



January 30, 2019

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

Submitted via www.regulations.gov

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

Dear Assistant Secretary Marcus,

On behalf of the 170,000 members and supporters of the American Association of University Women (AAUW), I write to comment in response to the Department of Education's (the Department) Notice of Proposed Rulemaking (NPRM or proposed rule) on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, as published in the Federal Register on November 29, 2018. AAUW expresses our strong opposition to the Department's NPRM to amend the rules implementing Title IX of the Education Amendments of 1972 (Title IX) and urges the Department to withdraw the proposal.

Introduction

Title IX was enacted nearly 50 years ago to ensure all students have access to an education free from sex discrimination. This groundbreaking civil rights statute has had a dramatic effect on all areas of education, opening many opportunities for women. Indeed, women and girls have made tremendous progress during that time. Throughout the first part of the 20th century, colleges could—and did—openly exclude or limit the number of female students. In the ensuing decades, women and girls have made progress at every level of education, from P-12 to graduate school. Today women make up a majority of undergraduates on college campuses, but inequities remain. Over the past decade, there has been increased recognition that sexual harassment and assault create an unequal educational environment. An environment fraught with sexual harassment and violence can severely impede a student's ability to perform well in school, and in extreme cases can even prompt them to drop out. Recognizing this reality, the Department of Education and advocates have spent years honing enforcement of Title IX to ensure that students who experience sexual harassment and assault can come forward, seek justice, and proceed in a supportive educational environment.

AAUW has a long history of advocating for Title IX's full implementation and enforcement, and fighting efforts to weaken the law, its regulations, and guidance. This includes making

recommendations for the initial regulations,¹ successfully advocating for the Civil Rights Restoration Act of 1988,² testifying to Congress about Title IX’s implementation,³ and supporting guidance and regulations from prior administrations. In addition, AAUW has also weighed in with regards to precedent-setting Title IX litigation.⁴ The AAUW Legal Advocacy Fund has supported plaintiffs fighting to right the wrongs they experienced, including sexual assault and harassment in *Simpson v. University of Colorado*,⁵ retaliation in *Jackson v. Birmingham Board of Education*,⁶ sexual harassment in *Doe v. Notre Dame University and St. Mary’s College*,⁷ and disparate treatment in *Brzonkala v. Virginia Polytechnic Institute and State University, et al.*,⁸ among others.⁹

The proposed rule would undermine Title IX’s guarantee that, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”¹⁰ As these comments will discuss, the proposed rule fails to respond to the reality of sexual harassment and violence in schools. In addition, it limits the response of schools to much of the abuse students experience. The NPRM also does not fully account for the burden inflicted on students who experience sexual harassment and violence. The proposed rule would also allow unfair processes in schools that make it harder for students to come forward and receive the remedies the law requires. Finally, the proposed rule sets up confusion and conflict with existing state laws.

Overall, the proposed rule would make it harder for students who experience sex discrimination, specifically sexual harassment or violence, to come forward and receive the support and remedies

¹ August 1974: AAUW Leaders Issue Statement on Title IX, AAUW (Oct. 5, 2012), <https://history.aauw.org/title-ix/statement-on-title-ix>; March 1975: AAUW Rallies Support for Title IX, AAUW (Oct. 5, 2012), <https://history.aauw.org/title-ix/support-for-title-ix>.

² March 1988: Civil Rights Restoration Act Passes, AAUW (Oct. 5, 2012), <https://history.aauw.org/title-ix/civil-rights-restoration-act>.

³ *Building on the Success of 35 Years of Title IX: Hearing Before the Subcomm. on Higher Educ., Lifelong Learning, & Competitiveness of the H. Comm. on Educ. & Labor*, 110th Cong. (2007), available at <https://www.govinfo.gov/content/pkg/CHRG-110hhrg35961/pdf/CHRG-110hhrg35961.pdf>; *Preventing & Responding to Sexual Assault on College Campuses: Hearing Before the Subcomm. on Higher Educ. & Workforce Training of the H. Comm. on Educ. and the Workforce*, 114th Cong. (2015), available at <https://www.govinfo.gov/content/pkg/CHRG-114hhrg96035/pdf/CHRG-114hhrg96035.pdf>.

⁴ E.g., November 1983: AAUW Weighs In on *Grove City College v. Bell*, AAUW (Oct. 5, 2012), <https://history.aauw.org/title-ix/grove-city-college-v-bell>; Brief for NOW Legal Def. and Educ. Fund et. al. as Amici Curiae Supporting Petitioner, *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999) (No. 97-843), 1998 WL 784401; Brief for Nat’l Women’s Law Ctr. et. al. as Amici Curiae Supporting Petitioner, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (No. 96-1866), 1998 WL 47598.

⁵ Ebonee Avery-Washington, Court Case: *Lisa Simpson, et al. v. University of Colorado*, AAUW, <https://www.aauw.org/resource/lisa-simpson-et-al-v-university-of-colorado/>.

⁶ Ebonee Avery-Washington, Court Case: *Roderick Jackson v. Birmingham Board of Education*, AAUW, <https://www.aauw.org/resource/roderick-jackson-v-birmingham-board-of-education/>.

⁷ Ebonee Avery-Washington, Court Case: *Doe v. Notre Dame University and St. Mary’s College*, AAUW, <https://www.aauw.org/resource/doe-v-notre-dame-university-and-st-marys-college/>.

⁸ Ebonee Avery-Washington, Court Case: *Brzonkala v. Virginia Polytechnic Institute and State University, et al.*, AAUW, <https://www.aauw.org/resource/brzonkala-v-virginia-polytechnic-institute-and-state-university-et-al/>.

