



January 30, 2019

The Honorable Ken Marcus  
Assistant Secretary for Civil Rights  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, D.C. 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 Assistant Secretary Marcus,

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the civil and human rights of all persons in the United States, and the 44 undersigned organizations, **we write in response to the Department of Education's Notice of Proposed Rulemaking (NPRM) to express our strong opposition to the Department's proposal to amend rules implementing Title IX of the Education Amendment Act of 1972 (Title IX) as published in the Federal Register on November 29, 2018. The Department of Education should immediately withdraw this NPRM and instead focus its energies on vigorously enforcing the Title IX requirements that the Department has relied on for decades, to ensure that schools promptly and effectively respond to sexual harassment.**

The Department of Education (ED or Department) is a civil rights agency and is responsible for protecting students from discrimination on the basis of race; color; national origin; sex; disability; and age.<sup>i</sup> Under Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act of 1990, and the Age Discrimination Act of 1975, ED is tasked with enforcing these laws in response to complaints of discrimination and through proactive compliance reviews, data collection, and technical assistance.<sup>ii</sup> The Department has an obligation to ensure that all students have equal educational opportunities.

We support ED's 2001 Revised Sexual Harassment Guidance<sup>iii</sup> and 2010 Dear Colleague Letter on Bullying and Harassment,<sup>iv</sup> as well as the principles and requirements outlined in the 2011 Dear Colleague Letter on Sexual Violence<sup>v</sup> and accompanying 2014 Questions and Answers on Title IX and Sexual Violence,<sup>vi</sup> all of which provide much needed clarity for schools, students, and families regarding Title IX's protections and obligations. These

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guidance documents and enforcement of Title IX by the ED’s Office for Civil Rights (OCR) have spurred schools to address the pervasive sexual harassment and assault that for far too long have contributed to hostile environments that deprive many students of equal educational opportunities.

Students deserve, and the law requires, a Department that works to protect *all* students from discrimination. The proposed rules are a cruel attempt to silence sexual assault survivors and deny them educational opportunities and could lead schools to do even less to prevent and respond to sexual violence and harassment. This NPRM would only reinforce unsafe school environments, deprive students of their right to an education, and deny students equal protection of the law. As explained below, these proposed rules ignore the far-reaching harmful impact of sexual violence in schools; they would make it harder for students to report abuse; they would allow—and in some cases, *force*—schools to ignore reports when they are made; and they would unfairly tilt the investigation process in favor of named harassers to the direct detriment of survivors, all of which would cause particular harm to women and girls, students of color, students with disabilities, and LGBTQ students.

We strongly oppose ED’s proposed NPRM for the following reasons:

**1. The proposed rules, by narrowing the definition of sexual harassment, would discourage reporting and permit sexual violence and harassment to interfere with students’ education.**

The proposed rules would narrow the definition of sexual harassment to “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” and would mandate dismissal of complaints of harassment that do not meet this standard.<sup>vii</sup> Under this definition, even if a student bravely reports sexual harassment to the “right person,”<sup>viii</sup> their school would still be *required* to ignore the student’s Title IX complaint until the harassment has already denied them an education. Under the proposed rules, 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.

By forcing students to endure repeated and escalating levels of abuse before schools could be legally required to act, the proposed rules flout the purpose of Title IX, which is to protect students from sex-based discrimination *before* their education is actively harmed.<sup>ix</sup> Instead of protecting students’ civil rights, the proposed rules are constructed to protect schools from being held accountable for failing to address sexual harassment and abuse that interferes with students’ education. The proposed rules fundamentally allow schools to sweep allegations of harassment and abuse under the rug by erroneously sending the message to schools that is permissible to allow, and force students to endure, unwelcome conduct of a sexual nature. In this way, the proposed rule would put vulnerable students at greater risk of being denied educational opportunities, or pushed out of school entirely, because of sex-based discrimination.

