S. Hrg. 116–432

# REAUTHORIZING HEA: ADDRESSING CAMPUS SEXUAL ASSAULT AND ENSURING STUDENT SAFETY AND RIGHTS

## HEARING

OF THE

## COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS

ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

APRIL 2, 2019

Printed for the use of the Committee on Health, Education, Labor, and Pensions

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## UNITED STATES SENATE

ONE HUNDRED SIXTEENTH CONGRESS

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ON

EXAMINING REAUTHORIZING HEA, FOCUSING ON ADDRESSING CAMPUS SEXUAL ASSAULT AND ENSURING STUDENT SAFETY AND RIGHTS

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# C O N T E N T S

STATEMENTS

TUESDAY, APRIL 2, 2019

QUESTIONS AND ANSWERS

# REAUTHORIZING HEA: ADDRESSING CAMPUS SEXUAL ASSAULT AND ENSURING STUDENT SAFETY AND RIGHTS

**Tuesday, April 2, 2019**

U.S. SENATE,
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,
*Washington, DC.*

The Committee met, pursuant to notice, at 10 a.m., in room SD–430, Dirksen Senate Office Building, Hon. Lamar Alexander, Chairman of the Committee, presiding.

Present: Senators Alexander [presiding], Isakson, Cassidy, Scott, Romney, Murray, Baldwin, Kaine, Jones, Murphy, Hassan, Rosen, Casey, Warren, and Smith.

## OPENING STATEMENT OF SENATOR ALEXANDER

The CHAIRMAN. The Senate Committee on Health, Education, Labor, and Pensions will please come to order. Senator Murray and I will each have an opening statement. We will then introduce the witnesses, one of whom is slightly delayed but who is within sight, so she will be here shortly. After the witnesses' testimony, Senators will each have 5 minutes for a round of questions. I just mentioned to Senator Murray, I have done, with her encouragement, I have done a good deal of homework on this, and as a result, my opening statement is a little longer than it otherwise would be, so hope you will tolerate that.

Today's hearing will focus on how colleges and universities should respond to accusations of sexual assault. This is an important and difficult topic, and for that reason, I am glad that Senator Murray and I have been able to agree, as we usually do, on a bipartisan hearing, and to agree on the witnesses. On these issues I have a number of perspectives, that of a father of daughters and sons, of a grandfather, a lawyer, a Governor, also a former Chairman of the Board and President of a large public university.

As University Administrator, my first priority always was the safety of students. My goal was to quickly and compassionately respond to victims of alleged assaults, offering counseling and other support, including assisting the victim if he or she wished to report the assault to law enforcement. And my goal was also to protect the rights of both the accused and the victim to ensure that campus disciplinary processes were fair. If you are an administrator of one of the six thousand or so American colleges and universities, and you were to ask your legal counsel, what laws must the insti-

tution follow when it comes to allegations of sexual assault? Your counsel would reply, there are several places to look. First you would look at the Federal statutes. Two Federal laws govern allegations of sexual assault. All colleges and universities that receive Federal funds, including Federal financial aid, must follow those two laws.

First, Title IX of the Education Amendments Act of 1972, which says, "no person in the United States shall on the basis of sex be excluded from participation in, denied the benefits of, or subjected to discrimination under the education program or activity." Then, in 1999 the Supreme Court ruled that student on student sexual harassment is covered by Title IX. And second, there is the Clery Act, as amendment in 2013 by the Violence Against Women Act, which requires colleges to, "have procedures for institutional disciplinary action in cases of alleged domestic violence, dating violence, sexual assault, or stalking." The Clery Law mandates such proceedings shall prompt "a fair, prompt, and impartial investigation, and resolution" and "the accuser and the accused are entitled to the same opportunities to have others present during an institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice." That advisor may be a lawyer. The law also requires institutions to state in their procedures, "the standard of evidence that will be used during any institutional conduct proceeding," but it does not say what that standard should be.

Next, your counsel would refer you to regulations based upon the two Federal laws. They also have the force of law. First, the relevant regulation under Title IX requires schools to have a disciplinary process, which is defined in the regulation as, "a grievance procedure, providing for a prompt and equitable resolution." Regulations under the Clery Act define a, "prompt, fair, and impartial proceeding." Under these regulations, the institution, "may establish restrictions regarding the extent to which the adviser of choice may participate in the proceedings." Your counsel will also tell you that sometimes the U.S. Department of Education will send out a letter or guidance to institutions giving its interpretation of what a law or regulation might mean. Such letters or guidance do not have the force of law, they are only advisory, but campuses sometimes consider them binding as a law, and unfortunately, Department officials have in the past, made the same mistake. For example, in 2011 and '14, during the Obama administration, officials at the U.S. Department of Education wrote two guidance letters interpreting Title IX, saying and deciding whether an accused student is guilty of sexual assault, the decider, "must use a preponderance of the evidence standard." It was no surprise that many campuses thought this interpretation was the law, because the Department acted as if it were the law when it was only advisory.

On June 26, 2014, at a hearing before this Committee, I asked this former Assistant Secretary for Civil Rights, "do you expect institutions to comply with your Title IX guidance documents?" and she responded, we do. In September 2017, Secretary DeVos withdrew both of those letters of guidance, and a year later, in November of last year, proposed to replace them with a new rule under Title IX, a process which allows extensive comment and discussion

and would have the force of law when it is filed. Now that is not all your legal counsel would tell you.

If you are the President of a public institution, as I was, where 80 percent of undergraduates attend college, your counsel would remind you that your disciplinary process must meet the standards of the 14th Amendment to the U.S. Constitution, which says, "nor shall any state deprive any person of life, liberty, or property without due process of law." And then finally, you would have to look at any applicable state laws. For example, if you are an administrator at one of Tennessee's public colleges, as one of our witnesses is, the state's Uniform Administrative Procedure Act mandates that, "at public colleges and universities, a student facing suspension or expulsion must be given the option to have a full administrative hearing with the right to counsel and the opportunity to conduct cross-examination." This array of laws and regulations creates a challenge for college administrators, for students who allege an assault, and for those who are an accused to know what the law requires.

The purpose of today's hearing is to hear how we can create more certainty and how colleges and universities should appropriately and fairly respond to allegations of sexual assault. During this hearing, I would like to focus on three issues raised by the Department's proposed rule. One, the requirements of due process, including cross-examination. Two, the effect of the location of the alleged assault. And three, the definition of sexual harassment. According to an article published by the Cornell Law Review, more than 100 lawsuits have been filed by students accused of sexual assault who claim schools denied them due process.

In one lawsuit, an accused student sued Brandeis University. The opinion of the Judge of the U.S. District Court for the District of Massachusetts criticized the Department of Education's earlier 2011 guidance for causing students to adopt unfair practices saying, and I want to quote this, "in recent years, universities across the U.S. have adopted procedural and substantive policies intended to make it easier for victims of sexual assault to make and prove their claims, and for the schools to adopt punitive measures in response. That process has been substantially spurred by the Office for Civil Rights of the Department of Education, which issued a dear colleague letter in 2011, demanding that universities do so or face a loss of Federal funding. The goal of reducing sexual assault and providing appropriate discipline for offenders is certainly laudable. Whether the elimination of basic procedural protections and the substantially increased risk that innocent students will be punished is a fair price to achieve that goal is another question altogether."

In February of this year, Supreme Court Justice Ruth Bader Ginsburg told the Atlantic, "there has been criticism of some colleges codes of conduct for not giving the accused person a fair opportunity to be heard and that is one of the basic tenets of our system, as you know. Everyone deserves a fair hearing," said Justice Ginsburg.

In an attempt to meet that requirement, the Department's proposed rule would require a live hearing, which is defined as a hearing in which "the decisionmaker must permit each party to ask the

other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the hearing must be conducted by the party's advisor of choice." That is the proposed rule. It would also allow parties who do not feel comfortable being in the same room with each other to request to be in separate rooms, visible by a video feed, for example.

This definition of a live hearing aligns with recent decisions by the U.S. Circuit Court of Appeals and the California State Court of Appeals. In the Sixth Circuit, a student accused of sexual assault sued the University of Michigan. It alleged the school violated the due process clause of the 4th amendment when it did not hold a hearing with the opportunity for the accused to cross-examine his accuser and other witnesses. The Sixth Circuit ruled in favor of the accused student saying, "if a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and diverse witnesses in the presence of a neutral fact-finder." And in California, the State Court of Appeals for the Second District made a similar finding stating, when a student, "a student accused of sexual misconduct faces severe disciplinary sanctions and the credibility of witnesses is central to the adjudication of the allegation, fundamental fairness requires at a minimum that the university provide a mechanism by which the accused may cross-examine those witnesses directly or indirectly at a hearing in which the witnesses appear in person or by other means."

Some college administrators with whom I have talked, have said to me, I do not want to turn our campus into a courtroom. Others point out that the requirements of fairness and due process often require inconvenient administrative burdens. So, it seems to me that the question before us, which I hope our witnesses will help us understand, is how can the law satisfy the Constitutional requirements of due process without imposing unnecessary administrative burdens and expense on higher education institutions.

Now, a second issue is the location of the alleged assault. The proposed rule requires a school to respond to an allegation of sexual assault even if it is off-campus if, "the conduct occurs within an institution's education program or activity." There is some question about the definition of university program or activity. And a second question is if a university can choose to go beyond university programs or activities to protect its students. The third issue is how Federal law or regulation should define sexual harassment.

The proposed rule uses a definition established by the U.S. Supreme Court in 1999, which requires the conduct to be, "so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the institution's education program or activity." Some have suggested we look at other definitions in the Federal law or Supreme Court precedent. In the future, regulations for the force of law and guidance letters that are merely advisory will continue to interpret Federal laws and constitutional requirements, governing allegations of sexual assault on campus.

But as Congress seeks to reauthorize The Higher Education Act this year, we should do our best to agree on ways to clarify these three issues. The more we do that, the more certainty and stability

we will give to the law governing how institutions of higher education should respond to accusations of sexual assault.

Senator MURRAY.

## OPENING STATEMENT OF SENATOR MURRAY

Senator MURRAY. Well, thank you very much, Chairman Alexander. I am really pleased that this Committee is working toward a comprehensive reauthorization of The Higher Education Act that addresses all of the issues students are facing in higher education. And in order for reauthorization to be truly comprehensive, it has to address for student-centered priorities, making college more affordable and addressing the exploding debt crisis, holding colleges accountable for students' success, increasing access and opportunities for historically underrepresented students, and ensuring our students are able to learn in an environment free from discrimination, harassment, and assault. We have had a number of productive discussions in this Committee about the first three priorities. I am pleased today that we are turning to the critical issue of campus safety.

Our conversation today is focused on addressing the scourge of campus sexual assault, and that is very important, but as we work together on reauthorizing HEA, I hope we also can address the levels of bullying, and hazing, and harassment happening on our campuses. We owe that to students like Tyler Clementi who tragically took his own life after he was bullied by his fellow classmates, and the students who have died on college campuses around the country as a result of dangerous hazing practices. Jeopardizing their safety is not a price students should have to pay just to get an education.

With that in mind, I want to turn to the topic of our hearing today, addressing campus sexual assault and ensuring students' safety. The intention of Title IX was to ensure that no student can be discriminated against in school on the basis of sex, and that means schools must respond appropriately to sexual harassment, rape, or sexual assault. For too long, this was the unspoken norm on our college campuses. Survivors did not report their attacks. They were ashamed or afraid they would be blamed, and when they did come forward, schools would ignore or hide those stories and refuse to take the necessary steps to prevent sexual violence going forward. But over the past few years, brave women and men have come forward, and used their personal experiences with sexual assault to shine a light on what has been happening on college campuses around the country for decades. And for the first time, this epidemic is finally being taken seriously by schools and universities, by the public, and by Congress.

I am so in awe of the women and man who have shared one of the worst moments of their lives in order to let other survivors know it is okay to come forward, and to try and stop it from happening to others. But in listening to the stories, it is clear there is much more that both Congress and colleges and universities need to do to prevent sexual assault, and to make sure students feel safe after it does happen. Students like Sarah, from my home State of Washington. Sarah's school found she had been raped and yet still forced her to go to school with her assaulter. Sarah felt that Title

IX, "failed her entirely." Jennifer from Michigan who after reporting being sexually harassed by a classmate, she felt her case was written off as, "insignificant and unbelievable." Jennifer grew into a deep depression because she was not being believed by school administrators and said Title IX should be, "strengthened, not defanged." And yet defanging campus sexual assault protection is exactly what Secretary DeVos is proposing to do. Her proposed rule would weaken protections for students and allow schools to short their responsibility to keep students safe.

By only requiring schools to investigate claims that happen on their campus, it would mean that Britney school would not be responsible for her rape. Britney was raped in her off-campus apartment a few years ago, and she said without protections under Title IX afforded to her, she would have never returned to finish her degree. By limiting the definition of harassment and only requiring schools to act if an attack is reported to specific school officials, Secretary DeVos's proposal would discourage students from coming forward because they feel they will not be believed or have their claims taken seriously.

As Alice, a survivor of sexual assault said, there needs to be a wider definition of sexual assault so survivors can, "receive the recognition, care, and action they need." And by requiring survivors to be directly cross-examined in live hearings by the accused or their representatives, this proposal would mean survivors would have to relive their trauma while being questioned by people who may be wholly unqualified to question survivors. Thousands of students, parents, teachers, and experts across the country have pointed out that parts of her proposed rule are callus, ignore the experience of survivors and the advice of experts, and are likely to discourage students from coming forward.

Chairman Alexander, as we work now to reauthorize the Higher Education Act, we have to reverse the harmful steps Secretary DeVos has taken and make meaningful progress to address campus sexual assault. And as we do that, it is imperative that we do not turn colleges into fake courtrooms. Students who have been assaulted have every right to use the judicial system to seek justice, but schools also have a responsibility to students. Every student should be treated equally and fairly. The process should be unbiased and transparent, and students should know what the process is before they enter, and it should be consistent for all cases. And we must have a process that ensures students have access to an education without being forced to be re-traumatized. We cannot have the trappings of the judicial system without the protections of it.

I am pleased we are having this hearing, and I hope as we continue this conversation, we can continue to lift up the voices of survivors, listen to their stories, and use them to influence our decisions. We cannot address this issue without listening to them and I am so thankful for all of the survivors who are here in this room today. I stand with you. I am going to keep fighting to stop what happened to you from happening to other students. We need a legislative solution to make sure students are able to get an education without being sexually harassed or assaulted.

Chairman Alexander, thank you for holding this hearing, and I look forward to working with you.

Thank you.

The CHAIRMAN. Thank you, Senator Murray, and thank you for your leadership in making sure that we have had this hearing and that we can deal with it in a bipartisan way. We have five excellent witnesses today. We look forward to that. And I will ask Senator Warren to introduce one of those witnesses. Welcome, Senator Warren.

Senator WARREN. Thank you very much, Mr. Chairman. And I apologize in advance that I am trying to cover multiple hearings this morning. Thank you for holding this very important hearing. It is my pleasure today to be able to introduce my former colleague, Professor Jeannie Suk Gersen. Jeannie is the John H. Watson, Jr. Professor of Law at Harvard Law School where she has taught criminal law and procedural constitutional law and regulating sex on campus. Professor Suk joined Harvard's faculty in 2006, and in 2010 became the first Asian American woman to be awarded tenure in the law school's history. Jeannie, thank you so much for taking time to be here today to help us discuss this important issue.

As I said, I have other hearings this morning, so if I cannot make it back, I am going to submit questions for the hearing's record for you and for the other witnesses to answer. And I just want to note, based on reading you testimony, I want to understand more about your objections to Secretary DeVos's extremely concerning proposals to weaken schools' responsibilities under Title IX. I find it very alarming, for example, that Secretary DeVos thinks schools should only be responsible for assaults that occur on campus or at the school-sponsored program or activity, ignoring students who may be victims of assaults that happen, for example, at an off-campus fraternity party.

Based on your testimony and legal scholarship, I know you agree that while the discipline process should be fair and transparent, requiring schools to subject survivors to live cross-examination undermines Title IX and discourages victims and witnesses from coming forward. There is an epidemic of sexual assault and harassment on college campuses across our country, but instead of addressing the problem and listening to survivors, Secretary DeVos issues a Title IX proposal that would narrow the law's protection and sweep campus sexual assault back under the rug.

Jeannie, I plan to ask you and your fellow witnesses about these issues. We look forward to your testimony. And thank you again, Mr. Chairman, for this opportunity to introduce such an illustrious scholar.

The CHAIRMAN. Thank you, Senator Warren. Thank you for the introduction. I will now introduce the other witnesses. Patricia Hamill, a Partner with Conrad O'Brien in Philadelphia. She has extensive experience, primarily representing students accused of sexual assault both in campus disciplinary proceedings and in lawsuits they have filed against universities. Her bachelor's degree is from Bryn Mawr, and her law degree from the University of Maryland.

Fatima Goss Graves is President and CEO of the National Women's Law Center. She has spent more than a decade at the National

Women's Law Center where she has worked to combat harassment and sexual assault, and to advance opportunities for women and girls. She received her bachelor's degree from the University of California, Los Angeles. Her law degree from Yale. Senator Warren has introduced Professor Gersen.

The fourth witness is Ann Meehan, Director of Government and Public Affairs for the American Council on Education. She has held that position since 2007. She previously worked in the Senate as a staff member for Senator Collins. She earned a bachelor's degree from Kenyon, and a law degree from Duke University.

Finally, from Tennessee, Dr. Jeff Howard, Associate Vice President for Student Life and Enrollment at East Tennessee State University in Johnson City. He overseas student conduct and Title IX proceedings through the Union Students' Office in a staffed-advised student conduct board and service resources, and advocates for all students. Dr. Howard received his bachelor's degree in History and Political Science, and doctoral degree in Education and Leadership, all from ETSU.

Thanks to all five of you. If you could summarize your remarks in 5 minutes. That will leave more time to questions. As I indicated, several of us were interested in the issues of the location of the alleged sexual assault, the definition of sexual harassment, and the definition of the requirements of due process, especially cross-examination. So, Ms. Hamill, let us begin with you.

**STATEMENT OF PATRICIA HAMILL, PARTNER, CONRAD O'BRIEN, PHILADELPHIA, PA**

Ms. HAMILL. Thank you, Chairman, and Ranking Member Murray, and Members of the Committee. And thank you for inviting me to testify here today on this important matter. My name is Patricia Hamill, and as Chairman Alexander stated, I am a Partner at the Philadelphia Law Firm of Conrad O'Brien, where I head up the firm's nationwide Title IX due process and campus discipline practice. I hope my experience, which I will share here today, will assist this Committee in addressing safety and student rights in the context of campus sexual assault.

I believe I bring a unique perspective to these issues. I am a feminist, married to a woman, graduate of a women's college, and the mother of two teenage sons and a daughter currently in college. So, it may surprise you that in the past 6 years I have devoted a large portion of my legal practice to representing more than 100 students, mostly though not exclusively men, accused of various levels of sexual misconduct. This is not a partisan issue. It is a fundamental principle of our democracy that all persons are entitled to a fair hearing.

I first want to point out that many campus procedures are an effort to correct for decades of failure to take claims of sexual assault seriously. Let me be very clear, sexual assault on college campuses is a serious problem, but the corrective to past inadequate responses to sexual assault is not to presume that accused people are guilty, deprive them of the ability to defend themselves, and punish them without a full consideration of the facts. I am concerned by the national polarization on this issue and by the apparent as-

sumption by many that measures to give accused people, usually men, a fair hearing are a strike against justice for women.

What is often missing from the public discourse is an understanding that misconduct occurs on a spectrum, and often there are plausible competing narratives and no independent witnesses or corroborating evidence. In my written testimony, I outline how complex these cases can be, and how difficult it can be to determine exactly what happened. Let me give you a sense of a typical scenario.

A young man, 18 or 19 years old, calls us. He went to a college party, drank alcohol, and had a sexual encounter with a young woman. Both were tipsy, maybe even drunk, but not incapacitated. He felt that the encounter was mutual and fully consensual. After the encounter, the two had a few friendly interactions, but nothing more. Days, months, or even years later, he is notified by the Title IX Office that he has been accused of sexual assault. If a lot of time has passed, he may not remember the encounter very well, but he is someone who takes consent seriously and is certain it was consensual. He is ostracized and afraid no one will listen to him. He is certain that the system already assumes he is guilty and that he will suffer lasting consequences, kicked out of school, and permanently branded. I can assure you that this is not a rare situation as some would have you believe.

This Committee is in a position to ensure fair processes for all parties, which include adequate support services, thorough and fair investigations, procedures for informal resolution, and if a formal hearing is required, that both parties get to fully present their positions and both are fairly questioned, respectfully and thoroughly. I want to address a critical component of this process. Much opposition has been expressed about live hearings and direct questioning, but they are critical to a fair process. They allow decisionmakers to get as clear an understanding as possible of what occurred from everyone's perspective. They allow advocates for each party to thoroughly and respectfully explore people's memory and credibility.

Some have suggested that cross-examination by written question should be used, but this does not allow for a true exploration of these situations. There is no dialog, no flow, no opportunity to follow-up. Mr. Chairman, I do understand the emotional distress and chilling effect direct questioning can have, but that is the case for both parties. And if we are to ensure a fair process, every reasonable effort to get at the truth must be pursued. There is too much at stake to do anything less. In closing, I want to stress that though my focus here today has been drawn from my representation of male students, I have represented women too, both complainants and respondents.

While the erosion of due process protections in campus disciplinary proceedings has so far primarily impacted man, it is leading to injustice and insecurity for everyone. In my written testimony, I reflect on some recent cases in which women have been accused. I believe both complainants and respondents have a right to be heard. Neither has a right to be automatically believed. If we want fair processes for ourselves and our loved ones, we must support fair processes across the board.

Thank you.

[The prepared statement of Ms. Hamill follows:]

PREPARED STATEMENT OF PATRICIA HAMILL

## I. INTRODUCTION

As Congress considers reauthorizing the Higher Education Act (HEA), I have been asked to testify before this Committee on what a fair process in a campus disciplinary proceeding involving alleged sexual assault should include. I thank you for this opportunity.

I bring a unique perspective to these issues, and a deep understanding of the challenges faced by all the interested parties. I am a partner at the Philadelphia law firm Conrad O'Brien, P.C., and Chair of the firm's nationwide Title IX, Due Process and Campus Discipline practice. I am also a feminist, married to a woman, graduate of a women's college, and the mother of two teenage sons and a daughter who is in college. Given my personal background it may seem incongruous that I have, over the past six years, represented more than a hundred students and academic professionals, mostly men, who have been accused of various levels of sexual misconduct. But it is a fundamental principle of American jurisprudence that all persons are entitled to a fair hearing. My task as an attorney is to advocate for fair, objective, and reliable Title IX proceedings, and I see that as a nonpartisan issue. [1]

Before addressing the question of fair process, I want to draw attention to the fact that many of the campus procedures now in place are an effort to correct for decades of sexual assault claims not being taken seriously or, worse, being completely ignored. I want to be perfectly clear. Sexual assault on and related to college campuses is a serious problem. I am heartened whenever women (and, though less commonly, men) come forward and speak up, when their concerns are taken seriously and properly investigated, and when they are given the support they need both during and after a disciplinary process, regardless of the outcome.

However, we must be careful not to allow current disciplinary processes to be marred by the sins of the past, however oppressive and heinous they may have been. The corrective to inadequate responses to sexual assault, whether past or present, is not to presume that accused people are guilty, deprive them of the ability to defend themselves, and punish them without a full consideration of the facts from both parties' perspectives. I am concerned by the national polarization on these topics, and by the apparent assumption by many that measures to give accused people—usually men—a fair hearing are a strike against justice for women. Title IX prohibits gender discrimination, and the effort to correct discrimination against one gender does not justify discrimination against others. What is often missing from the public discourse is an understanding that misconduct occurs on a spectrum, and often there are plausible competing narratives and no independent witnesses or corroborating evidence. Many cases involve encounters between young people who are sexually inexperienced, are engaged in the casual hook-up culture prevalent on campuses, or both. They may have misread or misinterpreted each other's feelings or intent. Often both parties have consumed alcohol or drugs, further diminishing their ability to make clear decisions, communicate effectively, or remember what happened. In addressing contested cases—whether they involve sexual or any other form of serious misconduct –our nation's fundamental values require fairness to both parties, a thorough and impartial investigation, and a fair hearing before impartial decisionmakers. [2]

In the words of one judge, commenting on college disciplinary procedures that "appear[] to have substantially impaired, if not eliminated, an accused student's

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[1] Patricia Hamill is a partner at the Philadelphia law firm Conrad O'Brien, P.C., and Chair of the firm's nationwide Title IX, Due Process and Campus Discipline practice. She represents college students and academic professionals in disciplinary proceedings and related litigation. Patricia is a frequent speaker on Title IX litigation and related issues to audiences including Title IX coordinators, advocacy groups, and attorneys. Patricia is also a commercial litigator who represents clients in white-collar and internal investigations, and is a member of the firm's three-person Executive Committee.

[2] As the American Civil Liberties Union has observed: "Conventional wisdom all too often pits the interests in due process and equal rights against each other, as though all steps to remedy campus sexual violence will lead to deprivations of fair process for the respondent, and robust fair process protections will necessarily disadvantage or deter complainants. There are, however, important ways in which the goals of due process and equality are shared. Both principles seek to ensure that no student—complainant or respondent—is unjustifiably deprived of access to an education. Moreover, both parties (as well as the schools themselves) benefit from disciplinary procedures that are fair, prompt, equitable, and reliable." ACLU Comment, *https://www.aclu.org/letter/aclu-comments-title-ix-proposed-rule.*

right to a fair and impartial process, it is not enough simply to say that such changes are appropriate because victims of sexual assault have not always achieved justice in the past. Whether someone is a 'victim' is a conclusion to be reached at the end of a fair process, not an assumption to be made at the beginning. Each case must be decided on its own merits, according to its own facts. If a college student is to be marked for life as a sexual predator, it is reasonable to require that he be provided a fair opportunity to defend himself and an impartial arbiter to make that decision. Put simply, a fair determination of the facts requires a fair process, not tilted to favor a particular outcome, and a fair and neutral fact-finder, not predisposed to reach a particular conclusion." Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 573 (D. Mass. 2016).

Providing a fair process and impartial decisionmakers will make each individual disciplinary proceeding and outcome more reliable, and will benefit complainants, respondents, schools, and their officials. At the same time, our focus should not simply be on addressing situations after-the-fact: as a nation, we should consider other steps to address the conditions and attitudes that lead to contested sexual assault complaints, including excessive use of alcohol and drugs, and to provide more effective education on consensual sexual conduct. [3]

I present my comments as follows. First, I give some historical background—how did we get where we are today, and how and why is the federal government involved? (Pages 4–7). As discussed below, starting in 2011, U.S. Department of Education guidance and other federal government initiatives have changed the way sexual assault is adjudicated on school campuses. Concerns have been growing, however, that procedures developed to address sexual assault allegations are not effective for people who report sexual assault, are eroding fundamental protections for people who are accused, and are undermining the legitimacy of campus disciplinary proceedings and outcomes. These concerns have been voiced in public and scholarly commentary, by universities and colleges, in an increasing number of opinions from federal and state courts, in several state legislatures, and in new guidance and proposed Title IX regulations from the Department of Education.

Second, I give a brief overview of the Department of Education's current approach, including its proposed Title IX regulations, and how the proposed regulations match up with my experience and recommendations. (Pages 7–10). Overall, I support the Department's efforts to align Title IX regulatory requirements with basic principles of justice, with court precedent requiring fair procedures for people accused of serious misconduct, and with Title IX's proscription of all gender discrimination. I also support the Department's proposal to give schools and parties more flexibility to pursue informal, non-punitive resolutions. At the same time, commenters have expressed legitimate concerns about some of the proposed provisions, particularly the definitions and conditions that give rise to schools' duty to respond, and there is room for discussion and compromise.