⁹ See *What We Do: Public Policy, Title IX*, AAUW, <https://www.aauw.org/what-we-do/public-policy/aauw-issues/titleix/>; Resources: LAF Cases, AAUW, <https://www.aauw.org/resources/by-type/laf-cases/>.

¹⁰ 20 U.S.C. §1681.

they need. These changes would return schools and students back to a time where rape, assault, and harassment were ignored by schools and the Department of Education. Ultimately, the proposed rule protects institutions rather than students. By discouraging reports of sexual harassment and requiring schools to dismiss many of these reports, the Department of Education seems to be enabling schools to evade their responsibility to create a safe learning environment for all students. AAUW expresses our strong opposition to the Department's proposed rule and urges the Department to withdraw the proposal

I. The NPRM fails to acknowledge and respond to the reality of sexual harassment and assault in schools.

The proposed rule ignores the overwhelming prevalence and harmful reality of sexual harassment and violence in schools. Instead of responding to what we know about how common sexual harassment and violence are and the impact they have by strengthening Title IX's promise to ensure students can access education free from sex discrimination, the proposed rule weakens current protections for students.

AAUW research has found that women on college campuses and girls in junior high and high school frequently experience sexual harassment, sexual abuse or assault, and other crimes or behavior that constitute sex discrimination under Title IX. These experiences hurt their ability to focus on their academic goals and can diminish their equal access to educational opportunities. Specifically, according to an AAUW survey, 56 percent of girls and 40 percent of boys in grades 7–12 face sexual harassment.¹¹ Of that number, 87 percent said it had a negative effect on them.¹² This harassment and violence follows students into higher education, where 62 percent of women and 61 percent of men experience sexual harassment.¹³

AAUW research is joined by a host of other scholarship in this space that asserts that many students experience sexual harassment and violence in schools and that it impacts their educations. As the National Women's Law Center found, more than 1 in 5 girls ages 14-18 are kissed or touched without their consent.¹⁴ In addition, many campus climate surveys have found that more than 1 in 5 women and nearly 1 in 18 men are sexually assaulted in college.¹⁵ It is worth noting that research shows that men and boys are far more likely to be victims of sexual assault than to be falsely accused of it.¹⁶ Additionally, historically marginalized and underrepresented groups are more likely to experience sexual harassment than their peers: 56 percent of girls ages 14-18 who are

¹¹ Catherine Hill & Holly Kearl, *Crossing the Line: Sexual Harassment at School*, AAUW 11 (2011), available at <https://www.aauw.org/research/crossing-the-line/>.

¹² *Id.*, 2.

¹³ Catherine Hill & Elena Silva, *Drawing the Line: Sexual Harassment on Campus*, AAUW 18 (2005), available at <https://history.aauw.org/files/2013/01/DTLFinal.pdf>.

¹⁴ Nat'l Women's Law Ctr., *Let Her Learn: Stopping School Pushout for: Girls Who Have Suffered Harassment and Sexual Violence 1* (2017), [hereinafter *Stopping School Pushout: Harassment*] available at <https://nwlc.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence>.

¹⁵ E.g., David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, ASS'N OF AM. UNIV. 13-14 (Sept. 2015), available at <https://www.aau.edu/key-issues/aau-climate-survey-sexual-assault-and-sexual-misconduct-2015>.

¹⁶ E.g., Tyler Kingkade, *Males Are More Likely to Suffer Sexual Assault than to Be Falsely Accused of It*, HUFFINGTON POST (Dec. 8, 2014), https://www.huffingtonpost.com/2014/12/08/false-rape-accusations_n_6290380.html.

pregnant or parenting are kissed or touched without their consent;¹⁷ more than half of LGBTQ students ages 13-21 are sexually harassed at school;¹⁸ nearly 1 in 4 transgender and gender-nonconforming students are sexually assaulted during college;¹⁹ and students with disabilities are 2.9 times more likely than their peers to be sexually assaulted.²⁰

But educational institutions frequently fail to accurately report the sexual harassment or assault that is occurring on their watch. AAUW examined data from colleges and universities that participated in federal financial aid programs (virtually all institutions of higher education in the United States, including private ones) and from public and public charter P-12 institutions that receive federal financial assistance from the Department of Education. That analysis revealed that the vast majority of institutions do not disclose any reported incidents of sexual harassment or sexual assault. Such underreporting may be due to individual student fears of reporting to school authorities or law enforcement; procedural gaps in how institutions record or respond to incidents; a reluctance on the part of institutions to be associated with these problems; or a combination of these factors. But regardless of the reasons, educational institutions have a legal responsibility to accurately monitor, disclose, and diligently respond to sexual harassment and assault.

The vast majority (89 percent) of 11,000 college and university campuses failed to disclose even a single reported incident of rape in 2016, despite numerous studies showing that rape is common on campuses.²¹ In addition, AAUW analysis found low rates overall of reports of sexual assault, including rape and fondling, domestic violence, dating violence, and stalking. Altogether, nearly four in five (77 percent) of campuses reported zero incidents of sexual assault, including rape and fondling, domestic violence, dating violence, and stalking — a shocking statistic given how frequently these incidents occur on campuses. Underreporting occurs across different institution types. Even when considering only institutions' primary campuses and the institutions with at least 250 students — excluding the smallest institutions, as well as the secondary campus locations of multi-campus institutions, such as international facilities or off-site research labs — many campuses still fail to disclose reported incidents across these categories. Half of these campuses (49 percent) fail to disclose reported incidents in any of the five categories.

AAUW also analyzed 2015-16 data from the Civil Rights Data Collection (CRDC) from 96,000 public and public charter P-12 educational institutions — including magnet schools, special education schools, alternative schools, and juvenile justice facilities. More than three-fourths (79 percent) of the 48,000 public schools with students in grades 7 through 12 disclosed zero reported allegations of harassment or bullying on the basis of sex.²² These numbers do not square with what

¹⁷ Nat'l Women's Law Ctr., *Let Her Learn: Stopping School Pushout for Girls Who Are Pregnant or Parenting* 12 (2017), available at <https://nwlc.org/resources/stopping-school-pushout-for-girls-who-are-pregnant-or-parenting/>.