The proposed definition would also discourage reporting. Research shows that many college survivors of sexual assault do not report to their schools because survivors have normalized or minimized the violence inflicted, perceiving it to be “insufficiently severe.” In one study,<sup>x</sup> this was the most frequently cited reason for not reporting a sexual assault. While reporting sexual harassment can already be extremely hard for many survivors, the proposed rules would only further discourage students from coming forward to ask their schools for help. The most common reasons students give for not reporting their experiences are doubts that school officials would help and fears that reporting the incidents would make the situation worse.<sup>xi</sup> Already, only 12 percent of college survivors<sup>xii</sup> and 3 percent of girls ages 14-18<sup>xiii</sup> report sexual assault to their schools or to the police. In a culture that already minimizes gender-based violence, redefining sexual harassment as behavior that is “severe, pervasive, and objectively offensive” versus “unwelcome conduct of a sexual nature” would have a predictable chilling effect on students who would otherwise seek help by reporting violence and abuse.

Sexual harassment and violence are far too common in schools. Students are discriminated against and experience harassment in intersectional ways, based on their sex, including sexual orientation and gender identity; race;<sup>xiv</sup> color; national origin; and disability. Unfortunately, despite how far we’ve come with the Me Too movement and survivors feeling more encouraged to disclose their traumatic experiences, there still exists a culture that discounts and ignores the experiences of our most vulnerable and marginalized student survivors, including girls and women of color, particularly Black girls and women; LGBTQ students; and students with disabilities.

The proposed rules’ narrow definition would therefore disproportionately impact women and girls of color who already experience excessive rates of sexual harassment and violence, are already less likely to report, and who, because of harmful race and sex stereotypes that label them as “promiscuous,”<sup>xv</sup> more adult-like, less innocent and less deserving of protection and care,<sup>xvi</sup> are often ignored or face punishment when they do report. For example, schools are 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.”<sup>xvii</sup> Indeed, some of our member organizations have worked directly with survivors, including girls of color, who were punished by their schools after reporting their sexual harassment, and by narrowing the scope of when a school can take action, the proposed rules would make the cost of reporting even higher for Black women and girls. Ultimately, these rules would further deter reporting, make it even less likely that survivors of color will have their complaints heard, and further increase school pushout of survivors, particularly Black girls.

Women and girls who are pregnant or parenting are more likely to experience sexual harassment than their peers, due in part to the stereotypes that are associated with having engaged in sexual intercourse in the past. For example, 56 percent of girls ages 14-18 who are pregnant or parenting have been kissed or touched without their consent, which is more than double the rate of girls overall in the same age bracket.<sup>xviii</sup>

Narrowing the definition of “sexual harassment” may make LGBTQ student survivors even less likely to report their experiences to school officials. LGBTQ students are more likely to experience sexual harassment than their peers. More than half of LGBTQ students ages 13-21 are sexually harassed at

school,<sup>xxix</sup> and nearly 1 in 4 transgender and gender-nonconforming students are sexually assaulted during college.<sup>xx</sup> According to a study of LGBTQ students in high school, the majority of students who were harassed or assaulted at school did not report these incidents to school staff, most often because they doubted that school officials would help or take their experiences seriously.<sup>xxi</sup>

The proposed redefinition of “sexual harassment” would also be especially harmful to students with disabilities. As ED notes in the preamble,<sup>xxii</sup> students with disabilities have different experiences, challenges, and needs. Students with disabilities are more likely to be victims of sexual assault and may be particularly vulnerable due to a range of factors, including physical challenges that can prevent them from protecting themselves, stereotypes about people with disabilities, and lack of opportunities for comprehensive sexual education.<sup>xxiii</sup> Children with disabilities are 2.9 times more likely than children without disabilities to experience abuse and violence. College students with disabilities are also more likely to experience sexual assault. A recent study found 31.6 percent of undergraduate females with disabilities reported nonconsensual sexual contact involving physical force or incapacitation, compared to 18.4 percent of undergraduate females without a disability.<sup>xxiv</sup> This means that one of every three female undergraduates with a disability had been sexually assaulted during their time at college. Students with disabilities, however, are less likely to be believed when they report and often have greater difficulty describing the harassment they experience.<sup>xxv</sup>

