report, these behaviors are often the first manifestations of trauma. The proposed rules create a threshold of harm that restricts schools' ability to intervene and contribute to academic success for victims in the aftermath of trauma before it is too late.

It is unclear under the proposed rules how much interference with a student's education would be required to establish that they have been effectively denied equal access to a program or activity. Would the victim of sexual harassment need to stop attending a class or fail a course or even drop out of school to qualify for protection? If that is not necessary, then how far would a student's grades need to fall to show that that they were no longer benefiting from equal access to education?

The definition of sexual harassment in the proposed rules is difficult to understand and would be challenging to apply in practice. Also, instead of requiring schools to protect students in a way that allows them to continue to have meaningful access to educational opportunities, it instead it seems to require a significant level of failure to be experienced by the student before they would be eligible for protection. This goes against the goals and purposes of Title IX.

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[47] 2001 Guidance, *supra* note 27.

[48] VOYCE, 2013; Schoolwartz, D. Leflore-Porter, L. 2013, https://www.isbe.net/Documents/ess-task-force-final-report0610.pdf

The Department repeatedly attempts to justify its proposed definition by citing "academic freedom and free speech."[49] But harassment is not protected speech if it creates a "hostile environment,"[50] i.e., if the harassment limits a student's ability to participate in or benefit from a school program or activity.[51] Schools have the authority to regulate harassing speech. The Supreme Court held in *Tinker v. Des Moines* that school officials can regulate student speech if they reasonably forecast "substantial disruption of or material interference with school activities" or if the speech involves "invasion of the rights of others."[52]

The right to free speech is not absolute, and this is especially true in schools where students are essentially a "captive audience." In *Bethel Sch. Dist. v. Fraser*, the Supreme Court allowed a student to be punished by the school for making a speech that was centered on an "elaborate, graphic, and explicit sexual metaphor."[53] The Court noted: "The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission. . . . Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education."[54] Similarly, sexual assault and sexual harassment are inconsistent with the fundamental values of our society and interfere with students' equal access to educational programming. Therefore, Title IX may appropriately require educational institutions to intervene and protect the student victims from those who commit these acts.

There is no real conflict between Title IX's regulation of sexually harassing speech in schools and the First Amendment, just as Title VII has not been held to violate the First Amendment when it prohibits supervisors and co-workers from sexually harassing employees in government, schools or other public employment. From our home-state's perspective, Illinois Courts have held that "Sexual harassment is of such slight social value that it is not afforded first amendment protection."[55] The Department should not use the First Amendment to shield schools from taking responsibility for protecting students from sexual harassment.

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[49] 83 Fed. Reg. 61464, 61484. *See also* § 106.6(d)(1), which states that nothing in Title IX requires a school to "[r]estrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution."

[50] *See* Joanna L. Grossman & Deborah L. Brake, *A Sharp Backward Turn: Department of Education Proposes to Protect Schools, Not Students, in Cases of Sexual Violence*, VERDICT (Nov. 29, 2018) [hereinafter *A Sharp Backward Turn*], available at https://verdict.justia.com/2018/11/29/a-sharp-backward-turn-department-of-education-proposes-to-protect-schools-not-students-in-cases-of-sexual-violence. ("There is no legitimate First Amendment or academic freedom protection afforded to unwelcome sexual conduct that creates a hostile educational environment.").

[51] 2001 Guidance, *supra* note 27.

[52] 393 U.S. 503, 513, 514 (1969).

[53] 478 U.S. 675, 678 (1986)

[54] *Id. at 686-686.*

[55] *People v. Allen*, 680 N.E.2d 795, 800 (June 2, 1977) (citing *Trayling v. Board of Fire and Police Com'rs of Village of Bensenville*, 652 N.E.2d 386, 395 (June 22, 1995) ("It would be absurd if *Pickering* [*v. Board of Education of Township High School District 205*, 391 U.S. 563 (1968)], created a safe harbor for the commission of

d. Proposed rules §§ 106.30 and 106.45(b)(3) would *require* schools to ignore harassment that occurs outside of a school activity, even when it creates a hostile educational environment.

The proposed rules would *require* schools to ignore all complaints of off-campus or online sexual harassment that happen outside of a school-sponsored program, even if the student is forced to see their harasser on campus every day and the harassment directly impacts their education as a result.

To understand why it is crucial to maintain Title IX protections for off-campus activity, one only need to look at the Department's own recent decision to cut off partial funding to the Chicago Public Schools for failing to address two reports of off-campus sexual assault, which the Department described as "serious and pervasive violations under Title IX."[56] In one case, a 10th grade student was forced to perform oral sex in an abandoned building by a group of 13 boys, 8 of whom she recognized from school. In the other case, another 10th grade student was given alcohol and sexually abused by a teacher in his car.

If the proposed rules become final, school districts would be required to dismiss similarly egregious complaints simply because they occurred off-campus, even if they result in a hostile educational environment. Off-campus assaults can have a devastating effect on a student's ability to participate in class with a teacher or student who is their off-campus abuser. The proposed rules ignore the effect of trauma from sexual assault and harassment and its impact on access to education regardless of where the assault or harassment occurred.

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 . . . ."[57] 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,"[58] regardless of where it occurs.[59]

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sexual harassment by public employees . . . while an individual employed by a private entity would be subject both to the Act and Title VII. We decline to so hold.")

[56] *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.

[57] 20 U.S.C. § 1681(a).

[58] 2001 Guidance, *supra* note 27.

[59] 2017 Guidance, *supra* note 26 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 26 ("a school must process all complaints of sexual violence, regardless of where the conduct occurred"); 2011 Guidance, *supra* note 26 ("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 26 at 2 (finding Title IX violation where "conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's

The Department's proposed rules ignore the reality that sexual harassment that happens off campus and outside of a school activity is no less traumatic than on-campus harassment.[60] The negative impact on the student's education is typically the same if they are forced to see their harasser regularly at school.

Almost 9 in 10 college students live off campus,[61] and much of student life takes place outside of school-sponsored activities. If a student is assaulted off-campus by a professor, his college would be required to ignore his complaints—even if he has to continue taking the professor's class. If a college student is raped at an off-campus party, her college would not need to investigate—even if she sees her rapist every day in class, residence halls or the student union. If schools interpret the proposed rule to prevent them from addressing assault or harassment that occurs off campus in fraternity and sorority houses,[62] this is particularly troubling. Students of all genders are more likely to be sexually assaulted if they belong to a fraternity or sorority.[63]

Also, this restriction on Title IX protection ignores the reality that student services and residential options are established on the edges of campus to serve the student population, and colleges and universities rely on these services being available to supplement needs for housing, meeting space, food service and shopping that cannot be fully met on campus. These may not be university-owned properties, but they are de facto student inhabited spaces and absent the educational institution they would not exist, and the students would not likely converge there.