¹⁸ 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), available at <https://www.glsen.org/article/2017-national-school-climate-survey-1>.

¹⁹ Cantor, *supra* note 15.

²⁰ Nat'l Women's Law Ctr., *Let Her Learn: Stopping School Pushout for: Girls With Disabilities* 7 (2017), available at <https://nwlc.org/resources/stopping-school-pushout-for-girls-with-disabilities>.

²¹ AAUW, *Schools Are Still Underreporting Sexual Harassment and Assault* (Nov. 2, 2018), <https://www.aauw.org/article/schools-still-underreporting-sexual-harassment-and-assault/>.

²² *Id.*

research shows students experience. Far more students experience sexual harassment than schools report in the CRDC. This is a cause for concern.

It is worth noting that many students who experience sexual harassment do not come forward. Research shows that only 12 percent of college survivors²³ and 2 percent of girls ages 14-18²⁴ 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 that no one would do anything to help.²⁵ Some students—especially students of color, undocumented students,²⁶ LGBTQ students,²⁷ 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.²⁸ Too many survivors end up dropping out of school because they do not feel safe on campus; some are even expelled for lower grades in the wake of their trauma.²⁹ For example, 34 percent of college survivors drop out of college.³⁰ It follows then that any Title IX regulations and guidance should, first and foremost, respond to the overwhelming prevalence of sexual harassment and violence in education and strive to increase school response to and individual reporting of incidents.

There is overwhelming evidence that sexual harassment and violence are prevalent in schools and limit students' access to education. In addition, schools currently fail to fully report the sexual harassment and violence they do know about and see gaps in reporting where students do not feel comfortable coming forward to seek support. Any policy changes, such as the Department's proposed rule, that either reduce reporting or reduce school responses are the opposite of what the research on sexual harassment and violence demand and are unacceptable.

²³ Poll: One in 5 women say they have been sexually assaulted in college, WASH. POST (June 12, 2015), <https://www.washingtonpost.com/graphics/local/sexual-assault-poll>.

²⁴ Stopping School Pushout: Harassment, *supra* note 14.

²⁵ RAINN, *Campus Sexual Violence: Statistics*, <https://www.rainn.org/statistics/campus-sexual-violence>.

²⁶ Jennifer Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation*, N.Y. TIMES (Apr. 30, 2017), <https://www.nytimes.com/2017/04/30/us/immigrants-deportation-sexual-abuse.html?mcubz=3>.

²⁷ Nat'l Ctr. for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey: Executive Summary* 12 (Dec. 2016), available at <https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf>.

²⁸ E.g., Audrey Chu, *I Dropped Out of College Because I Couldn't Bear to See My Rapist on Campus*, VICE (Sept. 26, 2017), https://broadly.vice.com/en_us/article/qvjzpd/i-dropped-out-of-college-because-i-couldnt-bear-to-see-my-rapist-on-campus.

²⁹ E.g., Alexandra Brodsky, *How much does sexual assault cost college students every year?*, WASH. POST (Nov. 18, 2014), https://www.washingtonpost.com/posteverything/wp/2014/11/18/how-much-does-sexual-assault-cost-college-students-every-year/?utm_term=.0fb3f9e6f4de.

³⁰ Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18(2) J.C. STUDENT RETENTION: RES., THEORY & PRAC. 234, 244 (2015), available at <https://doi.org/10.1177/1521025115584750>.

II. The NPRM limits the response of schools to much of the abuse students experience, instead aiming to reduce liability for schools rather than support students.

The proposed rule limits the situations in which schools must respond to incidents of sexual harassment and violence in several ways, including by altering who must respond to reports of sexual harassment and violence and increasing how severe sexual harassment and violence must be to warrant a response from a school. When we weaken accountability for schools, we limit students' federal rights to access an education free from discrimination.

Inappropriately Narrow Definition of Sexual Harassment

Section 106.30 of the NPRM proposes narrowing the definition of sexual harassment to exclude many students' experiences. The Department's 2001 Guidance, which went through public notice-and-comment and has been enforced in both Democratic and Republican administrations,³¹ defines sexual harassment as "unwelcome conduct of a sexual nature."³² The NPRM 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"³³ and mandates dismissal of complaints of harassment that do not meet this standard.

The Department does not provide a persuasive justification to change the definition of sexual harassment. The current definition rightly charges schools with responding to harassment before it escalates to a point that students suffer severe harm. Changing this definition to what the Department proposes means that students would be forced to put up with escalating levels of sexual harassment without being able to obtain help from their schools. Many incidents of sexual harassment and violence would no longer "count," schools could ignore these survivors, and the Department of Education would not have students' backs. For many students, this may mean that by the time their school has to act they will have missed out on critical educational opportunities if they were even able to stay in school.

In the proposed rule, the Department claims that the definition change is in pursuit of protecting "academic freedom and free speech."³⁴ It is worth noting, however, that sexual harassment is not

³¹ These standards have been reaffirmed by the Department of Education in 2006 by the Bush Administration, in 2010, 2011, and 2014 in guidance documents issued by the Obama Administration, and 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), 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), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>; U.S. Dep't of Educ. Office of Civil Rights, *Dear Colleague Letter: Sexual Violence* at 4, 6, 9, 16 (Apr. 4, 2011), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>; U.S. Dep't of Educ. Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* 1-2 (Apr. 29, 2014), 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), available at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

³² 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>.

³³ Proposed rule § 106.30.