By narrowing the definition of “sexual harassment” with respect to Title IX, ED would be making it more difficult for students in schools to be protected from sexual harassment and shirk the responsibility of schools from acting until it’s too late. The job of the Department is to protect the civil rights of students, including the right of survivors to access education, not to help shield schools from accountability. The proposed rules, however, send the message that students should be forced to put up with sexual violence and that some level of sexual harassment is acceptable.<sup>xxvi</sup>

## **2. The proposed rules would allow schools to ignore reports of sexual harassment and violence in violation of Title IX.**

Sexual assault is already very difficult to talk about, and even without this proposed rule, there are numerous barriers to reporting. When students do report, however, schools should respond to ensure that students are not denied educational opportunities. Under the proposed rules, however, schools would have no obligation to act if students do not report to “the right person” or if the harassment or assault occurred off-campus, outside a school activity.

Proposed §§ 106.44(a) and 106.30 would allow schools to ignore a report unless it is made to a small subset of school employees who have “the authority to institute corrective measures.”<sup>xxvii</sup> This is a dramatic change from the 2001 Guidance, which requires schools to address sexual harassment if almost any school employee<sup>xxviii</sup> either knows, or should reasonably have known, about it.<sup>xxix</sup> That standard reflects the reality that many students disclose sexual abuse to those school employees they trust the most and are generally not informed about which employees have authority to institute corrective measures.

Under the proposed rules, however, if a K-12 student told a non-teacher school employee they trust—such as a guidance counselor, teacher aide, or athletics coach—that they had been sexually assaulted by another student, the school would have no obligation to help the student.<sup>xxx</sup> Such a rule is particularly unworkable for students who are non-verbal, students with physical or intellectual disabilities, and English Language Learners, who often have closer relationships with their teacher aides, members of their Section 504 team or IEP team, school psychologists, and other school employees who are not their teachers or the Title IX coordinator. College students would fare no better. If a college student told their professor or RA that they 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.

Additionally, the proposed rules would prohibit schools from investigating complaints regarding off-campus and 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. Forty-one percent of college sexual assaults involve off-campus parties,<sup>xxxii</sup> but a school would not need to investigate or respond to a complaint, even if the survivor shares a dorm with their assailant or is forced to interact with or see their rapist every day in class, at the library, or in the dining hall. Similarly, K-12 students harassed or assaulted by a peer on their way to or from school may not be protected, even if the harassment or violence prevents them from accessing an education. Such a result is at odds with the purpose of Title IX. Similarly, schools have an obligation to respond to online harassment and abuse that denies access to educational opportunities.<sup>xxxiii</sup>

The proposed rules also conflict with the Clery Act's requirements. The Clery Act, which is enforced by ED, requires colleges and universities that receive federal funding to notify all students who report sexual assault, stalking, dating violence, and domestic violence of their rights, including the right to seek protecting measures and academic accommodations, regardless of "whether the offense occurred on or off campus."<sup>xxxiii</sup> This conflict between the proposed rules and the Clery Act requirements will only create more confusion for colleges and universities in reporting and responding to sexual harassment and violence, especially given that 41 percent of college sexual assaults involve off-campus parties.<sup>xxxiv</sup>

ED should be working with students and schools to decrease barriers to reporting. Instead, these rules propose to prevent students from getting access to help. The rules would make it even harder for students to report harassment and get the help they need to be able to continue their education. The effect of ignoring reports of abuse can be particularly devastating to students of color, undocumented students,<sup>xxxv</sup> LGBTQ students,<sup>xxxvi</sup> and students with disabilities, who can feel more comfortable reporting to their schools than approaching the police for help. These students may be less likely than their peers to report sexual assault to the police due to fear of facing mistreatment, violence, and/or deportation. In these communities, there is a deep mistrust of law enforcement stemming from a history of police violence, harassment, and officers' frequent skepticism of survivors. In addition, most survivors know their assailants, and may fear retaliation or may not necessarily want to see their assailants go to prison or otherwise contribute to the over-criminalization of men, boys, and gender nonconforming people of color. Schools are uniquely positioned to provide accommodations and address the effects of harassment or violence that can interfere with a student's ability to access educational opportunities that may or may not

be classified as a crime due to a state's penal code. Therefore, schools often provide the only remedy with which students of color feel they can seek justice

The purpose of Title IX is keeping survivors in schools and providing appropriate accommodations for a safe educational environment. However, these proposed rules would hinder Title IX enforcement, discourage reporting of sexual harassment, and prioritize protecting schools from, and an OCR investigation over, protecting survivor's educational rights.