I conclude by identifying key procedural protections which, under our nation's system of law, are required for fair and reliable determinations, including notice, impartial decisionmakers, thorough and fair investigations where both exculpatory and inculpatory evidence is gathered and considered, a meaningful opportunity to be heard (including the opportunity for the parties to present their positions and confront the testimony against them in a live hearing before decisionmakers), a presumption that the respondent is not responsible unless the applicable standard of proof is met, decisions based on the facts of the particular case, and, if there is a finding of responsibility, sanctions proportionate to the conduct. (Pages 10-15).

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[3] I share the concern that many women have been subjected to inappropriate conduct. However, the claim that one in five women is sexually assaulted in college, a claim that has been the basis for advocacy efforts, disciplinary processes, and government policy decisions, is based on anonymous surveys, not scientific studies, and has been seriously challenged. E.g., *https://www.washingtonpost.com/news/fact-checker/wp/2014/12/17/one-in-five-women-in-college-sexually-assaulted-an-update/?utm—term=.7f211e30541e; https://www.washingtonexaminer.com/no-1-in-5-women-have-not-been-raped-on-college-campuses; http://www.slate.com/articles/double—x/doublex/2015/09/aau—campus—sexual—assault—survey—why—such—surveys—don—t—paint—an—accurate.html.* The Bureau of Justice Statistics' National Crime Victimization Survey reports a much lower rate of sexual assault: 6.1 per 1000 female students from 1995 to 2013, with the rate trending downwards. *https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf.* Advocates for reported victims also often suggest false accusations of sexual assault are rare. This too has been disputed, has been undermined by some high profile cases, and does not appear to take into account the wide spectrum of situations in which complaints can arise. But let's not let the mission of this Committee be sidetracked by surveys and statistics, whether reliable or not. Even one assault is too many. My point here is about ensuring a fair process. Regardless of the accuracy of surveys, the decision in any particular case should be based on the facts of that case, objectively and fairly assessed.

## II. HISTORICAL BACKGROUND

Title IX of the Education Amendments of 1972 provides that "[n]o 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 . . . ."[4] As interpreted by federal courts, gender discrimination under Title IX includes sexual assault and sexual harassment. The United States Department of Education's Office of Civil Rights (OCR) is the federal agency in charge of enforcing Title IX compliance.

Starting in 2011, the federal government began to take aggressive steps to combat what it viewed as an epidemic of sexual assault on college campuses, focusing on countering discrimination against women. On April 4, 2011, OCR issued a "significant guidance document" known as the 2011 "Dear Colleague letter," stating that "about 1 in 5 women are victims of completed or attempted sexual assault while in college" and setting forth steps schools should take to end sexual harassment and violence.[5] Among other things, the letter defined sexual harassment broadly as "unwelcome conduct of a sexual nature," conflating cases based on conduct with cases based on speech;[6] stated that "mediation is not appropriate even on a voluntary basis" in cases involving alleged sexual assault;[7] directed schools to ensure "steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant";[8] directed schools to take interim steps to protect complainants and "minimize the burden on the complainant";[9] "strongly discourage[d]" schools from allowing cross-examination of parties; 1A[10] and urged schools to focus on victim advocacy.[11] The letter also stated that schools "must use a preponderance of the evidence standard (i.e., it is more likely than not that sexual harassment or violence occurred)," and must not use the "clear and convincing standard (i.e., it is highly probable or reasonably certain that the sexual harassment or violence occurred.)."[12]

Although the letter was framed as "guidance" and did not go through the procedures required for formal, binding regulations, much of its language—including the standard of proof provision—is mandatory. And the letter specifically warned that "[w]hen a recipient does not come into compliance voluntarily, OCR may initiate proceedings to withdraw Federal funding by the Department or refer the case to the U.S. Department of Justice for litigation."[13]

In 2014, OCR released additional guidance in which it reiterated many of the directives set forth in the 2011 Dear Colleague Letter, including the injunction to "ensure that steps to accord any due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant."[14] The same year, a White House Task Force was created, co-chaired by the Office of the Vice President and the White House Council on Women and Girls, with a mission "to tell sexual assault survivors that they are not alone" and "help schools live up to their obligation to protect students from sexual violence."[15] The Task Force's first report opened with the claim that "[o]ne in five women is sexually assaulted in college," stated that the federal government was ramping up Title IX enforcement efforts, and stressed again that schools found in violation of Title IX risked losing federal funding.[16] Among other things, the Task Force supported the use of a single investigator model, which generally involves one school official serving as investigator, prosecutor, and decisionmaker and severely limits the respondent's ability to challenge the complainant's account.[17] The Task Force also encouraged colleges and universities to provide "trauma-informed" training for their officials, stating that "when survivors are treated with care and wisdom, they start trusting the system,

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[4] 20 U.S.C.—1681(a).
[5] Letter from Russlynn Ali, Ass't Sec'y for Civil Rights, U.S. Dep't of Educ., OCR, at 2 (Apr. 4, 2011), *http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.*
[6] Id. at 3.
[7] Id. at 8.
[8] Id. at 12.
[9] Id. at 15-16.
[10] Id. at 12.
[11] Id. at 19 n.46.
[12] Id. at 11.
[13] Id. at 16.
[14] Questions and Answers on Title IX and Sexual Violence, *https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.*
[15] Not Alone: The First Report of the White House Task Force to Protect Students From Sexual Assault, p.2, *https://www.justice.gov/ovw/page/file/905942/download.*
[16] Id. at 2, 17.
[17] Id. at 3, 14.

and the strength of their accounts can better hold offenders accountable."[18] The report stated that the Justice Department, through its Center for Campus Public Safety and its Office on Violence Against Women, was developing trauma-informed training programs.[19] Ultimately, the Department of Justice funded a "Start by Believing' campaign that seeks to train investigators to investigate cases from an initial presumption of guilt and write reports "that successfully support the prosecution of sexual assault cases", including by presenting events "from the victim's perspective"; focusing on evidence that "corroborate[s] the victim's account"; focusing on "what the victim was thinking and feeling;" and "always us[ing] the language of non-consensual sex."[20]

On May 1, 2014, as part of its aggressive enforcement, OCR published a list of 55 higher education institutions nationwide that were under investigation for possible Title IX violations.[21] According to the Chronicle of Higher Education, that number eventually grew to over 500.[22]

In response to the federal government's directives and enforcement activities, schools have adopted special policies for disciplinary proceedings involving alleged sexual misconduct. The policies are administered by designated officials and include investigatory and decision-making processes, evidentiary standards, and appeal processes based on OCR's actual and perceived requirements. In many instances, the policies and processes are very different from those used to resolve other campus disciplinary matters, including matters involving allegations of serious non-sexual misconduct. Many schools have gone even further than OCR's specific directives, essentially eliminating due process protections for respondents—the great majority of whom are male—in proceedings involving alleged sexual misconduct. Trauma-informed and "#BelieveWomen" approaches have been applied in ways that lead school officials (and the community at large) to presume that an alleged assault occurred or that a complainant's account of an incident must be true. Students and academic professionals are suspended, expelled, or pushed out of their positions without meaningful notice or opportunity to be heard, and are left with records that permanently brand them as sexual offenders, devastate them personally, and severely impact their educational and career opportunities. In this age of social media and the Internet, the mere mention of a sexual misconduct accusation can have the same negative and ongoing effects as a finding of responsibility, even if the accused is exonerated.

Since 2011, some 400 students have filed lawsuits asserting that their schools disciplined them for alleged sexual misconduct without providing a fair process or following the schools' own procedures. In over 100 of those cases, federal and state courts have written opinions raising concerns about the lack of meaningful procedural protections in campus Title IX proceedings.[23]

## III. THE DEPARTMENT OF EDUCATION'S CURRENT APPROACH

In response to the developing case law and escalating concerns that individual Title IX complaints are not being justly resolved, the Department of Education has modified its position on Title IX enforcement. In September 2017, it withdrew the 2011 Dear Colleague Letter and the 2014 Questions and Answers on Title IX Sexual

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[18] Id. at 3.

[19] Id.

[20] *See* End Violence Against Women International (EVAWI), *Effective Report Writing: Using the Language of NonConsensual Sex,* at 5, 10, 14 *https://www.evawintl.org/library/DocumentLibraryHandler.ashx?id=43* (emphasis original); Campus Action Kit, *Start by Believing, https://www.startbybelieving.org/wp-content/uploads/2018/08/Campus-Action-Kit.pdf.*

[21] *U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations* (May 1, 2014), *https://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations.*

[22] *Title IX, Tracking Sexual Assault Allegations,* Chronicle of Higher Education, *https://projects.chronicle.com/titleix/.*

[23] For a sampling of articles and court opinions expressing concerns about the erosion of procedural protections, see Foundation for Individual Rights in Education (FIRE), *Mountain of evidence shows the Department of Education's prior approach to campus sexual assault was "widely criticized" and "failing"* (Nov. 15, 2018), *https://www.thefire.org/mountain-of-evidence-shows-the-department-of-educations-prior-approach-to-campus-sexual-assault-was-widely-criticized-and-failing/; see also* Comments of Eric Rosenberg, Cynthia Garrett, Kimberly Lau, and KC Johnson on proposed Title IX regulations (Jan. 8, 2019), *https://www.regulations.gov/document-D=ED-2018-OCR-0064-6244* (discussing case law foundations for many provisions in the proposed Title IX regulations). I have included FIRE's summary of cases in an appendix, along with more detailed summaries of key cases cited in the FIRE article and cases decided since the article was published.

Violence, and released a new interim Q&A on Campus Sexual Misconduct to guide schools on how to investigate and adjudicate allegations under federal law. In November 2018, it issued a Notice of Proposed Rulemaking including proposed amended Title IX regulations.[24] Over 100,000 comments have been filed by legislators, colleges, students, attorneys, and other organizations and citizens, and the Department is in the process of digesting and considering them.

Broadly speaking, the proposed regulations have three aspects: first, definitions and conditions that activate a school's obligations under Title IX; second, provisions giving schools more flexibility to take constructive, non-punitive steps to resolve specific concerns and prevent recurrence of inappropriate behavior while still ensuring that both parties can pursue their education; and third, procedural protections required for formal Title IX proceedings.

Along with a number of colleagues, I have submitted detailed comments on the proposed regulations.[25] Overall, I support the Department's efforts to align Title IX regulatory requirements with basic principles of justice and court rulings calling for fair procedures for individuals accused of serious misconduct, including the specific procedures I discuss below. As the Department has acknowledged, Title IX is concerned with all forms of gender discrimination, and a school's treatment of either a complainant or a respondent in connection with a sexual harassment complaint may constitute discrimination on the basis of sex. Discrimination in favor of complainants, who are almost always female, and against respondents, almost always male, is pervasive in campus Title IX proceedings, and the proposed regulations take crucial steps toward addressing it. Even apart from the regulations, courts are requiring schools to protect due process and avoid gender discrimination. To the extent Congress considers legislation to address these issues, any provisions must be constrained by constitutional principles and other statutory protections. A society dedicated to equal justice under law cannot function if we abandon basic fairness and due process principles in reaction to particular types of cases.[26]

I also support the Department's proposal to give complainants who report conduct covered by Title IX a meaningful choice between a formal Title IX process or an alternative dispute resolution, and the corresponding requirement that schools provide supportive, non-punitive individualized services designed to restore or preserve both parties' access to the school's education programs and activities, whether or not formal proceedings are pursued. The Department's expressed goal is not to limit protections for complainants, but to provide more options, acknowledging that college students are adults and different resolution processes may be appropriate for different individuals and different situations.[27] As I said before, the facts in many

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[24] *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal.*

[25] *See* Comments of Concerned Lawyers and Educators in Support of Fundamental Fairness for All Parties in Title IX Grievance Proceedings, signed by 40 practicing lawyers and professors (Jan. 28, 2019), *https://conradobrien.com/uploads/attachments/cjrjac2cb0cmt01iw4vzo4aev-comments-of-concerned-lawyers-and-educators-in-support-of-fundamental-fairness-for-all-parties-in-title-ix-grievance-proceedings-1–28–2019.pdf*; Comments of Patricia M. Hamill (Jan. 28, 2019), *https://conradobrien.com/uploads/attachments/cjrjaco9u0cmszciwf8gq9jfj-comment-of-p-hamill-on-proposed-title-ix-regulations-1–28–2019.pdf*. In my individual comments, I set forth scenarios drawn from cases involving accused students to illustrate why procedural reforms are so badly needed. Other comments to the regulations include personal stories reinforcing this point. Some involve students who were found responsible after a blatantly unfair proceeding. In others, the accused student was ultimately exonerated, but still suffered significant and lasting damage due to the mere fact of the accusation or how the proceedings were handled.

[26] The Department's confirmation, in proposed Section 106.45(a), that a school's treatment of either a complainant or a respondent may constitute discrimination on the basis of sex, is an essential step toward correcting the view that Title IX allows (or should even be interpreted to require) procedures that are biased in favor of "victims" (again, almost always women). Title IX proceedings should be fundamentally fair to all genders. Schools routinely argue in court proceedings that Title IX does not preclude "pro-victim" bias and some courts have accepted that argument, though others have not. *Compare, e.g., Doe v. University of Oregon*, No. 6:17–CV-01103-AA, 2018 WL 1474531, 15 (D. Or. Mar. 26, 2018) (suggesting that bias against an accused male would not violate Title IX if it "stemmed from a purely 'pro-victim' orientation," and that it would be lawful if a university, "in an attempt to change historical patterns of giving little credence to sexual assault allegations, has adopted a presumption that purported victims of sexual misconduct are telling the truth"), *with Noakes v. Syracuse Univ.*, No. 5:18–CV–43, 2019 WL 936875 (N.D.N.Y. Feb. 26, 2019) (holding that allegations of flawed and pro-complainant proceedings, in combination with allegations of general and university-specific pressure to believe complainants and crack down on accused offenders, suffice at the motion to dismiss stage to plead gender bias).

[27] 83 FR at 61462, 61470.

contested sexual misconduct cases are nuanced and complicated. I agree with the Department's observation, based on "feedback from many stakeholders," that "often the most effective measures a recipient can take to support its students in the aftermath of an alleged incident of sexual harassment are outside the grievance process and involve working with the affected individuals to provide reasonable supportive measures that increase the likelihood that they will be able to continue their education in a safe, supportive environment."[28] Informal resolution processes are equally, if not more, appropriate when a complainant reports conduct that is not covered by Title IX, for example, conduct that is unwelcome but not necessarily severe or pervasive and does not constitute assault.[29]

At the same time, however, certain aspects of the proposed regulations have given rise to legitimate concerns, and there is room for clarification and compromise. In particular, in setting forth the definitions and conditions that give rise to a school's duty to respond under Title IX, the Department's apparent intent was to restrict formal Title IX proceedings to cases of alleged misconduct that interfere with a complainant's participation in an educational program or activity, consistent with the language of Title IX and with court decisions. But even commenters who welcome the Department's efforts to balance protection of alleged victims with due process protections have expressed concerns that the Department has gone too far in loosening schools' duty to respond. Counterproposals include, on the one hand, expanded definitions of sexual harassment and the conditions that give rise to a duty to respond, and, on the other, measures to ensure schools do not circumvent key procedural protections by handling cases of serious alleged misconduct outside of the Title IX process. While this is beyond the scope of the issues I was asked to address, I encourage lawmakers and the Department to consider the comments and requests for clarification regarding the Department's proposed definitions of sexual harassment and sexual assault (Section 106.30 of the proposed regulations), the "deliberate indifference" standard (Section 106.44(a)); and the standards for what constitutes conduct within a school's "education program or activity" (Section 106.44(a)).[30]

## IV. PROCEDURAL PROTECTIONS REQUIRED FOR A FAIR AND RELIABLE PROCESS

The procedural protections I outline below are generally included in the Department's proposed regulations, though in some instances I propose modifications or clarifications. As I have emphasized, these protections are consistent with basic principles of justice and with rulings by many courts.[31] Most of them would be freely accepted in any other context, and many have not been the subject of specific objections (with notable exceptions such as the live hearing, cross-examination, standard of proof, and presumption of non-responsibility provisions, which I address below). While commenters have raised general concerns about the potential cost and complexity of these provisions, they are necessary for fair proceedings and can be avoided if schools and parties voluntarily pursue less formal resolutions. In addition, the disproportionate negative impact of sexual misconduct policies and proceedings on men of color has been well documented, and makes due process and other legal rights all the more important.[32]

1. Schools should offer supportive measures –"non-disciplinary, non-punitive individualized services . . . designed to restore or preserve access to

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[28] 83 FR at 61470.

[29] Even commenters who oppose other aspects of the regulations have welcomed the provisions giving schools more power to pursue informal resolutions, including restorative justice or mediation. To quote just one of a number of similar comments: "Students and institutions alike desire the power to settle these disputes in a productive manner rather than being arbitrarily forced into a one-size-fits-all solution." Association of Governing Boards of Universities and Colleges, *https://www.regulations.gov/document?D=ED-2018-OCR-0064-7550.*

[30] While I am not presenting any particular solution to these concerns in this submission, I note suggestions made by Harvard professors Gersen, Gertner, and Halley, *https://perma.cc/3F9K-PZSB;* the ACLU, *https://www.aclu.org/letter/aclu-comments-title-ix-proposed-rule;* and Concerned Lawyers and Educators, *https://conradobrien.com/uploads/attachments/cjrjac2cb0cmt01iw4vzo4aev-comments-of-concerned-lawyers-and-educators-in-support-of-fundamental-fairness-for-all-parties-in-title-ix-grievance-proceedings-1-28-2019.pdf.*

[31] Representative examples of court decisions affirming these rights in the context of Title IX disciplinary proceedings are included in the appendix.

[32] See, for example, Janet Halley, Trading the Megaphone for the Gavel in Title IX Enforcement, Harvard Law Review, *https://harvardlawreview.org/2015/02/trading-the-megaphone-for-the-gavel-in-title-ix-enforcement-2/.*

the [school's] education program or activity"—to both parties, whether or not a formal complaint is filed.[33]

2. An interim suspension should be imposed only if a school determines, after an individualized analysis, that it is justified by an immediate threat of harm to students or employees, and the respondent should be given notice and an opportunity to challenge the decision immediately after the suspension is imposed. In addition to these protections (included in the proposed regulations),[34] an interim suspension should be allowed only if it is the least restrictive alternative, and the same standards and limitations should apply to the currently-routine practice of placing holds on accused students' transcripts or withholding their degrees while a disciplinary proceeding is pending. This practice can result in severe and unwarranted punishment even if the accused student is ultimately found not responsible.

3. Schools should give both parties timely and adequate notice of the applicable school policy or code provisions and their rights.[35]

4. Schools should give respondents notice of complaints against them, including the factual allegations on which a complaint is based and the relevant provisions of the school's policy or code, before any initial interview and with sufficient time to prepare a response. Parties should also be notified if the school decides to investigate additional or different allegations or charges from those included in the initial notice.

5. Title IX coordinators, investigators, and decisionmakers should not have conflicts of interest, bias for or against complainants or respondents generally, or bias for or against a particular party.

6. Decisionmaker(s) should not be the same person(s) as the Title IX coordinator or the investigator(s).

7. Investigators, decisionmakers, and all other officials involved in Title IX disciplinary proceedings should be trained on the requirements of Title IX and the school's procedures. They should be trained to conduct impartial proceedings, not to rely on sex stereotypes, and to protect due process for all parties. In particular, while investigators may be appropriately trained to be sensitive in how they question parties, they should not be trained to presume alleged conduct occurred or to make credibility determinations based on presumptions about complainants or respondents.

8. Schools—not parties—should be responsible for gathering all relevant evidence, both inculpatory and exculpatory, and for evaluating it objectively. Credibility determinations should not be based on a person's status as a complainant, respondent, or witness.

9. Respondents should be given a presumption of non-responsibility. Such a presumption is a corollary to the standard of proof: whatever standard is ultimately adopted, if it is not satisfied the respondent should be found not responsible. An express statement of the presumption is necessary because college officials are commonly trained to presume a complainant's credibility.

10. The parties should have an equal opportunity to present witnesses and evidence and to be accompanied during the proceedings by an advisor of their choice.

11. The parties should be given written notice of all interviews, meetings, and hearings, with sufficient time to prepare.

12. The parties should be given an equal and meaningful opportunity to review, respond to, and present all evidence gathered during the investigation, both inculpatory and exculpatory.

13. The investigative report should fairly summarize relevant evidence, both inculpatory and exculpatory, and the parties should be given a meaningful opportunity to review and respond to the report.

14. Decision-makers should issue a comprehensive written determination based on an objective evaluation of the evidence. The determination should identify the relevant policy or code provision(s), describe the investigation, review the evidence, include findings of fact and conclusions as to how the

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[33] Proposed Section 106.30.
[34] Proposed Section 106.44(c).
[35] The rest of these points are generally covered by proposed Section 106.45(b). Some points, including 17–20, include suggested modifications of the Department's proposals.

code provisions apply to the facts, state the decision as to each allegation and the rationale for the decision, describe any sanction and the rationale for the sanction, and describe any support measures or remedies provided to the complainant.

15. The parties should receive timely written notice of their appeal rights, and an independent decisionmaker for the appeal.

16. Institutions of higher education should provide a live hearing and allow the parties' advisors to question the other party and witnesses. These provisions in the proposed regulations have provoked particular opposition. However, they are consistent with longstanding legal precedent and critical to a fair determination, ensuring that the parties can test, and decisionmakers can assess, the credibility and reliability of the parties and witnesses. The practice currently used at many schools, where parties can submit written questions, school officials decide what questions to ask, and decisionmakers may never even see the parties in person, is not an adequate substitute. Questioning should take place in real time, in the presence of both the parties and the decisionmakers. The written question process is artificially constrained and does not allow the questioner to flow with the testimony or effectively address new points as they come up. While some have expressed concerns that the prospect of live questioning will deter reporting of sexual misconduct, I have not seen evidence that this is true, and I note that respondents too will be subject to questioning and may decide to accept sanctions rather than undergo that process. Regardless, as I have said, I firmly believe complainants should be supported and taken seriously, but the goal of a particular disciplinary proceeding should be to determine whether the allegations in that case are true. Any assumption that a particular complainant is a victim of sexual misconduct and should not be questioned or effectively tested is not consistent with basic fairness. Schools can, should, and do adopt measures to ensure respectful treatment of parties and witnesses and prevent irrelevant, unfair, or badgering questions, and can also take steps to keep the parties separated.

17. If a Title IX proceeding continues while a criminal investigation is pending, a respondent's right to avoid self-incrimination must be protected and no adverse inference should be drawn if the respondent limits his participation or testimony.

18. Consistent with Federal Rule of Evidence 412, evidence of prior sexual history should be allowed if it is offered to prove that someone else committed the alleged conduct; if it concerns specific incidents of the parties' sexual conduct and is offered to prove consent, non-consent, welcomeness, or unwelcomeness; and if the "probative value [of the evidence] substantially outweighs the danger of harm to any victim and of unfair prejudice to any party."[36]

19. A uniform "clear and convincing evidence" standard of evidence should apply. Sexual misconduct charges carry the potential for life-long consequences, including permanent transcript notations that will forever impair a respondent's educational and career prospects. As courts have acknowledged, the preponderance of the evidence standard is not sufficient to protect against unreliable determinations.[37] The clear and convincing standard is essential to ensure that schools reach just results, not simply adopt fairer procedures on paper. Otherwise the risk is high that school officials, long steeped in a pro-"victim," anti-"perpetrator" approach, will continue to bow to widespread pressure to resolve grievances against respondents, and thus perpetuate the gender bias that pervades Title IX disciplinary processes now.

20. Regarding the Department's proposal that schools be required to dismiss a complaint that does not satisfy the standards in the regulations, some commenters have taken the position that the Department's provi-

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[36] Rule 412(b)(2). The proposed regulations include the first two conditions; I propose the third based on established rules of evidence and further propose that limits to inquiry into prior sexual history should apply to both parties.

[37] *See, e.g., Lee v. Univ. of New Mexico,* No. 1:17-cv-01230–JB–LF (D.N.M. Sept. 20, 2018); *Doe v. Univ. of Mississippi,* No. 3:16–CV–63–DPJ–FKB, 2018 WL 3570229, *11 (S.D. Miss. July 24, 2018) (allowing student to pursue claims against university based in part on use of preponderance standard to resolve sexual assault complaint). The proposed regulations would generally allow schools to choose whether to apply a preponderance or clear and convincing standard.

sions for formal Title IX grievance proceedings should establish a floor, not a ceiling, and that schools should remain free to respond to complaints of conduct that does not fall within the Department's definition of sexual harassment, that violates a school's own policies, etc. I believe this concept is built into the proposed regulations. If a school decides to provide recourse or support for other conduct, however, it should make supportive measures available to both parties, and any proceeding that could result in a respondent's being deprived of access to a school's educational programs or activities should provide the procedural protections set forth above. [38]

## V. CONCLUSION

While the erosion of due process protections in campus disciplinary proceedings has so far primarily impacted men, it is leading to injustice and insecurity for everyone. This is starkly illustrated by several recent cases in which women have been the accused or have argued that others should receive a fair process. In one reported case, two students had a sexual encounter while under the influence of alcohol. The woman was found responsible for sexual assault and was given a suspension to last as long as the man attended the school. She filed suit and asked the Court to enjoin the sanction, arguing that she was not given due process and that the school should have considered whether she was a victim herself, since both parties had been drinking. She lost her motion and then withdrew her lawsuit. [39] When a well-known feminist scholar was accused of sexually harassing a graduate student, other academics rallied around her, asked that she receive "a fair hearing," and stated their "objection to any judgment against her." [40] And the female CEO of an organization that grew out of the #MeToo movement stepped down after her son was accused of sexual misconduct, stating her intention to stand by him; the organization issued a statement reiterating its unequivocal support for survivors. [41]

I believe both complainants and respondents have a right to be heard. Neither has a right to be automatically believed. If we want fair processes for ourselves and our loved ones, we must support fair processes across the board, and not abandon our basic principles of justice because of the nature of the accused conduct or the unpopularity of the accused.

## APPENDIX

The following is an excerpt from an article by the Foundation for Individual Rights in Education, *Mountain of evidence shows the Department of Education's prior approach to campus sexual assault was "widely criticized" and "failing"* (Nov. 15, 2018),*https://www.thefire.org/mountain-of-evidence-shows-the-department-of-educations-prior-approach-to-campus-sexual-assault-was-widely-criticized-and-failing/* (pages 17–19); additional information about the facts and holdings in some of those cases (pages 20–22); and a representative sampling of cases decided since the article was published (pages 22–23).

### Excerpt from FIRE article:

[S]ince 2011, approximately 117 federal courts, as well as a number of state courts, have raised concerns about the lack of meaningful procedural protections in campus adjudications. A number of those judges have put their concerns in particularly clear terms:

*Doe v. Regents of the University of California*, No. B283229 (Cal. Ct. App. Oct. 9, 2018) ("It is ironic that an institution of higher learning, where American history and government are taught, should stray so far from the principles that underlie our democracy.").

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[38] I am also concerned about students who have been found responsible under current processes that did not provide the basic protections necessary to ensure a fair result, and believe consideration should be given to offering them recourse. At the very least, a process should be available for persons found responsible to have their records expunged after a designated period, and there should be a time frame after which respondents are no longer required to report an adverse disciplinary ruling on an application for admission to another school.

[39] *Jane Roe v. U. of Cincinnati,* No. 1:18-cv-312 (S.D. Ohio Aug. 21, 2018), *https://kcjohnson.files.wordpress.com/2018/08/roe-v-cincinnati-pi-denial.pdf.*

[40] As reported by Nell Gluckman, *How a Letter Defending Avital Ronell Sparked Confusion and Condemnation,* Chronicle of Higher Education (June 12, 2018), *https://www.chronicle.com/article/How-a-Letter-Defending-Avital/243650.*

[41] David French, The Great Due-Process Revival (Feb. 25, 2019), *https://www.nationalreview.com/corner/due-process-protections-metoo-movement/*.