The college years are often a time when young people first experiment with both sex and alcohol, and often the combination can lead to inappropriate and even dangerous situations, which are most likely happening off campus. Sexual assault may happen because the person has gotten drunk and is taken advantage of, or as a result of a spiked drink or "date rape drug" being purposefully used to create a situation where the intended victim is vulnerable or cannot fight back. Alcohol is often used to facilitate sexual assault, and often students seek access to alcohol

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ability to participate in or benefit from the services, activities, or opportunities offered by a school," regardless of location of harassment).

[60] The Department itself admitted in the previous leaked draft of the proposed rules that 41% of college sexual assaults occur off campus. *See* Letter from Anne C. Agnew to Paula Stannard et al., *HHS Review: Department of Education Regulation – Noon September 10*, U.S. DEP'T OF HEALTH & HUMAN SERVICES 79 n.21 (Sept. 5, 2018) [*hereinafter* Draft NPRM], available at https://atixa.org/wordpress/wp-content/uploads/2018/09/Draft-OCR-regulations-September-2018.pdf.

[61] Sharpe, *How Much Does Living Off-Campus Cost?*, *supra* note 14.

[62] Although the preamble mentions one case where a Kansas State college fraternity was considered an "education program or activity" for the purposes of Title IX, the Department emphasizes that there are many "factors" and that the determination would be specific to each incident. For example, it would depend on whether the school "owned the premises; exercised oversight, supervision, or discipline; or funded, sponsored, promoted, or endorsed the event or circumstance" (83 Fed. Reg. 61468). This multi-factor test is not only unnecessarily unclear and confusing but also is not included in the proposed regulatory language, making it difficult for students and schools to understand their rights and obligations under Title IX. Schools might certainly conclude that § 106.30 and § 106.45(b)(3) mandates dismissal of complaints from all students who are sexually assaulted at unrecognized fraternities, sororities, and other unrecognized social clubs; at unaffiliated local bars and clubs; in non-residential housing; and through online channels in many instances.

[63] Freyd, *supra* note 16.

off-campus. Under the proposed rules, colleges are unable to address the impact of alcohol facilitated off-campus sexual assault on the access to education by the victim.

Restricting Title IX to apply only in cases that occur on campus does a great disservice to victims. The proposed rule would pose particular risks to students attending urban colleges and community colleges and vocational schools.

In urban areas like Chicago, off-campus housing is more common than on-campus housing. This is the case for nearly every higher education institution in Chicago. The City College of Chicago community college system consists of seven colleges and seven satellite campuses. In addition, there are three public universities in Chicago, and it is also home to more than two dozen private, non-profit colleges and universities. The largest university in Chicago, with more than 30,000 enrollees, is the University of Illinois at Chicago (UIC) where 85% of students live off campus. Northeastern Illinois University enrolls nearly 15,000 students, and Chicago State University has around 10,000. University of Chicago, which has the most on-campus housing in Chicago only has about 54% of students living in that housing. With so few students living on campus, bars and off-campus parties are often where sexual violence is happening in communities like Chicago. The proposed rules ignore the realities of college life and sexual assault.

Additionally, it is common that none of the students attending community colleges and vocational schools live on campus, so when they are sexually assaulted and harassed by faculty or other students it is especially likely to occur off campus.

One of the Illinois sexual assault crisis centers is in a rural area where there are four community colleges with a total enrollment of 26,000 students. None of these community colleges offer on-campus housing. Students on athletic scholarship at these local community colleges receive free tuition and books and are referred by college officials to certain houses or apartments off campus. Many times, the referral is to a house or apartment building that only houses athletes from the team. As the housing is not on campus, the colleges would not be able to act regarding sexual assault or harassment that takes place on what is really de facto college accommodations.

An advocate reported her experience with two sexual assaults involving community colleges with female student athletes as victims and male student athletes as the offenders. These two incidents occurred in the same house that had been turned into student apartments. One occurred before the April 2011 Department of Education Office for Civil Rights Dear Colleague Letter and the other occurred after that guidance was in place. The results were very different.

In the first instance, prior to 2011, a female student athlete was sexually assaulted in housing to which she was steered by the school. She attended the college on an athletic scholarship and was some distance from her hometown. An older male student also attending school on an athletic scholarship resided at the same property. There was a party at the property and both students attended. The male student went to the female student's apartment and sexually assaulted her. She reported the sexual assault to the police immediately. Charges were considered but ultimately not filed. She also reported the assault to campus authorities. The victim made the decision to leave the school at winter break. The offender opted to remain in his apartment during the break. The victim asked the school if it could have him leave his apartment for a few hours so she could move her things. The school declined, so she asked her advocate to intervene,

and the advocate called and spoke to the president of the college. The president informed the advocate that because the housing was not owned by the school the college had no power to ask the other student to leave, even temporarily. The advocate pointed out that every school year student athletes were living there and that during summer no one lived there, so it appeared the housing was reserved for the college. After a few days, the college arranged for the male student to leave so the victim could remove her personal items from her apartment. No Title IX process occurred and, other than leaving his apartment for a few hours, the male student faced no consequences for his sexual assault.

In contrast, after 2011, another similar sexual assault was handled very differently. At the beginning of the school year, a female student athlete was sexually assaulted by a male student athlete in that same apartment building. Like the previous victim, she was attending school on an athletic scholarship and was some distance from her hometown. Also, the male offender was guided to the housing by the community college. The two students went to a party at the male student's apartment complex, and the male student sexually assaulted the female student. The victim reported the incident to the police, who referred her for services at the local sexual assault center. She also reported the incident to the college, which acted on this information immediately and started the process as outlined in its Title IX policy. The female student felt supported by the school, and her family members repeatedly expressed their appreciation for the school's quick response. Ultimately the male student was barred from attending school. Later, criminal sexual assault charges were also filed against the offender. More importantly from a Title IX perspective, the female student was able to continue her studies through the end of the school year.

These two assaults have very similar facts. The only real difference is the outcome for the victims. One was afforded appropriate Title IX protections and was able to remain at college and continue her education. The other was not provided with support or protections, and she left school. As can be seen from this example, Title IX can make a clear difference in a student's life. However, restricting its reach strictly to harassment and assaults that happen on-campus, as provided for in the proposed rules, would severely and unnecessarily limit Title IX protections and not fully protect victims' access to education.

e. The Department's proposed "deliberate indifference" standard would allow schools to do virtually nothing in response to complaints of sexual harassment and assault.

The "deliberate indifference" standard adopted by the proposed rules is a much lower standard than that required of schools under current guidance, which requires schools to act "reasonably" and "take immediate and effective corrective action" to resolve harassment complaints.[64] Under the proposed rules, by contrast, schools would simply have to be not deliberately indifferent—which means that their response to harassment would be deemed to comply with Title IX as long as it was not *clearly* unreasonable. As long as a school follows various procedural requirements set out in the proposed rules, the school's response to harassment complaints could not be challenged. The practical effects of this proposed rule would shield schools from any

[64] 2001 Guidance, *supra* note 27.

accountability under Title IX, even if a school mishandles a complaint, fails to provide effective supports for survivors, and wrongly determines against the weight of the evidence that an accused harasser was not responsible for sexual assault.