### **3. The proposed rules would fail to ensure students have access to information that specifies which schools have requested religious exemptions.**

Current Title IX rules allow schools controlled by religious organizations to claim religious exemptions to Title IX by notifying ED in writing and indicating the exact Title IX regulations that conflict with a specific tenet of the religion. The proposed rules would remove that requirement and permit schools to opt out of Title IX at any time, including during an OCR investigation, and without notice or warning to ED or students in advance of discriminating against them. This would allow schools to conceal their intent to discriminate against students, exposing them 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 services.<sup>xxxvii</sup> By allowing schools to claim exemptions during investigations, the proposed rules could also be abused by schools who may use religion as a pretext for their unlawful discrimination.

The Department's interpretation of the religious exemption conflict with the current<sup>xxxviii</sup> and proposed<sup>xxxix</sup> 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. Women, LGBTQ students, and married or unmarried pregnant and parenting students could be subject to discrimination or expulsion from school without any notice, thereby affecting their ability to make an informed decision about where to go to school and ensure that they choose a college that will treat them fairly. Students should not have to avoid attending religious colleges and universities due to a lack of transparency regarding the institution's intentions to protect their civil rights under Title IX. Clear guidance in this area, as is established by the current rules, is necessary to ensure all students are aware of, and institutions implement, the legal protections that the law provides.

### **4. The proposed rules would fail to ensure that schools adopt and publish grievance procedures that provide for a prompt and equitable resolution of student complaints of sexual misconduct.**

The proposed rules would roll back survivors' rights and undermine the processes that safeguard their right to equal access to educational opportunities. In particular, students with disabilities also are routinely denied required accommodations during Title IX hearings, judicial procedures, suspensions, and other

procedures and actions on campus.<sup>xi</sup> The proposed rules would single out complaints of sexual harassment and assault for different treatment than other forms of misconduct and force many schools to adopt a grievance procedure with a different standard of proof than they would use to investigate other types of student misconduct, thereby giving special rights to named harassers. Additionally, the proposed rules would allow schools to delay investigations indefinitely and would require live-cross examination during the grievance process that would further traumatize survivors and discourage many students from coming forward or participating in a Title IX grievance process.

### Standard of Proof

The proposed rules would force many schools to use the clear and convincing evidence standard in sexual misconduct 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.<sup>xii</sup> 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 unspoken stereotypes and the 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. Such an assumption has no place in regulations governing a statute meant to protect against sex-discrimination in education.

The Department has suggested that this proposed change is necessary to protect the due process rights of named harassers, but the preponderance of the evidence standard is on the only evidentiary standard that treats all students fairly and equally. It is also the standard that is used by courts in all civil rights cases.<sup>xiii</sup> The Department provides no reason why this standard, which is appropriate in all other civil rights cases, would not be adequate for a school grievance process apart from a special concern regarding "stigma" for respondents found responsible for sexual harassment. Such a concern, however, does not address the fundamental inequity of giving one party in a school grievance procedure a higher benefit of the doubt than another, especially when *both* parties risk facing stigma and "significant, permanent, and far reaching" consequences regardless of the outcome.