³⁴ 83 Fed. Reg. 61464, 61484. See also § 106.6(d)(1) (stating 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.").

protected speech, specifically if it creates a “hostile environment,”³⁵ which limits the ability of students to participate in or benefit from an education program or activity.³⁶ Schools also 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.”³⁷ There is no conflict between Title IX’s regulation of sexually harassing speech in schools and the First Amendment and this justification for changing the definition of sexual harassment in the proposed rule is groundless.

Limited Number of School Employees Who Must Act on Reports

In addition, in sections 106.44(a) and 106.30, the proposed rule reduces which employees have an obligation to report sexual harassment and violence. Schools would be able to ignore reports of sexual harassment made to many school employees. These changes in the proposed rule are a departure from past guidance and regulations, as the Department has long required schools to be responsible for addressing student-on-student sexual harassment if almost any school employee³⁸ either knew or should reasonably have known about it.³⁹ Past guidance also required schools to address employee-on-student sexual harassment, whether or not the school had notice, recognizing the particular vulnerabilities and responsibilities of such a situation.⁴⁰

The proposed rule limits the ability of students to get help from someone they trust. According to the proposed rule, schools would only have to address sexual harassment when a very narrow subset of school employees have been told or actually knew about the harassment. Schools would not be required to address sexual harassment unless there was “actual knowledge” of the harassment by a Title IX coordinator or an official who has “the authority to institute corrective measures.”⁴¹ A P-12 teacher would also have to address a report, but only in circumstances of student-on-student harassment, not employee-on-student harassment. That means that the proposed rule would put in place a more limited duty to respond for P-12 schools when a student is sexually harassed by an employee or teacher than by a student. This problematic standard makes little sense under any circumstances, but particularly so when the harassing behavior is coming from a person who holds such a great power differential over the student.

Sections 106.44(a) and 106.30 of the proposed rule would mean even when students find the courage to talk to the adult school employees they trust about sexual harassment or violence that they experience, schools would frequently have no obligation to respond.

³⁵ See Joanna L. Grossman & Deborah L. Brake, *A Sharp Backward Turn: Department of Education Proposes to Protect Schools, Not Students, in Cases of Sexual Violence*, VERDICT (Nov. 29, 2018), available at <https://verdict.justia.com/2018/11/29/a-sharp-backward-turn-department-of-education-proposes-to-protect-schools-not-students-in-cases-of-sexual-violence>. (“There is no legitimate First Amendment or academic freedom protection afforded to unwelcome sexual conduct that creates a hostile educational environment.”).

³⁶ 2001 Guidance, *supra* note 32 at 22–23 (noting that the First Amendment does not apply to harassing speech).

³⁷ 393 U.S. 503, 513, 514 (1969).

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 32 at 13.

³⁹ *Id.* at 14.

⁴⁰ *Id.* at 10.

⁴¹ Proposed rule § 106.30.

Standards for School Action Following Notice

Students will also be harmed by the proposed rule's shift from requiring schools to act "reasonably" and "take immediate and effective corrective action" to resolve harassment complaints,⁴² which is expected under current guidance. Under the proposed rule section 106.44(b)(5), schools would merely have to not be deliberately indifferent, meaning that when they respond to sexual harassment, they only have to be not *clearly* unreasonable.⁴³

And as proposed in section 106.44(b), 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. This would have the effect of sheltering schools from accountability under Title IX, even when a school does any number of things that harm students.

This section of the proposed rule also appears to treat survivors differently from the other students involved in a Title IX grievance proceeding. In the proposed rule, section 106.45(a) states that:

Deliberate indifference to a complainant's allegations of sexual harassment may violate Title IX by separating the student from his or her education on the basis of sex; likewise, a respondent can be unjustifiably separated from his or her education on the basis of sex, in violation of Title IX, if the recipient does not investigate and adjudicate using fair procedures before imposing discipline. Fair procedures benefit all parties by creating trust in both the grievance process itself and the outcomes of the process.

This is an unfair standard that is different for complainants (deliberate indifference) as compared to respondents (any discipline without following all procedural requirements). Current Title IX rules⁴⁴ and other proposed sections in the proposed rule,⁴⁵ require an equitable grievance proceeding for both parties, which section 106.45(a) does not fulfill.

Students Survivors Receive Fewer Protections than Employee Survivors

In addition, and particularly confounding, is that under these changes to the definition of sexual harassment, the notice requirements, and the standards under which schools must act, schools would be obligated to respond to fewer incidents of sexual harassment and violence impacting students who have been subjected to harassment than employees who have similarly subjected to harassment. Under Title VII, which addresses workplace harassment, a school is potentially liable for harassment of an employee if the harassment is, "sufficiently severe *or* pervasive to *alter* the conditions of employment."⁴⁶ In addition, if the employee is harassed by a coworker, the school is liable if it knew or should have known of the misconduct, unless it can show that it took immediate and appropriate corrective action.⁴⁷ If the employee is harassed by a supervisor, the school is

⁴² 2001 Guidance, *supra* note 32.

⁴³ Proposed rule §106.44(b)(5).

⁴⁴ 34 C.F.R. § 106.8(b).

⁴⁵ Proposed rule §§ 106.8(c) and 106.45(b).

⁴⁶ *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986) (emphasis added); Equal Employment Opportunity Commission, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 18, 1999), [*hereinafter* EEOC Guidance] available at <https://www.eeoc.gov/policy/docs/harassment.html>.