One of our ICASA sexual assault crisis centers had a female high school student report to her advocate that she had complained to the principal of her high school about a male teacher. The complaint was that the teacher would stand in the hallway and as she walked by would make sexual comments to her. These comments were about her body and how she dressed, and they had been ongoing for the entire school year. The victim met with various personnel about this matter. In the end, she was told by the school that nothing could be done to stop the teacher's behavior. She was very frustrated with how she was treated. A year and a half later this teacher was arrested and charged with criminal sexual assault of a student at this school. He was eventually sentenced to prison. While the school may have followed its process for hearing complaints, the school's lack of effective action in response to the first victim's complaints of sexual harassment by a teacher allowed that teacher's behavior to escalate to criminal activity.

Title IX should hold schools to a higher standard of response to complaints of sexual harassment and assault than deliberate indifference. The proposed rules undermine the goals of Title IX to combat sexual harassment and sexual assault in schools and on college campuses.

III. The grievance procedures required by the proposed rules would impermissibly favor named harassers, 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.[65] The proposed rules purport to require "equitable" processes as well.[66] 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 and harms complainants.

The Department repeatedly uses the purported need to increase protections of respondents' "due process rights" to justify weakening Title IX protections for complainants and proposes a provision specifying that nothing in the rules would require a school to deprive a person of their due process rights.[67] 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 schools[68] require only "some kind of" "oral

[65] 34 C.F.R. § 106.8(b).

[66] *See* proposed rule § 106.8(c).

[67] Proposed rule § 106.6(d)(2).

[68] Constitutional due process requirements do not apply to private institutions.

or written notice" and "some kind of hearing."[69] 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."[70] The Court has also approved at least one circuit court decision holding that expulsion from a public school does not require "a full-dress judicial hearing."[71] Furthermore, the Department's 2001 Guidance already instructs schools to protect the "due process rights of the accused."[72] Adding § 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.

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

Under proposed rule § 106.45(b)(1)(iv), schools would be required to presume that the reported harassment did not occur, which would ensure partiality to the respondent. This presumption would also exacerbate rape myths upon which many of the proposed rules are based—namely, the myth that women and girls often lie about sexual assault.[73] The presumption of innocence is a criminal law principle, incorrectly imported into this context[74]; criminal defendants are presumed innocent until proven guilty because their very liberty is at stake—criminal defendants go to prison if they are found guilty. There is no such principle in civil proceedings or civil rights proceedings, and Title IX is a civil rights law that ensures that sexual harassment is never the end to anyone's education.

Section 106.45(b)(1)(iv) would only encourage schools to ignore or punish historically marginalized and underrepresented groups that report sexual harassment for "lying" about it.[75] Schools may be more likely to ignore or punish survivors who are women and girls of color,[76]

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[69] *Goss v. Lopez*, 419 U.S. 565, 566, 579 (1975).

[70] *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).

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

[72] 2001 Guidance, *supra* note 27 at 22.

[73] 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 8.

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

[75] *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.

[76] *E.g.*, Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARVARD J.L. & GENDER 1, 16, 24-29 (forthcoming), available at https://ssrn.com/abstract=3168909; National Women's Law Center, *Let Her Learn: A Toolkit to Stop School*

pregnant and parenting students,[77] and LGBTQ students[78] because of unfair and damaging stereotypes that label them as "promiscuous" and "untrustworthy."

Women and girls of color already face unfair discipline due to race and sex stereotypes.[79] Schools are also more likely to ignore, blame, and punish women and girls of color who report sexual harassment due to harmful race and sex stereotypes that label them as "promiscuous."[80] For example, Black women and girls are commonly stereotyped as "Jezebels," Latina women and girls as "hotblooded," Asian American and Pacific Islander women and girls as "submissive, and naturally erotic," Native women and girls as "sexually violable as a tool of war and colonization," and multiracial women and girls as "tragic and vulnerable, historically, products of sexual and racial domination" (internal quotations and brackets omitted).[81]

Black women and girls are especially likely to be punished by schools. 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 K-12, and that while Black girls represented 20% of all preschool enrolled students, they were 54% of preschool students who were suspended.[82] The Department's 2015-16 CRDC again shows that Black girls are more likely to be suspended and expelled than other girls.[83] 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 to trauma because of stereotypes that they are "angry" and "aggressive."[84]

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.

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

[78] *See e.g.*, David Pinsof, et al., *The Effect of the Promiscuity Stereotype on Opposition to Gay Rights* (2017), available at https://doi.org/10.1371/journal.pone.0178534.

[79] *Let Her Learn: Girls of Color*, *supra* note 76 at 1.

[80] *E.g.*, Cantalupo, *supra* note 76 at 16, 24-29.

[81] *Id.* at 24-25.

[82] 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), available at https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf.

[83] U.S. Dep't of Education, Office for Civil Rights, *School Climate and Safety: Data Highlights on School Climate and Safety In Our Nation's Public Schools* (Apr. 2018), available at

https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf.

[84] NAACP Legal Defense and Educational Fund, Inc. & National Women's Law Center, *Unlocking Opportunity for African American Girls: A Call to Action for Educational Equity* 5, 18, 20, 25 (2014), available at https://nwlc.org/wp-content/uploads/2015/08/unlocking_opportunity_for_african_american_girls_report.pdf. *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), available at http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1312&context=bglj.

Women and girls who are pregnant or parenting are more likely to experience 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. For example, 56% of girls ages 14-18 who are pregnant or parenting are kissed or touched without their consent.[85]

LGBTQ students are more likely to experience sexual harassment than their peers. For example, more than half of LGBTQ students ages 13-21 are sexually harassed at school,[86] and nearly one in four transgender and gender-nonconforming students are sexually assaulted during college.[87] However, LGBTQ students are also less likely to report sexual assault to school authorities or the police because they are rightfully concerned about further discrimination or retaliation due to their LGBTQ status.[88] They are also less likely to be believed due to stereotypes that they are more "promiscuous" or bring the "attention" upon themselves.

As the Department notes in the preamble, "students with disabilities have different experiences, challenges, and needs."[89] But the proposed rules are especially harmful to students with disabilities, who already face additional barriers to equal access to education and are 2.9 times more likely than their peers to be sexually assaulted.[90] They are also less likely to be believed due to stereotypes about people with disabilities and often have greater difficulty describing the harassment they experience.[91]

In taking a position that at the outset of an investigation complainants are not to be believed, the proposed rules ignore Title IX's nondiscrimination mandate and buy into negative stereotypes regarding the complainants. Requiring a presumption that the reported harassment or assault did not happen conflicts with the current Title IX rules[92] and other proposed rules,[93] which require that schools provide "equitable" resolution of complaints. A presumption in favor of one party 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." ICASA encourages the Department to withdraw the proposed rules and not implement this harmful presumption.