Others have argued that the proposed rule will promote racial justice by ensuring that Black men and boys accused of sexual assault are not unfairly disciplined for false allegations.<sup>xiiii</sup> This view preys upon the very real concern of bias against Black men and boys in the criminal justice system. Yet the guarantee of a higher burden of proof in the criminal justice system has not protected Black men and boys from unfair punishment in the criminal context. Further, the Department has not attempted through its proposed rule to address bias against students of color in the school grievance process. While Black students are disproportionately suspended from elementary and secondary school compared to their white peers, available data shows that there is no statistical significance in the proportion of Black boys disciplined for sexual misconduct compared to white boys—indicating that a proposed rule on how schools investigate sexual harassment or misconduct would do little to address disproportionate rates of discipline for Black boys in school.<sup>xliv</sup>

Instead, the proposed rules would have the impact of continuing to disadvantage student survivors of color. Black women and girls, who may be more likely than white women and girls to suffer harassment

and assault, are also often treated unfairly by schools when they report sexual harassment by being blamed for their assault, pressured to stay silent about their experiences,<sup>xlv</sup> or pushed into the criminal justice system<sup>xlvi</sup> (“sexual abuse-to-prison pipeline”). The proposed rule would make schools less safe for women and girls of color who tend to be disproportionately targeted for sexual harassment and assault in schools for both race- and sex-based reasons. As organizations committed to racial justice, we recognize that protecting the educational rights of students of color requires that schools investigate reports of harassment and assault in a prompt, effective, and equitable manner such that survivors of color are not pushed out of school. At a minimum, that requires that schools preserve due process protections for both survivors and named harassers.

Yet, by departing from previous guidance documents, the proposed rules would exacerbate inequities against survivors by mandating unfair processes that favor named harassers. Since the Title IX regulations were issued in 1975, educational programs have been required to create “grievance procedures providing for prompt and *equitable* resolution” of complaints (emphasis added).<sup>xlix</sup> The rescinded 2011 Guidance further clarified what constitutes an *equitable* grievance procedure. Specifically, the Department reminded schools that both the complainant and the respondent should have the same rights in any grievance procedure, such as the right to review documents, the right to counsel, the right to present witnesses and evidence, and the right to an appeal. Moreover, the Department clarified that an equitable grievance procedure means that both the complainant and respondent bear the same standard of proof, which led to schools using the “preponderance of the evidence” standard. This standard is used in cases alleging discrimination under civil rights laws,<sup>l</sup> in civil lawsuits between two private parties (including suits related to possible criminal conduct such as tort actions for battery or murder/wrongful death), and in 80 percent of schools, according to a 2002 report issued well before the rescinded 2011 Guidance.<sup>li</sup> In fact, by demanding equitable treatment of both the respondent and complainant, the Department’s interpretation of Title IX provides named harassers with procedural protections beyond those the Supreme Court has said are guaranteed under the U.S. Constitution.<sup>lii</sup>

### Indefinite Delays

The proposed rules would require schools to have “reasonably prompt timeframes,” but would allow them to create a “temporary delay” or “limited extension” for “good cause,” which includes “concurrent law enforcement activity.”<sup>liii</sup> By contrast, the rescinded 2011 Guidance 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, however, if there is an ongoing criminal investigation, the school would be allowed to delay its Title IX investigation for an unspecified length of time. The goals of the criminal justice system and the goals of Title IX, however, are different. Whereas criminal investigations seek to punish, including to imprison, an abuser for their misconduct, civil rights investigations, including Title IX investigations, are intended 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 a civil rights resolution from their schools. Title IX is not about criminal liability; it protects students from discrimination and preserves the educational opportunities for all students. Therefore, any action that a school is required to take under Title IX should not rely on what is happening in a related criminal



process.

Also, of concern is that the proposed rules would allow schools to delay proceedings if they do not have language interpreters or available accommodations for individuals with disabilities. Students with disabilities and English Language Learners should not have their proceedings delayed just because their schools are failing to follow existing civil rights laws that require these accommodations to be available.<sup>liv</sup>