*Lee v. University of New Mexico*, No. 17-cv-01230 (D.N.M. Sept. 20, 2018) ("[P]reponderance of the evidence is not the proper standard for disciplinary investigations such as the one that led to Lee's expulsion, given the significant consequences of having a permanent notation such as the one UNM placed on Lee's transcript.").

*Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018) ("[I]f a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder.").

*Doe v. University of Michigan*, 325 F. Supp. 3d 821 (E.D. Mich. 2018) ("Without a live proceeding, the risk of an erroneous deprivation of Plaintiff's interest in his reputation, education, and employment is significant.").

*Doe v. Trustees of Boston College*, 892 F.3d 67 (1st Cir. 2018) (holding that it is "reasonable for a student to expect that a basic fairness guarantee excludes having an associate Dean of Students request Board members to give special treatment to the prime alternative culprit in a case in which the key defense is that someone other than the accused student committed the alleged sexual assault").

*Doe v. Marymount University*, 297 F. Supp. 3d 573 (E.D. Va. 2018) ("[C]olleges and universities should treat sexual assault investigations and adjudications with a degree of caution commensurate with the serious consequences that accompany an adjudication of guilt in a sexual assault case. If colleges and university do not treat sexual assault investigations and adjudications with the seriousness they deserve, the institutions may well run afoul of Title IX.").

- *Doe v. University of Notre Dame*, 2017 U.S. Dist. LEXIS 69645 (N.D. Ind. May 8, 2017) (in response to university's argument that lawyers were not required because its disciplinary process was educational, not punitive, judge wrote: "This testimony is not credible. Being thrown out of school, not being permitted to graduate and forfeiting a semester's worth of tuition is 'punishment' in any reasonable sense of that term.").
- *Doe v. Brandeis University*, 177 F. Supp. 3d 561 (D. Mass. 2016) ("Brandeis appears to have substantially impaired, if not eliminated, an accused student's right to a fair and impartial process. . . . If a college student is to be marked for life as a sexual predator, it is reasonable to require that he be provided a fair opportunity to defend himself and an impartial arbiter to make that decision.").
- *Doe v. Columbia University*, 831 F.3d 46 (2d Cir. 2016) ("A covered university that adopts, even temporarily, a policy of bias favoring one sex over the other in a disciplinary dispute, doing so in order to avoid liability or bad publicity, has practiced sex discrimination . . . .").
- *See also Doe v. Miami Univ.*, 882 F.3d 579 (6th Cir. 2018); Doe v. Univ. of Cincinnati, 872 F.3d 393 (6th Cir. 2017); Doe v. Columbia Univ., 831 F.3d 46 (2d Cir. 2016); Rossley v. Drake Univ., No. 4:16-cv-00623 (S.D. Iowa Oct. 12, 2018); Doe v. Univ. of So. Miss., No. 2:18-cv-00153 (S.D. Miss. Sept. 26, 2018); Doe v. Syracuse Univ., 2018 U.S. Dist. LEXIS 157586 (N.D.N.Y. Sept. 16, 2018); Doe v. Brown Univ., 2018 U.S. Dist. LEXIS 144967 (D.R.I. Aug. 27, 2018); Doe v. Pa. St. Univ., 2018 U.S. Dist. LEXIS 141423 (M.D. Pa. Aug. 21, 2018); Doe v. Geo. Wash. Univ., 2018 U.S. Dist. LEXIS 136882 (D.D.C. Aug. 14, 2018); Rowles v. Curators of the Univ. of Miss., No. 2:17-cv-04250 (W.D. Mo. July 16, 2018); Doe v. Univ. of Miss., 2018 U.S. Dist. LEXIS 123181 (S.D. Miss. July 14, 2018); Doe v. Johnson & Wales Univ., No. 1:18-cv-00106 (D.R.I. May 14, 2018); Doe v. DiStefano, 2018 U.S. Dist. LEXIS 76268 (D. Colo. May 7, 2018); Werner v. Albright Coll., No. 5:17-cv-05402 (E.D. Pa. May 2, 2018); Doe v. Ohio St. Univ., 2018 U.S. Dist. LEXIS 68364 (S.D. Ohio Apr. 24, 2018); Roe v. Adams-Gaston, No. 2:17-cv-00945 (S.D. Ohio Apr. 17, 2018); Elmore v. Bellarmine Univ., 2018 U.S. Dist. LEXIS 52564 (W.D. Ky. Mar. 29, 2018); Doe v. Univ. of Or., 2018 U.S. Dist. LEXIS 49431 (D. Or. Mar. 26, 2018); Doe v. Marymount Univ., 297 F. Supp. 3d 573 (E.D. Va. 2018); Schaumleffel v. Muskingum Univ., 2018 U.S. Dist. LEXIS 36350 (S.D. Ohio Mar. 6, 2018); Gischel v. Univ. of Cincinnati, 302 F. Supp. 3d 961 (S.D. Ohio 2018); Powell v. St. Joseph's Univ., 2018 U.S. Dist. LEXIS 27145 (E.D. Pa. February 16, 2018); Doe v. Rider Univ., 2018 U.S. Dist.

LEXIS 7592 (D.N.J. Jan. 17, 2018); Doe v. Pa. St. Univ., 2018 U.S. Dist. LEXIS 3184 (M.D. Pa. Jan. 8, 2018); Saravanan v. Drexel Univ., 2017 U.S. Dist. LEXIS 193925 (E.D. Pa. Nov. 24, 2017); Painter v. Adams, 2017 U.S. Dist. LEXIS 171565 (W.D.N.C. Oct. 17, 2017); Doe v. Univ. of Chicago, 2017 U.S. Dist. LEXIS 153355 (N.D. Ill. Sept. 20, 2017); Rolph v. Hobart & William Smith Colls., 271 F. Supp. 3d 386 (W.D.N.Y. Sept. 20, 2017); Doe v. Case Western Reserve Univ., 2017 U.S. Dist. LEXIS 142002 (N.D. Ohio Sept. 1, 2017); Doe v. Trs. of the Univ. of Pa., 270 F. Supp. 3d 799, 817 (E.D. Pa. 2017); Gulyas v. Appalachian St. Univ., 2017 U.S. Dist. LEXIS 137868 (W.D.N.C. Aug. 28, 2017); Nokes v. Miami Univ., 2017 U.S. Dist. LEXIS 136880 (S.D. Ohio Aug. 25, 2017); Mancini v. Rollins Coll., 2017 U.S. Dist. LEXIS 113160 (M.D. Fl. July 20, 2017); Tsuruta v. Augustana Univ., No. 4:15-cv-04150 (D.S.D. June 16, 2017); Doe v. Univ. of Notre Dame, 2017 U.S. Dist. LEXIS 69645 (N.D. Ind. May 8, 2017); Doe v. Williams Coll., No. 3:16-cv-30184 (D. Mass. Apr. 28, 2017); Doe v. Amherst Coll., 238 F. Supp. 3d 195 (D. Mass. 2017); Doe v. Ohio St. Univ., 239 F. Supp. 3d 1048 (S.D. Ohio 2017); Neal v. Colo. St. Univ.—Pueblo, 2017 U.S. Dist. LEXIS 22196 (D. Colo. Feb. 16, 2017); Doe v. Lynn Univ., 2017 U.S. Dist. LEXIS 7528 (S.D. Fl. Jan. 19, 2017); Doe v. W. New England Univ., 228 F. Supp. 3d 154 (D. Mass. 2017); Doe v. Alger, 228 F. Supp. 3d 713 (W.D. Va. 2016); Collick v. William Paterson Univ., 2016 U.S. Dist. LEXIS 160359 (D.N.J. Nov. 17, 2016); Doe v. Brown Univ., 210 F. Supp. 3d 310 (D.R.I. Sept. 28, 2016); Ritter v. Okla. City Univ., 2016 U.S. Dist. LEXIS 95813 (W.D. Okla. July 22, 2016); Doe v. Weill Cornell Med. Coll. of Cornell Univ., No. 1:16-cv-03531 (S.D.N.Y. May 20, 2016); Doe v. Bd. of Regents of the Univ. Sys. Of Ga., No. 15-cv-04079 (N.D. Ga. April 19, 2016); Doe v. George Mason Univ., No. 1:15-cv-00209 (E.D. Va. Feb. 25, 2016); Prasad v. Cornell Univ., 2016 U.S. Dist. LEXIS 161297 (N.D.N.Y. Feb. 24, 2016); Doe v. Brandeis Univ., 177 F. Supp. 3d 561 (D. Mass. 2016); Doe v. Brown Univ., 166 F. Supp. 3d 177 (D.R.I. 2016); Marshall v. Indiana Univ., 170 F. Supp. 3d 1201 (S.D. Ind. 2016); Doe v. Pa. St. Univ., No. 4:15-cv-02072 (M.D. Pa. Oct. 28, 2015); Sterrett v. Cowan, 2015 U.S. Dist. LEXIS 181951 (E.D. Mich. Sept. 30, 2015); Doe v. Middlebury Coll., 2015 U.S. Dist. LEXIS 124540 (D. Vt. Sept. 16, 2015); Doe v. Salisbury Univ., 123 F. Supp. 3d 748 (D. Md. August 21, 2015); Doe v. Washington and Lee Univ., 2015 U.S. Dist. LEXIS 102426 (W.D. Va. Aug. 5, 2015); Tanyi v. Appalachian St. Univ., 2015 U.S. Dist. LEXIS 95577 (W.D.N.C. July 22, 2015); Doe v. Salisbury Univ., 107 F. Supp. 3d 481 (D. Md. 2015); King v. DePauw Univ., 2014 U.S. Dist. LEXIS 117075 (S.D. Ind. August 22, 2014); Benning v. Corp. of Marlboro Coll., 2014 U.S. Dist. LEXIS 107013 (D. Vt. Aug. 5, 2014); Harris v. St. Joseph's Univ., 2014 U.S. Dist. LEXIS 65452 (E.D. Pa. May 13, 2014); Wells v. Xavier Univ., 7 F. Supp. 3d 746 (S.D. Ohio 2014); Doe v. Geo. Wash. Univ., No. 1:11-cv-00696 (April 8, 2011).

**Additional details from a sampling of these cases, affirming the principles that schools are obligated to follow their own procedures; clearly notify respondents of the charges against them and the factual basis for those charges; conduct a thorough and fair investigation; give respondents a meaningful opportunity to defend themselves (with access to relevant materials and the ability to confront their accusers); ensure decisionmakers and investigators are impartial; meaningfully consider both exculpatory and inculpatory evidence; and give fair and consistent treatment both to complainants (usually female) and respondents (usually male):**

- *Doe v. Baum*, 903 F.3d 575 (6th Cir. Sept. 7, 2018): allowed a male student to proceed with due process and Title IX claims because credibility was at issue and plaintiff was not given a hearing or "an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder;" also held plaintiff had plausibly alleged that university officials "discredited all males, including Doe, and credited all females, including Roe, because of gender bias."
- *Doe v. Miami University*, 882 F.3d 579 (6th Cir. 2018): allowed a male student to proceed with claims that the university did not adequately consider inconsistencies in a complainant's statement, did not apply its own definition of consent, and treated the parties differently, failing to take seriously the male student's allegations that the female student engaged in non-consensual conduct.

- *Collick v. William Paterson University*, 699 Fed. Appx. 129 (3d Cir. Oct. 26, 2017): allowed a male student to proceed with claims against an individual college official who conducted a cursory investigation.
- *Doe v. Univ. of Cincinnati*, 872 F.3d 393 (6th Cir. Sept. 25, 2017): enjoined university from suspending a male student, because complainant did not appear at hearing, issues turned on credibility, and plaintiff had no opportunity to confront her.
- *Lee v. University of New Mexico*, No. 17–1230, Order (D.N.M. Sept. 20, 2018): allowed a male student to proceed with due process claims based on allegations that the disciplinary proceeding turned on a problem of credibility "such that a formal or evidentiary hearing, to include the cross-examination of witnesses and presentation of evidence in his defense, is essential to basic fairness;" "preponderance of the evidence is not the proper standard for disciplinary investigations such as the one that led to Lee's expulsion, given the significant consequences of having a permanent notation such as the one UNM placed on Lee's transcript;" and plaintiff did not receive notice of certain charges until his sanctions hearing, when it was too late to prepare an adequate defense.
- *Doe v. Syracuse University*, 341 F. Supp. 3d 125 (N.D.N.Y. Sept. 16, 2018): allowed a male student to proceed with Title IX claims based on allegations that the university had concluded both students were highly intoxicated but applied a presumption of inability to knowingly consent to sexual intercourse only to the female and had not adequately investigated or questioned the female's credibility.
- *Doe v. Brown Univ.*, 327 F. Supp. 3d 397 (D.R.I. Aug. 27, 2018): allowed African American male student to proceed with certain Title IX, race discrimination, and contract claims, based on allegations that the university pursued charges against the male but not the female, notwithstanding evidence that she was the aggressor and had committed other violations of university policy.
- *Doe v. Distefano*, No. 16–CV–1789–WJM–KLM, 2018 WL 2096347 (D. Colo. May 7, 2018): allowed a male student to proceed with due process claims based on alleged procedural flaws that included delays in giving plaintiff notice and access to information and failure to provide impartial investigators and decisionmakers, and using allegations of procedural violations to support an inference of bias, saying that for due process purposes any actual bias is unacceptable.
- *Doe v. University of Oregon*, No. 6:17–CV–01103–AA, 2018 WL 1474531 (D. Or. Mar. 26, 2018): allowed a male student to proceed with claims including allegations that a university decisionmaker explained away inconsistencies in complainant's account and problems with her evidence, ignored evidence favoring him, did not give him advance copies of evidence, and allowed the complainant to introduce new evidence at the hearing without allowing him to respond.
- *Doe v. Marymount University*, 297 F. Supp. 3d 573 (E.D. Va. Mar. 14, 2018): allowed a male student to proceed with claims including allegations that the university did not allow him to interview potential witnesses or gather exculpatory evidence, and did not investigate or consider evidence that contradicted complainant's account, including her inconsistent statements.
- *Schaumleffel v. Muskingum University*, 2018 WL 1173043 (S.D. Ohio Mar. 6, 2018): allowed a male student to proceed with claims including allegations that the university did not consider exculpatory evidence and helped persuade female students to file complaints against him.
- *Gischel v. University of Cincinnati*, 302 F. Supp. 3d 961 (S.D. Ohio Feb. 5, 2018): allowed a male student to proceed with claims that the university's investigator was biased against him, that the university did not consider evidence that contradicted the complainant's account, and that the university denied cross-examination by refusing to ask the complainant questions posed by the respondent.
- *Doe v. Rider University*, No. 3:16–CV–4882–BRM–DEA, 2018 WL 466225 (D.N.J. Jan. 17, 2018): allowed a male student to proceed with claims including allegations that the investigator ignored complainant's inconsistent statements and the hearings panel answered to an official who had prejudged the male student as guilty.

- *Doe v. Pennsylvania State University*, No. 4:17–CV–01315, 2018 WL 317934 (M.D. Pa. Jan. 8, 2018): allowed a male student to proceed with claims including allegations that the university did not give him adequate notice of the charges against him and failed to cite adequate evidence to support the decision of responsibility.
- *Saravanan v. Drexel University*, No. 17–3409, 2017 WL 5659821 (E.D. Pa. Nov. 24, 2017): confirmed universities in disciplinary proceedings "must strive to ensure fairness including avoiding inherent bias or procedures which may favor a woman's claim of sexual harassment and stalking over a man's claim of sexual assault by the woman."
- *Painter v. Adams*, No. 315CV00369MOCDCK, 2017 WL 4678231 (W.D.N.C. Oct. 17, 2017): allowed male student to proceed with claims including allegations that the university refused to consider exculpatory evidence.
- *Rolph v. Hobart and William Smith Colleges*, 271 F. Supp. 3d 386 (W.D.N.Y. Sept. 20, 2017): allowed a male student to proceed with claims including allegations that the university conducted an inadequate investigation, failed to review or preserve evidence, failed to address inconsistencies, helped the complainant prepare her case, and did not treat the parties equally during the hearing.
- *Doe v. The Trustees of the University of Pennsylvania*, 270 F. Supp. 3d 799 (E.D. Pa. Sept. 13, 2017): allowed a male student to proceed with claims including allegations that the university failed to conduct a thorough investigation and trained investigators and members of the Hearing Panel to presume that complainants were telling the truth and accused students were responsible.

**Sampling of new cases decided since November 2018:**

- *Noakes v. Syracuse University*, No. 5:18–CV–43, 2019 WL 936875 (N.D.N.Y. Feb. 26, 2019): denied university's motion to dismiss Title IX claims by male African American student who was expelled for alleged sexual assault of a female student and claimed mistaken identity; the complainant did not testify at the hearing, plaintiff was not allowed to cross-examine her or key witnesses, and plaintiff alleged flaws in the investigation, pro-complainant assumptions, and unwillingness to consider evidence of plaintiff's innocence or question complainant's credibility, coupled with facts to show public and university-specific pressure to believe accusers and presume accused students responsible.
- *Norris v. Univ. of Colorado*, No. 1:18–CV–02243–LTB, 2019 WL 764568 (D. Colo. Feb. 21, 2019): denied university's motion to dismiss Title IX and due process claims brought by a male student who was suspended for 18 months for alleged sexual misconduct with a female student; plaintiff, among other things, alleged the university applied the wrong version of its code, withheld notice of its investigation until after plaintiff was interviewed by police, denied him a hearing and the right to cross-examine his accuser and other witnesses, unreasonably denied him access to the investigation file, made inconsistent findings, used a "trauma-informed" approach that presumed the truth of complainant's allegations, and assigned officials with conflicts of interest to investigate and decide the case. Court cited other cases finding that "a lack of meaningful cross-examination may contribute to a violation of due process rights of an accused student in a disciplinary hearing regarding sexual assault."
- *Oliver v. University of Texas Southwestern Medical School*, No. 3:18–CV–1549–B, 2019 WL 536376 (N.D. Tex. Feb. 11, 2019): denied motion to dismiss Title IX and due process claims filed by a male medical student who was expelled based on an alleged physical assault of his former fiance; plaintiff alleged the university had first found the complaint against plaintiff to be unfounded but then reopened it based on "new evidence" which it did not share with plaintiff; held a hearing without requiring complainant to testify and without allowing cross-examination; and disregarded proof that complainant had doctored the audio recording which comprised the "new evidence."
- *Doe v. White*, BS171704 (Cal. Super. Ct. Feb. 7, 2019), *https://kcjohnson.files.wordpress.com/2019/02/doe-v-white-csu-northridge.pdf*: latest of several recent cases in which California state courts have di-

rected both public and private universities to set aside decisions finding male students responsible for sexual misconduct, and have held that when a disciplinary decision turns on credibility, parties and witnesses must be subjected to questioning and cross-examination at a live hearing before a neutral adjudicator who cannot be the same person as the investigator.

- *Doe v. Univ. of Mississippi*, No. 3:18–CV–138–DPJ–FKB, 2019 WL 238098 (S.D. Miss. Jan. 16, 2019): denied motion to dismiss Title IX, due process, and equal protection claims filed by male student suspended for three years for alleged sexual assault of female student; plaintiff alleged that the investigator excluded exculpatory evidence, failed to interview key witnesses, and failed to address medical records that made clear complainant did not think she was raped, that a panel member mocked defenses raised by men accused of sexual assault, that defendants treated plaintiff less favorably than complainant for the same conduct (sexual activity with someone under the influence of alcohol), that the investigative report was flawed and incomplete, that decision makers were trained to assume an assault occurred, that plaintiff was not allowed to cross-examine complainant or witnesses because they did not appear at the hearing, and that the preponderance standard was not sufficient to protect plaintiff's rights.
- *Doe v. Coastal Carolina University*, 2019 WL 142299 (D.S.C. Jan. 9, 2019): denied motion to dismiss Title IX claims filed by male student expelled for alleged sexual assault of female student; plaintiff was criminally investigated but no charges were filed against him, a panel conducted a hearing and found in plaintiff's favor, the female student appealed without following the school's procedures, the appellate officer requested a new hearing, and an "appeal panel" convened for a second "hearing," without any testimony, and found plaintiff responsible.
- *Doe v. George Washington Univ.*, No. CV 18–553 (RMC), 2018 WL 6700596 (D.D.C. Dec. 20, 2018): denied motion to dismiss breach of contract and Title IX claims by male student suspended for one year (after finishing all his course work) for alleged sexual assault of female student; Court noted among other things that "[t]he Appeals Panel was presented with direct contradictions in the evidence and appears to have strained to overlook such contradictions, leaving no trail of reasoning."

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The CHAIRMAN. Thank you, Ms. Hamill.

Ms. Goss Graves, welcome.

**STATEMENT OF FATIMA GOSS GRAVES, PRESIDENT AND CEO, NATIONAL WOMEN'S LAW CENTER, WASHINGTON, DC**

Ms. GOSS GRAVES. Thank you. Chairman Alexander, Ranking Member Murray, and Members of the Committee, I am Fatima Goss Graves, President and CEO of the National Women's Law Center and I appreciate the opportunity to testify today.

The National Women's Law Center was founded the same year that Title IX was passed, and we have worked to address sex discrimination in schools, including harassment since that time. And I have personally been engaged in this topic, representing clients, serving on the Clery rulemaking round tables, and on the ALI project on this topic. Study after study has shown that students in college continue to experience extremely high rates of sexual assault. More than 1 in 5 women, more than 1 in 18 men, and nearly 1 in 4 transgender and gender non-conforming students.

The students we hear from at the National Women's Law Center report that they were discouraged from reporting in the first place, that they have been met with delays, that the process that they have experienced was extremely unfair. Trauma they experience both from their assault and from going through their school process

stays with them far after they leave their universities. For some, what is at stake is whether they continue to stay in school at all.

Any reauthorization of The Higher Education Act should really take all of this into account, including also the principles of the Clery Act and Title IX that the Senator outlined earlier, and the existing requirements to adopt and enforce procedures to address sexual assault that include promptness, being equitable, and being impartial. Unfortunately, recently the Department of Education's proposed changes to its Title IX rules have created a lot of confusion. Schools have been forced—if the rules were to go into effect, schools would be forced to ignore a lot of sexual assaults. They would be required to have unfair and sometimes harmful processes that we believe would deter survivors from coming forward in the first place. And the response to these proposed rules has been swift with thousands of people around this country urging the Department to abandon this misguided plan.

Many reminded the Department of Education of the guiding principle rules that are already embedded in Title IX and Clery. I do not have time to go through all of them, but I want to highlight a few. First, we really believe that fair processes require all parties to have timely and clear notice in advance of meetings and hearings. We have heard of schools failing to do this to the detriment of all students.

In addition, it requires effective interim measures that preserve complainants' equal access to education. This may be as simple as changing a dorm or classroom. It also requires resolving sexual assault complaints with the same evidentiary standard used in other civil rights proceedings, which is the preponderance of evidence standards, and school should not subject sexual violence to hire and unique standards. That is a thing that you will hear from me. In addition, campus processes should treat all students involved equitably. This means that both respondents and complainants should have the same rights to have witnesses, and the same rights to have evidence, and the same rights to appeal. It would be unfair to allow only one side to appeal a process that is decidedly unfair.

Finally, want to take a minute to address the issue of cross-examination that the Senator raised. Some have argued, including the Department of Education in its unfortunate proposed rule, that cross-examination is required to ensure that a process is fair. Here is where I strongly disagree. These are not courtrooms. In these proceedings students typically do not have counsel. They do not have rules of evidence that apply. There isn't trial procedures. There aren't meaningful protections from inappropriate or unfair or victim-blaming questions, and most fundamentally, any rule that requires colleges and universities to conduct live quasi-criminal type trials with live cross-examination only in the area of sexual violence and not in any other misconduct at schools, communicates the message that survivors are uniquely unreliable. And implicit in such a requirement is a deep rooted skepticism of sexual assault itself. It is already an issue that is dramatically underreported. This will only be exacerbated if students who report must undergo traumatic and unnecessary procedures.

It should not surprise anyone that student survivors care deeply about the fairness in their school systems. They have as much interest in the outcome of a complaint as students who are responding to allegations. Each are harmed when schools implement processes that are unfair. This is especially true for survivors who are experiencing multiple forms of discrimination. We hear from black and brown women in particular that they are less likely to be believed in these processes and they are especially vulnerable to unfair processes.

In my view it is just really time to match the seriousness of survivors who are out there demanding accountability from their schools.

Thank you for the opportunity to be here today, and I look forward to any questions.

[The prepared statement of Ms. Goss Graves follows:]

PREPARED STATEMENT OF FATIMA GOSS GRAVES

Thank you for the opportunity to submit testimony to the Committee on addressing campus sexual assault and fair campus disciplinary processes in the reauthorization of the Higher Education Act.

## I. INTRODUCTION

The National Women's Law Center ("the Center") is a nonprofit organization that has worked since 1972 to combat sex discrimination and expand opportunities for women and girls in every facet of their lives, including education. Founded the same year Title IX of the Education Amendments of 1972 was enacted, the Center has participated in all major Title IX cases before the Supreme Court as counsel [1] or amici. The Center is committed to eradicating all forms of sex discrimination in school, specifically including discrimination against pregnant and parenting students, LGBTQ students, and students who are vulnerable to multiple forms of discrimination, such as girls of color and girls with disabilities. This work includes a deep commitment to eradicating sexual harassment, including sexual assault, as a barrier to educational success. We equip students with the tools to advocate for their own rights at school, assist policymakers in strengthening protections against sexual harassment and other forms of sex discrimination, and litigate on behalf of students whose schools fail to adequately address their reports of sexual harassment.

As attorneys representing those who have been harmed by sexual violence and other forms of sexual harassment, we know that too often when students seek help from their schools to address the harassment or assault, they experience retaliation, including being pushed out of school altogether. We also know how important it is for schools to intervene when students are sexually harassed, before it escalates in severity or to the point where students no longer feel safe in school.

## II. THE REALITY OF CAMPUS SEXUAL ASSAULT

While we have made major strides to address campus sexual assault, too many colleges and universities still fail to make even efforts to support survivors' opportunities to learn in the wake of sexual violence. Students are still urged to leave school until their assailants graduated, [2] discouraged from filing formal disciplinary reports or telling friends, [3] and denied essential accommodations like dorm changes

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

[2] Dana Bolger, Where Rape Gets a Pass, N.Y. DAILY NEWS (July 6, 2014), *http://www.nydailynews.com/opinion/rape-pass-article-1.1854420* ("In 2011, my sophomore year of college, I was raped and then stalked by a fellow student. When I went to report my assault to my college dean, he encouraged me to take time off, go home, be "safe," focus on my own healing, and put my education on hold - so that the man who raped me could comfortably conclude his.").