⁴⁷ EEOC Guidance, *supra* note 46.

automatically liable if the harassment resulted in a tangible employment action, such as firing or demotion. If not, the school may be able to avoid liability when an employee is harassed by a supervisor if they acted to prevent and correct the harassment and the employee failed to take advantage of any preventive or corrective opportunities.⁴⁸

In contrast, under the proposed rule section 106.30 a school would only be liable for harassment against a student if the school is deliberately indifferent to sexual harassment that is so “severe, pervasive, *and* objectively offensive that it denied the student access to the school’s program or activity;” and the harassment occurred only directly within the school’s program or activity; and a school employee with “the authority to institute corrective measures” had “actual knowledge” of the harassment. Under the proposed rule, schools are held to a far lesser standard in addressing the harassment of students, some of whom are minors, under Title IX’s protections, than employees under Title VII’s protections.

Inappropriate Application of Liability Standards

In taking these steps to alter the definition of sexual harassment, the employees who must respond to reports of discrimination, and the actions schools are expected to take, the Department has misapplied the Supreme Court’s liability standards for Title IX lawsuits seeking monetary damages against a school to administrative enforcement. Administrative enforcement with its iterative process and focus on voluntary corrective action by schools is, by its nature, different than private suits seeking monetary damages. Indeed, in the NPRM the Department acknowledges that it is “not required to adopt the liability standards applied by the Supreme Court in private suits for money damages.”⁴⁹

Currently, to succeed in recovering money damages, a plaintiff must show that their school was deliberately indifferent to sexual harassment, which the school knew about, and was severe and pervasive and deprived a student of access to educational opportunities and benefits.⁵⁰ The Supreme Court acknowledged when establishing that standard that it applied specifically to private suits seeking money damages, and even went so far as to clarify that that standard did not apply to administrative enforcement.⁵¹ The Court 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 money damages.⁵² The Department’s 2001 Guidance directly addressed this development from the Court and concluded that it was appropriate for the Department to continue to enforce the broad protections provided under Title IX, not restrict administrative enforcement to standards intended only for money damages. By choosing to import these liability standards, this Department of Education both puts in place a harder standard and confuses its enforcement mechanisms with court processes that have no place in administrative proceedings. This will make it more difficult for students who experience sexual harassment and violence to receive a prompt and equitable response from their schools to prevent and remedy the behavior.

⁴⁸ *Id.*

⁴⁹ 83 Fed. Reg. 61468, 61469.

⁵⁰ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998) (detailing standard for employee-on-student harassment); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999) (detailing standard for student-on-student harassment).

⁵¹ *Gebser*, 524 U.S. at 291-92 (citing 20 U.S.C. § 1682).

⁵² *Davis*, 526 U.S. at 639.

Unlawful Narrowing of Response to Sexual Harassment Based on Location of Incident

The proposed rule would require schools to ignore sexual harassment and violence that occurs outside of a school activity, even if that sex discrimination creates a hostile environment and impacts a student's education. In the proposed rule sections 106.30 and 106.45(b)(3), schools are instructed to take no notice of harassment that occurs outside of a school activity. This would include ignoring complaints of sexual harassment or violence that occurs off-campus or online so long as it is technically outside of a school-sponsored program. The proposed rule imposes this approach even if the student is forced to see their harasser in school or on campus and the harassment directly impacts their education as a result.

This is out of touch with students' experiences. Sexual harassment occurs both on-campus and in off-campus spaces closely associated with school: Nearly 9 in 10 college students live off campus;⁵³ 41 percent of college sexual assaults involve off-campus parties;⁵⁴ students are far more likely to experience sexual assault if they are in a sorority (nearly 1.5 times more likely) or fraternity (nearly 3 times more likely);⁵⁵ and only 8 percent of all sexual assaults occur on school property.⁵⁶

This aspect of the proposed rule is also in conflict with Title IX's statutory language, which does not depend on where the underlying conduct, in this case sexual harassment or violence, occurred. Title IX states that no person shall be, "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity."⁵⁷ The Department has long asserted in guidance documents that this means 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 The proposed rule disregards this reality, that sexual harassment that happens away from school property or even outside of a school activity can be no less impactful on a student's education than in-school harassment.

⁵³ Rochelle Sharpe, *How Much Does Living Off-Campus Cost? Who Knows?*, N.Y. TIMES (Aug. 5, 2016), <https://www.nytimes.com/2016/08/07/education/edlife/how-much-does-living-off-campus-cost-who-knows.html> (87%).

⁵⁴ 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.

⁵⁵ 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).

⁵⁶ RAINN, *supra* note 25.

⁵⁷ 20 U.S.C. § 1681(a).

⁵⁸ 2001 Guidance, *supra* note 32.

⁵⁹ 2017 Guidance, *supra* note 31 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 31 ("a school must process all complaints of sexual violence, regardless of where the conduct occurred"); 2011 Guidance, *supra* note 31 ("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 31 at 2 (finding Title IX violation where "conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school," regardless of location of harassment).

Elimination of Transparency Regarding Statutory Religious Exemptions

The proposed rule section 106.12 allows schools to claim Title IX's statutory religious exemption without providing any transparency or prior warning to students or the Department. In the past, schools have claimed an exemption by writing and identifying which Title IX provisions conflict with their religious beliefs. The proposed rule would remove the expectation that schools notify the Department of their desired exemption. This means that students may not know that their schools will not fully implement Title IX's protections.

Schools that seek a religious exemption from Title IX's protections for LGBTQ students, for example, may include in their school code of conduct provisions that bar students from certain behavior. Reporting sexual harassment or violence could then open a student up to discipline for violating that aspect of the school's policy. In addition, this approach to implementing Title IX's religious exemption is potentially an escape hatch—schools could claim or expand a religious exemption after a Title IX violation in order to evade any responsibility. The Department's assurances that schools can retroactively claim a religious exemption also directly conflicts with the current⁶⁰ and proposed⁶¹ rule requiring all covered educational institutions “notify” all applicants, students, employees, and unions “that it *does not* discriminate on the basis of sex.” Without clarity with regards to the school's position, students could be misled, while schools receive a safe harbor from liability from the Department.