### Cross-Examination

The proposed rules would cause further trauma to survivors by unnecessarily subjecting them to live cross-examination. The proposed rules require post-secondary institutions to conduct a “live-hearing” in which parties and witnesses must submit to cross-examination by the other party’s “advisor of choice.”<sup>lv</sup> The rules do not forbid this advisor from being an attorney who is prepared to grill the survivor about the traumatic details of the assault or an angry parent or a close friend of either party. As such, universities will be forced to subject survivors to endure a potentially traumatic process just for seeking 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<sup>lvi</sup> would understandably discourage many students-parties and witnesses- from participating in a Title IX grievance process, chilling those who have experienced or witnessed harassment from coming forward. If a survivor is too traumatized to be cross-examined, the proposed rules would prohibit the school from relying on any of the survivor’s statements to reach a conclusion regarding the named harassers responsibility.<sup>lvii</sup>

Nor would the proposed rules entitle the survivor to the procedural protections that witnesses have during cross-examination in the criminal court proceedings that allegedly inspired this requirement; schools would not be required to apply rules of evidence or make an opposing attorney available to object to inappropriate questions or a judge available to rule on objections. The live cross-examination requirement would also lead to sharp inequalities if one party can afford an attorney and the other cannot.

### **5. The proposed rules exceed the Department’s authority to effectuate the nondiscrimination provisions of Title IX and fail to hold schools and institutions accountable when misconduct occurs.**

While the Department is well within its authority to require schools to adopt civil rights protections to effectuate Title IX’s mandate against sex discrimination, it does not have the authority to force schools to violate students’ and employees’ civil rights under Title IX by forcing schools to ignore sexual harassment. The proposed rules would *require* schools to dismiss complaints of sexual harassment if it is determined that the harassment does not meet the improperly narrow definition of “severe, pervasive, *and* objectively offensive harassment,” or if the conduct occurs outside of an educational program or activity, which includes most off-campus and online harassment. But 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.<sup>lviii</sup>

The proposed rules do not clarify ED’s vigorous enforcement of civil rights laws. These rules limit



OCR's leadership in ensuring that schools are held accountable for violations of Title IX. Following the issuance of the now rescinded 2011 Guidance documents, OCR enforcement led to more schools taking sexual harassment reports more seriously.<sup>lix</sup>

Unfortunately, the proposed rules would enable or even require schools to avoid their Title IX requirements and respond inappropriately at the expense of the civil rights of students. When schools fail to provide effective responses, the impact of sexual harassment can be devastating. 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.<sup>lx</sup>

Ensuring that all our children are safe and welcomed in schools is incredibly important to our organizations, our partners, and the communities we represent. Civil rights laws are critical to safeguarding equal educational opportunities for all students. ED's prior Title IX guidance letters and enforcement have been vital in the effort to ensure that students do not face discrimination in school based on sex. Yet, as advocates for civil rights, including gender justice, racial justice, disability rights, LGBTQ rights, and immigrants' rights, we know that such discrimination continues to deny students equal access to education at all levels. The administration cannot turn its back on student survivors and must make clear that the fundamental American values of fairness and equality will not be abandoned and that schools will provide *all* students an educational environment free from sex discrimination and violence. We call on the Department of Education to immediately withdraw this NPRM and instead focus 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.

If you have any questions, please contact Leadership Conference K12 Program Analyst Anum Malik at [malik@civilrights.org](mailto:malik@civilrights.org) or 202.548.7171.

Sincerely,

The Leadership Conference on Civil and Human Rights  
American Association of University Women  
American Federation of Teachers  
American-Arab Anti-Discrimination Committee  
Anti-Defamation League  
Arab American Institute (AAI)  
Augustus F. Hawkins Foundation  
Autistic Self Advocacy Network  
Campaign for Youth Justice  
CLASP  
Clearinghouse on Women's Issues  
Council of Parent Attorneys and Advocates  
Disability Rights Education & Defense Fund (DREDF)  
Education Law Center – PA  
Feminist Majority Foundation