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[85] *Let Her Learn: Pregnant or Parenting Students*, *supra* note 9 at 12.

[86] *2017 National School Climate Survey*, *supra* note 10 at 27.

[87] *AAU Campus Climate Survey*, *supra* note 6 at 13-14 (Sept. 2015), available at https://www.aau.edu/key-issues/aau-climate-survey-sexual-assault-and-sexual-misconduct-2015.

[88] *2015 U.S. Transgender Survey*, *supra* note 22 at 12.

[89] 83 Fed. Reg. 61483.

[90] *Let Her Learn: Girls with Disabilities*, *supra* note 13 at 7.

[91] *E.g.*, Angela Browne, et al., *Examining Criminal Justice Responses to and Help-Seeking Patterns of Sexual Violence Survivors with Disabilities* 11, 14-15 (2016), available at https://www.nij.gov/topics/crime/rape-sexual-violence/Pages/challenges-facing-sexual-assault-survivors-with-disabilities.aspx.

[92] 34 C.F.R. § 106.8(b).

[93] Proposed rules §§ 106.8(c) and 106.45(b).

b. The proposed rules would improperly require survivors and witnesses in college and graduate school to submit to live cross-examination by their named harasser's advisor of choice, causing further trauma.

Proposed rule § 106.45(b)(3)(vii) requires colleges and graduate schools to conduct a "live hearing," and requires parties and witnesses to submit to cross-examination by the other party's "advisor of choice." This could be an attorney who is prepared to grill the survivor about the traumatic details of the assault, or possibly an angry parent or a close friend of the named harasser. The adversarial and contentious nature of cross-examination would further traumatize college and graduate school survivors who seek help through Title IX. Being asked detailed, personal, and humiliating questions often rooted in gender stereotypes and rape myths that tend to blame victims for the assault they experienced[94] would understandably discourage many students, both parties and witnesses, from participating in a Title IX grievance process. This proposed requirement would have a chilling effect, making it less likely that those who have experienced or witnessed harassment will come forward.

Furthermore, the proposed rules do not entitle the survivor 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 rules of evidence or make a prosecuting attorney available to object or a judge available to rule on objections. The live cross-examination requirement would also lead to sharp inequities if one party can afford an attorney and the other cannot.

Neither the Constitution nor any other federal law requires live cross examination in school conduct proceedings. The Supreme Court does not require any form of cross-examination (live or indirect) in disciplinary proceedings in public schools under the Due Process clause.[95] Instead, the Court has explicitly said that a 10-day suspension does not require "the opportunity … to confront and cross-examine witnesses"[96] and has approved at least one circuit court decision holding that expulsion does not require "a full-dress judicial hearing, with the right to cross-examine witnesses."[97]

The vast majority of courts that have addressed 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.[98] The Department itself admits that written questions submitted by students or oral questions asked by a neutral school official are

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[94] 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).

[95] Of course, private schools are not impacted by Constitutional due process requirements.

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

[97] *E.g.*, *Dixon*, 294 F.2d at 158, *cert. denied*, 368 U.S. 930 (1961). *See also Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993) (holding no due process violation in expulsion of college student without providing him to right to cross-examination).

[98] *See A Sharp Backward Turn*, *supra* note 50 (*Baum* "is anomalous.").

fair and effective ways to discern the truth in K-12 schools,[99] and proposes retaining that method for K-12 proceedings. The Department has not explained why the processes that it considers effective for addressing harassment in proceedings involving 17- or 18-year-old students in high school would be ineffective for 17- or 18-year-old students in college.

Not surprisingly, Title IX and student conduct experts oppose these proposed rules. The Association of Title IX Administrators (ATIXA) announced in October 2018 that it opposes live, adversarial cross-examination, instead stating, "investigators should solicit questions from the parties, and pose those questions the investigators deem appropriate in the investigation interviews."[100] The Association for Student Conduct Administration (ASCA) agrees that schools should "impose guidelines limiting advisors' participation in student conduct proceedings."[101] The American Bar Association recommends that schools provide "the opportunity for both parties to ask questions through the hearing chair."[102]

When survivors of sexual assault seek any form of accountability via criminal or civil justice systems they are often concerned about their safety. ICASA's sexual assault crisis center advocates are routinely asked questions, such as "if I pursue a protective order or criminal charges, will the individual who hurt me know I spoke to police or will I have to see them in court?" It is often at this point that survivors opt out of these processes because of fear of seeing the person who harmed them. Seeing their abuser, and particularly being confronted by them or their representative, will deter countless survivors from coming forward and, as a result, allow sexual violence to continue unabated in school settings.

In addition to being a deterrent to reporting and seeking services or accountability. Being forced to see their abuser and answer cross-examination style questions posed by a representative of their abuser is also harmful to survivors. Events like seeing their abuser can trigger survivors into an acute crisis mentality exacerbating rape trauma response and post-traumatic stress disorder (PTSD). The proposed rules would create a hearing system that is harmful to survivors and discourages reporting, which violates the goals of Title IX.

c. The proposed rules would force many schools to use a more demanding standard of proof to investigate sexual harassment than they would use to investigate other types of student misconduct.

The Department's longstanding practice requires that schools use a "preponderance of the evidence" standard, which means "more likely than not," in Title IX cases to decide whether

[99] 83 Fed. Reg. 61476.

[100] Association of Title IX Administrators, *ATIXA Position Statement on Cross-Examining: The Urge to Transform College Conduct Proceedings into Courtrooms* 1 (Oct. 5, 2018), available at https://atixa.org/wordpress/wp-content/uploads/2018/10/ATIXA-Position-Statement_Cross-Examination-final.pdf.

[101] *ASCA 2014 White Paper*, *supra* note 129 at 2 (2014).

[102] 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).

sexual harassment occurred.[103] Proposed rule § 106.45(b)(4)(i) departs from that practice, and establishes a system where schools could elect to use the more demanding "clear and convincing evidence" standard in sexual harassment cases, while allowing all other student misconduct cases to be governed by the preponderance of the evidence standard, even if they carry the same maximum penalties.[104]

The Department's decision to allow schools to impose a more burdensome standard in sexual assault cases than in any other student misconduct case appears to rely on the unspoken stereotype and assumption that survivors (who are mostly women) are more likely to lie about sexual assault than students who report physical assault, plagiarism or other school disciplinary violations. There is no basis for that sexist belief, and in fact men and boys are far more likely to be *victims* of sexual assault than to be *falsely accused* of sexual assault.[105]

The preponderance of the evidence standard is used by courts in all civil rights cases.[106] It is the only standard of proof that treats both sides equally and is consistent with Title IX's requirement that grievance procedures be "equitable." By allowing schools to use a "clear and convincing evidence" standard, the proposed rule would tilt investigations in favor of respondents and against complainants.