III. The proposed rule does not fully account for the burden and significant costs inflicted on students who experience sexual harassment and assault.

The proposed rule fails to accurately estimate the true and full burden of the required policy changes in violation of Executive Order 12866, which requires agencies to assess all costs and benefits of a proposed rule “to the fullest extent that these can be usefully estimated.”

The burden calculation in the proposed rule fails to include the cost on students who would no longer receive support, action, or accommodation from their schools for many incidents of sexual harassment and violence that schools would no longer have to respond to under the new provisions in the proposed rule. The proposed rule's burden calculation also fails to include the cost on students who are silenced and decide not to report sexual harassment and violence because of problematic changes to the processes schools implement to respond to reports. These costs range from the health care costs survivors bear to the drag on economic security experienced by survivors who drop out of school.

Sexual assault inflicts enormous costs on survivors. Research shows that following rape, survivors experience costs between \$87,000 and \$240,776.⁶² The lifetime costs of intimate partner violence, which can include sexual harassment that impacts a student's education including related health problems, lost productivity, and criminal justice costs, can total \$103,767 for women and \$23,414

⁶⁰ 34 C.F.R. § 106.9(a).

⁶¹ Proposed rule §106.8(b)(1).

⁶² White House Council on Women and Girls, *Rape and Sexual Assault: A Renewed Call to Action* 15 (Jan. 2014), available at https://www.knowyourix.org/wp-content/uploads/2017/01/sexual_assault_report_1-21-14.pdf.

for men.⁶³ The Centers for Disease Control and Prevention estimates that the lifetime cost of rape is \$122,461 per survivor, resulting in an annual national economic burden of \$263 billion.⁶⁴ It is worth noting that about one-third of the cost is borne by taxpayers.⁶⁵

Students also have unique experiences with associated costs after suffering sexual harassment and violence that impacts their educations. Thirty-four percent of students who have experienced sexual assault dropout of college, a rate that is higher than the overall dropout rate for college students.⁶⁶ In addition, more than 40 percent of college students who were sexually victimized also reported experiences of institutional betrayal, which impacts their abilities to continue their education.⁶⁷ Stopping out and dropping out of college have associated costs on students both in the short-term and long-term.

While the NPRM acknowledges that estimates regarding the effects of sexual harassment and assault exist, it claims that the proposed rule will have no impact on the underlying rate of harassment and therefore those estimates are not relevant.⁶⁸ This is nonsensical. For example, the proposed rule would limit schools' response to sexual harassment, asking students to experience repeated and escalating incidents before intervention—this, by definition, would mean students experience more sexual harassment and violence which needs to be adequately estimated. The analysis of the burden is so flawed it cannot be used to justify the proposed rule.

IV. The NPRM allows unfair processes that are inappropriate in the context of civil rights enforcement and would make it harder for students to come forward and receive the support they need when they experience sexual harassment or assault.

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.⁶⁹ While the proposed rule section 106.8(c) claims to also require “equitable” processes,⁷⁰ the requirement would lead schools to conduct their grievance procedures in a fundamentally inequitable way.

As discussed earlier, Title IX is a landmark civil rights statute designed to allow equal access to educational opportunity based on sex. Title IX procedures exist because only schools—not a criminal process—can provide most of the protections and accommodations that survivors need and deserve to ensure equal access to education, like separate classes or campus spaces. Title IX requires schools to provide a fair process to all students. AAUW has supported the 2011 and 2014

⁶³ Cynthia Hess & Alona Del Rosario, *Dreams Deferred: A Survey on the Impact of Intimate Partner Violence on Survivors' Education, Careers, and Economic Security*, INST. FOR WOMEN'S POLICY RESEARCH 8 (2018), available at https://iwpr.org/wp-content/uploads/2018/10/C474_IWPR-Report-Dreams-Deferred.pdf.

⁶⁴ Cora Peterson et al., *Lifetime Economic Burden of Rape Among U.S. Adults*, 52(6) AM. J. PREV. MED. 691, 698 (2017), available at https://stacks.cdc.gov/view/cdc/45804/cdc_45804_DS1.pdf.

⁶⁵ *Id.*

⁶⁶ Mengo, *supra* note 30 at 234–48.

⁶⁷ Carly Parnitzke Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, J. TRAUMATIC STRESS 119 (2013), available at <https://dynamic.uoregon.edu/jjf/articles/sf2013.pdf>.

⁶⁸ 83 Fed. Reg. 61485.

⁶⁹ 34 C.F.R. § 106.8(b).

⁷⁰ *See* proposed rule § 106.8(c).

Guidance’s clarity on fairness and equity—allowing indirect cross-examination, reiterating parties’ access to information and ability to respond, and use of a standard of evidence that is most equitable. In this proposed rule, the Department of Education is using as many approaches as it can to keep students from reporting sexual harassment and violence at all and requiring schools to respond to fewer reports when they are received.

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.⁷¹ But, as discussed below, the current Title IX regulations already provide more rigorous due process protections than are required under the Constitution. Furthermore, the Department’s 2001 Guidance already instructs schools to protect the “due process rights of the accused.”⁷² Adding section 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. Title IX, its regulations, and the 2001 Guidance are clear and strong on the protection of students’ rights. Concerns regarding school implementation of these provisions, and instances where schools fail to protect students’ rights, call for increased enforcement of the law, not a rewriting of its regulations.

The NPRM requires schools to implement grievance procedures that are unfair in several ways:

Unfair Standard

The NPRM allows, and in certain situations requires, schools to use an unfairly tilted standard in disciplinary proceedings. This would discourage survivors from coming forward and violates Title IX’s requirement that all complaints be resolved in an “equitable” manner. The Department’s longstanding practice has required that in a Title IX grievance procedures schools use a “preponderance of the evidence” standard in determining responsibility—meaning it is “more likely than not,” that sexual harassment has occurred.⁷³ In section 106.45(b)(4)(i), the NPRM 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. The preponderance of the evidence standard is used in civil lawsuits and civil rights proceedings, where

⁷¹ Proposed rule § 106.6(d)(2).