[3] Anonymous, On Assault Narratives, Yale Daily News (Feb. 1, 2010), *http://yaledailynews.com/blog/2012/02/01/anonymous-on-assault-narratives/*.

to allow them to live separately from their assailants.[4] Survivors sometimes still face severe retaliation, including disciplinary complaints, for speaking out about the abuse they faced.[5] Some schools imposed unique procedural burdens on student victims[6] of sexual harassment seeking disciplinary remedies, such as corroboration requirements and short windows to report—approaches that are steeped in long rejected myths that women frequently lie about rape.[7]

As a result of injustices like these, we routinely hear from students, most of them women,[8] who drop out of school, change majors, miss class, or otherwise lose crucial educational opportunities as a result of experiencing sexual violence.[9] As one lawyer who represents victims explained:

Probably—95 percent of the time, students will skip class for one reason or another. And . . . the reasons are because the perp's in the class, because the perp's friends are in the class, because, sometimes schoolwork just gets to be too much, again in the aftermath of the assault. Sometimes, they've come out to the professor as a survivor, and the professor hasn't . . . been particularly supportive, so they won't go back to the class. . . . I think victims will oftentimes think, "So I would rather miss class for the next 3 weeks and then just take my final, than go to class where I know he's going to be there."[10]

Those survivors who do stay in school may experience a drop in their academic performance. As another lawyer noted, and as we have also seen in our own cases at the Center, "I have not had a client yet whose grades did not, not just slightly diminish, but markedly diminish. Going from A's and B's to D's and F's. No doubt. It happens every time."[11]

The threat that inadequate university support poses to a survivor's continued education can have particularly grave costs for survivors without significant financial means: they often experience heavy financial costs, including lost scholarships, additional loans to finance additional semesters, reduced future wages due to diminished academic performance, and hefty expenses for housing changes and medical care that should be provided, free of cost, by colleges and universities.[12]

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[4] Angie Epifano, An Account of Sexual Assault at Amherst College, Amherst Student (Oct. 17, 2012), *http://amherststudent.amherst.edu/?q=article/2012/10/17/account-sexual-assault-amherst-college.*

[5] Annie-Rose Strasser, University of North Carolina rape victim may be expelled for speaking about her case, ThinkProgress (Feb. 23, 2013), *https://thinkprogress.org/university-of-north-carolina-rape-victim-may-be-expelled-for-speaking-about-her-case-2d6e6b0eb24e.*

[6] We use the terms "victim" and "survivor" interchangeably to acknowledge students' range of responses to violence. For critiques of the limiting function of either term, see Dana Bolger, "Hurry Up and Heal": Pain, Productivity, and the Inadequacy of "Victim vs. Survivor", Feministing.com (Dec. 10, 2014), *http://feministing.com/2014/12/10/hurry-up-and-heal-pain-productivity-and-the-inadequacyof-victim-vs-survivor/;* Parul Sehgal, The Forced Heroism of the 'Survivor', N.Y. Times Mag., May 3, 2016, *http://www.nytimes.com/2016/05/08/magazine/the-forced-heroism-of-thesurvivor.html?—r=0.*

[7] See generally Michelle J. Anderson, The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault, 84 B.U. L. Rev. 945 (2004) (describing onerous university requirements for rape victims not imposed on students reporting other forms of harm).

[8] Nick Anderson and Susan Svrluga, What a massive sexual assault survey found at 27 top universities, The Washington Post (Sept. 21, 2015), *https://www.washingtonpost.com/news/grade-point/wp/2015/09/21/what-a-massive-sexual-assault-survey-showed-about-27-top-u-s-universities/?utm—term=.07c97b1f0c90.*

[9] Rebecca Marie Loya, Economic Consequences of Sexual Violence for Survivors: Implications for Social Policy and Social Change 96–100 (June 2012) (unpublished Ph.D. dissertation, Brandeis University), *https://static1.squarespace.com/static/551e0348e4b0c1bae0983f61/t/55b19581e4b01705b03e0b1c/1437701505305/Loya2012EconomicConsequencesRape.pdf.*

[10] Id. at 96. See also id. at 94 ("For a lot of the students that I've seen, the biggest problem is that the perpetrator . . . goes to their school as well, and in a lot of cases, even has classes with them. So in that sense, being able to concentrate in class when the person who assaulted you is sitting two rows behind you, obviously is going to make it almost impossible for you to do anything. So I think to the biggest degree it's just being able to concentrate, even passing, going through the regular reaction, for them to also have to deal with the fact that the person might be sitting next to you in class, might be passing you in the hall while you're walking to class, or even going to class becomes something difficult and can be triggering every- almost every moment.").

[11] Id. at 94.

[12] See generally Dana Bolger, Gender Violence Costs: Schools' Financial Obligations Under Title IX, 125 Yale L.J. 2106 (2016) (describing the financial impact of gender violence on student survivors).

Only over the last few years, under pressure from student advocates [13] and the federal government, [14] have schools begun to rise to their legal and ethical duty to preserve survivors' educational opportunities. [15] Without a doubt, there is still much work to be done. Now that many schools have acknowledged their responsibility to address sexual violence, we are tasked with hard questions about how to get those responses right. We cannot forget the high stakes of our mission, colleges' very recent history of apathy, and the brave student advocates who pushed schools to change.

### a. CAMPUS SEXUAL ASSAULT IS PERVASIVE IN SCHOOLS ACROSS THE COUNTRY

Students in college experience high rates of sexual harassment and sexual assault. During college, 62 percent of women and 61 percent of men experience sexual harassment, [16] and more than one in five women and nearly one in 18 men are sexually assaulted. [17] Nearly one in four transgender and gender-nonconforming students are sexually assaulted during college. [18] When schools fail to provide effective responses, the impact of sexual harassment and assault can be devastating. [19] For example, 34 percent of college student survivors of sexual assault drop out of college. [20]

### b. CAMPUS SEXUAL ASSAULT IS CONSISTENTLY AND VASTLY UNDERREPORTED

Reporting sexual assault can be hard for most victims. Only 12 percent of college survivors who experience sexual assault, [21] and only 7.7 percent of college students who experience sexual harassment, report to their schools or the police. [22] Students often choose not to report for fear of reprisal, because they believe their abuse was not important enough, [23] because they are "embarrassed, ashamed or that it would be too emotionally difficult," [24] because they think the no one would do anything to help, [25] and because they fear that reporting would make the situation even worse. [26] Common rape myths that victims could have prevented their assault if

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[13] Libby Sander, "Quiet no longer, rape survivors put pressure on colleges," the Chronicle of Higher Education (Aug. 12, 2013), *http://www.chronicle.com/article/Quiet-No-Longer-Rape/141049.*

[14] Alyssa Peterson & Olivia Ortiz, A Better Balance: Providing Survivors of Sexual Violence with "Effective Protection" Against Sex Discrimination Through Title IX Complaints, 125 Yale L.J. 2132, 2138–39 (2016); Robin Wilson, 2014 Influence List: Enforcer, Chronicle of Higher Education (Dec. 15, 2014), available at *http://www.chronicle.com/article/enforcer-catherine-e-lhamon/150837* (describing Assistant Secretary for Civil Rights' Catherine Lhamon's efforts to strengthen OCR's Title IX enforcement).

[15] Letter from the National Women's Law Center, et al. to Education Secretary John King (July 13, 2016), available at *https://nwlc.org/resources/sign-on-letter-supporting-title-ix-guidance-enforcement/* ("These guidance documents and increased enforcement of Title IX by the Office for Civil Rights have spurred schools to address cultures that for too long have contributed to hostile environments which deprive many students of equal educational opportunities.");

[16] AAUW, Drawing the Line: Sexual Harassment on Campus17, 19 (2005) [hereinafter Drawing the Line], *https://history.aauw.org/files/2013/01/DTLFinal.pdf* (noting differences in the types of sexual harassment and reactions to it).

[17] E.g., Association of American Universities [AAU], Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct, 13–14 (Sept. 2015) [hereinafter AAU Campus Climate Survey], *https://www.aau.edu/sites/default/files/—40—20Files/Climate—%20Survey/AAU—Campus—Climate—Survey—12—14—15.pdf.*

[18] Id. at 13–14.

[19] 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.*

[20] 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.*

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

[22] AAU Campus Climate Survey, supra note 17 at 35.

[23] Id. at 36.

[24] Id.

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

[26] GLSEN, The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools 27 (2018) [hereinafter 2017 Na-

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they had only acted differently, wore something else, or did not consume alcohol, only exacerbate underreporting.

Survivors of sexual assault may also be unlikely to make a report to law enforcement because, in some instances, criminal reporting often does not serve survivors' best interests or address their most pressing needs. Police officers are concerned with investigating crimes and catching perpetrators; they are not in the business of providing supportive measures to survivors and making sure that they feel safe at school. And some students—especially students of color, undocumented students,[27] LGBTQ students,[28] and students with disabilities—can be expected to be even less likely than their peers to report sexual assault to the police due to increased risk of being subjected to police violence and/or deportation. Survivors of color also may not want to report to the police if their assailant is non-white, in order to avoid exacerbating the overcriminalization of men and boys of color. Whatever the reason, it is critical that survivors maintain the ability to determine whether, when and how to report sexual violence.

### c. STUDENTS WHO DO REPORT CAMPUS SEXUAL ASSAULT ARE OFTEN IGNORED AND SOMETIMES EVEN PUNISHED BY THEIR SCHOOLS

Unfortunately, students who do report to their schools too often face hostility. Reliance on common rape myths that blame individuals for the assault and other harassment they experience[29] can lead schools to minimize and discount sexual harassment reports. An inaccurate perception that false accusations of sexual assault are common[30]—despite the fact that men and boys are far more likely to be victims of sexual assault than to be falsely accused of it[31]—can also lead schools to dismiss reports of assault and assume that complainants are being less than truthful. Indeed, students report that after complaining to their schools about sexual assault, they faced discipline, including for engaging in so-called "consensual" sexual activity[32] or premarital sex,[33] for defending themselves against their harassers,[34] or for merely talking about their assault with other students in violation of a school "gag order" or nondisclosure agreement imposed by their school.[34] The Center regularly receives requests for legal assistance from student survivors across the country who have been disciplined by their schools after reporting sexual assault.[36]

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tional School Climate Survey], available at *https://www.glsen.org/article/2017-national-school-climate-survey-1.*

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

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

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

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

[31] E.g., Tyler Kingkade, Males Are More Likely To Suffer Sexual Assault Than To Be Falsely Accused Of It, HUFFINGTON POST (Dec. 8, 2014) [hereinafter Males Are More Likely to Suffer Sexual Assault] [last updated Oct. 16, 2015], *https://www.huffingtonpost.com/2014/12/08/false-rape-accusations—n—6290380.html.*

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

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

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

[35] See, e.g., Tyler Kingkade, When Colleges Threaten To Punish Students Who Report Sexual Violence, HUFFINGTON POST (Sept. 9, 2015), *https://www.huffingtonpost.com/entry/sexual-assault-victims-punishment—us—55ada33de4b0caf721b3b61c.*

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

Women and girls of color, particularly Black women and girls, already face discriminatory discipline due to race and sex stereotypes.[37] Schools are also more likely to ignore, blame, and punish women and girls of color who report sexual harassment due to harmful race and sex stereotypes that label them as "promiscuous."[38]

Similarly, LGBTQ students are less likely to be believed and more likely to be blamed due to stereotypes that they are more "promiscuous," "hypersexual," "deviant," or bring the "attention" upon themselves.[39] Students with disabilities, too, are less likely to be believed because of stereotypes about people with disabilities being less credible[40] and because they may have greater difficulty describing or communicating about the harassment they experienced, particularly if they have a cognitive or developmental disability.[41]

## III. PREVENTION PROGRAMS ON CAMPUSES

Since the reauthorization of the Violence Against Women Act (VAWA) in 2013 amended the Clery Act, campuses have been required to implement prevention and awareness programs for incoming students and employees on dating violence, domestic violence, sexual assault and stalking.[42] These prevention and awareness programs must include the definition of consent, a description of safe and positive options for bystander intervention, definitions of sexual assault, dating violence, domestic violence, and stalking, and information on risk reduction.[43] The prevention programs include positive and healthy behaviors to foster healthy relationships, programs that seek to change behavior and social norms in healthy and safe manners, and programs to increase understanding of domestic violence, dating violence, sexual assault, and stalking.[44] Clery specifies that these programs would be "informed by research or assessed for value, effectiveness, or outcome that are intended to stop dating violence, domestic violence, sexual assault, and stalking before they occur."[45] Since Clery was amended and these changes went into effect in 2014, campuses have been experimenting with promising prevention programs and should continue to build to on this in addressing campus sexual assault.

Clery also requires that officials who conduct investigations receive annual training on dating violence, domestic violence, stalking, and sexual assault, and "on how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability."[46] In addition to the Clery requirements, in ensuring that trainings focus on "protect[ing] the safety of victims and promot[ing] accountability," these trainings, and trainings for employees who respond to sexual assault generally on campuses, should also should include practical ways to prevent and identify sexual assault, including the behaviors that may lead to assault, the atti-

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

[37] Nat'l Women's Law Ctr., Let Her Learn: A Toolkit To Stop School Pushout for Girls of Color 1 (2016) [hereinafter Let Her Learn: Girls of Color], available at *https://nwlc.org/resources/let-her-learn-a-toolkit-to-stop-school-push-out-for-girls-of-color.*

[38] E.g., Nancy Chi Cantalupo, And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color, 42 HARVARD J.L. & GENDER 16, 24–29 (forthcoming) [hereinafter And Even More of Us Are Brave], available at *https://ssrn.com/abstract=3168909.*

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

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

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

[42] 34 C.F.R. 668.46(j).

[43] 34 C.F.R. 668.46(j)(1)(i).

[44] 34 C.F.R. 668.46(j)(2)(iii) & (iv).

[45] 34 C.F.R. 668.46(k)(2)(ii).

[46] 34 C.F.R. 668.46(j)(2)(iv).

tudes of bystanders that may allow conduct to continue, the potential for revictimization of survivors by employees responding to and investigating sexual assault, trauma-informed methods for responding to students who are sexually assaulted, including the use of nonjudgmental language and an understanding of the neurobiology of trauma.

## IV. CAMPUS PROCESSES NEED TO BE FAIR TO ALL STUDENTS

Since the Clery Act and Title IX already requires that schools adopt and enforce procedures to address sexual assault that is prompt, equitable, and impartial reauthorization of the Higher Education Act should support and reaffirm the principles and requirements of both Clery and Title IX, including ensuring that schools address sexual harassment before it causes greater harm to a student's education and create equitable processes that preserve and restore access to education for survivors of sexual violence. [47]

However, recently, the Department of Education proposed changes to its Title IX regulations i, which would impose upon the nearly 7,000 colleges and universities across the country, prescriptive and confusing requirements. Under these rules, schools would be forced to ignore sexual assault in many cases and create confusing, unfair, and harmful grievance processes that would only deter survivors and witnesses from participating in their schools' investigations. Title IX protects all students from sex discrimination, including sexual violence, and so any changes to the Department's Title IX rules will necessarily have an impact on how colleges and universities respond to sexual assault.

### a. SCHOOLS MUST TAKE EFFECTIVE AND IMMEDIATE ACTION WHEN RESPONDING TO SEXUAL ASSAULT AND OTHER FORMS OF HARASSMENT THAT SCHOOL EMPLOYEES KNOW ABOUT OR REASONABLY SHOULD KNOW ABOUT

For the better part of two decades, the Department has used one consistent standard to determine if a school violated Title IX by failing to adequately address sexual assault or other forms of sexual harassment. The Department's 2001 Guidance, which went through public notice-and-comment and has been enforced in both Democratic and Republican administrations, [48] defines sexual harassment as "unwelcome conduct of a sexual nature." [49] This definition and the obligation rightly charges schools with responding to harassment before it escalates to a point that students suffer severe harm. The 2001 Guidance requires schools to address student-on-student harassment if any employee "knew, or in the exercise of reasonable care should have known" about the harassment. In the context of employee-on-student harassment, the 2001 Guidance requires schools to address harassment "whether or not the [school] has 'notice' of the harassment." [50] Under the 2001 Guidance, the Department would consider schools that failed to "take immediate and effective corrective action" to be in violation of Title IX. [51] For years, these standards have appropriately guided colleges in understanding their obligations around responding to campus sexual assault.

This standard considers the reality that many students disclose sexual abuse to employees who do not have the authority to institute corrective measures, both be-

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[47] 34 C.F.R. 106.8(b).

[48] These standards have been reaffirmed time and time again, in 2006 by the Bush Administration, in 2010, 2011, and 2014 in guidance documents issued by the Obama administration, and even in the 2017 guidance document issued by the current Administration. U.S. Dep't of Educ. Office for Civil Rights, Dear Colleague Letter: Sexual Harassment (Jan. 25, 2006) [hereinafter 2006 Guidance], *https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html;* U.S. Dep't of Educ. Office for Civil Rights, Dear Colleague Letter: Harassment and Bullying (Oct. 26, 2010) [hereinafter 2010 Guidance], *https://ww2ed.gov/about/offices/ list/ocr/letters/colleague-201104.pdf;* U.S. Dep't of Educ. Office of Civil Rights, Dear Colleague Letter: Sexual Violence at 4, 6, 9, &16 (Apr. 4, 2011) [hereinafter 2011 Guidance], *https://ww2ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf;* U.S. Dep't of Educ. Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence 1–2 (Apr. 29, 2014) [hereinafter 2014 Guidance], *https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf;* U.S. Dep't of Educ. Office for Civil Rights, Questions and Answers on Campus Sexual Misconduct (Sept. 2017) [hereinafter 2017 Guidance], *https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf.*

[49] U.S. Dep't of Educ., Office for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (2001) [hereinafter 2001 Guidance], *https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.*

[50] Id.

[51] Id.

cause students seeking help turn to whatever adult they trust the most, regardless of that adult's official role, and because students are likely not informed about which employees have authority to address the harassment. The 2001 Guidance also requires schools to address all employee-on-student sexual harassment, "whether or not the [school] has 'notice' of the harassment."[52] The 2001 Guidance recognized the particular harms of students being preyed on by adults in positions of authority, and students' vulnerability to pressure from adults to remain silent, and accordingly acknowledged schools' heightened responsibilities to address harassment by their employees.

There are, however, some employees who would not be required to report sexual assault of which it receives notice in confidential settings—such as campus mental-health counselors, social workers, psychologist, or other employees with a professional license requiring confidentiality. It is important to ensure that these relationships continued to exist in these settings so that students get the help that they need and that these professionals are trained to understand when they may keep a report confidential.

**b. Complainants Must Be Afforded Non-Punitive Interim Measures to Preserve and Restore Access to Educational Programs**

Campuses should afford complainants non-punitive interim measures that preserve and restore their access to educational programs. As the Department appropriately noted in its 2001 guidance, schools "should take reasonable, timely, age-appropriate and effective corrective action, including steps tailored to the specific situation."[53] Schools should also take into account the severity or pervasiveness of the alleged incident(s) and any continuing effects of the incident(s) on the complainant.

This means that in some instances, a school may need to transfer the respondent to another class or dorm even if it may burden him. Because the school should aim to restore and preserve access to the school's programs for the victim, it would be inappropriate to force the complainant to change all of her own classes and housing assignments in order to avoid her harasser.

Schools should also use restorative supportive measures that are often necessary to ensure a complainant's equal access to educational opportunities. These include the ability to retake a class, to remove a "Withdrawal" or failing grade from the harassment victim's transcript, or to obtain reimbursement of lost tuition after being forced to withdraw and retake a course as a result of sexual assault. Also, schools may need to review any disciplinary actions taken against the complainant to ascertain if there is a causal connection between the harassment and the misconduct that may result in disciplinary action against the complainant (for example, a complainant may be disciplined for skipping class, even though she skipped that class to avoid seeing her perpetrator).

Schools also should make all necessary interim measures available to all parties and at no cost to them.[54] Examples of effective interim measures include:

(1) health accommodations (e.g., counseling, other mental health and substance abuse services, medical services not covered by health insurance, disability services);

(2) safety accommodations (e.g., changes to academic, extracurricular, housing, transportation, dining, and employment assignments; no-contact orders; protection from retaliation; campus escort services; housing assistance; increased security and monitoring); and

(3) academic accommodations (e.g., academic support services; homework extensions; exam retakes; excused absences; preserved eligibility for grants, scholarships, and other activities or honors).

In addition, schools should never require a survivor to agree to a mutual no-contact order. Such a requirement would be contrary to decades of expert consensus that mutual no-contact orders are harmful to victims, because it gives abusers an opportunity to manipulate their

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[52] Id. at 10.

[53] Id. at 16.

[54] Know Your IX, Letter to Sec'y Arne Duncan & Asst. Sec'y Catherine Lhamon 3–4 (Nov. 6, 2014), available at *https://www.knowyourix.org/wp-content/uploads/2017/01/2014–11–6-Know-Your-IX–USSA–Letter-to-OCR–Redacted.pdf*. See also TIXPA § 4 (amending DEOA by adding (d)(30)).

victims into violating the mutual order,[55] and allowing perpetrators to potentially turn what was intended to be a protective measure into a punitive measure against the survivor. Groups such as the Association for Student Conduct Administration (ASCA) agree that "[e]ffective interim measures, including . . . actions restricting the accused, should be offered and used while cases are being resolved, as well as without a formal complaint."[56]

### c. INVESTIGATIONS MUST BE EQUITABLE AND MUST NOT CREATE BARRIERS TO PARTICIPATION

Institutions of higher education have worked to respond to sexual assault in ways that are tailored to their campus community and culture, size, location, resources, and state or local legal requirements. There is no one-size-fits all model. As ASCA has noted, "[w]ith different missions, resources, staffing models, funding sources, system policies, and especially campus cultures and student populations at postsecondary institutions across the United States, each college or university must develop its own policies and procedures."[57] But there are effectively four types of hearing and investigatory models for adjudicating campus sexual assault in place now: the "investigative model," the "hearing model," the "investigation and hearing hybrid," and the "investigation and deliberative panel hybrid."[58] The investigative model relies on skilled investigators gather evidence and interview the parties [] and any other witness in separate, individual meetings, then write an investigative report where they review the evidence and fact factual findings."[59] Sometimes, after the investigator completes the investigation report, the report is forwarded to an adjudicator to issue findings and sanctions.[60] This model is common in the employment context to address workplace discrimination, including sexual harassment.[61] The "hearing model" relies more on the parties, rather than the investigator and the school, to gather and present evidence to support their claims, to a hearing panel that does not do their own investigation, but rather "passively hear[s] testimony and consider[s] evidence presented by all parties and witnesses, then make factual findings based on that testimony and evidence."[62] The "investigation and hearing hybrid" combines both and factual findings are made by a hearing panel based on the investigative report and witness testimony.[63] The investigation with the deliberative panel requires the "investigator to appear before the panel to answer questions before the panel makes a final decision."[64] Any of these models can be an appropriate response to sexual assault and other forms of sexual harassment.

In one comment submitted by 24 private liberal arts colleges and universities, the comment noted that the schools have different policies, and that "[t]he model chosen by each Institution is based on careful consideration of many factors, including what has worked for them in years of experience, what best fits their individual school's mission, culture, and values, what is most sensible given the size and unique organization of their administrations and programs, and what kinds of sexual harassment cases they each most commonly face, which can differ significantly in nature, scope, and quantity in ways that may warrant significantly differing approaches."[65] Representing 60 of the leading public and private research universities in the country, the American Association of Universities noted in its comment that "approaches

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

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

[57] Id. at 1.

[58] Nancy Chi Cantalupo, Comment Regarding Proposed Rule § 106.45(b)(3) at 4, Filed in Response to the Notice of Proposed Rulemaking regarding Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Office [for] Civil Rights, Department of Education, ED–2018–OCR–0064, RIN 1870–AA14 [hereinafter Cantalupo Comment].

[59] Id.

[60] ASCA 2014 White Paper, supra note 56 at 16.

[61] Cantalupo Comment, supra note 58 at 4.

[62] Id.

[63] Id.

[64] Id.

[65] Letter from Pepper Hamilton to Sec'y Elisabeth DeVos at 2 (Jan. 30, 2019) [hereinafter Pepper Hamilton Comment], *https://www.pepperlaw.com/resource/35026/22G2,* (submitted comment on behalf of 24 private, liberal arts colleges and universities throughout the United States).

[should] allow institutions to maintain, utilize, and respect the different schools' values, student populations, community resources, and educational philosophies. Student populations vary widely in terms of the proportion of students residing on-campus or off-campus, the mix of undergraduate and graduate/ professional students, the presence of nontraditional students, and so on. Mandating that all schools address these issues in the same way will limit their ability to tailor their policies and procedures to their campus community and implement their individual educational missions."[66] Finally, the Association of Independent Colleges and Universities in Massachusetts, which represents 55 colleges and universities, wrote in its comment that "[r]ather than prescribing highly specific, 'one size fits all' rules that would be rigidly applied to large research universities, small colleges, commuter colleges, institutions that feature experiential education, and others, the Department should limit its concern to whether a school has adopted procedures that are intended to provide fundamental fairness to the rights of all parties."[67]

While no one investigatory model fits all, whatever investigation or hearing the school uses must be equitable—that is, fair to all students. Under Title IX and Clery, schools are already required to have proceedings for investigating sexual assault that are prompt and equitable. In addition, no investigatory model should place the burden on a student—whether complainant or respondent—to "prove" the case; rather, institutions have their own independent interest in finding out what happened in order to respond appropriate to ensure its campus community is safe, which should not depend on the advocacy skills or resources of student parties.

Fair processes also require that institutions train employees on the policies addressing campus sexual assault, investigation requirements and techniques, trauma-informed responses to sexual assault, and resources and options for support; balance a survivor's request for confidentiality with its obligation to its student body; provide effective interim measures that preserve, and if necessary, restore, equal access to education; designate reasonable timeframes for each part of the investigation; provide timely and clear notice to the parties in advance of any meeting or hearing concerning the investigation, and of their rights and responsibilities under school policy and law; use of the preponderance of the evidence standard for investigations; allow parties an equal opportunity to produce witnesses and other evidence, and an equal opportunity to respond to each other's claims, evidence, or testimony (if applicable); eliminate direct questioning or cross-examination of the parties and witnesses given there are not corresponding safeguards; provide notice to the parties of the outcome of the investigation; provide appropriate remedies that would prevent recurrence of the sexual assault or harassment and restore equal access to the complainant's education; and allow equal appeal rights. These principles have also recognized by the Department in earlier Title IX guidance[68] and by ASCA.[69]

During an investigation, to the extent possible, a school should only disclose information regarding allegations of sexual assault to those who are responsible for handling the schools' response or investigation. If a student requests that their name not be revealed to the alleged perpetrator or asks the school to not take action or investigate, the school should explain that its response will therefore be limited, including pursuing any disciplinary action against the alleged perpetrator. The school will also need to determine whether or not they can still provide a safe educational environment by honoring that request, considering for example, whether or not there would be an increased risk of the alleged perpetrator committing additional acts of sexual violence.

Ensuring an equitable process also means that the school must use the preponderance-of-the-evidence standard. Resolving sexual harassment reports using the preponderance of the evidence is necessary to assure fairness and equality. Only that standard, the same one used in nearly all civil actions, including civil rights claims, places both parties on a level playing field, acknowledging that both students' edu-

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[66] See Letter from Ass'n of Am. Univs. (AAU) to Brittany Bull at 2–3 (Jan. 24, 2019) [hereinafter AAU Letter], *https://www.aau.edu/sites/default/files/AAU–Files/Key-Issues/Higher-Education-Regulation/AAU–Title-IX–Comments-1–24–19.pdf* (discussing "higher costs associated with the regulation's prescribed quasi-court models").

[67] Letter from Ass'n of Indep. Colls. and Univs. (AICUM) to Sec'y Elisabeth DeVos at 3 (Jan.23, 2019) [hereinafter AICUM Letter], *http://aicum.org/wp-content/uploads/2019/01/AICUM-public-comments-on-Notice-of-Proposed-Rulemaking-E2-80-9CNPRM-E2-80-9D-amending-regulations-implementing-Title-IX-of-the-Education-Amendments-of-1972–Title-IX-E2-80-9D–Docket-ID–ED–2018–OCR–0064.pdf*

[68] 2001 Guidance, supra note 49 at 20.

[69] ASCA 2014 White Paper, supra note 56 at 2.

cations are equally important.[70] For this reason, student conduct professionals have long endorsed using the preponderance standard for making determinations in all student misconduct investigations, including sexual assault, and continue to do so.[71] The standard that places both parties on an equal footing is particularly necessary in the case of disciplinary proceedings that implicate students' civil rights—rights that demand universities protect and value those students that have historically been systemically unprotected and undervalued, excluded from education and public life.

Requiring a heightened "clear and convincing evidence" of a sexual assault before taking disciplinary or restorative action prioritizes the educational interests and well-being of named assailants over complainants and creates too much risk that sexual assault complaints will be dismissed based on the very biases that have long led to women and girls being disbelieved, belittled, and blamed when they speak out about their experiences of sexual assault and other forms of sexual harassment.[72] A clear and convincing standard would do the most harm to the students whose credibility is most likely to be doubted, including and especially LGBTQ people and women of color.[73] Most likely, administrators judging student complaints under such a heightened standard would functionally reinstate the old, and long discarded, common law corroborating witness requirement for sexual assault, resulting in virtually automatic finding that no assault could be substantiated in the large number of cases that lack a third-party witness. (Of course, the lack of such a witness would not be dispositive in a civil, or even a criminal, proceeding.) As a result, complainants will be less likely to come forward under such a system, knowing that the applicable standard will require administrators to view their side of the story with a de facto presumption against their veracity.