The Department argues that Title IX investigations may need a more demanding standard because of the "heightened stigma" and the "significant, permanent, and far-reaching" consequences for respondents if they are found responsible for sexual harassment.[107] But the Department ignores the reality that Title IX complainants face "heightened stigma" for reporting sexual harassment as compared to other types of misconduct, and that complainants suffer

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[103] The Department has required schools to use the preponderance standard in Title IX investigations since as early as 1995 and throughout both Republican and Democratic administrations. For example, its April 1995 letter to Evergreen State College concluded that its use of the clear and convincing standard "adhere[d] to a heavier burden of proof than that which is required under Title IX" and that the College was "not in compliance with Title IX." U.S. Dep't of Educ., Office for Civil Rights, *Letter from Gary Jackson, Regional Civil Rights Director, Region X, to Jane Jervis, President, The Evergreen State College* (Apr. 4, 1995), at 8, available at http://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed_ehd_1995.pdf. Similarly, the Department's October 2003 letter to Georgetown University reiterated that "in order for a recipient's sexual harassment grievance procedures to be consistent with Title IX standards, the recipient must … us[e] a preponderance of the evidence standard." U.S. Dep't of Educ., Office for Civil Rights, *Letter from Howard Kallem, Chief Attorney, D.C. Enforcement Office, to Jane E. Genster, Vice President and General Counsel, Georgetown University* (Oct. 16, 2003), at 1, available at http://www.ncherm.org/documents/202-GeorgetownUniversity--110302017Genster.pdf.

[104] Proposed rule § 106.45(b)(4)(i) permits schools to use the preponderance standard *only if* it uses that standard for all other student misconduct cases that carry the same maximum sanction *and* for all cases against employees. This is a one-way ratchet: a school would be permitted to use the higher clear and convincing evidence standard in sexual assault cases, while using a lower standard in all other cases.

[105] *E.g.*, Kingkade, *supra* note 8.

[106] Katharine Baker et al., *Title IX & the Preponderance of the Evidence: A White Paper* (July 18, 2017), available at http://www.feministlawprofessors.com/wp-content/uploads/2017/07/Title-IX-Preponderance-White-Paper-signed-7.18.17-2.pdf (signed by 90 law professors).

[107] 83 Fed. Reg. 61477.

"significant, permanent, and far-reaching" consequences to their education if their school fails to meaningfully address the harassment, particularly as 34% of college survivors drop out of college.[108] Both students have an equal interest in obtaining an education. Taking special notice of the impact on respondents in designing a grievance process to address harassment is inequitable, especially in light of the equally serious consequences for the complainant.

Moreover, Title IX experts support the preponderance of the evidence standard, which is used to address harassment complaints at over 80% of colleges.[109] The NCHERM Group, whose white paper *Due Process and the Sex Police* was cited by the Department,[110] 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."[111]

The white paper by four Harvard professors that is cited by the Department[112] recognizes that schools should use the preponderance standard if "other requirements for equal fairness are met."[113] Also, the Association of Title IX Administrators (ATIXA)'s position is that "any standard higher than preponderance advantages those accused of sexual violence (mostly men) over those alleging sexual violence (mostly women). It makes it harder for women to prove they have been harmed by men. The whole point of Title IX is to create a level playing field for men and women in education, and the preponderance standard does exactly that. *No other evidentiary standard is equitable*."[114]

NASPA - Student Affairs Administrators in Higher Education recommends the preponderance standard: "Allowing campuses to single out sexual assault incidents as requiring a higher burden of proof than other campus adjudication processes make it, by definition, harder for one party in a complaint than the other to reach the standard of proof. Rather than leveling the field for survivors and respondents, setting a standard higher than preponderance of the evidence tilts

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[108] 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.

[109] Heather M. Karjane, et al., *Campus Sexual Assault: How America's Institutions of Higher Education Respond* 120 (Oct. 2002), available at https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf.

[110] 83 Fed. Reg. 61464 n.2.

[111] 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.

[112] 83 Fed. Reg. 61464 n.2.

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

[114] Association of Title IX Administrators, *ATIXA Position Statement: Why Colleges Are in the Business of Addressing Sexual Violence* 4 (Feb. 17, 2017), available at https://atixa.org/wordpress/wp-content/uploads/2017/02/2017February-Final-ATIXA-Position-Statement-on-Colleges-Addressing-Sexual-Violence.pdf.

proceedings to unfairly benefit respondents."[115] The Association for Student Conduct Administration (ASCA) agrees that schools should "[u]se the preponderance of evidence (more likely than not) standard to resolve all allegations of sexual misconduct"[116] because "it is the only standard that reflects the integrity of equitable student conduct processes which treat all students with respect and fundamental fairness."[117]

d. The proposed rules inappropriately allow evidence regarding past sexual contact between the complainant and the respondent.

Under previous guidance, it was disfavored to use consent to one instance of sexual contact to prove consent to another instance of sexual contact. The Department recognized that this is not how consent works: "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."[118]

Rule 106.45(b)(viii) would allow the presentation of evidence regarding past sexual contact between the complainant and respondent if it "is offered to prove consent." This new rule encourages a dangerous misunderstanding regarding consent to sexual activity: that prior consent to sex is continuing consent or evidence of consent to additional sexual acts. That is simply not the case. Both people must agree to sex – every single time – for it to be consensual.

The U.S. Uniform Code of Military Justice provides the following definition of consent: "a freely given agreement to the conduct at issue by a competent person," and continues to note "[a] current or previous dating or social or sexual relationship by itself . . . shall not constitute consent."[119] The Illinois PSVHE Act requires that schools adopt a policy, in which the definition of consent, at a minimum, includes: "consent is a freely given agreement to sexual activity, . . . a person's consent to past sexual activity does not constitute consent to future sexual activity, . . . a person can withdraw consent at any time." When both federal and state laws agree that past consent to one instance or act of sexual activity does not prove consent to another instance or act, there is no excuse for the proposed rules to recognize and allow evidence of prior sexual activity to be "offered to prove consent."

The proposed rule is legally and morally unfounded. It would create confusion regarding consent and encourage accused students to bring in past sexual history to try to shame or

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[115] NASPA - Student Affairs Administrators in Higher Education, *NASPA Priorities for Title IX: Sexual Violence Prevention & Response* at 1-2, available at ttps://www.naspa.org/images/uploads/main/NASPA_Priorities_re_Title_IX_Sexual_Assault_FINAL.pdf.

[116] *ASCA 2014 White Paper*, *supra* note 129.