⁷² 2001 Guidance, *supra* note 32.

⁷³ 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>.

both parties have an equal stake in the matter.⁷⁴ In this case, both students have an equal right to education and any implementing regulations must be in line with Title IX's requirement that grievance procedures be "equitable." Catering only to the impacts on respondents in designing a grievance process to address harassment is inequitable.

Schools would also be allowed to use a higher standard in grievance procedures for sexual harassment and violence while continuing to use the preponderance of the evidence standard in other student misconduct cases, even if they carry the same maximum penalties.⁷⁵ The NPRM's permitting schools to use a more burdensome standard in sexual harassments and assault cases appears to be based on stereotypes assuming that survivors lie about sexual assault,⁷⁶ and does not make that assumption about students who report other physical assaults, plagiarism, or other school disciplinary violations.

Yet again, the proposed rule sets up a situation where student survivors would receive fewer protections than employee survivors. Where the school chooses under section 106.45(b)(4)(i) of the NPRM to use a clear and convincing evidence standard in its Title IX grievance procedures, but must maintain use of the preponderance of the evidence standard for workplace disputes under Title VII, a real contrast would exist. In addition, for those whose recognition as an employee with the school varies by jurisdiction, such as graduate student lab assistants, teaching assistants, or research assistants, and who must rely on Title IX's employment protections, a higher set of standards would apply for the same behavior. This makes little sense.

Title IX experts and practitioners support the use of the preponderance standard and have implemented it at most institutions of higher education. Research shows that the standard was used by over 80 percent of colleges surveyed.⁷⁷ The NCHERM Group recommends that schools use the preponderance standard.⁷⁸ The Association of Title IX Administrators (ATIXA) acknowledges that no other evidentiary standard than preponderance is equitable and that "any standard higher than preponderance advantages those accused of sexual violence (mostly men) over those alleging sexual violence (mostly women)."⁷⁹ The National Association of Student Personnel Administrators recommends it saying, "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

⁷⁴ 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).

⁷⁵ 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.

⁷⁶ Kingkade, *supra* note 16.

⁷⁷ 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>.

⁷⁸ 83 Fed. Reg. 61464 n.2.

⁷⁹ Ass'n of Title IX Admin's, *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>.

of the evidence tilts proceedings to unfairly benefit respondents.”⁸⁰ 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”⁸¹ because “it is the only standard that reflects the integrity of equitable student conduct processes which treat all students with respect and fundamental fairness.”⁸²

Presumption of Innocence

The proposed rule’s requirement of a “presumption that the respondent is not responsible” for harassment is inequitable.⁸³ Under proposed section 106.45(b)(1)(iv), schools would be required to presume that the reported harassment did not occur as the complainant claims, 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.⁸⁴ The presumption of innocence is a criminal law principle, incorrectly imported into this context.⁸⁵ Criminal defendants are, and should be, 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.

This presumption conflicts with the current Title IX rules⁸⁶ and other proposed sections in the proposed rule,⁸⁷ 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 section 106.45(b)(1)(ii), which states that “credibility determinations may not be based on a person’s status as a complainant” or “respondent.”

Unequal Appeal Rights

The proposed rule does not provide equal grounds for appeal to both parties. The proposed rule says that “if a recipient offers an appeal, it must allow both parties to appeal.”⁸⁸ But, section 106.45(b)(5) also places restrictions on complainants’ appeal rights. Under the proposed

⁸⁰ NASPA – Student Affairs Admin’rs in Higher Educ., *NASPA Priorities for Title IX: Sexual Violence Prevention & Response*, available at

https://www.naspa.org/images/uploads/main/NASPA_Priorities_re_Title_IX_Sexual_Assault_FINAL.pdf.

⁸¹ Ass’n for Student Conduct Admins., *ASCA 2014 White Paper: Student Conduct Administration & Title IX: Gold Standard Practices for Resolution of Allegations of Sexual Misconduct on College Campuses* (2014), available at <https://www.theasca.org/Files/Publications/ASCA%202014%20White%20Paper.pdf>.

⁸² Chris Loschiavo & Jennifer L. Waller, *The Preponderance of Evidence Standard: Use In Higher Education Campus Conduct Processes*, ASS’N FOR STUDENT CONDUCT ADMINs., available at <https://www.theasca.org/files/The%20Preponderance%20of%20Evidence%20Standard.pdf>.

⁸³ Proposed rule 106.45(b)(1)(iv)

⁸⁴ Kingkade, *supra* note 16.

⁸⁵ 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*, WASH. POST (Nov. 20, 2018), https://www.washingtonpost.com/opinions/betsy-devos-its-time-we-balance-the-scales-of-justice-in-our-schools/2018/11/20/8dc59348-ecd6-11e8-9236-bb94154151d2_story.html).

⁸⁶ 34 C.F.R. § 106.8(b).

⁸⁷ Proposed rules §§ 106.8(c) and 106.45(b).

⁸⁸ §106.45(b)(5).

rule complainants are limited in whether and on what grounds they can appeal an inadequate sanction on a respondent. Alternatively, respondents are not limited in their appeal. They can appeal sanctions as well as appeal inequitable procedures. Such imbalance in the process makes little sense. Survivors are also impacted by sanction decisions, given those frequently dictate the ways in which both parties will interact with the school moving forward. It is out of line with Title IX's expectation of equitable grievance procedures to put in place an unequitable right to appeal.