### d. LIVE-CROSS EXAMINATION WOULD DETER REPORTING OF CAMPUS SEXUAL ASSAULT AND IS UNNECESSARY

The systems we build on campus to investigate and address student reports of sexual harassment must both enable truth-seeking and avoid perpetuating a hostile environment. Direct cross-examination of a victim by his or her assailant or the assailant's representative in campus misconduct proceeding is likely to result in the latter without uniquely promoting the former. 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[74] would understandably discourage many students—parties and witnesses—from participating in the grievance process, chilling those who have experienced or witnessed harassment from coming forward.[75] This is especially the case in student misconduct proceedings, where schools are less likely to be equipped to apply general rules of evidence or trial procedure or apply the procedural protections that witnesses have during cross-examination in criminal or civil court proceedings[76] and ensure that they are not subject

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[70] See Deborah L. Brake, Fighting the Rape Culture Wars Through the Preponderance of the Evidence Standard, 78 Mont. L. Rev. 109, 133–37 (2017) [hereinafter Fighting the Rape Culture Wars] (arguing that only the preponderance of the evidence standard holds in equipoise the credibility of the parties and the relative interests at stake).

[71] Id. at 128 (discussing an influential Model Student Conduct Code published in 2004); Chris Loschiavo & Jennifer L. Waller, Association for Student Conduct Administration, The Preponderance of the Evidence Standard: Use in Higher Education Campus Conduct Processes, *http://www.theasca.org/files/The-20Preponderance-20of-20Evidence-20Standard.pdf.*

[72] Fighting the Rape Culture Wars, supra note 70 at 131.

[73] Id. at 137–39.

[74] 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).

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

[76] The proposed rules impose only mild restrictions on what it considers "relevant" evidence. See proposed § 106.45(b)(3)(vi) (excluding evidence "of the complainant's sexual behavior or predisposition, unless such evidence about the complainant's sexual behavior is offered to prove

to improper questions. Nor is there a judge available to rule on objections. Any live cross-examination requirement would also lead to sharp inequities, due especially to the "huge asymmetry" that would arise when respondents are able to afford attorneys and complainants cannot.[77] According to the president of Association of Title IX Administrators (ATIXA), the live cross-examination provision alone—"even with accommodations like questioning from a separate room—would lead to a 50 percent drop in the reporting of misconduct."[78]

Many advocates of live cross-examination in school grievance procedures, assume that cross-examination will improve the reliability of a decision-maker's determinations of responsibility and allow them to discern "truth."[79] But the reality is much more complicated, particularly in schools, where procedural protections against abusive, misleading, confusing, irrelevant, or inappropriate tactics are largely unavailable. Empirical studies show that adults give significantly more inaccurate responses to questions that involve the features typical of cross-examination, like relying on leading questions, compound or complex questions, rapid-fire questions, closed (i.e., yes or no) questions, questions that jump around from topic to topic, questions with double negatives, and questions containing complex syntax or complex vocabulary.[80] While these common types of questions are likely to confuse adults and result in inaccurate or misleading answers, these problems are compounded and magnified when such questions are targeted at young people and minors.[81]

Neither the Constitution nor any other federal law requires live cross-examination in public school conduct proceedings. The Supreme Court has not required any form of cross-examination (live or indirect) in disciplinary proceedings in public schools under the Due Process clause. Instead, the Court has explicitly said that a 10-day suspension does not require "the opportunity . . . to confront and cross-examine witnesses."[82] The vast majority of courts that have reached the issue have agreed that live cross-examination is not required in public school disciplinary proceedings, as long as there is a meaningful opportunity to have questions posed by a hearing examiner.[83] Moreover, requiring cross-examination of both parties could put respondents in the position of self-incrimination; if the school allows a respondent to not be cross-examined in order to avoid self-incrimination, but requires the complainant to be cross-examined, it would create an inequity that at the very least would violate Title IX.

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that someone other than the respondent committed the conduct alleged" or to prove consent). The problems inherent in the evidence restrictions the Department chooses to adopt (and those it chooses not to) are discussed in Part IV.E.

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

[78] Id.

[79] See, e.g., 83 Fed. Reg. at 61476. The Department of Education offers no evidence to support its assumption that live cross examination will improve the reliability of schools' determinations regarding sexual assault; it merely cites a case which relies on John Wigmore's evidence treatise. See id. (citing California v. Green, 399 U.S. 149, 158 (1970) (quoting John H. Wigmore, 5 Evidence sec. 1367, at 29 (3d ed., Little, Brown & Co. 1940))).

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

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

[82] Goss v. Lopez, 419 U.S. 565, 583 (1975). 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).

[83] The Department cites to one case, Doe v. Baum, 903 F.3d 575, 581 (6th Cir. 2018) to support its proposed cross-examination requirement. However, Baum is anomalous. See e.g., Dixon, 294 F.2d at 158, cert. denied 368 U.S. 930 (1961) (expulsion does not require a full-dress judicial hearing, with the right to cross-examine witnesses."); Osteen v. Henley, 13 F.3d 221, 225 (7th Cir. 1993) (holding no due process violation in expulsion of college student without providing him right to cross-examination); Winnick v. Manning, 460 F.2d 545, 549 (2d Cir. 1972) ("The right to cross-examine witnesses generally has not been considered an essential requirement of due process in school disciplinary proceedings.); Gorman v. Univ. of Rhode Island, 837 F.2d 7, 16 (1st Cir. 1988) (a public institution need not conduct a hearing which involves the right to confront or cross-examine witnesses). See also Joanna L. Grossman & Deborah L. Brake, A Sharp Backward Turn: Department of Education Proposes to Protect Schools, Not Students, in Cases of Sexual Violence, VERDICT (Nov. 29, 2018) [hereinafter A Sharp Backward Turn], available at *https://verdict.justia.com/2018/11/29/a-sharp-backward-turn-department-of-education-proposes-to-protect-schools-not-students-in-cases-of-sexual-violence.*

While requiring cross-examination "is problematic for all institutions, regardless of size and resources available,"[84] it would fall particularly heavily on community colleges, vocational schools, online schools, and other educational institutions that lack the resources of a traditional four-year college or university. The difficulty and burden imposed by live cross-examination will also likely ensure that proceedings to address sexual assault allegations are consistently delayed, harming all who seek prompt resolution of such matters and especially harming those who are depending on final determinations to address and remedy sexual assault.

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

Unsurprisingly, Title IX experts, student conduct experts, institutions of higher education,[85] and mental health experts overwhelmingly oppose live cross-examination. ATIXA, for example, opposes live, adversarial cross-examination, instead recommending that investigators "solicit questions from the parties, and pose those questions the investigators deem appropriate in the investigation interviews."[86] ASCA agrees that schools should "limit[] advisors' participation in student conduct proceedings."[87] The American Bar Association recommends that schools provide "the opportunity for both parties to ask questions through the hearing chair."[88] The Association of Independent Colleges and Universities in Massachusetts (AICUM), representing 55 accredited, nonprofit institutions of higher education, oppose the cross-examination requirement because it would "deter complainants from coming forward, making it more difficult for institutions to meet Title IX's very purpose, preventing discrimination and harassment, stopping it when it does occur, and remedying its effects."[89] The Association of American Universities (AAU), representing 60 leading public and private universities, oppose the requirement because it can be "traumatizing and humiliating" and "undermines other educational goals like teaching acceptance of responsibility."[90] And over 900 mental health experts who specialize in trauma state that subjecting a survivor of sexual assault to cross-examination in the school's investigation would "almost guarantee[] to aggravate their symptoms of post-traumatic stress," and "is likely to cause serious to harm victims who complain and to deter even more victims from coming forward."[91]

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[84] E.g., Letter from Liberty University to Sec'y Elisabeth DeVos at 4 (Jan. 24, 2019) [hereinafter Liberty University Letter], *http://www.liberty.edu/media/1617/2019/jan/Title-IX–Public-Comments.pdf.*

[85] Pepper Hamilton Comment at 15 ("[A]dversarial cross-examination will unnecessarily increase the anxiety of both parties going through the process. For complainants in particular, this may lead them to simply not come forward or utilize the school's process, no matter how meritorious their claims may be. As a result, our campuses will be less safe."); Letter from Georgetown University to Sec'y Elizabeth DeVos as 7 (Jan. 30. 2019), *https://georgetown.app.box.com/s/fwk978e3oai8i5hpq0wqa70cq9iml2re* ("Mandatory cross-examination by advisors will have a chilling effect on reporting and therefore diminish accountability of perpetrators. We already know that the majority of students who experience sexual misconduct never proceed with a formal complaint. There is little doubt that the specter of being cross-examined by a trained criminal defense attorney during a school's grievance procedure would drive down the number of students seeking redress through formal process even further.").

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

[87] ASCA 2014 White Paper, supra note 56 at 2.

[88] Am. Bar Ass'n, ABA Criminal Justice Section Task Force On College Due Process Rights and Victim Protections: Recommendations for Colleges and Universities in Resolving Allegations of Campus Sexual Misconduct 8–10 (June 2017) [hereinafter Am. Bar Ass'n Task Force].

[89] AICUM Letter, supra note 67.

[90] AAU Letter, supra note 66.

[91] Letter from 903 Mental Health Professionals and Trauma Specialists to Ass't Sec'y Kenneth L. Marcus at 3 (Jan. 30, 2019) [hereinafter Mental Health Professionals Letter], *https://*

Instead of allowing for cross examination, colleges and universities have developed creative systems that allow parties to challenge each other's and witnesses' accounts. For example, some schools allow parties to submit questions through a neutral and trained school official, such as a hearing panel member, to ask questions on their behalf and screen for abusive, irrelevant, and inappropriate questions.[92] Alternatively, under a "single investigator model," students can be re-interviewed to dispute the other party's testimony.[93] Crucially, these models demonstrate that fair and effective hearings need not, and affirmatively should not, replicate criminal trials.

### e. CAMPUSES MUST NOT ALLOW MEDIATION FOR SEXUAL ASSAULT

Mediation is a strategy often used in schools to resolve peer conflict, where both sides must take responsibility for their actions and come to a compromise. However, mediation is never appropriate for resolving sexual assault, even on a voluntary basis, because of the power differential between assailants and victims, the potential for re-traumatization, and the implication that survivors somehow share "partial" responsibility for their own assault. It also is difficult to ensure such programs are truly voluntary.

The dangers of mediation are also exacerbated at schools where mediators are untrained in trauma and sexual assault and at some religious schools, where mediators may be especially like to rely on harmful rape myths, such as "good girls forgive," that retraumatize survivors.[94] Furthermore, students with developmental disabilities—both complainants and respondents—are vulnerable to being pressured or manipulated into participating in mediation and agreeing to harmful mediation outcomes, including outcomes that unfairly remove a complainant or respondent with a disability from their current school and instead push them into an alternative school.

Experts also agree that mediation is inappropriate for resolving sexual violence. For example, the National Association of Student Personnel Administrators (NASPA), representing student affairs administrators in higher education, stated in 2018 that it was concerned about students being "pressured into informal resolution against their will."[95] Mental health experts also oppose mediation for sexual assault because it would "perpetuate sexist prejudices that blame the victim" and "can only result in further humiliation of the victim."[96]

In light of the many risks from informal processes, we recommend the following safeguards be met for any informal resolution process: such processes should not presume any shared responsibility for the assault or pressure the complainant to "forgive" the respondent; should be conducted by trained facilitators who understand the dynamics of sexual assault, particularly on college campuses; should be trauma-informed; should ensure that students fully understand what the process entails before agreeing to participate in it; and should allow parties to stop the informal process and start with the formal process at any time.

### f. CAMPUSES MUST NOT CONSIDER IRRELEVANT OR PREJUDICIAL EVIDENCE

In campus investigations of sexual assault, evidence should be excluded if it is irrelevant,[97] or if it is relevant but its probative value is substantially outweighed

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*nwlc.org/wp-content/uploads/2019/01/Title-IX–Comment-from-Mental-Health-Professionals.pdf.*

[92] At Harvard Law School, for example, students can now submit questions through a panel. HLS Sexual Harassment Resources and Procedure for Students, Harvard Law School 3.4.1 (Dec. 2014), *https://hls.harvard.edu/content/uploads/2015/07/HLSTitleIXProcedures150629.pdf.*

[93] Djuna Perkins, Behind the headlines: An insider's guide to Title IX and the student discipline process for campus sexual assaults, Boston Bar Journal (July 8, 2015), *https://bostonbarjournal.com/2015/07/08/behind-the-headlines-an-insiders-guide-to-title-ix-and-the-student-discipline-process-for-campus-sexual-assaults/.*

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

[95] Nat'l Ass'n of Student Personnel Administrators (NASPA), NASPA Priorities for Title IX: Sexual Violence Prevention & Response 1–2 [hereinafter NASPA Title IX Priorities], available at *https://www.naspa.org/images/uploads/main/NASPA—Priorities—re—Title—IX—Sexual—Assault—FINAL.pdf.*

[96] Mental Health Professionals Letter, supra note 91 at 3.

[97] See Fed. R. Evid. 401, 402.

by a danger of unfair prejudice, confusing the issues, misleading the factfinder, undue delay, wasting time, and/or needlessly presenting cumulative evidence.[98]

Schools should not be allowed to improperly consider any evidence related to the sexual history between the parties, even if it is "offered to prove consent"— if such evidence relies on victim-blaming and "slut-shaming" myths that cause unfair prejudice to the complainant, mislead the investigator(s) or decisionmaker(s), or render the evidence entirely irrelevant to the investigation. Also, schools should recognize that the fact that students have a current or previous consensual dating relationship, it does not imply any consent.

### g. CAMPUSES MUST PROVIDE REMEDIES TO PRESERVE OR RESTORE ACCESS TO EDUCATION

Upon completing an investigation, schools should inform both sides in writing at the same time of (1) whether the alleged sex-based harassment occurred; (2) school-wide remedies to eliminate any hostile environment that exists and to prevent its recurrence;[99] and (3) the parties' right to appeal, if any. Schools should also inform the complainant of (4) any individual remedies available to the complainant; and (5) (i) if non-physical sexual harassment occurred, any sanctions on the respondent that directly affect complainant;[100] or (ii) if sexual violence occurred, all sanctions on the respondent.[101] Finally, schools should also inform the respondent of (6) all sanctions on the respondent; and (7) none of the individual remedies offered to the complainant.

Examples of school-wide remedies include training students and staff on identifying and responding to sex-based harassment or taking additional steps to address the way a school handles its athletics program.[102] Individual remedies for the complainant include extending any necessary interim measures and, where necessary to remedy a hostile environment, the ability to withdraw from and retake classes without financial penalties, extension of the complainant's eligibility for grants and scholarships for any additional time needed to complete their degree, and reimbursement of any lost tuition or student loan interest. Sanctions on the respondent that directly affect the complainant include no-contact orders, suspensions, expulsions, and transfers.[103]

### h. CAMPUSES MUST HAVE EQUITABLE APPEAL RIGHTS

Experts and school leaders alike support equal appeal rights. While the Department's proposed Title IX rules may require schools to provide respondents appeal rights that they deny complainants,[104] the American Bar Association recommends that the grounds for appeal include "a sanction disproportionate to the findings in the case (that is, too lenient or too severe)."[105] Even the white paper by four Harvard professors that is cited by the Department[106] in support of it NPRM recognizes that schools should allow "[e]ach party (respondent and complainant) [to] request an impartial appeal."[107]

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[98] See Fed. R. Evid. 403.

[99] 34 C.F.R. 106.8(b) (requiring "equitable" procedures).

[100] 20 U.S.C. § 1221(d) (specifying that "[n]othing in this chapter," including the Family Educational Rights and Privacy Act (FERPA), "shall be construed to affect the applicability of . . . [T]itle IX"). See also 2001 Guidance, supra note 49 at vii n.3.

[101] FERPA, 20 U.S.C. § 1232g(b)(6); 34 C.F.R. § 668.46(k)(3)(iv).

[102] 2001 Guidance, supra note 49 at 16, 19.

[103] See id. at vii n.3.

[104] Proposed §§ 106.45(b)(1)(i), 106.45(b)(1)(vi), 106.45(b)(4)(ii)(E), 106.45(b)(5), and 106.45(b)(7)(i)(A) (Although Secretary DeVos has claimed that the proposed rules make "[a]ppeal rights equally available to both parties," they may not in fact provide equal grounds for appeal to both parties. In the proposed rules, the Department's repeatedly draws a distinction between "remedies" and "sanctions," implying that sanctions are not a category of remedies. (Elisabeth DeVos, Betsy DeVos: It's time we balance the scales of justice in our schools, WASH. POST (Nov. 20, 2018), *https://www.washingtonpost.com/opinions/betsey-devos-its-time-we-balance-the-scales-of-justice-in-our-schools/2018/11/20/8dc59348-ecd6–11e8–9236-bb94154151d2—story.html)).*

[105] Am. Bar Ass'n Task Force, supra note 88 at 5.

[106] 83 Fed. Reg. at 61464 n.2.

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

### i. CAMPUSES MUST PROHIBIT RETALIATION AGAINST PARTIES AND WITNESSES

Schools should have explicit prohibitions against retaliation, not only from the moment that a complaint is initiated, but prohibitions against threats of retaliation made to discourage survivors from filing complaints and to intimidate witnesses and complainants from participating in the grievance process.

## V. THE DEPARTMENT OF EDUCATION'S PROPOSED TITLE IX RULES, IF FINALIZED, WOULD FORCE SCHOOLS TO IGNORE SEXUAL HARASSMENT AND TO CREATE UNFAIR GRIEVANCE PROCEDURES

The Department of Education's proposed Title IX rules remove significant protections for students and employees who experience sexual assaults and other forms of sexual harassment, apparently motivated by invidious sex stereotypes that women and girls are likely to lie about sexual assault and other forms of sexual harassment and by the perception that sexual assault and other forms of sexual harassment have a relatively trivial impact on those who experience it.

As also described in NWLC's comment on the proposed rules, which is appended to this testimony, proposed rules ignore the devastating impact of sexual violence and other forms of sexual harassment in schools. Instead of effectuating Title IX's purpose of protecting students and school employees from sexual abuse and other forms of sexual harassment, that is, from unlawful sex discrimination, they make it harder for individuals to report abuse, allow (and sometimes require) schools to ignore reports when they are made, and unfairly tilt the investigation process in favor of respondents, to the direct detriment of survivors.

### a. THE DEPARTMENT'S PROPOSED RULES WOULD DISCOURAGE REPORTING AND MANDATE DISMISSAL OF COMPLAINTS OF SEXUAL ASSAULT

Under the proposed rules, schools would not be required to address any sexual harassment and assault unless one of a small subset of school employees had "actual knowledge" of it.[108] The proposed rules also unjustifiably limits the set of school employees for whom actual notice of sexual assault or other forms of harassment triggers the school's Title IX duties. For example, under the proposed rules, if a college or graduate student told their professor, residential advisor, or teaching assistant that they had been raped by another student or by a professor or other university employee, the university would have no obligation to help them.

Under the Department's proposed rules, even when students find the courage to talk to the adult school employees they trust, schools would frequently have no obligation to respond. For example, if the proposed rules had been in place, colleges like Michigan State and Penn State would have had no responsibility to stop Larry Nassar and Jerry Sandusky—even though their victims reported their experiences to at least 14 school employees over a 20-year period—including athletic trainers, coaches, counselors, and therapists[109]—because those employees are not considered to be school officials who have the "authority to institute corrective measures."[110] These proposed provisions would absolve some of the worst Title IX offenders of legal liability.

The Department's proposed rules would also require schools to dismiss all complaints of off-campus or online sexual harassment that happen outside of a school-sponsored program—even if the student is forced to see their harasser at school every day and the harassment directly impacts their education as a result. The proposed rules conflict with Title IX's statutory language, which does not depend on where the underlying conduct occurred but instead prohibits discrimination that "exclude[s a person] from participation in, . . . denie[s a person] the benefits of, or . . . subject[s a person] to discrimination under any education program or activity . . . ."[111] For almost two decades, the Department's guidance documents have agreed that schools are responsible for addressing sexual harassment if it is "sufficiently serious to deny or limit a student's ability to participate in or benefit from

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[108] Proposed §§ 106.30, 106.44.

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

[110] Proposed § 106.30.

[111] 20 U.S.C. § 1681(a).

the education program," [112] regardless of where it occurs. [113] No student who experiences out-of-school harassment should be forced to wait until they are sexually harassed again on school grounds or during a school activity in order to receive help from their school. Nor should they be required to sit in class next to their assailant with no recourse.

Sexual harassment and assault occur both on-campus and in off-campus spaces closely associated with school. Nearly nine in ten college students live off campus. [114] According to a 2014 U.S. Department of Justice report, 95 percent of sexual assaults of female students ages 18–24 occur outside of school. [115] Forty-one percent of college sexual assaults involve off-campus parties [116] and many fraternity and sorority houses are located off campus. Students are also far more likely to experience sexual assault if they are in a sorority (nearly one and a half times more likely) or fraternity (nearly three times more likely). [117] But under the proposed rules, if a college or graduate student is sexually assaulted by a classmate in off-campus housing, their university would be required to dismiss their complaint—even though almost nine in ten college students live off campus. [118] The proposed rules would also pose particular risks to students at community colleges and vocational schools. Approximately 5.8 million students attend community college (out of 17.0 million total undergraduate students), [119] and 16 million students attend vocational school. [120] But because none of these students live on campus, the harassment they experience by faculty or other students is especially likely to occur outside of school, and therefore outside of the protection of the proposed Title IX rules. Finally, proposed § 106.8(d) would create a unique harm to the 10 percent of U.S. undergraduate students who participate in study abroad programs. If any of these students report experiencing sexual harassment during their time abroad, including within their study abroad program, their schools would be required to dismiss their complaints—even if they are forced to see their harasser in the study abroad program every day, and even if they continue to be put into close contact with their harasser when they return to their home campus.

By forcing schools to dismiss complaints of out-of-school sexual harassment, the proposed rules would "unduly tie the hands of school leaders who believe every child deserves a safe and healthy learning environment." [121] It would also require schools to single out complaints of sexual assault and other forms of harassment by treating them differently from other types of student misconduct that occur off-campus, per-

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[112] 2001 Guidance, supra note 49.

[113] 2017 Guidance, supra note 48 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 ("a school must process all complaints of sexual violence, regardless of where the conduct occurred"); 2011 Guidance ("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 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).

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

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

[116] United Educators, Facts From United Educators' Report - Confronting Campus Sexual Assault: An Examination of Higher Education Claims (2015), *https://www.ue.org/sexual—assault—claims—study.*

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

[118] How Much Does Living Off-Campus Cost?, supra note 114.

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

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

[121] Letter from The School Superintendents Ass'n (AASA) to Sec'y Elisabeth DeVos at 5 Jan. 22, 2019) [hereinafter AASA Letter], *http://aasa.org/uploadedFiles/AASA—Blog(1)/AASA Title IX Comments Final.pdf*

petuating the pernicious notion that sexual assault is somehow less significant than other types of misconduct and making schools vulnerable to litigation by students claiming unfairness or discrimination in their school's policies treating harassment based on sex differently from other forms of misconduct.

**b. THE PROPOSED DEFINITION OF SEXUAL HARASSMENT IMPROPERLY PREVENTS SCHOOLS FROM PROVIDING A SAFE LEARNING ENVIRONMENT**

The Department's proposed rules would also require schools to dismiss all complaints of sexual harassment that do not meet its proposed narrow definition. The proposed rules [122] define sexual harassment as (1) "[a]n employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct"; (2) "[u]nwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the [school's] education program or activity"; or (3) "[s]exual assault, as defined in 34 CFR 668.46(a)." The proposed rules mandate dismissal of all complaints of harassment that do not meet this standard. Thus, if a complaint did not allege quid pro quo harassment or sexual assault, a school would be required to dismiss a student's Title IX complaint if the harassment has not yet advanced to a point that it is actively harming a student's education. A school would be required to dismiss such a complaint even if it involved harassment by a teacher or other school employee. A school would be required to dismiss such a complaint even if the school would typically take action to address behavior that was not based on sex but was similarly harassing, disruptive, or intimidating. The Department's proposed definition is out of line with Title IX purposes and precedent, discourages reporting, unjustifiably creates a higher standard for sexual harassment than other types of harassment and misconduct, and excludes many forms of sexual harassment that interfere with equal access to educational opportunities.

The Department does not provide a persuasive justification to change the definition of sexual harassment from that in the 2001 Guidance, which defines sexual harassment as "unwelcome conduct of a sexual nature." [123] The current definition rightly charges schools with responding to harassment before it escalates to a point that students suffer severe harm. But under the Department's proposed, narrower definition of harassment, students would be forced to endure repeated and escalating levels of abuse, from a student or professor, before their schools would be permitted to take steps to investigate and stop the harassment.

In addition, the proposed rules are inconsistent with the Supreme Court's liability standard for money damages, which holds schools liable for sexual harassment that, inter alia, "effectively denie[s] [a person] equal access to an institution's resources and opportunities" or its "opportunities or benefits." [124] Setting aside for a moment the fact that agency enforcement standards need not—and should not—be as demanding as litigation standards for money damages, the proposed rule is nonetheless still more burdensome than the Supreme Court's standard because denial of equal access to a school's "program" or "activity" is a more burdensome threshold than denial of equal access to a school's "resources," "opportunities," and "benefits."

The Department's proposed definition is also vague and complicated. Administrators, employees, and students would struggle to understand which complaints meet the standard. These difficulties would be significantly compounded for students with developmental disabilities. Students confronted with this lengthy, complicated definition of sexual harassment would have a hard time understanding whether the harassment they endured meets the Department's narrow standard. How would these students know what allegations and information to put in their formal complaint in order to avoid mandatory dismissal? A student may believe that she suffered harassment that was both severe and pervasive, but does she know whether it was also "objectively offensive" and whether it "effectively denied" her of "equal access" to a "program or activity?"

The Department's proposed definition would discourage students from reporting sexual harassment. Already, the most commonly cited reason for students not reporting sexual harassment is the fear that it is "insufficiently severe" to yield a re-

[122] §§ 106.30 and 106.45(b)(3).

[123] Id.

[124] Davis, 526 U.S. at 631 (emphasis added).

sponse.[125] Moreover, if a student is turned away by her school after reporting sexual harassment because it does not meet the proposed narrow definition of sexual harassment, the student is even more unlikely to report a second time when the harassment escalates. Similarly, if a student knows of a friend or classmate who was turned away after reporting sexual harassment, the student is unlikely to make even a first report. By the time a student reports sexual harassment that the school can or must respond to, it may already be too late: because of the impact of the harassment, the student might already be ineligible for an important AP course, disqualified from applying to a dream college, or derailed from graduating altogether.

In addition, the proposed definition excludes many forms of sexual harassment, including some that schools are required to report under the Clery Act's requirements. Under the proposed rules, schools would be required to dismiss some complaints of stalking, dating violence, and domestic violence, while also being required to report those complaints to the Department under Clery.[126] These inconsistent requirements would cause confusion among school administrators struggling to make sense of their obligations under federal law and demonstrate the perverse nature of sharply limiting schools' ability to respond to harassment complaints.