[117] Chris Loschiavo & Jennifer L. Waller, *The Preponderance of Evidence Standard: Use In Higher Education Campus Conduct Processes*, ASSOCIATION FOR STUDENT CONDUCT ADMIN, available at https://www.theasca.org/files/The%20Preponderance%20of%20Evidence%20Standard.pdf.

[118] Department of Education, *Questions and Answers on Title IX and Sexual Violence*, Q&A F7, p. 31. https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf

[119] 10 U.S.C. §920(g)(8).

disparage the complainant. The proposed rule would also deter reporting of sexual assault when the victim has had a prior relationship with the accused.

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

The proposed rules require schools to have "reasonably prompt timeframes," but allows them to create a "temporary delay" or "limited extension" of timeframes for "good cause," which includes "concurrent law enforcement activity."[120] In contrast, Title IX guidance issued by the Obama administration recommended that schools finish investigations within 60 days, and prohibited schools from delaying a Title IX investigation just because there was an ongoing criminal investigation.

Under the proposed rules, if there is an ongoing criminal investigation, the school would be allowed to delay its Title IX investigation for an unspecified length of time. While criminal investigations seek to punish an abuser for their conduct, Title IX investigations should seek to ensure that complainants are able to access educational opportunities that become inaccessible due to harassment. Students should not be forced to wait months or years until after a criminal investigation is completed in order to seek resolution from their schools. The Association of Title IX Administrators (ATIXA) agrees that a school that "delay[s] or suspend[s] its investigation" at the request of a prosecutor creates a safety risk to the survivor and to "other students, as well."[121]

The average time frame of a sexual assault investigation for the City of Chicago is anywhere from 2-4 years from report to trial. Waiting for law enforcement to complete an investigation will stall many cases from being addressed, will postpone accountability and most importantly will delay safety measures for student survivors. Additionally, allowing the response from a school to wait for law enforcement to complete their investigation will often lead to schools adopting the outcome of a criminal investigation, which required the highest burden of proof of "beyond a reasonable doubt" to result in a conviction. Because the burden of proof is appropriately lower in a Title IX proceeding and the goals of that process are different than that criminal system, schools should not be able to indefinitely delay addressing Title IX complaints.

f. The proposed rules do not sufficiently protect survivor confidentiality.

Section 106.45(b)(3)(vii) requires that a school must allow both the complainant and the respondent access to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised, including evidence upon which the [school] does not intend to rely in reaching a determination regarding responsibility . . ." This requirement of full access to all evidence, even that not considered in making the decision, could have dire consequences for the complainant.

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[120] Proposed rule § 106.45(b)(1)(v).

[121] Association of Title IX Administrators, *ATIXA Position Statement on the Proposed Legislation Entitled: Promoting Real Opportunity, Success, And Prosperity Through Education Reform (PROSPER) Act (Higher Education Act Reauthorization)* (Jan. 18, 2018), available at https://atixa.org/wordpress/wp-content/uploads/2015/03/ATIXA-POSITION-STATEMENT-ON-PROSPER-ACT-Final.pdf.

The complainant may provide the school with records and information that are not appropriate to provide to the respondent. For example, if the complainant has been harassed and stalked by the respondent, the complainant may change her residence for safety reasons. The new address is likely in the school's records and the fact that the complainant moved may be submitted as evidence of fear of the respondent. In this case, if the address is part of records that are "evidence" the school would be required to provide the respondent access to it, even though requiring the school to provide respondent with the complainant's address may place the complainant in danger.

Section 106.45(b)(4) and (b)(7) also require the respondent to have access to "any remedies to the complainant to restore or preserve access to the recipient's education program or activity". At the same time, the proposed rules also mention access to confidentiality for complainants under 106.44(e)(4) for supportive measures. Paragraph (e)(4) states that the recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the institution to provide the supportive measures. These regulations side by side are confusing and offer no guidance on how to navigate confidentiality of supportive measures.

Special attention should be paid to allowing victims to access confidential supportive services, like rape crisis counseling and advocacy, some of which may be campus-based. Often these services are governed by both state and federal law to protect the identity of survivors as well as their status as clients receiving services. Providing information to a respondent about where a survivor is accessing services can threaten a survivor's safety. The requirement to provide the respondent with information about "remedies" provided to the complainant, does not consider what limits are necessary for safety and how schools determine what to make available, particularly as it relates to confidential supportive measures that may be protected by a state statutory privilege or federal funding requirement.

Referrals to school-based advocacy programs and partnerships with community-based sexual assault crisis programs should be part of the rules, with a special provision exempting referrals, information and records of these programs from the "access" requirement under 106.45(b)(4). Particularly, the role of a confidential advisor should be created and required as a resource for all college campuses so that students can confidentially access resources outside of the Title IX process, which is addressed in more detail in Section V below.

The proposed rules offer no help to clear-up confusion around access to confidential resources, and conflict with numerous state laws and federal laws requiring confidentially of these programs that support survivors of sexual assault. The 2001 Guidance requires confidentiality in reporting when requested by the complainant.[122] The proposed rules only protect the confidentiality of students who do not wish to make a formal report and offer no safeguards or confidential supports to those who formally report.

[122] 2001 Guidance page 17, Section: Confidentiality

The proposed rules also require the Title IX officer to initiate a formal report when the officer has actual knowledge of multiple complaints of conduct by the same respondent that could constitute sexual harassment. This provides no protection to students who do not wish to file an official report yet contact the Title IX officer for assistance. These students do not know whether other reports have been filed against their abuser. In this scenario, a report could be filed without the consent of the survivor, and the survivor's confidentiality will be compromised.

Respecting the confidentiality of the complainants should be a priority under Title IX, especially in light of its impact on student safety. Instead of safeguarding confidentiality, the proposed rules create conflict and confusion in this area. Because of their failure to protect survivor confidentiality, ICASA objects to the proposed rules.

g. The proposed rules would require schools to give unequal appeal rights.

Although Secretary DeVos claims that the proposed rules make "[a]ppeal rights equally available to both parties,"[123] they do not in fact provide equal *grounds for appeal* to both parties, as complainants are barred from appealing a school's resolution of a harassment complaint based on inadequate sanctions imposed on a respondent. Allowing only the respondent the right to appeal a sanction decision is both unfair and a violation of the requirement of "equitable" procedures, because survivors are also impacted by sanction decisions. For example, if their abuser is still allowed to live in the same dorm as the survivor, or if they are still in the same classroom, the survivor may experience further trauma.

Experts support equal appeal rights. The American Bar Association recommends that the grounds for appeal include "a sanction disproportionate to the findings in the case (that is, too lenient or too severe)."[124] The Association of Title IX Administrators (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."[125] Even the white paper by four Harvard professors that is cited by the Department (p.9-10 n.2) recognizes that schools should allow "[e]ach party (respondent and complainant) [to] request an impartial appeal."[126]

IV. The proposed rules impermissibly limit the "supportive measures" available to complainants (§ 106.30).

Under the proposed rules, even if a student suffered harassment that occurred on campus and it was "severe, pervasive, *and* objectively offensive," their school would still be able to deny the student the "supportive measures" they need to stay in school. In particular, the proposed rules allow schools to deny a student's request for effective "supportive measures" on the grounds that

[123] DeVos, *supra* note 74.