Adversarial Hearing Process

The NPRM fosters a hostile and confrontational hearing process, which will deter survivors from coming forward. In section 106.45(b)(3)(vii) of the proposed rule, institutions of higher education are required to conduct a "live hearing." Parties and witnesses would be required to participate in cross-examination by an advisor of choice for the other party. An advisor of choice could be any number of individuals – an attorney, a friend, or an angry parent. The adversarial and contentious nature of cross-examination would further traumatize college and graduate school survivors who seek help through Title IX.

In addition, while importing an inappropriate element of the criminal justice system to school disciplinary proceedings in the requirement for "live hearings,"⁸⁹ the NPRM fails to provide the necessary protections for such an element. For example, the proposed rule does not include applying the rules of evidence, it does not ensure an attorney or advisor is available and able to object to certain questions, nor a judge available to rule on objections. In addition, while conducting live hearings is only required under the proposed rule for institutions of higher education, they would be allowed for P-12 schools. It is deeply problematic to subject children to an adversarial hearing, even with the concession in section 106.45(b)(3)(vi) that questioning would be conducted by the decision-maker, not the parties involved. Finally, the live cross-examination requirement would also lead to sharp inequities if one party can afford an attorney and the other cannot.

It is inappropriate for the Department to impose upon schools the requirement that grievance procedures must include live hearings. This is a requirement that is not demanded by the Constitution nor by other federal laws. The Supreme Court has addressed issues around school disciplinary and grievance procedures and has not required any form of cross-examination (live or indirect) in disciplinary proceedings in public schools under the Due Process clause. The Court has explicitly said that a 10-day suspension does not require "the opportunity...to confront and cross-examine witnesses"⁹⁰ and has let stand at least one circuit court decision holding that expulsion does not require "a full-dress judicial hearing, with the right to cross-examine witnesses."⁹¹ The majority of courts that have considered issues around school disciplinary proceedings 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

⁸⁹ Proposed rule §106.45(b)(3)(vii).

⁹⁰ *Goss v. Lopez*, 419 U.S. 565, 583 (1975). See also *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).

⁹¹ E.g., *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 158 (5th Cir. 1961), *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).

examiner.⁹² The Department itself admits that written questions submitted by students or oral questions asked by a neutral school official are fair and effective ways to discern the truth in P-12 schools,⁹³ and proposes retaining that method for P-12 proceedings.

While imposing new requirements on grievance proceedings that make them inherently more adversarial, the proposed rule also allows schools to pressure survivors into traumatizing mediation procedures with their assailants. Proposed section 106.45(b)(6) would allow schools to use “any informal resolution process, such as mediation” to resolve a complaint of sexual harassment. While the proposed rule includes the requirements that a school obtain voluntary, written consent to move forward with mediation, the proposed rule also allows schools to prohibit students from ending the information process once it begins. Mediation is never appropriate for resolving sexual harassment or assault, as it assumes that both parties bear responsibility for the incident, and exposes survivors to possible retraumatization, bullying, or coercion during the process—especially if they cannot end the mediation.

AAUW has supported the 2011 and 2014 Guidance’s process requirements—allowing indirect cross-examination, reiterating parties’ access to information and ability to respond, and use of the preponderance standard. Deviation from this approach does not serve students and sets up inherently unequal proceedings.

V. The NPRM sets up conflict and confusion with existing state laws.

In addition to the strong protections provided by Title IX, students and schools rely on corresponding state laws to ensure access to an education free from sex discrimination. Over the last two decades, some states added provisions to their legal codes to help augment those protections. Many of these laws were passed to codify and bolster previous regulations and guidance from the Department. But the current NPRM diverges from this path and, if implemented, would cause conflicts with existing laws in at least 10 states.⁹⁴ In a few states, access to state funding may be in jeopardy because each state’s institutions of higher education are required to create sexual harassment policies that include provisions specifically in conflict with those required by the NPRM. In other states, laws diverge from the NPRM by mandating that schools use different standards of proof, covering students both on and off campus, providing more robust supportive measures to victims, and laying out different procedures for cross-examination or mediation. The consequences of these conflicts could be wide-ranging, posing problems for enforcement, leading to confusion for schools, imposing additional cost burdens, and prompting lengthy litigation battles.

Conclusion

The proposed rule is antithetical to the fundamental promise of Title IX, that students be able to access and benefit from education free from sex discrimination. It fails to acknowledge the reality

⁹²Grossman, *supra* note 35.

⁹³ 83 Fed. Reg. 61476.

⁹⁴ See e.g., California (Cal. Educ. Code § 67386, Cal. Educ. Code § 66290.1); Connecticut (Conn. Gen. Stat. Ann. § 10a-55m); Hawaii (Haw. Rev. Stat. Ann. § 304A-120), Illinois (110 Ill. Comp. Stat. Ann. 155); Maryland (Md. Code Ann., Educ. § 11-601); New Jersey (N.J. Stat. Ann. § 18A:61E-2); New York (N.Y. Educ. Law §§ 6439-49); Oregon (Or. Rev. Stat. Ann. § 350.255, Or. Rev. Stat. Ann. § 342.704); Texas (Tex. Educ. Code Ann. § 51.9363); and Virginia (Va. Code Ann. § 23.1-806).

of sexual harassment in schools, limits the response of schools to much of the abuse students experience, and allows unfair processes that make it harder for students to come forward and receive the remedies the law requires. AAUW expresses our strong opposition to the Department's NPRM to amend the rules implementing Title IX of the Education Amendments of 1972 (Title IX) and urges the Department to withdraw the proposal.

Please do not hesitate to contact me at 202/785-7720 or Anne Hedgepeth, Director of Federal Policy, at 202/785-7724, if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Deborah J. Vagins". The signature is written in black ink and is positioned above the printed name.

Deborah J. Vagins
Senior Vice President, Public Policy and Research