Finally, the Department's harassment definition and mandatory dismissal requirement would create inconsistent rules for sexual harassment as compared to other misconduct. Harassment based on race or disability, for example, would continue to be governed by the more inclusive "severe or pervasive" standard for creating a hostile educational environment.[127] And schools could address harassment that was not sexual in nature even if that harassment was not "severe and pervasive" while, at the same time, being required to dismiss complaints of similar conduct if it is deemed sexual. This would create inconsistent and confusing rules for schools in addressing different forms of harassment. It would send a message that sexual harassment is less deserving of response than other types of harassment and that victims of sexual harassment are inherently less deserving of assistance than victims of other forms of harassment. It would also force students who experience multiple and intersecting forms of harassment to slice and dice their requests for help from their schools in order to maximize the possibility that the school might respond, carefully excluding reference to sexual taunts and only reporting racial slurs by a harasser, for example.[128] Further, it would also make schools vulnerable to litigation by students who rightfully claim that being subjected to more burdensome requirements in order to get help for sexual harassment than their peers who experience other forms of student misconduct, is discrimination based on their sex, in direct violation of Title IX. In other words, schools would be hard-pressed to figure out how to comply with Title IX when they are instructed to follow a new set of rules that demands responses that violate Title IX.

### c. THE PROPOSED DELIBERATE INDIFFERENCE STANDARD WOULD ALLOW SCHOOLS TO DO VIRTUALLY NOTING IN RESPONSE TO COMPLAINTS OF SEXUAL ASSAULT AND OTHER FORMS OF SEXUAL HARASSMENT

Under the proposed rules, schools would simply have to not be deliberately indifferent[129] to sexual harassment and assault; in other words, their response to harassment would be deemed to comply with Title IX as long as it was not clearly unreasonable. The deliberate indifference standard is a much more lax standard than that set out by the current Department guidance, which requires schools to act "reasonably" and "take immediate and effective corrective action" to resolve harassment complaints.[130]

The Department's proposed "safe harbors" within this deliberate indifference standard weaken it still further, allowing schools to avoid liability even if they unreasonably handled a Title IX complaint. As long as a school follows the requirements set out in the proposed rules,[131] the school's response to harassment com-

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

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

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

[128] See A Sharp Backward Turn, supra note 83.

[129] Proposed 34 C.F.R. § 106.44(a).

[130] 2001 Guidance, supra note 49.

[131] Proposed § 106.45.

plaints could not be challenged, effectively insulating them from any review.[132] And by codifying the rule that the Department would not find a school deliberately indifferent based on a school's erroneous determination regarding responsibility, the Department further provides a safe harbor for schools that erroneously determine that sexual harassment did not occur, but does not provide a corresponding rule protecting schools from liability if they erroneously decide that sexual harassment did occur.[133] This means it would always be safer for a school to make a finding of nonresponsibility for sexual harassment. Indeed, such a rubber stamp finding would be completely permissible under the proposed rules as long as the school went through the motions of even a weak required process.

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

### d. THE DEPARTMENT'S PROPOSED RULES CREATE INCONSISTENT AND UNFAIR STANDARDS

The Department's longstanding interpretation of Title IX requires that schools use a "preponderance of the evidence" standard, which means "more likely than not".to decide whether sexual assault or other forms of harassment occurred.[134] The proposed rules[135] depart from that practice, and establishes a system where schools could elect to use the more demanding "clear and convincing evidence" standard in sexual harassment matters, while allowing all other student or employee misconduct investigations to be governed by the preponderance of the evidence standard, even if they carry the same maximum penalties.[136] Indeed in some instances, the proposed rules would require that schools utilize the "clear and convincing evidence" standard.[137]

The Department's decision to allow schools to impose a more burdensome standard in sexual harassment matters than in any other investigations of student or employee misconduct appears to rely on the stereotype and false assumption that those who report sexual assault and other forms of sexual harassment (mostly women) are more likely to lie than those who report physical assault, plagiarism, or the wide range of other school disciplinary violations and employee misconduct. When this unwarranted skepticism of sexual assault and other harassment allegations, grounded in gender stereotypes, infect sexual misconduct proceedings, even the preponderance standard "could end up operating as a clear-and-convincing or even a

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

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

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

[135] Proposed § 106.45(b)(4)(i).

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

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

beyond-a-reasonable-doubt standard in practice."[138] Previous Department guidance recognized that, given these pervasive stereotypes, the preponderance standard was required to ensure that the playing field, at least on paper, was as even as possible. The Department now ignores the reality of these harmful stereotypes by imposing a standard of evidence that encourages, rather than dispels, the stereotype that women and girls lie about sexual assault and other harassment, a result that is contrary to Title IX.

The preponderance standard is used for nearly all civil cases, including where the conduct at issue could also be the basis for a criminal prosecution.[139] The preponderance standard is also used for people facing more severe deprivations than suspension, expulsion or other school discipline, or termination of employment or other workplace discipline, including in proceedings to determine paternity,[140] competency to stand trial,[141] enhancement of prison sentences,[142] and civil commitment of defendants acquitted by the insanity defense.[143] The Supreme Court has only required something higher than the preponderance standard in a narrow handful of civil cases "to protect particularly important individual interests,"[144] where consequences far more severe than suspension, expulsion, or firing are threatened, such as termination of parental rights,[145] civil commitment for mental illness,[146] deportation,[147] denaturalization,[148] and juvenile delinquency with the "possibility of institutional confinement."[149] In all of these cases, incarceration or a permanent loss of a profound liberty interest was a possible outcome—unlike in school sexual harassment proceedings. Moreover, in all of these cases, the government and its vast power and resources was in conflict with an individual—in contrast to school harassment investigations involving two students with roughly equal resources and equal stakes in their education, two employees who are also similarly situated, or a student and employee, where any power imbalance would tend to favor the employee respondent rather than the student complainant.[150] Preponderance is the

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

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

[140] Rivera v. Minnich, 483 U.S. 574, 581 (1987).

[141] Cooper v. Oklahoma, 517 U.S. 348, 368 (1996).

[142] McMillan v. Pennsylvania, 477 U.S. 79, 91–92 (1986).

[143] Jones v. United States, 463 U.S. 354, 368 (1983).

[144] Addington v. Texas, 441 U.S. 418, 424 (1979) (civil commitment).

[145] Santosky v. Kramer, 455 U.S. 745, 758 (1982).

[146] Addington, 441 U.S. at 432.

[147] Woodby v. INS, 385 U.S. 276, 286 (1966).

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

[149] In re Winship, 397 U.S. 358, 367–68 (1970).

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

only standard of proof that treats both sides equally and is consistent with Title IX's requirement that grievance procedures be "equitable." [151]

For this reason, Title IX experts and school leaders alike support the preponderance standard, which is used to address harassment complaints at over 80 percent of colleges. [152] The National Center for Higher Education Risk Management (NCHERM) Group, whose white paper Due Process and the Sex Police was cited by the Department, [153] has promulgated materials that require schools to use the preponderance standard, because "[w]e believe higher education can acquit fairness without higher standards of proof." [154] And even the Department admits it is "reasonable" for a school to use the preponderance standard. [155]

By permitting and sometimes mandating the clear and convincing evidence standard in sexual harassment proceedings, the Department treats sexual harassment differently from other types of school disciplinary violations and employee misconduct, uniquely targeting and disfavoring sexual harassment complainants. First, the Department argues that Title IX harassment investigations are different from civil cases, and therefore may appropriately require a more burdensome standard of proof, because many Title IX harassment investigations do not use full courtroom procedures, such as active participation by lawyers, rules of evidence, and full discovery. [156] However, the Department does not exhibit this concern for the lack of full-blown judicial proceedings to address other types of student or employee misconduct, including other examples of student or employee misconduct implicating the civil rights laws enforced by the Department. Schools have not, as a general rule, imposed higher evidentiary standards in other misconduct matters, nor have employers more generally in employee misconduct matters, to compensate for the proceedings' failure to be full-blown judicial trials, and the Department does not explain why such a standard is appropriate in this context alone.

Second, although the proposed rules would require schools to use the "clear and convincing" standard for sexual harassment investigations if they use it for any other student or employee misconduct investigations with the same maximum sanction, [157] and would require that it be used in student harassment investigations if it is used in any employee harassment investigations, the proposed rules would not prohibit schools from using the clear and convincing standard in sexual harassment proceedings even if they use a lower proof standard for all other student conduct violations. [158] School leaders agree that requiring different standards for sexual misconduct as opposed to other misconduct is inequitable.

Further, many school employees have bargained for contracts that require using a more demanding standard of evidence than the preponderance standard for employee misconduct investigations. [159] The proposed rules would force those schools to either (1) impose the same evidentiary for all cases of misconduct that carry the same maximum sanction as Title IX proceedings [160] or (2) maintain the clear and convincing evidence standard for only employee misconduct and student sexual misconduct proceedings. The latter choice would leave schools vulnerable to liability for sex discrimination, as schools cannot defend specifically disfavoring sexual harassment investigations, which is a form of sex discrimination, by pointing to collective

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

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

[153] 83 Fed. Reg. at 61464 n.2.

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

[155] 83 Fed. Reg. at 61477.

[156] Id.

[157] Proposed § 106.45(b)(4)(i).

[158] See A Sharp Backward Turn, supra note 83 ("It is a one-way ratchet.").

[159] See id. (clear and convincing evidence is "the standard the [American Association of University Professors] has urged on colleges and universities for faculty discipline and which some unionized institutions have incorporated in collective bargaining agreements with institutions").

[160] Although the Department claims that it wants to give schools "flexibility" in choosing their standard of proof,160 Proposed § 106.45(b)(4)(i) would effectively force schools to use "clear and convincing evidence" for student sexual harassment investigations if "clear and convincing evidence" is used by that school in employee sexual harassment investigations. Given that most schools already use the preponderance standard in student Title IX proceedings, many of them would be forced to change their procedures—hardly the "flexibility" that the Department claims it wishes to provide.

bargaining agreements or other contractual agreements for employees that require a higher standard. [161]

### e. THE DEPARTMENT'S PROPOSED RULES WOULD CREATE UNFAIR GRIEVANCE PROCESSES

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. [162] The proposed rules [163] purports to require "equitable" processes as well. However, the proposed rules are also riddled with language that would require schools to conduct their grievance procedures in a fundamentally inequitable way that favors respondents. In so doing, it distorts the very fundamental notions of due process it claims to protect.

A 2018 report studying more than 1,000 reports of sexual misconduct in institutions of higher education found that "[f]ew incidents reported to Title IX Coordinators resulted in a formal Title IX complaint, and fewer still resulted in a finding of responsibility or suspension/expulsion of the responsible student." [164] Despite the Department's unsubstantiated concern for respondents, the study found that "[t]he primary outcome of reports were victim services, not perpetrator punishments." [165] The Department's due process arguments totally ignore the complainants who are still treated unfairly in violation of Title IX and are often pushed out of schools from inadequate and unfair responses to their reports.

While the Department repeatedly cites the purported need to increase protections of respondents' "due process rights" to justify weakening Title IX protections for complainants, current Title IX regulations already provide more rigorous due process protections than are required under the Constitution. The Supreme Court has held that students facing short-term suspensions from public schools [166] require only "some kind of" "oral or written notice" and "some kind of hearing." [167] The Court has explicitly said that a 10-day suspension does not require "the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident." [168] However, the proposed rule's flat prohibition on reliance on testimony that is not subject to cross-examination [169] would force survivors to a "Hobson's choice" between being revictimized by their assailant's advisor or having their testimony completely disregarded, and would prohibit schools from simply "factoring in the victim's level of participation in [its] assessment of witness credibility." [170] It would also make no allowance for the unavailability of a witness and would not allow any reliance at all on previous statements, regardless of whether those statements have other indicia of reliability, such as being made under oath or against a party's own interest. This would require schools to disregard relevant evidence in a variety of situations in a manner that could pose harms to both parties and would hinder the school's ability to ensure that their findings concerning responsibility are not erroneous.

Under the proposed rules, [171] schools would be required to presume that the reported harassment did not occur, which would ensure partiality to the respondent. This presumption would also exacerbate the rape myth upon which many of the proposed rules are based—namely, the myth that women and girls often lie about sex-

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

[162] 34 C.F.R. § 106.8(b).

[163] Proposed § 106.8(c).

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

[165] Id.

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

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

[168] Id. at 583. See also Gomes v. Univ. of Maine Sys., 365 F. Supp. 2d 6, 23 (D. Me. 2005); B.S. v. Bd. of Sch. Trs., 255 F. Supp. 2d 891, 899 (N.D. Ind. 2003); Coplin v. Conejo Valley Unified Sch. Dist., 903 F. Supp. 1377, 1383 (C.D. Cal. 1995); Fellheimer v. Middlebury Coll., 869 F. Supp. 238, 247 (D. Vt. 1994).

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

[170] Liberty University Letter, supra note 84 at 5.

[171] Proposed § 106.45(b)(1)(iv).

ual assault.[172] The presumption of innocence is a criminal law principle, inappropriately imported into this context.[173] Criminal defendants are presumed innocent until proven guilty because their very liberty is at stake: criminal defendants go to prison if they are found guilty. There is no such principle in civil proceedings generally or civil rights proceedings specifically.

The proposed non-responsibility presumption is inconsistent with the Department's own explanation of why it is proposed. The Department explains that the requirement "is added to ensure impartiality by the recipient until a determination is made," but requiring a presumption against the complainant's account that harassment occurred is anything but impartial. In fact, the presumption ensures partiality to the named harasser, particularly because officials in this Administration have spread false narratives about survivors and other harassment victims being untruthful and about the "pendulum swinging too far" in school grievance proceedings against named harassers. This undoubtedly will influence schools to conclude this proposed rule means that a higher burden should be placed on complainants. The presumption of non-responsibility may also discourage schools from providing crucial supportive measures to complainants, in order to avoid being perceived as punishing respondents.[174] This proposed rule[175] would also only encourage schools to ignore or punish historically marginalized groups that report sexual harassment for "lying" about it.[176]

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

## VI. CAMPUS RESPONSES TO SEXUAL ASSAULT SHOULD BE CONSISTENT WITH THE CLERY ACT

A number of the Department's proposed rules are inconsistent with the Clery Act, which the Department also enforces, and which also addresses the obligation of institutions of higher education to respond to sexual assault and other behaviors that may constitute sexual harassment, including dating violence, domestic violence, and stalking. First, the proposed rules prohibiting schools from investigating off-campus and online sexual harassment conflict with Clery's notice and reporting requirements. The Clery Act requires institutions of higher education to notify all students who report sexual assault, stalking, dating violence, and domestic violence of their rights, regardless of "whether the offense occurred on or off campus."[177] The Clery Act also requires institutions of higher education to report all sexual assault, stalking, dating violence, and domestic violence that occur on "Clery geography," which includes all property controlled by a school-recognized student organization (such as an off-campus fraternity); nearby "public property"; and "areas within the patrol jurisdiction of the campus police or the campus security department."[178] The proposed rules would undermine Clery's mandate and create a perverse system in which schools would be required to report instances of sexual assault that occur off-campus to the Department, yet would also be required by the Department to dismiss these complaints instead of investigating them.

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[172] Indeed, the data shows that men and boys are far more likely to be victims of sexual assault than to be falsely accused of it. See, e.g., Males Are More Likely to Suffer Sexual Assault, supra note 31.

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

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

[175] Proposed § 106.45(b)(1)(iv).

[176] See, e.g., Males Are More Likely to Suffer Sexual Assault, supra note 31.

[177] 20 U.S.C. § 1092(f)(8)(C).

[178] 20 U.S.C. § 1092(f)(6)(iii); 20 U.S.C § 1092(f)(6)(iv)); 34 C.F.R. § 668.46(a)).

Second, the Department's definition of "supportive measures" is inconsistent with Clery, which requires institutions of higher education to provide "accommodations" and "protective measures" if "reasonably available" to students who report sexual assault, dating violence, domestic violence, and stalking.[179] The Clery Act does not prohibit accommodations or protective measures that are "punitive," "disciplinary," or "unreasonably burden[] the other party." Third, the proposed rules' unequal appeal rights conflict with the preamble to the Department's Clery rules stating that institutions of higher education are required to provide "an equal right to appeal if appeals are available," which would necessarily include the right to appeal a sanction.[180]

Finally, the proposed rules' indefinite timeframe for investigations conflicts with Clery's mandate that investigations be prompt.[181] And the many proposed rules discussed above that tilt investigation procedures in favor of the respondent are anything but fair and impartial.

Although the Department acknowledges that Title IX and the Clery Act's "jurisdictional schemes—may overlap in certain situations,"[182] it fails to explain how institutions of higher education should resolve the conflicts between two different sets of rules when addressing sexual harassment. These different sets of rules would likely create widespread confusion for schools.

With careful consideration of the needs of students to be able to learn, thrive, and feel safe on campus, the procedures required to make campus processes fair and equitable to all parties, and the various ways that schools can appropriately respond to campus sexual assault that takes into account their student body, size, resources, culture, location, and state and local requirements, reauthorization of the Higher Education Act should reaffirm the principles of Title IX and Clery to ensure that campuses everywhere are safe places for students.

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[SUMMARY STATEMENT OF FATIMA GOSS GRAVES]

While we have made major strides to address campus sexual assault over the past few years, too many colleges and universities still fail to make appropriate efforts to support survivors' opportunities to learn in the wake of sexual violence. Any reauthorization of the Higher Education Act should take this into account, as well as the principles and requirements of the Clery Act and Title IX, which already require schools to adopt and enforce procedures to address sexual assault that is prompt, equitable, and impartial. Through prevention and awareness programs for incoming students and employees and addressing sexual harassment, under these laws, schools have been charged with addressing behaviors leading up to and including sexual assault, before they cause greater harm to students' education.

Campus sexual assault is pervasive, underreported, and survivors are still being punished by their schools when they report: Students in college experience high rates of sexual harassment and sexual assault. During college, 62 percent of women and 61 percent of men experience sexual harassment, and more than one in five women and nearly one in 18 men are sexually assaulted. Nearly one in four transgender and gender-nonconforming students are sexually assaulted during college. Unfortunately, campus sexual assault is still consistently and vastly underreported and when students do report campus sexual assault, they are often ignored and sometimes even punished by their schools.

Campus processes need to be fair to all students: Schools must take effective and immediate action when responding to sexual assault and other forms of harassment that school employees know about or reasonably should know about. When schools respond, complainants must be afforded non-punitive interim measures to preserve and restore access to educational programs, and investigations must be equitable and not create barriers to reporting. This means that live-cross examination should not be allowed as it is an unnecessary measure that would deter reporting of campus sexual assault. Campuses should also not allow mediation to resolve sexual assault complaints, must not consider irrelevant or prejudicial evidence, and must provide parties with remedies to preserve or restore access to education. Campuses must also have equitable appeal rights and must prohibit retaliation against parties and witnesses.

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[179] 20 U.S.C. § 1092(f)(8)(B)(vii); 34 C.F.R. § 668.46(b)(11)(v).

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

[181] 20 U.S.C. § 1092(f)(8)(b)(iv)(I)(aa).

[182] 83 Fed. Reg. at 61468.

Unfortunately, the Department of Education (ED) recently proposed changes to Title IX that, if finalized, would force schools to ignore sexual harassment and create unfair grievance processes. ED's proposed rules would only discourage reporting of sexual assault and improperly prevent schools from providing a safe learning environment by mandating dismissal of many complaints of sexual assault and harassment. By imposing the deliberate indifference, schools would be allowed to do virtually nothing in response to complaints of sexual assault and other forms of sexual harassment. The proposed rules would also force schools into using inappropriate and inequitable standards and create other unfairness in the grievance process, including mandating live cross-examination and allowing mediation for sexual assault.

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The CHAIRMAN. Thank you, Ms. Goss Graves. Thank you for coming today.

Ms. Gersen, glad you got here. Thank you for coming.

**STATEMENT OF JEANNIE SUK GERSEN, JOHN H. WATSON, JR., PROFESSOR OF LAW, HARVARD LAW SCHOOL, CAMBRIDGE, MA**

Ms. GERSEN. Chairman Alexander, Ranking Member Murray, and Members of the Committee, thank you for the opportunity to testify. I am Jeannie Suk Gersen. I am a professor of law at Harvard Law School. I will address two questions of fairness and campus sexual assault, discipline, how schools should define the prohibited contact, and what elements are essential to a fair process of investigation and adjudication.

First, discipline can only be fair if the definitions of prohibited conduct are clear. We often use terms like sexual harassment and sexual assault, but they mean so many different things. They have their criminal definition, civil definitions, colloquial uses, and often it is very confusing. Sometimes schools adopt over broad definitions because what they want to do is to communicate to the student body the aspirations and desired norms of the community. But for the purpose of campus discipline, some of these very broad definitions are improper. Sometimes they cover too much and make accusations that arise under these rules seem arbitrary, and that is unfair to all parties, both complainants and respondents, and it harms legitimacy of efforts to address the harm of sexual assault.

The Federal Government should provide a basic definition that anchors schools to the definition of hostile environments sexual harassment that the Supreme Court has provided in Meritor Savings Bank v. Vinson. That is, unwelcome conduct of a sexual nature that is sufficiently severe or pervasive that it impairs a person's access to a protected activity. Here we are talking about education. This is broader than the definition that is proposed in the current Education Department's Title IX rules, and it is narrower than many schools' current definitions of sexual harassment. Sexual harassment, of course, includes sexual assault but the term sexual assault refers to many different kinds of standards, and its use causes great ambiguity, and it should defined.

The Federal Government should provide a definition of sexual assault to guide schools, and they in turn will give schools clear and fair notice about the line between prohibited conduct and permitted conduct. It should set expectations that are administrable, realistic, and tethered to a person's access to equal educational opportunity, as Title IX requires. I now turn to disciplinary procedures, the procedures used by schools to respond to allegations that sex discrimi-

nation has occurred. Campus discipline is not criminal justice, but the basic elements of fair process must be present to ensure integrity, accuracy, and lack of bias. Both the complainant and the accused must be treated equally and fairly. The elements of fair process in this context should include the following basic requirements.

First, notice. Parties have to be provided the written complaint and informed of all of the factual basis of the complaint. Evidence. Parties should be given full and fair access to all of the evidence gathered that is directly related to the allegation, and also to the identities of the witnesses and all of their statements. There should be neutral and independent decisionmakers. Schools must separate the functions of the investigator, the adjudicator, and the appellant body, rather than combining all of those roles into one, or any two of them into one person.

There should be a live hearing and an opportunity for the parties to be heard before the decisionmaker. The live hearing need not involve direct cross-examination, but there should be a meaningful opportunity for each side to pose questions to the other side or to witnesses, and that can be done in a variety of ways. One of them is to pass questions to a neutral decisionmaker who will then post the questions to the people who are testifying, and then have opportunities for some reasonable amount of follow-up questions.

There should be a presumption of innocence and any accused individual should have a presumption of innocence on any kind of accusation whether it is a sexual harassment accusation, racial harassment, or any other kind of accusation. The standard of evidence should be equalized among sexual and non-sexual accusations. So, if you use one standard for racial harassment, it should be the same standard for sexual harassment. And finally, there should be some opportunity for informal resolution of complaints. Whether it is through restorative justice or mediation, there should be an option that schools can offer for people who want to have an informal resolution rather than a formal one.

In closing, I would like to emphasize that the two portions, the clearly defining prohibited conduct and a fair process to investigate complaints, are very closely related. No matter how unambiguously conduct is defined, no one can have faith in a process that does not use fair procedures to investigate complaints. And even the fairest adjudicatory procedures cannot remedy the basic injustice of ill-defined, vague, and over broad, or under inclusive categories of conduct.

I want to close by thanking you, and I look forward to your questions.

[The prepared statement of Ms. Gersen follows:]

PREPARED STATEMENT OF JEANNIE SUK GERSEN

Chairman Alexander, Ranking Member Murray, and Members of the Committee, I am Jeannie Suk Gersen, the John H. Watson, Jr. Professor of Law at Harvard Law School. I have taught courses on Criminal Law, Criminal Adjudication, Constitutional Law, and Regulating Sex on Campus. My research and writing have considered the problems of equality and fairness in legal and institutional responses to sexual assault and harassment, including in the context of Title IX and campus discipline.[1] As an attorney, I have represented multiple students and faculty who

[1] See, e.g., Jacob E. Gersen & Jeannie Suk, The Sex Bureaucracy, 104 Cal. L. Rev. 881 (2016), adapted in Jacob Gersen & Jeannie Suk Gersen, The College Sex Bureaucracy, Chron. Higher

have been parties in campus cases about sexual assault, sexual harassment, and sex discrimination. I was a signatory to the statement of twenty-eight Harvard Law School professors who, in October 2014, criticized Harvard University's then newly adopted sexual misconduct policy as "unfairly staked against the accused," and "in no way required by Title IX law or regulation."[2] I serve on the American Law Institute's Project on the Model Penal Code: Sexual Assault and Related Offenses, as an Advisor, and on the organization's Project on Sexual and Gender-Based Misconduct on Campus: Procedural Frameworks and Analysis, as part of the Members' Consultative Group.

Thank you for the opportunity to testify about the response to sexual assault on college campuses. In addition to my own research, my testimony today draws on past public comments, submitted to the Department of Education, that I co-authored with my Harvard colleagues, Elizabeth Bartholet, Nancy Gertner, and Janet Halley, as feminist law professors who have been concerned about fairness in campus discipline processes.[3]

In the past decade, we have seen many colleges and universities recognize their past approaches to sexual misconduct to be inadequate, and undertake to adopt new policies and procedures, inspired by pressure from the federal government. In the same period, we have also seen the rise of an unfortunately common notion that effectively addressing sexual assault and advocating for due process are politically opposed sides of a debate. I appreciate that a premise of this hearing is to reject that false choice in the endeavor to understand what fairness for all parties would look like in rigorous and legitimate measures to address sexual assault.

The two broad questions in campus sexual assault discipline are how prohibited conduct should be defined, and what elements are essential to a fair process of investigation and adjudication. I will address them in turn.

**Definitions of Prohibited Sexual Conduct**

Title IX prohibits schools that receive federal funding from discriminating on the basis of sex, and in the past decades, it has become clear in court decisions and agency rules that sex discrimination includes sexual harassment, which in turn includes sexual assault. Schools therefore understand that they are legally obligated to take measures to address, remedy, and prevent sex discrimination, sexual harassment, and sexual assault in their communities. But they often face uncertainty and contention about the exact contours of the conduct that they ought to prohibit, both as a matter of their responsibilities under federal law, and as a matter of values and norms they would wish to promote in their communities. The problem of definitions is especially challenging at a time when sexual norms and ideas of acceptable behavior are rapidly changing, especially among young people who are the beating heart of college campuses.

Discipline that affects any party's access to education can be fair only if definitions of prohibited conduct are clear, understandable, and not excessively under-in-

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Educ., Jan. 17, 2017; Jeannie Suk Gersen, The Socratic Method in the Age of Trauma, 130 Harv. L. Rev. 2320 (2017); Jacob E. Gersen & Jeannie Suk, Timing of Consent, in The Timing of Lawmaking 149 (Frank Fagan & Saul Levmore eds., 2017). I have also written the following analyses on campus sexual misconduct discipline, in The New Yorker: Assessing Betsy DeVos's Proposed Rules on Title IX and Sexual Assault, Feb. 1, 2019, *https://www.newyorker.com/news/our-columnists/assessing-betsy-devos-proposed-rules-on-title-ix-and-sexual-assault;* Deborah Ramirez's Allegation Against Brett Kavanaugh Raises Classic Questions of Campus Assault Cases, Sept. 25, 2018, *https://www.newyorker.com/news/our-columnists/deborah-ramirezs-allegation-against-brett-kavanaugh-raises-classic-questions-of-campus-assault-cases;* The Transformation of Sexual Harassment Law Will Be Double-Faced, Dec. 20, 2017, *https://www.newyorker.com/news/news-desk/the-transformation-of-sexual-harassment-law-will-be-double-faced;* Betsy DeVos, Title IX, and the "Both Sides" Approach to Sexual Assault, Sept. 8, 2017, *https://www.newyorker.com/news/news-desk/betsy-devos-title-ix-and-the-both-sides-approach-to-sexual-assault;* The Trump administration's Fraught Attempt to Address Campus Sexual Assault, July 15, 2017, *https://www.newyorker.com/news/news-desk/the-trump-administrations-fraught-attempt-to-address-campus-sexual-assault;* College Students Go To Court Over Sexual Assault, Aug. 5, 2016, *https://www.newyorker.com/news/news-desk/colleges-go-to-court-over-sexual-assault.*

[2] Elizabeth Bartholet et al., Rethink Harvard's Sexual Harassment Policy, Bos. Globe, Oct. 15, 2014, *https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html.*

[3] Elizabeth Bartholet, Nancy Gertner, Janet Halley & Jeannie Suk Gersen, Fairness for All Students Under Title IX, Aug. 21, 2017, *https://dash.harvard.edu/bitstream/handle/1/33789434/Fairness—20for—20All—20Students.pdf?sequence=1;* Jeannie Suk Gersen, Nancy Gertner & Janet Halley, Comment on Proposed Title IX Rulemaking, Jan. 30, 2019, *https://perma.cc/3F9K–PZSB.*

clusive or over-inclusive. Standard legal definitions of sexual harassment include both quid-pro-quo sexual harassment and hostile-environment sexual harassment. The standard definition of hostile-environment sexual harassment comes from the Supreme Court in Meritor Savings Bank v. Vinson: unwelcome conduct of a sexual nature that is sufficiently severe or pervasive that it impairs a person's access to a protected activity to a protected activity to a protected activity.[4] According to the Court, the elements of a hostile environment must not only subjectively experienced but also objectively reasonable. The definition allows consideration of the complainant's subjective experience, while also providing a reasonableness check against arbitrary accusations. The definition is clear, and when used in the context o schools, has a nexus to equal access to educational opportunity.