Girls Inc.  
GLSEN  
Hispanic Federation  
Human Rights Campaign  
Impact Fund  
Judge David L. Bazelon Center for Mental Health Law  
MALDEF  
NAACP  
NAGLREP  
National Alliance for Partnerships in Equity (NAPE)  
National Association for Bilingual Education  
National Association of Councils on Developmental Disabilities  
National Black Justice Coalition  
National Center for Learning Disabilities  
National Center for Transgender Equality  
National Council of Jewish Women  
National Disability Rights Network  
National Education Association  
National Fair Housing Alliance  
National Lawyers' Committee for Civil Rights Under Law  
National Urban League  
National Women's Law Center  
OCA - Asian Pacific American Advocates  
People For the American Way  
Sargent Shriver National Center on Poverty Law  
Southeast Asia Resource Action Center (SEARAC)  
Southern Poverty Law Center  
Stop Street Harassment  
The Education Trust  
TNTP

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<sup>i</sup> 20 U.S.C. Ch. 48

<sup>ii</sup> U.S. Department of Education, Office for Civil Rights. "About OCR." Last modified: 10/15/2015.

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

<sup>iii</sup> See: <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

<sup>iv</sup> See: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>

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

<sup>vi</sup> See: <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

<sup>vii</sup> Proposed rules § 106.30

<sup>viii</sup> This argument relates to further arguments in Section 2.

<sup>ix</sup> Feminist Campus. "Title IX Under Attack." November 2018.

<http://feministcampus.org/campaigns/campus-violence/title-ix-under-attack/>

<sup>x</sup> Holland, K, Cortina, L. "It Happens to Girls All the Time": Examining Sexual Assault Survivors' Reasons for Not Using Campus Supports," *Am J Community Psychol* (2017) 59:50–64 at 61

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- <sup>xi</sup> Kosciw, J. G., Greytak, E. A., Zongrone, A. D., Clark, C. M., & Truong, N. L. (2018). *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools*. New York, NY: GLSEN
- <sup>xii</sup> Poll: One in 5 women say they have been sexually assaulted in college. WASHINGTON POST. June 2015. <https://www.washingtonpost.com/graphics/local/sexual-assault-poll>
- <sup>xiii</sup> National Women's Law Center, *Let Her Learn: Sexual Harassment and Violence*. 2016. <https://nwlc.org/blog/combating-sexual-violence-to-getherlearn/>
- <sup>xiv</sup> Crenshaw, K. "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color." *Stanford Law Review*, Vol. 43, No. 6. July 1991.
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- <sup>xxvi</sup> Feminist Campus. "Title IX Under Attack." November 2018. <http://feministcampus.org/campaigns/campus-violence/title-ix-under-attack/>
- <sup>xxvii</sup> Proposed rules § 106.44(a), 106.30.
- <sup>xxviii</sup> 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, at 13.
- <sup>xxix</sup> *Id* at 14.
- <sup>xxx</sup> 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).

<sup>xxxii</sup> See *Feminist Majority Foundation v. University of Mary Washington* (finding that under Title IX, schools cannot ignore harassment that pervades and disrupts campus “solely because the offending conduct took place through cyberspace.”)

<sup>xxxiii</sup> 20 U.S.C. § 1092(f)(8)(C).

<sup>xxxiv</sup> United Educators, *Facts From United Educators' Report - Confronting Campus Sexual Assault: An Examination of Higher Education Claims*.

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<sup>xxxv</sup> Medina, J. *Too Scared to Report Sexual Abuse. The Fear: Deportation*, NY TIMES. April 2017.

<https://www.nytimes.com/2017/04/30/us/immigrants-deportation-sexual-abuse.html?mcubz=3>

<sup>xxxvi</sup> National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey: Executive Summary* December 2016.

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

<sup>xxxvii</sup> Green, E. ‘Transgender’ Could Be Defined Out of Existence Under Trump Administration, NEW YORK TIMES. October 2018.

<https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html>

<sup>xxxviii</sup> 34 C.F.R. § 106.9(a)

<sup>xxxix</sup> Proposed rules §106.8(b)(1)

<sup>xl</sup> National Council on Disability. *Not on the Radar: Sexual Assault of College Students with Disabilities*. January 2018. <https://ncd.gov/publications/2018/not-radar-sexual-assault-college-students-disabilities>.

<sup>xli</sup> 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.