[124] American Bar Association, *supra* note 102, at 5.

[125] Association of Title IX Administrators, *ATIXA Position Statement on Equitable Appeals Best Practices* 1 (Oct. 5, 2018), available at https://atixa.org/wordpress/wp-content/uploads/2018/10/2018-ATIXA-Position-Statement-Appeals.pdf.

[126] Bartholet, et al., *supra* note 113.

the requested measures are "disciplinary," "punitive," or "unreasonably burden the other party." For example, a school might feel constrained from transferring a named harasser to another class or dorm because it would "unreasonably burden" him, thereby forcing a survivor to change all of her own class 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 their own assault.[127] This is a departure from longstanding practice under the 2001 Guidance, which instructed schools to direct "the harasser to have no further contact with the harassed student" but not vice-versa.[128] 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."[129]

As mentioned above, Illinois went through extensive public hearings in 2008 about the realities of schools' responses to student survivors. The hearings stemmed from 2007 legislation that required the Illinois State Board of Education to create the Ensuring Success in School Task Force.[130] In light of the increasing dropout and push-out rates in Illinois, this task force was charged with developing policies, procedures and protocols to be adopted by school districts to address the educational needs of elementary and secondary students who are parents, expectant parents, or survivors of domestic or sexual violence. The goal was to ensure the students' ability to stay in school, stay safe while in school, and successfully complete their education.

The public hearings revealed that for survivors of sexual violence:

> School response to sexual violence survivors has often had the effect of revictimizing the student. Unintentional—or intentional—blaming of the survivor is common with a number of student survivors reporting at Task Force hearings that schools were not only ignorant but also sometimes openly hostile toward them. Witnesses told stories of schools that refused to respect orders of protection, denied reasonable accommodations requested by the survivor, placed the burden of change and compliance on the survivor and not the perpetrator, forced the survivor to repeat her story several times and in front of other people, denied the survivor basic confidentiality, and punished the survivor for minor offenses related to the violence while overlooking the

[127] Experts have recognized for decades that *mutual* no-contact orders are harmful to victims, because abusers often manipulate their victims into violating the mutual order. *E.g.*, Joan Zorza, *What Is Wrong with Mutual Orders of Protection?* 4(5) DOMESTIC VIOLENCE REP. 67 (1999), available at https://www.civicresearchinstitute.com/online/article.php?pid=18&iid=1005.

[128] 2001 Guidance, *supra* note 27, at 16.

[129] Association for Student Conduct Administration, *ASCA 2014 White Paper: Student Conduct Administration & Title IX: Gold Standard Practices for Resolution of Allegations of Sexual Misconduct on College Campuses* 2 (2014) [hereinafter *ASCA 2014 White Paper*], available at https://www.theasca.org/Files/Publications/ASCA%202014%20White%20Paper.pdf.

[130] 105 ILCS 5/2-3.142

> acts of violence committed by the perpetrator. Students who are survivors of sexual violence want to stay in school and graduate, but fear for their safety and well-being often forces them into involuntary homeschooling or alternative programs or forces them to drop out entirely.[131]

Supportive measures are key to helping students who are sexual violence survivors to have effective access to educational opportunities. The proposed rules impermissibly limit access to such measures and would deny complainants the assistance they need to stay in school, be safe at school and successfully complete their education.

V. The proposed rules do not require that schools provide confidential advisors to assist students in making a complaint and requesting supportive measures.

Confidential resources are critical in creating safe spaces for survivors of sexual violence. The Illinois PSVHE Act established the role of a confidential advisor to support sexual assault survivors at colleges and universities.[132] Illinois is one of three states that have codified the role of confidential advisors on college campuses.[133] Some states, including Illinois, also elevate the importance of confidentiality for survivors by recognizing a legal privilege for communication between survivors and on-campus programs that operate under state guidelines for certification as a rape crisis center.[134]

The Illinois PSVHE Act provides for "confidential advisors" who are "employed or contracted by a higher education institution to provide emergency and ongoing support to student survivors of sexual violence . . ."[135] Each institution of higher education in Illinois is required to have confidential advisors to assist students. In our experience, confidential advisors are very helpful to students and provide them with an avenue for seeking assistance that does not require a formal complaint or investigation and places a premium on protecting confidentiality.

The minimum level of services provided by confidential advisors in Illinois are as follows:

1. Inform the survivor of the survivor's choice of possible next steps regarding the survivor's reporting options and possible outcomes, including without limitation reporting pursuant to higher education institution's comprehensive policy and notifying law enforcement.
2. Notify the survivor of resources and services for survivors of sexual violence, including but not limited to, student services available on campus and through the community-based resources, including without limitation sexual assault crisis centers, medical treatment

[131] https://www.isbe.net/Documents/ess-task-force-final-report0610.pdf
[132] 110 ILCS 155.
[133] California Article 8.7, Domestic Violence Victim-Counselor Privilege, Cal. Evid. Code §§ 1037-1037.8; Oregon Certified advocate-victim privilege; Oregon Rev. Stat. 507-1; Washington Campus-affiliated advocates—Confidentiality of records, Rev. Code Wash. Ann. § 28B.112.030.
[134] 735 ILCS 5/8-802.1
[135] 110 ILCS 155/5.

facilities, counseling services, legal resources, medical forensic services, and mental health services.

3. Inform the survivor of the survivor's rights and the higher education institution's responsibilities regarding orders of protection, no contact orders, or similar lawful orders issued by the higher education institution or a criminal or civil court.
4. Provide confidential services to and have privileged, confidential communications with survivors of sexual violence in accordance with [Code of Civil Procedure Section establishing a legal privilege between survivors and confidential advisors].
5. Upon the survivor's request and as appropriate, liaise with campus officials, community-based sexual assault crisis centers, or local law enforcement and, if requested, assist the survivor with contacting and reporting to campus officials, campus law enforcement, or local law enforcement.
6. Upon the survivor's request, liaise with the necessary campus authorities to secure interim protective measures and accommodations for the survivor.[136]

In ICASA's experience, access to the services of a confidential advisor is beneficial to students and helps them continue their education while dealing with the trauma of sexual violence. We encourage the Department to include a requirement that schools must provide confidential advisors (similar to what the Illinois PSVHE Act requires) in any new rules related to Title IX.

VI. 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 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.[137]

[136] 110 ILCS 155/20.