But some schools currently use overbroad definitions of prohibited conduct that go far beyond legal definitions of sexual harassment. They may simply prohibit unwelcome conduct, even if it does not create a hostile environment, and even if a reasonable person would not have reason to know that the conduct was unwelcome. At many schools, sexual conduct is considered unwelcome or non-consensual if either party did not provide verbal consent to each act within a sexual encounter. Even those who are proponents of verbal affirmative consent standards must admit that, realistically, the definition effectively renders most subjectively and mutually desired sex that occurs a technical violation of the campus rules. While perhaps appealing as an aspirational norm or a way to avoid misunderstanding during sex, verbal affirmative consent definitions are overbroad for distinct purpose of campus discipline. They classify almost all sexual conduct as a violation of the rules. Therefore they are unhelpful for clearly distinguishing wrongful conduct from conduct that is mutually wanted and voluntary on both sides. If almost everyone is technically violating an overly broad rule that covers most sex that is voluntarily engaged in, the accusations that arise under the rule may be arbitrary. That is unfair to all parties and erodes the legitimacy of efforts to combat sexual assault.

Federal efforts to guide schools in defining prohibited conduct should be anchored to the Supreme Court's definition of hostile-environment sexual harassment in Meritor. The definition should prohibit unwelcome conduct of a sexual nature that is so severe or pervasive as to impair equal access to education, and it should require that hostile environment claims be objectively reasonable.

The Department of Education's current Proposed Title IX Rule, however, defines hostile-environment sexual harassment more narrowly, as unwelcome conduct that is "so severe, pervasive, or objectively offensive that it effectively denies a person equal access to [a school's] educational program or activity."[5] That definition is too narrow and under-inclusive, because it would not cover conduct that is severe but not pervasive (such as a single act of rape), or pervasive but not severe (such as multiple, repeated, unwelcome comments on someone's appearance). Both of these types of conduct are important for schools to address in order to preserve equal access to education.

While hostile-environment sexual harassment is supposed to encompass sexual assault, the term "sexual assault" refers to so many different and conflicting kinds of criminal, civil, and colloquial standards that its use currently causes tremendous ambiguity and uncertainty about what is prohibited and permitted. Someone may use "sexual assault" to refer to an unwelcome touching of an arm or a shoulder, while another may mean a digital penetration without affirmative verbal permission, and yet another may believe it means nothing short of a forcible act of rape. Similarly, the term "consent" can mean anything from explicit verbal permission for each act within a sexual encounter, to willing acquiescence, to absence of physical resistance.

It would be beneficial for the federal government to provide a definition of sexual assault that guides schools for the purposes of campus discipline, so they may give clear and fair notice to all parties about the line between prohibited and permitted sexual activity. I propose the following definition, as it includes the most important elements:

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[4] 477 U.S. 57, 67 (1986) ("For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'").

[5] This language is from the Title IX case, Davis v. Monroe County Board of Education, 526 U.S. 629, 650–2 (1999), in which the Supreme Court created a narrowing definition of sexual harassment for the specific purpose of limiting private parties' access to civil lawsuits against school boards for money damages. Citing Meritor, the Court in Davis recognized that the standard legal definition of sexual harassment is broader than the one it was adopting for that specific purpose. Id. at 651.

> Sexual assault is the penetration or touching of another's genitalia, buttocks, anus, breasts, or mouth without consent.
>
> A person acts without consent when, in the context of all the circumstances, he or she should reasonably be aware of a substantial risk that the other person is not voluntarily and willingly engaging in the conduct at the time of the conduct.

This definition clearly specifies the relevant body parts as sexual, and what constitutes consent in a way that accords with most legal and conventional understandings of sexually wrongful conduct. It gives clear notice to parties about what conduct is prohibited, it sets realistic expectations, and it is administrable.

The federal government should define prohibited sexual conduct for the purpose of campus discipline in a manner that is grounded in law and tethered to access to educational opportunity. In sum, the prohibited conduct consists of sexual harassment of three kinds: quid-pro-quo sexual harassment; hostile-environment sexual harassment (defined in keeping with the Supreme Court's definition in Meritor); and sexual assault (defined as proposed above) that effectively denies a person equal access to education.

A school's responsibilities to address the prohibited conduct should be tied to the impact of the conduct on equal access to the school's educational programs and activities. That means that its responsibilities to address a violation should extend to off-campus conduct that is not connected to any official program or activity of the school, if the effects of the violation produce a discriminatory impact on a victim's access to education, such as when both the victim and the perpetrator are both enrolled at the school. The focus should be on access to education, and that turns on concrete impairment to educational access due to the discriminatory conduct of the school's students, staff, or faculty.

Finally, schools should be considered in violation of Title IX if they behave unreasonably—that is, when they should have known of a substantial risk of sexual misconduct and failed to act to address it. The Department of Education's current Proposed Title IX Rule instead would hold schools responsible only if they knew of sexual-misconduct allegations and were deliberately indifferent to them. That standard sets an inappropriately low expectation for schools. It should be enough to show that a school reacted unreasonably.

**Discipline Procedures for Sexual Misconduct**

While sexual misconduct on campus may sometimes overlap with criminal conduct, campus disciplinary processes are not criminal processes. While serious, the stakes, deprivation of access to education rather than criminal penalties, are different and less severe. Criminal investigation and adjudication process with all of its protections of defendants' rights are not the precise benchmark for campus discipline processes. But basic elements of fair process must be present, to ensure integrity, accuracy, and lack of bias. When a complaint of sexual misconduct is made, both the complainant and the accused must be treated fairly and equally in the process of investigation and adjudication of the complaint. The elements of fair process in this context should include the following requirements:

*Notice.* Parties should be provided the written complaint and informed of the factual basis of the complaint.

*Evidence.* Parties should be given equal and full access to all of the evidence gathered that is directly related to the allegations, and to the identities and statements of all the witnesses.

*Division of Roles Among Neutral and Independent Decisionmakers.* Schools should separate the functions of investigator, adjudicator, and appellate body, rather than combining any of those roles. Decisionmakers at different stages of the process should be independent of each other and not be invested in reinforcing the outcomes of previous stages. The separation provides accountability and checks, and discourages bias and error. The role of advocate or counseling, for complainant or respondent, should be divided completely from the roles of investigation and adjudication of the complaint. The role of Title IX Coordinator should be limited to coordinating the process and separated from the neutral and independent investigation and adjudication. The Title IX Coordinator should not be placed in the roles of conducting investigations, making factual findings, deciding on responsibility, assigns sanctions, or hearing appeals.

*Live Hearing.* Schools should provide a live hearing before the decisionmaker, during which the parties can have the opportunity to be heard, hear testimony of wit-

nesses in real time, and offer amendments, interpretations, and challenges to the evidence and to the witnesses' accounts.

*Counsel.* Parties should be permitted to bring counsel to any interviews and hearings, and counsel should be allowed to speak to assert the parties' rights.

*Asking Questions.* Parties should be allowed to ask questions of other parties and witnesses in a meaningful way. This does not require cross-examination. It is sufficient, perhaps even optimal, to have parties instead submit questions to the presiding decision-maker, who should then ask all questions submitted unless they are irrelevant, excluded by a rule of evidence clearly adopted in advance, harassing, or duplicative. This submitted-questions procedure, if administered fairly to serve the truth-seeking function, provides ample opportunity for parties to probe each other's and witnesses' credibility and consistency such that direct cross-examination is not needed.

*Presumption of Innocence.* Any accused individual in a campus disciplinary matter concerning any kind of allegation should have a presumption of innocence. The rise of "trauma-informed training" for investigators and adjudicators can lead to biased process insofar as it induces a working presumption that problems in the evidence such as inconsistencies in the complainant's account supports the conclusion that the complainant has been traumatized by the accused party. This circular approach to evaluating evidence is inconsistent with the presumption of innocence and, more fundamentally, is incompatible with basic fair process.

*Burdens of Proof and of Production.* The school should bear the burdens of proof and of production, and should not place them on either complainant or respondent.

*Standard of Evidence.* The "preponderance of evidence" standard is now the commonly used standard of evidence in campus sexual misconduct discipline, because it was described as mandatory under the Obama administration's Title IX guidance. When combined with other fair procedures that treat the parties equally and fairly, the preponderance standard is a fair standard. Any higher evidentiary standard is tilted in favor of the accused. But the higher "clear and convincing evidence" standard is also plausibly appropriate and not unfair, because it may reflect the possible seriousness of the sanction of the accused. Schools should have discretion to use the preponderance or the clear and convincing evidence standard, assuming that the other surrounding processes are fair and equal. But if a school chooses preponderance for sexual misconduct, it should adopt the same standard for non-sexual misconduct as well, because there is no good justification for using a lower or higher evidentiary standard for sexual harassment than, for example, racial harassment.

*Written Reports.* Parties should be provided copies of written reports that detail the evidence gathered by investigators and explain the reasoning and conclusions reached by decisionmakers.

*Informal Resolution Methods.* Schools should be permitted to offer mediation or restorative justice approaches to accusations of sexual misconduct, in addition to the formal process of investigation and adjudication. An exclusively disciplinary or punitive approach needlessly deprives victims of options that they may believe will benefit them in the pursuit of equal educational opportunity. Some complainants desire a process focused on having the other party understand the harm caused, but may not pursue a complaint if they know that the only option is a full formal process leading to possibly severe punishment for the respondent. Some respondents may be prepared to confess, apologize, and take responsibility, but may be deterred from recognizing their harmful actions, because the formal and punitive-seeming framework pushes them to adopt an adversarial posture of denial. If both parties wish to explore alternatives to formal adjudication, schools should not be prohibited from providing the option of a structured and guided means for parties to settle the conflict, through an informal process that is less adversarial than the formal investigation and adjudication process.

*Racial Impact.* The Department of Education's Office for Civil Rights has acknowledged a serious risk of race discrimination in general student discipline in elementary and secondary schools, noting that African-American students "are more than three times as likely as their white peers" to be expelled or suspended, and those substantial racial disparities "are not explained by more frequent or more serious misbehavior by students of color." The race of the parties in sexual-misconduct cases is not included in existing federal reporting requirements, so the issue is difficult to study and understand. Schools may interpret their obligations under student privacy rules as preventing the release of such data, if they even compile such data. But among administrators, lawyers, and faculty members involved in sexual misconduct cases, stories and experiences of disproportionate racial impact are common. It is important for colleges and universities to study and address the potential for

race discrimination in sexual-assault allegations, affecting either respondents or complainants. That risk must be transparently analyzed as part of the project of enforcing sex discrimination law. And concerns about fair procedures that afford equal treatment complainants and respondents as outlined in this section are all the more important where there is a risk of racially disproportionate impact. Schools should include questions about racial and other demographic information in the sexual climate surveys they administer to the student body. The federal government should promote the rigorous gathering of knowledge about the racial impact, on both complainants and respondents in the campus disciplinary process.

Thank you for the opportunity to discuss these issues with the Committee.

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[SUMMARY STATEMENT OF JEANNIE SUK GERSEN]

In my testimony I address two broad questions in campus sexual assault discipline: how prohibited conduct should be defined, and what elements are essential to a fair process of investigation and adjudication.

**Definitions of Prohibited Sexual Conduct**

Discipline that affects any party's access to education can be fair only if definitions of prohibited conduct are clear, understandable, and not excessively under-inclusive or over-inclusive. Some schools currently use overbroad definitions of prohibited conduct that are unfair to all parties. Overly expansive definitions tend to undermine efforts to combat sexual assault. Overly narrow definitions may be under-inclusive of conduct that impairs access to education. The federal government should define prohibited sexual conduct for the purpose of campus discipline in a manner that is grounded in law, particularly the Supreme Court's definition of hostile-environment sexual harassment as unwelcome conduct of a sexual nature that is so severe or pervasive that it impairs a person's access to the protected activity, here, education. Schools' definitions of prohibited conduct should always be tethered to the concrete impact of the conduct on access to equal educational opportunity.

**Discipline Procedures for Sexual Misconduct**

For campus discipline to be legitimate, basic elements of fair process must be present, to ensure integrity, accuracy, and lack of bias. Both the complainant and the accused must be treated fairly and equally in the process of investigation and adjudication of the complaint. The most important elements of fair process include: giving the parties notice of and information about the factual basis of the complaint, and full access to evidence gathered; separation of the functions of investigator, adjudicator, and appellate body, to insure independence; separation between the Title IX coordinator and those conducting the investigation, adjudication, or appeal, to insure neutrality; a live hearings before the decisionmaker, during which the parties can have the opportunity to be heard and hear testimony in real time; permission to have counsel for parties attend interviews and hearings; opportunity for parties to put questions to parties and witnesses; a presumption of innocence; and the use of either a preponderance of the evidence or a clear and convincing standard of evidence.

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The Chairman. Thank you, Ms. Gersen for being here today.

Ms. Meehan, welcome.

## STATEMENT OF ANNE MEEHAN, DIRECTOR, GOVERNMENT AND PUBLIC AFFAIRS, AMERICAN COUNCIL ON EDUCATION, WASHINGTON, DC

Ms. MEEHAN. Mr. Chairman, Ranking Member Murray, and Members of the Committee, thank you for inviting me to speak with you today. My name is Anne Meehan and I am Director of Government Relations at the American Council on Education. I am testifying here today on behalf of ACE and the higher education associations listed at the end of my written testimony.

Campus sexual assault is one of the most important and serious issues facing colleges and universities today. Federal law requires

colleges and universities to address sexual assault on their campuses, and institutions take complying with these and all applicable laws very seriously. Institutions are committed to maintaining safe and supportive campus environments that allow students to benefit from the widest possible array of educational opportunities.

Unfortunately, campus sexual assault cases can be extremely difficult to resolve. They may involve different accounts of what happened, few if any witnesses, little or no physical evidence, conduct and recollections impaired by alcohol or drug use, and sometimes understandably, a time lapse between the event and the filing of a report. The central issue often is whether consent has been given, and this can be very difficult to determine. For these and other reasons, law enforcement authorities often decline to pursue these cases, but campuses must address them through their disciplinary processes, independent of whether criminal charges are filed.

In our efforts to address campus sexual assault, colleges and universities have three overarching goals. First, we want to support the survivor. Second, we want processes that are fair to both parties. And third, while clarity of Federal expectations is helpful, we also need flexibility to address these difficult cases compassionately, and effectively, and in a way that makes sense for a particular campus community. Campus disciplinary processes vary significantly from institution to institution. Based on, among other things, the institution's mission, size, student population, resources, and community values.

I provided examples of this in my written testimony, but regardless of the specific campus disciplinary process used, it must be fair. Both the Clery Act and Title IX require it. Clery statute and regulation set out the basic requirements of a fair process. For example, under Clery, campus disciplinary processes must, one, be conducted by officials who received training on sexual assault. Two, allow the parties to have an advisor of their choosing present. Three, be conducted by individuals who are free from conflicts of interest or biased. And four, provide timely and equal access to any information that will be used.

Fundamentally, we think the Clery fairness framework is a good one, and one that works well across a variety of institutions and campus disciplinary processes. As Congress considers whether to build on this framework, please keep in mind the five following observations. First, colleges and universities are not courts nor should they be. Efforts to impose court-like procedures and terminology are misguided and likely to create unintended consequences. The recent Title IX NPRM's requirement that all institutions provide a live hearing with direct cross-examination by a party's advisor is one such example. Second, campuses and their disciplinary processes are diverse.

Highly prescriptive one-size-fits-all requirements may undermine the goals of supporting survivors and being fair to both parties. Congress should set guardrails for what a fair process requires, and then provide flexibility for institutions to meet these requirements in a way that makes sense for their campus. Third, institutions are subject to a variety of Federal and state laws on this topic, as well judicial decisions and institutional policies. When

adding new requirements to the law, be mindful not to create overlapping, confusing, and possibly conflicting obligations.

Fourth, preserve institutions' ability to address sexual assault affecting their community, even if it is beyond what they are required to address under law. For example, campuses want and need to be able to address sexual assault even if it occurs off-campus. And finally, as important as it is to ensure fair disciplinary processes, we should not forget that our ultimate goal is to prevent sexual assault from occurring in the first place.

My written testimony contains examples of some of the prevention work our campuses are doing. Additional Federal support for these efforts would be welcomed.

Thank you for inviting me to testify. I would be happy to answer any questions.

[The prepared statement of Ms. Meehan follows:]

PREPARED STATEMENT OF ANNE MEEHAN

Mr. Chairman, Senator Murray, and Members of the Committee, thank you for inviting me to speak with you today. My name is Anne Meehan and I am the Director of Government Relations at the American Council on Education (ACE). ACE represents more than 1,700 public and private, two- and four-year colleges and universities and related higher education associations. I submit this testimony on behalf of ACE and the higher education associations listed at the end of my testimony.

As Congress works to reauthorize the Higher Education Act, we appreciate the Committee holding this hearing on addressing campus sexual assault and ensuring student safety and rights. I have been asked here today to talk about the variety of campus disciplinary processes used by colleges and universities to respond to allegations of sexual misconduct involving students, and ways to help ensure these processes are fair to both the survivor and the accused. My comments will focus on sexual assault between students because this has been an important emphasis of institutions and policymakers in recent years.

Two federal laws—the Clery Act and Title IX—require colleges and universities to address sexual assault on their campuses (Clery via statute and regulations and Title IX via regulations and guidance). Although different in scope, these laws also contain important requirements for campus disciplinary processes used to address sexual assault, including that these processes must be fair. Campuses take complying with these, and all applicable laws, very seriously. In addition to wanting to fulfill their legal obligations in this area, colleges and universities want to do the right thing. College and universities are committed to maintaining campus environments that are safe, supportive, and responsive so all students can benefit from the widest possible array of educational opportunities.

Unfortunately, campus sexual assault cases can be extremely difficult to resolve. They may involve differing accounts about what happened; few if any witnesses; little or no physical evidence; conduct and recollections impaired by alcohol or drug use; and, perhaps, understandably, a significant, but understandable, time lapse between the event and the filing of a report. The central issue in most of these cases is whether consent has been given, and this can be very difficult to determine based on the evidence available. For these and other reasons, law enforcement authorities often decline to pursue these cases through the criminal justice system, although campuses need to consider these situations in the context of their student conduct codes and disciplinary processes, independent of whether criminal charges are filed.

It is important to remember that while sexual assault is a serious crime, colleges and universities are not courts. Campus disciplinary processes are designed to determine whether an individual has violated an institution's specific code of conduct—not whether someone is guilty of a crime.

In addressing campus sexual assault, colleges and universities have three overarching goals. First, we want to support the survivor. Second, we want processes that are fair to both parties. And third, while we appreciate clarity about what is expected of us, we also need flexibility to address these difficult cases in a compassionate and effective way for the individuals involved and for the campus communities in which they arise. Today, our discussion will focus on this second goal—ensuring a fair process for both parties.

Finally, when considering potential legislation on this topic, the long view is important. Sadly, the scourge of sexual assault is unlikely to be eradicated in this country or on our campuses anytime soon, although colleges and universities continue to strive toward that goal. Campuses will continue to adapt, evolve and improve their prevention and awareness programs, as well as their support services and disciplinary processes to address sexual assault when it does occur. We encourage policymakers to be cautious about locking requirements into statute that could limit institutions' ability to incorporate the latest understandings, research, and state of the art techniques designed to address this serious problem.

**Campus Disciplinary Processes Vary**

It is critical to understand that campus disciplinary processes vary significantly from institution to institution, based on, among other things, the institution's mission, student populations, its culture, resources, and staffing of the campus. Although it can be difficult to generalize across more than 4,000 degree-granting institutions, processes generally fall into either a "hearing" or "non-hearing" model, with significant variation within these models, between different institutions, and even across units within the same institution.

Under a common version of a non-hearing model, a complainant reports sexual misconduct and indicates he or she would like to begin a formal disciplinary process. A trained sexual assault investigator is assigned to conduct a preliminary investigation to determine whether the allegations, if true, would be sufficient to constitute a violation of campus conduct standards. Assuming there is a sufficient basis, the investigator then notifies the complainant and respondent of the intent to proceed with a formal investigation and sets up time to interview the parties. The parties are interviewed, often multiple times, and are given the opportunity to identify evidence to pursue, witnesses to interview, and questions to ask the other party, in addition to information independently identified by the investigator. In deciding what questions to ask, the investigator relies not only upon clarifying questions suggested by the parties, but also on their own experience and prerogative to inquire thoroughly and seek clarification of inconsistencies, to promote fairness to both parties. This approach can effectively replicate the cross-examination approach used in some hearing-based models.

The investigator then prepares a draft report that contains the parties' statement, witness statements and a summary of any other evidence gathered during the investigation. Both parties would be presented with the draft, given an opportunity to respond, challenge any evidence, suggest additional areas for investigation, or provide new evidence now available. After incorporating this feedback, the investigator finalizes the investigative report. If additional evidence has been gathered, the parties are again given an opportunity to provide a response, which is added to the final report, and the final report is then submitted to the decisionmaker.

The decisionmaker may be a single individual or a panel. In a non-hearing model, the decision maker reviews the report and determines whether the evidence supports a finding of responsibility. The decision maker may also direct the investigator to go back and collect additional information regarding an issue before making a final decision. The decision maker may agree or disagree with the investigator's conclusions or weighing of the evidence—however, the decisionmaker's finding must be based on the information in the report and parties' responses.

Among non-hearing models, one model that has been the subject of recent discussion is the so-called "single-investigator" model. Most typically, this term is used to refer to a model where one individual, usually highly trained in investigating sexual assault cases, both investigates the matter and decides whether a violation of campus conduct rules has occurred.

Like non-hearing models, hearing models also come in many variations. The investigative phase is similar to a non-hearing model. However, at the conclusion of the investigation, the summary report, investigative file, and responding statements of the parties will be presented for review to a hearing officer or a hearing panel. (If the facts are not in dispute, some institutions will allow the students to mutually agree to opt for a summary disposition, instead of a full hearing.) The information presented to the hearing panel will also be presented to the parties with sufficient time for them to prepare, and a hearing date will be set. At the hearing, the investigator often presents an oral summary of the investigation and is available to answer questions posed by the panel. The hearing panel will ask questions of the parties and witnesses based on the information collected during the investigation. While the parties may be in the same room for the hearing, an option is often available to enable them to be in separate rooms with one party permitted to watch the other

party on a live video feed. While some institutions do allow for direct cross—examination by one party (or the party's representative) of the other party and any other witnesses, many do not. Where direct cross is not permitted, institutions often allow the parties to test the credibility of the other party and any witnesses by submitting written questions to a hearing panel, which reviews the questions to determine their appropriateness, and then poses them directly to the party or witness.

Regardless of the model used, after a finding of responsibility or non-responsibility is made, institutional processes determine whether an appeal is permitted, and the grounds on which a party may appeal. When there is a finding of responsibility, institutions differ on whether the same decision maker determines the sanction or whether another campus official or panel determines the sanction.

**"Fairness" Requirements in Title IX and Clery**

Title IX is a civil rights law. It says, "No person . . . 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." While the statute does not specifically mention either "sexual assault" or "campus disciplinary processes," Title IX regulations, guidance, and case law determine institutions' obligations. In November 2018, the Department of Education proposed new regulations for Title IX, which have proven controversial, generating more than 100,000 comments in response. While there is much debate about what the final regulations should entail, there are important Title IX obligations that are well-settled and not in dispute. Among them is that sexual harassment, which includes sexual assault, is a prohibited form of sex discrimination under Title IX. When allegations of sexual assault arise, institutions must take prompt action to eliminate the harassment, remedy its effect, and prevent its recurrence. It is also well-accepted law that when resolving allegations of sexual assault, campus disciplinary processes must be "prompt and equitable."

The Clery Act is the part of the Higher Education Act designed specifically to address campus safety issues—it requires institutions to report crimes that occur on campus and certain related property and it requires institutions to have a number of policies and practices related to safety. Clery, through statute and regulation, also provides a framework of requirements designed to ensure fairness in campus disciplinary processes involving sexual assault. Clery requires, among other things, that campus disciplinary processes must:

1. Provide for a "prompt, fair and impartial investigation and resolution."
2. Be conducted by officials who receive annual training on issues related to sexual assault and how to conduct an investigation and hearing process that "protects the safety of victims and promotes accountability."
3. Permit the complainant and the respondent to be accompanied by an "advisor of their choice" during the institutional disciplinary process, or any related meeting or proceeding.
4. Be completed within reasonably prompt timeframes designated by an institution's policy, including a process that allows for extension for good cause with written notice to the complainant and respondent.
5. Be conducted in a manner consistent with institutional polices and transparent to the parties.
6. Include timely notice of meetings at which the complainant or respondent, or both, may be present.
7. Provide "timely and equal access" to "any information that will be used during informal and formal disciplinary meetings and hearings."
8. Be "conducted by officials who do not have a conflict of interest or bias" against either party.

These requirements and others—the result of Violence Against Women Act (VAWA) amendments enacted in 2013—provide fundamental building blocks of what fair campus disciplinary processes should include. To the extent campus disciplinary processes did not include these features at the time of VAWA's passage (although most did), they have been readily incorporated. These elements are consistent with institutions' overarching goal of ensuring a fair process for both parties. They are also sufficiently high level as to give campuses the flexibility to meet these requirements in a way that makes sense for their institution.

Given this existing framework, we do not believe that additional changes in this area are necessary. However, if Congress feels the need to do more, it could consider the following:

- Some of the Clery requirements I mentioned are embodied in regulation and not in statute. If they are of fundamental importance to Congress, and Congress would like to insulate them from change through a regulatory process, Congress could consider incorporating them into the statutory language. For example, the regulatory requirement for "timely and equal access" to information that will be used during the campus disciplinary process could be explicitly stated in statute.
- Congress could consider whether campuses should be required to provide the parties notice of an intent to proceed with a formal campus disciplinary process, and the allegation. We believe most institutions already do this, but it could be explicitly referenced in statute. If Congress wants to do this, it should take care to ensure that the language is flexible to accommodate cases where it is appropriate to do so. For example, local police might ask the university to hold off initiating a disciplinary process to avoid alerting the subject of a criminal investigation. Similarly, the time when a victim of dating/domestic violence comes forward to report is often viewed as the most dangerous time for that individual—so there would need to be a safety plan in place before notifying the respondent of a formal disciplinary process.
- Another element of a fair disciplinary process is the ability to respond to evidence gathered in order to challenge adverse information, and to test the credibility of a party or witnesses. In speaking with member institutions, campuses do provide this opportunity, both in hearing and non-hearing disciplinary models. Congress could consider whether there are ways to ensure campus disciplinary processes reflect this principle, while again avoiding the pitfalls of overly-prescriptive, one-size-fits-all requirements. While ACE would be very concerned about a requirement that all institutions provide for direct cross-examination in a live hearing setting, flexible language that allows one party to propose questions to be asked of the other party—through an investigator, or some other process—could be considered and would be consistent with many existing institutional practices.