<sup>xlii</sup> Baker, K. et al., *Title IX & the Preponderance of the Evidence: A White Paper* (July 18, 2017)

<http://www.feministlawprofessors.com/wp-content/uploads/2017/07/Title-IX-Preponderance-White-Paper-signed-7.18.17-2.pdf> (signed by 90 law professors).

<sup>xliii</sup> Bazelon, L. “I’m a Democrat and a Feminist. And I support Betsy DeVos’s Title IX Reforms.” NYTIMES. December 2018.

<https://www.nytimes.com/2018/12/04/opinion/-title-ix-devos-democrat-feminist.html>

<sup>xliv</sup> While little research exists at the college level, the Department of Education’s own K-12 data shows that 18% of Black boys and 5.2% of White boys have received an out of school suspension; yet 0.3% of Black boys and 0.2% of White boys have been disciplined for sexual harassment. GAO. *Discipline Disparities for Black Students, Boys, and Students with Disabilities*. March 2018.

<https://www.gao.gov/assets/700/690828.pdf>

<sup>xlv</sup> Rosenblatt, L. “Why it’s harder for African American women to report campus sexual assaults, even at mostly black schools.” LATIMES. August 2017.

<https://www.latimes.com/politics/la-na-pol-black-women-sexual-assault-20170828-story.html>

<sup>xlvi</sup> <sup>xlvi</sup>NWLC. “Too many Black survivors get jail time and not justice.” December 2018.

<https://nwlc.org/blog/too-many-black-survivors-get-jail-time-not-justice/>

<sup>xlvii</sup> Saar, M., Epstein, R., Rosenthal, L., Vafa, Y. “The Sexual Abuse to Prison Pipeline: The Girl’s Story.”

[https://rights4girls.org/wp-content/uploads/r4g/2015/02/2015\\_COP\\_sexual-abuse\\_layout\\_web-1.pdf](https://rights4girls.org/wp-content/uploads/r4g/2015/02/2015_COP_sexual-abuse_layout_web-1.pdf)

<sup>xlviii</sup> Cantalupo, N. *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)

<sup>xlix</sup> 34 C.F.R. §106.8(b)

<sup>1</sup> See, e.g., *Elston v. Talladega Cnty. Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993); *Lynch v. Belden & Co.*, 882 F.2d 262, 267, 269 (7th Cir. 1989); 42 U.S.C. § 20001 (2006)

<sup>li</sup> Heather Karjane, et al., *Campus Sexual Assault: How America’s Institutions of Higher Education Respond* 122 (Nat’l Criminal Justice Reference Serv., Oct. 2002)

<https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf>

<sup>lii</sup> See *Goss v. Lopez*, 419 U.S. 565, 579 & 583 (1975) (“[S]tudents facing suspension [in public educational institutions] must be given some kind of notice and afforded some kind of hearing. . . . We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the

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student 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.”)

<sup>liii</sup> Proposed rules § 106.45(b)(1)(v).

<sup>liv</sup> National Council on Disability. *Not on the Radar: Sexual Assault of College Students with Disabilities*. January 2018. <https://ncd.gov/publications/2018/not-radar-sexual-assault-college-students-disabilities>.

<sup>lv</sup> Proposed rules § 106.45(b)(3)(vii).

<sup>lvi</sup> 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).

<sup>lvii</sup> Proposed rules § 106.45(b)(3)(vii).

<sup>lviii</sup> 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>.

<sup>lix</sup> U.S. Department of Education Office of Civil Rights. “Title IX Enforcement Highlights.” June 2012. <https://www2.ed.gov/documents/press-releases/title-ix-enforcement.pdf>

<sup>lx</sup> Brodsky, A, “How much does sexual assault cost college students every year?” WASHINGTON POST. November 2014.

[https://www.washingtonpost.com/posteverything/wp/2014/11/18/how-much-does-sexual-assault-cost-college-students-every-year/?utm\\_term=.889bacfa3c2c](https://www.washingtonpost.com/posteverything/wp/2014/11/18/how-much-does-sexual-assault-cost-college-students-every-year/?utm_term=.889bacfa3c2c)