[137] 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;[137] (ii) the Department's decision in February 2018 to stop investigating civil rights complaints from transgender students regarding access to sex-segregated facilities; and (iii) HHS's leaked proposal in October 2018 for the Department and other federal agencies to define "sex" to exclude transgender, non-binary, and intersex students. Erica. L. Green et al., *'Transgender' Could Be Defined Out of Existence Under Trump Administration*, NEW YORK TIMES (Oct. 21, 2018), https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html.

Further, the Department's proposed assurances directly conflict with the current[138] and proposed[139] rules requiring that each covered educational institution "notify" all applicants, students, employees, and unions "that it *does not* discriminate on the basis of sex." By requiring a school to tell students that it does not discriminate while simultaneously allowing it to opt out of anti-discrimination provisions whenever it chooses, the Department is creating a system that enables schools to actively mislead students. This bait-and-switch practice demonstrates that the Department is more interested in protecting schools from liability when they discriminate than protecting students from discrimination.

VII. 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 colleges and universities to respond to sexual assault and other behaviors that may constitute sexual harassment, including dating violence, domestic violence, and stalking. For example, the proposed rules prohibiting schools from investigating off-campus and online sexual harassment conflict with Clery's reporting requirements. The Clery Act requires colleges and universities to notify all students who report sexual assault, stalking, dating violence, and domestic violence of their rights, regardless of "whether the offense occurred on or off campus."[140]

The Clery Act also requires colleges and universities to report all sexual assault, stalking, dating violence, and domestic violence that occur on "Clery geography," which includes all property controlled by a school-recognized student organization (such as an off-campus fraternity); nearby "public property"; and "areas within the patrol jurisdiction of the campus police or the campus security department."[141] 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, but would be required by the Department to dismiss these complaints and not investigate them.

Additionally, the Clery Act requires that investigations of sexual harassment and assault be "prompt, fair, and impartial."[142] But the proposed rules' unclear 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.

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[138] 34 C.F.R. § 106.9(a).

[139] Proposed rule §106.8(b)(1).

[140] 20 U.S.C. § 1092(f)(8)(C).

[141] 20 U.S.C. § 1092(f)(6)(iii); 20 U.S.C § 1092(f)(6)(iv)); 34 C.F.R. § 668.46(a)).

[142] 20 U.S.C. § 1092(f)(8)(b)(iv)(I)(aa).

Although the Department acknowledges that Title IX and the Clery Act's "jurisdictional schemes … may overlap in certain situations,"[143] 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.

VIII. The proposed rules would create conflicts with Illinois law.

Law and policy regarding education has historically been the purview of state and local governments. This tradition of allowing local control of education is based on the 10th Amendment.[144] In light of the history of little federal regulation in this area, expanding federal administrative control over matters related to education should not be done lightly, and the Department should seek to respect previous legislation that has been implemented at the state level. The proposed rules would conflict with Illinois law in several key areas.

The Illinois PSVHE Act requires that the individuals at the school who are resolving a complaint regarding sexual violence, domestic violence, dating violence or stalking "shall use a preponderance of the evidence standard to determine whether the alleged violation of the comprehensive policy occurred."[145] The proposed rules would require, under certain circumstances, that schools use a different standard of clear and convincing evidence.[146] As described above, this higher standard is not appropriate for civil rights enforcement, such as Title IX proceedings.

The Illinois PSVHE Act does not require a hearing[147] and does not allow cross-examination of the parties. Instead it allows that the parties, "may, at the discretion and direction of the individual or individuals resolving the complaint, suggest questions to be posed by the individual or individuals resolving the complaint and respond to the other party."[148] The proposed rules would require that the procedure for investigations in a higher education setting "provide for a live hearing," and would also require that the "decision-maker must allow each party to ask the other party and any witnesses all relevant questions."[149] The proposed rules require that cross-examination be conducted by the party's advisor of choice, instead of Illinois' procedure of having questions be submitted and screened by the decision-maker.

These potential conflicts in the laws, as well as potential conflicts between the proposed rules and other states' laws, would require a complex analysis of preemption, separation of powers,

[143] 83 Fed. Reg. 61468.

[144] U.S. Const. amend. 10 ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.").

[145] 110 ILCS 155/25(b)(5).

[146] Proposed rule § 106.45(b)(4)(i).

[147] 110 ILCS 155/25(b)(8)

[148] 110 ILCS 155/25(b)(10)

[149] Proposed rule § 106.45(b)(3)(vii)

federalism and states' rights issues. In light of such conflicts and the likelihood that many aspects of the proposed rules go beyond the administrative rulemaking authority provided to the Department by Title IX (see below), it is expected that contentious litigation regarding these issues would be likely if the proposed rules were to be implemented. ICASA encourages the Department to avoid the confusion and lengthy legal battles by withdrawing the proposed rules.

IX. The proposed rules *requiring* schools to dismiss harassment complaints go beyond the Department's authority to effectuate the nondiscrimination provisions of Title IX and are practically unworkable.

Section 106.45(b)(3) of the proposed rules *requires* schools to dismiss complaints of sexual harassment if they do not meet specific narrow standards. If it is determined that harassment does not meet the improperly narrow definition of severe, pervasive, *and* objectively offensive harassment, it *must* be dismissed, per the proposed rules. 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.[150]

By requiring schools to dismiss certain types of complaints of sexual harassment, without regard to whether those forms of harassment deny students educational opportunities on the basis of sex, § 106.45(b)(3) fails to effectuate Title IX's anti-discrimination mandate. The proposed rules would force many schools that already investigate off-campus conduct 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 is does not have authority to force schools to violate students' and employees' civil rights under Title IX by forcing schools to ignore sexual harassment.

The Department notes that if conduct does not meet the proposed rule's definition of harassment or occurs off-campus, schools may still process the complaint under a different conduct code, but not Title IX. This "solution" to its required dismissals for Title IX investigations is confusing and impractical. The proposed rules 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 they require. Schools that did so would no doubt be forced to contend with respondents' complaints that the school had failed to comply with the requirements set out in the proposed rules and thus violated respondents' rights. Title IX rules should guide the enforcement and set the minimum compliance standards for schools, but states and schools should be allowed to go above and beyond those requirements.

[150] *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.

CONCLUSION

The Department's proposed rules import inappropriate legal standards into agency enforcement, rely on sexist stereotypes about survivors of sexual harassment and assault, and impose procedural requirements that force schools to tilt their Title IX investigation processes in favor of named accusers to the detriment of survivors. Instead of effectuating Title IX's prohibition on sex discrimination in schools, these rules serve only to protect schools from liability when they fail to address complaints of sexual harassment and assault. ICASA calls on the Department of Education to immediately withdraw the proposed rules 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 effectively respond to sexual harassment.

Thank you for the opportunity to submit comments on the proposed rules. Please do not hesitate to contact me at 217-753-4117 or sbeuning@icasa.org, if you have questions or would like ICASA to provide further information.

Respectfully submitted,

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