**General Observations for Policymakers**

In determining whether these or other changes are necessary or appropriate, we urge Congress to proceed cautiously, keeping the following observations in mind:

1. Colleges and universities are not courts, nor should they be. We do not have the resources, personnel, or expertise of the criminal and civil justice system. We do not have subpoena powers, rules of evidence, or the ability to hold an attorney in contempt. Efforts that attempt to turn us into quasi-courts, or to impose court-like procedures and terminology, are misguided and likely to result in unintended consequences.

For example, the recent Title IX NPRM would require all institutions to provide a live hearing with direct cross-examination by an advisor of a party's choice. Colleges and universities have grave concerns with this proposal, which could undermine efforts to encourage survivors to come forward, as well as efforts to be fair to both parties, turn our disciplinary processes into courtrooms, and create a cottage industry of legal advisors. The use of direct cross-examination, and the exclusion of statements from any party who is unwilling to be subject to direct cross, is likely to result in a highly adversarial process where attorney advisors attempt to break down the survivor, the accused, or witnesses to the events—in an effort to have their statements excluded from consideration. This proposal also raises equity concerns, when one student has the financial resources to hire an expensive and aggressive litigator, and the other student does not. If a respondent is facing a possible parallel criminal proceeding, a respondent's lawyer may advise the student not to participate in a live hearing with direct cross-examination, even though the respondent's lawyer would allow the student to participate in non-live hearing process. If a live hearing is required, the respondent's lack of participation is more likely to result in a finding of responsibility.

There are many ways campuses allow parties to respond to allegations, challenge evidence, seek clarification, and test credibility of witnesses that do not involve a live hearing and do not require direct cross-examination. There are many reasons why a particular survivor or accused student might not "present" well in a live setting: cultural differences, implicit bias,

the effects of trauma or extreme stress, a low-income student may not have the same level of support as a wealthier student to prepare for a live hearing format, differences in age and verbal skills of the participants, etc. There may be a benefit to giving students additional time to process a question and form their response outside of a live-hearing format. An assumption that the search for the truth of the matter in a disciplinary process can be achieved only through live, face-to face observation of the parties under direct cross-examination is a flawed one.

As another example, the NPRM, and some legislative proposals, have inappropriately imported the phrase "due process" when attempting to describe the need for fair processes for both parties.

"Due process" is a term most commonly associated with protections provided by law enforcement and the judicial system for criminal defendants where an accused individual's life or liberty is at risk. Indeed, Black's Law Dictionary defines "due process" in the context of criminal law: "Embodied in the due process concept are the basic rights of a defendant in criminal proceedings and the requisites for a fair trial." While public institutions are required to provide certain due process protections under the Fourteenth Amendment to the U.S. Constitution, private institutions are not, and the type and amount of process required of public institutions in these situations is far less than the process due in a criminal trial. Campus disciplinary hearings are neither "criminal proceedings" nor "trials."

Words matter. The use of the phrase "due process" in federal law contributes to a faulty perception that federal criminal trial-like constitutional due process protections must be provided on all campuses, public and private, for sexual assault proceedings, and is likely to result in substantially more civil litigation. We strongly support a process that is fair to both respondents and complainants, that is carefully designed to be even-handed, and that does not disadvantage either party. However, when incorporating this concept in federal statute or regulation, we recommend using "fair process" or "procedural fairness" instead.

2. Colleges and universities are highly diverse—in institutional-type, in the populations they serve, and in their educational missions. Not all institutions are residential. Not all have athletic programs. Some are small, faith-based institutions. Some are graduate-level only. Some serve adult students who commute. The standards institutions set for their campus communities, as reflected through their policies and codes of conduct also vary significantly, as do their campus disciplinary processes. While it is perfectly appropriate for Congress to set the guardrails about what a fair process entails, it should give institutions flexibility in how they meet this goal. Highly prescriptive, one-size-fits—all federal requirements are unlikely to work well and may actually undermine efforts to be fair to both parties. The problems I described regarding a live hearing with a direct cross-examination requirement for all institutions is just one illustration of why this rigid approach is both unnecessary and unwise. Campuses have many different processes that can be used to fairly determine whether a student is responsible for a conduct code violation. New hearing models and state of the art techniques may arise that will provide even better processes, which is another reason policy makers should avoid dictating a particular process.

3. Be aware of the many different sources of obligations on institutions in this area—in addition to the federal laws already discussed, there are other federal laws, state and local laws, judicial decisions regarding process requirements, and institutional policies. In one state, at least four pieces of campus sexual assault-related legislation are currently pending—state legislation on this topic has been passed or is pending in many others. Adding more federal requirements on top of the multitude of existing requirements is likely to result in confusing, overlapping, and potentially conflicting obligations. There has been significant churn in this area of the law, which makes it difficult for even the most-committed and well-resourced campuses to keep up with various requirements. Remember that changes will require revision of policies and practices and new trainings for staff. As one Title IX official for a major university campus described it, "No matter how knowledgeable about this area you are, no matter how hard you work, no matter how much you are committed and how much you care, it is hard to know if you are meeting all the different legal requirements." If this is challenging for a major university, imagine what it is like for small, less-resourced institutions to sort out all the various requirements, particularly

when the majority of institutions in this country do not have a dedicated general counsel on staff.

4. When considering policy in this area, institutions must have the ability to address conduct that violates their community standards, even if it occurs "off-campus" or otherwise falls outside what the law requires campuses to do. This was another concern raised by the recent NPRM, which is unclear on this point and appears to force institutions to "dismiss" a complaint that falls outside the Title IX definition, or outside an "education program or activity," even if that conduct is antithetical to campus values and prohibited under our conduct codes. While the preamble of the NPRM suggests that institutions would have the discretion to pursue these cases, preamble language does not have the force of law. Given the fundamental importance of this issue to colleges, campuses must have clear and unambiguous authority to pursue cases beyond what the law requires.

For example, an institution receives a report of a sexual assault involving two students that occurs in an off-campus house owned by a fraternity, where that fraternity is not recognized or sponsored by the institution. It is unclear whether under this scenario, the location of the assault would place it outside the NPRM's definition of an "education program or activity." But regardless, the alleged conduct would be a serious violation of the institution's code of conduct and one that the school would feel compelled to address in order to maintain a safe campus. Similarly, a university learns that a student has been accused of sexually assaulting another student while both are home on summer break.

While far removed from the university's programs, the campus general counsels I speak with tell me they would absolutely address this conduct through a disciplinary process, especially given that the students are likely to encounter one another when they return to campus. Many campus codes explicitly state that their expectations for student conduct apply regardless of whether the conduct occurs on or off campus. This is also important from a risk management perspective—if an institution has reason to believe a student poses a safety risk to other students, it needs to be able to investigate, assess, and, if necessary, discipline and remove that student from its community.

We believe that when sexual misconduct violates campus community standards, institutions must continue to have the right to pursue these matters through their disciplinary processes, regardless of whether the incident falls within the scope of Title IX. The campus general counsels I have spoken with tell me they absolutely want the ability to pursue these cases, and federal law should make clear that they may do so.

5. Finally, while we appreciate the focus of today's hearing is on how to improve campus disciplinary processes, we also encourage the Committee to consider ways the federal government can help support campuses in their prevention efforts. No matter how effective and fair our campus disciplinary processes are, our ultimate goal is to prevent sexual assault from occurring in the first place.

The Clery Act requires institutions to provide primary and ongoing sexual assault education and prevention programs for students and employees. Institutions have invested significant resources in expanded and innovative programming, with bystander prevention and consent education at the core of these efforts. I would like to highlight just a few of the efforts currently underway:

- NASPA—Student Affairs Administrators in Higher Education's "Culture of Respect" initiative builds the capacity of institutions to end sexual violence through ongoing, expansive organizational change. NASPA has created a "prevention programming matrix" which provides a curated list of more than 30 different theory-driven and evidence-based sexual violence prevention programs to help institutions identify the program that best meets their needs.
- The University of Washington incorporates a program called "Green Dot," which is popular on many campuses. The Green Dot strategy aims to shift campus culture by tapping the power of peer influencers (campus leaders, student-athletes) to increase proactive, preventative behavior. Every choice to be proactive as a bystander is categorized as a "new behavior" and thus a "Green Dot." Individual decisions (green dots) group together to create larger change.

- Vanderbilt University employs a variety of prevention strategies, targeted specifically to the needs of its community. For example, after survey data indicated that a significant number of students had experienced dating violence prior to coming to college, Vanderbilt enhanced its dating violence prevention programming by adding additional modules on this topic. Vanderbilt's programming also includes a theater-based program called True Life, which takes place during students' freshman orientation week. Through a series of skits, performed by Vanderbilt students and based on actual situations experienced by the students, the program addresses topics such as sexual assault, dating violence, and substance abuse, among others.

While many promising practices have emerged, additional federal support, possibly through grants, could help institutions evaluate the effectiveness of various approaches, share and scale best practices, and tailor programming to the particular needs of an institution. Efforts to educate students about healthy relationships and respect for others while still in high school and before they come to college is another piece of the prevention puzzle. While colleges and universities continue to ramp up efforts in this area, there is still work to be done and additional federal resources to support these efforts would be welcome.

**Conclusion**

Thank you for inviting me to testify on this important topic. I would be happy to answer any questions you have.

On behalf of:

ACPA—College Student Educators International
American Association of Collegiate Registrars and Admissions Officers
American Association of Community Colleges
American Association of State Colleges and Universities
American College Health Association
American Dental Education Association
American Indian Higher Education Consortium
APPA, Leadership in Educational Facilities
Association of American Colleges & Universities
Association of American Medical Colleges
Association of American Universities
Association of Catholic Colleges and Universities
Association of Community College Trustees
Association of Governing Boards of Universities and Colleges
Association of Jesuit Colleges and Universities
Association of Public and Land-grant Universities
Association of Research Libraries
College and University Professional Association for Human Resources
Consortium of Universities of the Washington Metropolitan Area
Council for Advancement and Support of Education
Council for Christian Colleges & Universities
Council for Higher Education Accreditation
Council of Graduate Schools
Council of Independent Colleges
EDUCAUSE
Hispanic Association of Colleges and Universities
NAFSA: Association of International Educators
NASPA - Students Affairs Administrators in Higher Education
National Association of College and University Business Officers
National Association of Independent Colleges and Universities

[SUMMARY STATEMENT OF ANNE MEEHAN]

Campus sexual assault is one of the most important and serious issues facing colleges and universities today. Federal law requires colleges and universities to address sexual assault on their campuses, and institutions take complying with these, and all applicable laws, very seriously. Institutions are committed to maintaining safe and supportive campus environments that allow students to benefit from the widest possible array of educational opportunities.

Unfortunately, campus sexual assault cases can be extremely difficult to resolve. They may involve differing accounts about what happened; few if any witnesses; little or no physical evidence; conduct and recollections impaired by alcohol or drug use; and, perhaps, understandably, a time lapse between the event and the filing of a report. The central issue often is whether consent has been given, and this can be very difficult to determine. For these and other reasons, law enforcement authorities often decline to pursue these cases. But campuses must address them through their disciplinary processes, independent of whether criminal charges are filed.

In our efforts to address campus sexual assault, colleges and universities have three overarching goals. First, we want to support the survivor. Second, we want processes that are fair to both parties. And third, while clarity of federal expectations is helpful, we also need flexibility to address these difficult cases compassionately and effectively, and in a way that makes sense for a particular campus.

Campus disciplinary processes vary significantly from institution to institution and even within units of the same institutions, based on, among other things, the institution's mission, size, student population, resources, and community values. In general, these processes can be grouped into "hearing" and "non-hearing" models. But regardless of the specific campus disciplinary process used, it must be fair –both Title IX and the Clery Act require it.

Clery statute and regulations set out the basic requirements of a fair process. Among them are that campus disciplinary processes must: (1) be conducted by officials who receive training on sexual assault; (2) allow the parties to have an advisor of their choosing present; (3) be conducted by individuals who are free from conflicts of interest or bias against the parties; and (4) provide timely access to available evidence. Fundamentally, we think the Clery "fairness" framework is a good one. As Congress considers whether to build on this framework, I recommend keeping the following five observations in mind:

1. Colleges and universities are not courts, nor should they be. We do not have the resources, personnel, or expertise of the criminal and civil justice system. Efforts that attempt to impose court-like procedures are misguided and likely to create unintended consequences. The recent Title IX NPRM's requirement that all institutions provide a live hearing with direct cross-examination is one such example.

2. Campuses and their disciplinary processes are diverse—highly prescriptive, one-size fits all requirements are unlikely to work across all campuses and may undermine the goals of supporting survivors and being fair to both parties.

3. Institutions are subject to a variety of federal and state laws on this topic, as well judicial decisions and institutional policies. When adding new requirements to the law, be mindful not to create overlapping, confusing, and possibly conflicting obligations.

4. Preserve institutions' ability to address sexual assault affecting their community, even if it is beyond what they are required to address under the law. For example, campuses want and need to be able to address sexual assault even if it occurs "off-campus."

5. As important as it is to ensure fair disciplinary processes, we should not forget that our ultimate goal is to prevent sexual assault from occurring in the first place. Campuses have many prevention efforts underway and additional federal support for these efforts would be welcome.

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The Chairman. Thank you, Ms. Meehan.
Dr. Howard, welcome.

**STATEMENT OF JEFF HOWARD, ASSOCIATE VICE PRESIDENT FOR STUDENT LIFE AND ENROLLMENT, EAST TENNESSEE STATE UNIVERSITY, JOHNSON CITY, TN**

Dr. HOWARD. Thank you, Chairman Alexander and Ranking Member Murray. I appreciate the opportunity to be here today to give a little bit of information about one institution's perspective on responding to sexual misconduct and things we do to support and provide resource during that process. Over the past two decades, I have served at three different institutions as the Dean of Students of the University of Virginia's College at Wise, as the Dean of Students at East Tennessee State University, which is also my alma mater where I currently serve.

At ETSU, we strive to maintain a community of care that is embedded with a commitment to a fair and equitable process for all parties involved in any student conduct matter. We have three separate and distinct steps for any sexual misconduct review. Those include an intake, an investigation, and a hearing. The three steps and their staff members involved in each step are kept distinctly separate. At the intake, a trained staff member meets with the complainant and the respondent individually. At this meeting, we share options and resources and information the student needs to make informed decisions. The staff member completing the intake will serve as a resource to the student throughout the investigation and during any contact hearing that might follow.

An important part of the intake is that ETSU student is made aware of interim support measures that can be taken to assist in supporting their health and well-being and their continued enrollment. Those can include counseling, health services, changes in housing, class, or on-campus work assignments. In all but the most severe sexual assault cases, the complainant and respondent will be offered the opportunity to meet with the trained mediator to reach a mutually agreed conclusion to the matter in lieu of an investigation. That mediation process is predicated on a restorative justice model and is only implemented when both parties agree to do so. Should an investigation proceed, then two trained investigators are assigned to review the complaint the complainant. The complainant and respondent are given the opportunity to supply investigators with a written statement and any additional information they wish to provide. ETSU investigators receive annual training that is comprehensive and includes information on trauma-informed care. The investigators offer an in-person meeting to the complaint, to the respondent, and to any witnesses, along with an advisor of each person's choosing. Following that interview, the investigators provide the individual with a written account of the meeting notes for review.

In addition to interviews, the investigators may review other information that is provided or which they request, which could include their ID card usage, phone or text messages, social media postings, video camera footage, etc. Following completion of the investigation, a report is submitted for review through our Title IX coordinator or university counsel, and finally for review and adoption by our university President. It is then shared in its entirety with the complainant and respondent, and both parties have the opportunity to review and to appeal the investigators' findings.

Based on the final recommendations of the report and following any appeals, the next step will mean one of two outcomes.

Based on a preponderance of evidence standard, a standard that we use in all student conduct matters, the investigators find that a policy was or was not violated. If no policy violation was found, the matter is concluded. If a policy violation was found, then the respondent will face a hearing and charges of the institutional disciplinary rules, commonly called the code of conduct. At a hearing where the code of conduct charges are reviewed—and I will mention our code of conduct is in effect on and off-campus for members of our community and that it spells out expectations of members of the community for their own behaviors and governs their interactions with each other. The code also outlines due process rights, the membership of our board, possible violations, as well as sanctions.

As an institution of higher education, it is important to note, the goal of the code of conduct and student conduct process is to be educational in nature. Those involved in such processes are stills students and members of our community. Out initial aim is to change the behavior and hold students accountable for their actions. However, that outcome might need to include suspension or expulsion from the university community, such sanctions that are never taken lightly. Charges for violating the code of conduct are placed by our Dean of Students Office and a hearing is scheduled. The parties are reminded of their due process rights. Details such a screening the complainant responded from viewing one another in the hearing room is arranged in advance.

Both parties can see and hear the board and witnesses and are able to directly question each other or to offer questions through the board. Many of the questions is submitted verbally or in writing to the board chair, and the response is given in a light manner. Each case is different as is each party's comfort level with questioning or answering one another directly. The board and the board chair has much leeway to make sure that all parties are able to actively participate in the manner in which they are most comfortable.

If the charges are of such a nature that suspension or expulsion are possible sanctions, then the respondent is also offered an option to choose the Tennessee UAPA, or Uniform Administrative Procedures Act, which Senator Alexander mentioned earlier. We do not find that the UAPA is selected often, and the overwhelming majority of cases proceed with the university judicial board. The board receives ongoing training on student conduct, due process, as well as sexual misconduct matters.

We annually review and continually review policy and process to ensure the individual rights, a fair process, and institutional compliance with state, Federal law, and such things as the recent decisions by the Sixth Circuit of the U.S. Court of Appeals. I will mention briefly because I realize I am running out of time, we offer a tremendous amount of educational prevention and support resources on our campus.

In addition to maintaining a strong commitment to student rights and institutional compliance in an equitable and fair process, ETSU works daily to provide strong education prevention and

support efforts. We have structures in place to offer online training to nearly 3,000 new students each year——

The CHAIRMAN. You need to wrap up your time.

Dr. HOWARD. I sure will. We also offer sexual assault nurse examiner programming, a counseling center that offers access to counselors 24 hours a day, and various other Title IX programs that happen throughout the year. I thank the Committee for your staff to share a brief overview of one institution's processes and efforts related to education and support.

Thank you.

[The prepared statement of Dr. Howard follows:]

PREPARED STATEMENT OF JEFF HOWARD

Over the past two decades, I served students at three institutions—Carson Newman University in Tennessee, The University of Virginia's College at Wise, and at my own alma mater, East Tennessee State University (ETSU) in Johnson City, Tennessee.

I serve ETSU as the Associate Vice President for Student Life and Enrollment under Vice President, Dr. Joe Sherlin, who leads the Division and its 25 departments with a daily mission of promoting student success. As our President, Dr. Brian Noland, reminds us often, the institution was founded over 108 years ago with a singular purpose, to improve the lives of the people of the region.

Through our processes and campus partnerships, we strive to maintain a community of care on our campus. Embedded in that community is a commitment to a fair and equitable process to all parties involved in any student conduct matter.

We have three separate and distinct steps for any sexual harassment or misconduct review. Those include an intake, investigation, and hearing. The three steps and those staff members involved in each step are kept distinctively separate.

**Intake**

At the initial intake, a trained staff member meets with the complainant and the respondent individually. At this meeting, options, resources, and information each student needs to make informed decisions is shared. The staff member completing the intake will serve as a resource to the student throughout the process of an investigation and possible conduct hearing.

An important part of the intake is that each student is made aware of interim support measures that can be taken to assist in supporting their health, well-being, and continued enrollment. Those can include counseling, changing housing, class, and on campus work assignments.

In all but the most severe sexual assault cases, the complainant and respondent will be offered the opportunity to meet with a trained mediator to reach a mutually agreed conclusion to the matter in lieu of an investigation. That mediation process is predicated on a restorative justice model and is only implemented with both parties agree to do so.

*(See Appendix A—Title IX Intake Form)*

**Investigation**

If mediation is not an option, then two trained investigators are assigned to review the complaint. The complainant and respondent are given the opportunity to supply investigators with a written statement and any additional information they wish to provide.

ETSU has two full time trained investigators in our Compliance Office and an additional pool of fifteen trained professional staff members who assist with student complaints. Training is comprehensive, conducted annually, and includes information on trauma informed care.

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Following the interview, the investigators will provide the individual with a written account of the meeting notes for review. In addition to interviews, the investigators may review other information provided or requested as part of the review that can be as varied as police reports, phone and text messages, student ID card usage,

social media postings, video or security camera footage, and other evidence that may be relevant to their review.

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*(See Appendix B—Investigation Flow Chart)*

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The Code of Conduct is in effect on and off campus. The Code spells out expectations of members of the ETSU community for their own behaviors and governs their interactions with one another.

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Charges for violating the Code of Conduct are placed by the Dean of Students Office and a hearing is scheduled with the University Judicial Board. The parties are reminded of their due process rights including ample and advanced notice of when and where the hearing will be held, copies of all materials that will be provided and reviewed by the Board, the ability to question one another and to call and question witnesses in a live hearing, and the ability to have an advisor of their own choosing. Details such as screening the complainant and respondent from viewing one another in the hearing room are arranged in advance.

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The Uniform Administrative Procedures Act (UAPA) from Tennessee Code Annotated Title 4 Chapter 5 is a more legalistic and lengthy process involving legal representation and an administrative law judge. We do not find that the UAPA is selected often and the overwhelming majority of cases proceed with the University Judicial Board. That Board is comprised of faculty, staff, and students who each receive ongoing training on student conduct, due process, as well as sexual misconduct matters.

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**Educational, Prevention, and Support Resources**

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ETSU has created certain structure's to support our efforts including the Sexual Misconduct Leadership Team (SMLT) and a Title IX Committee. Each group meets quarterly.

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The CHAIRMAN. Thank you very much to the witnesses for excellent testimony, and again, for being here. We have a lot of interest on the Committee. We will now begin a 5-minute round of questions, and what I will say to the Senators is I am going to try to keep everybody within 5 minutes on questions and answers, and if necessary, we will come back to a second round, and there can be written questions afterwards.

Ms. Gersen, so I understood you, did you say that in terms of definition of sexual harassment that you would recommend the Supreme Court decision that interpreted the Title VII case, and use that definition for Title IX case instead of the definition in the proposed rule?

Ms. GERSEN. Yes, that is what I said, Senator Alexander. And the reason is that definition in Meritor, which is the Title VII case, that the hostile environment sexual harassment definition has been understood for the past several decades as the sexual harassment definition that the Federal Government has adopted for Title IX as well. It is, in fact, quite new to think that the standard should be drawn from the Supreme Court case of Davis, which is what the proposed rule now proposes.

The CHAIRMAN. Thank you. Let me keep moving within my 5 minutes because I have several questions. I have another one for you.

Ms. GERSEN. I understand.

The CHAIRMAN. I want to make sure I understood what you said about the standard of evidence. You said that the standard of evidence that should be used in a sexual assault case, harassment case, should be the same standard of evidence that is used in other cases on campus. Which other cases?

Ms. GERSEN. There are many cases on campus that do not have to do with sexual matters. There could be racial harassment cases. There could be just cases that allege wrongdoing of any other kind. There could be theft. There could be plagiarism. And I think that the preponderance of the evidence is now the common standard, and it is, I think, important for all of the standards to be equalized among the different kinds of offenses that schools deal with. I do not—I agree with Ms. Goss Graves that there should not be a uniquely higher standard for sexual matters, nor should there be a lower one.

The CHAIRMAN. Okay. Ms. Hamill, I think it is clear that the law says there has to be a proceeding. It has to be fair, prompt. We have had discussions about vagueness, about notice. It is clear that the Clery Act requires that a student may have an advisor, and of the student's choice, both of them, and that could be a lawyer. The

question then becomes, what is a fair proceeding? The Sixth Circuit Court of Appeals said, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact finder. Others, including Ms. Goss Grave, say that is not necessary.

Let me ask you first, could evidence adduced in a hearing about sexual assault on campus be then used in a state court criminal case against the student who is accused?

Ms. HAMILL. Yes, Chairman. Absolutely. Any statements that are given in the course of a Title IX proceeding could be subpoenaed for law enforcement purposes and used in criminal proceedings.

The CHAIRMAN. If you were representing an accused person in a campus case, your advice to that student would consider the fact that he or she might put themselves at risk in a state criminal court by what they say or do not say?

Ms. HAMILL. That is correct, Chairman. But also, I think that is a small percentage of the matters that come through a Title IX process have definite criminal implications. There is always a specter but there is not always a parallel proceeding——

The CHAIRMAN. Well, what—then in a minute or so, what would be the minimum requirements for a cross-examination that the Sixth Circuit requires? By minimum I mean that would guarantee your client, if it is an accused person, fairness but at the same time not putting unnecessary administrative burden on the 6,000 universities we have, some of which are very small, some of which are large.

Ms. HAMILL. I believe that direct questioning, and by the way it should be very respectful. We are not here to harass witnesses who come into these Title IX proceedings, but it should be direct questioning. Handing out questions in written form to a neutral person to ask the questions is not true cross-examination and it is very difficult. Cross-examination by its nature flows. You may change the order in which you have asked things. You may need to clarify, and it is much better, and it is a better driver at truth, and for the decisionmakers to be able to evaluate the demeanor of witnesses if it is a much more of a given and take.

The CHAIRMAN. Thank you. Senator Murray.

Senator MURRAY. Thank you to all of our witnesses. As I have said, and I think many of us agree, it is critical that schools do have a fair, impartial process to address sexual violence and harassment. It is also important to remember that in most cases we are dealing with students at school, not victims and defendants in a court of law. Which is why I have been frankly shocked at some of the proposals including the proposal from Secretary DeVos that Title IX, which at its core protects students from sex discrimination at school, would require survivors, witnesses, and respondents students to undergo live direct cross-examination in order for a school to investigate issues of sexual violence, or harassment, and discrimination on campus.

To be clear, the proposed DeVos rule would require survivors and even witnesses to submit to direct cross-examination by the accused assaulter or their advocate, and I am really deeply concerned about the negative consequences of requiring schools to use direct cross-examination, including the potential to re-traumatize sur-

vivors and discourage survivors and witnesses from coming forward.

I would like to hear from several of you about whether you think direct cross-examination is required for a fair process. Ms. Graves if I—or Professor Gersen, let us start with you and then Ms. Graves, and then a few others. In your opinion, does a fair process require survivors and respondent students to undergo direct cross-examination?

Ms. GERSEN. Thank you. In my opinion, what is required is the opportunity to ask questions, and I do not think that the essential part of that is the opportunity to do it in a direct fashion so that either your lawyer or the party themselves would be able to do it personally. I think that as long as there is an opportunity to put questions to witnesses and to the other side through a neutral party, that is enough. That actually gets some of the search for truth and I think that we have to make compromises here. We cannot have—it may be that cross-examination is the ideal vehicle for getting at the truth in some context, but in this context there are other considerations. And so, I think that strikes an appropriate balance.

Senator MURRAY. Ms. Graves.

Ms. GOSS GRAVES. Just to build on what Professor Gersen said, I completely agree that it is not an ideal method of getting at the truth, which is what I think schools are trying to do here. And I also think the model that makes a lot of sense is what workplaces typically use. They routinely investigate complaints of discrimination and harassment without having live trials and direct cross-examination. Sort of an unusual model to have institutions put in live trials when the question that they are answering is whether or not you violated the school or the institution's rules.

If I could just add one point about the Baum case that was just discussed out of the Sixth Circuit. It is a bit of an outlier case and so looking at it closely I think it is important. The University of Michigan had decided that they were going to have mini trials, including cross-examination for most things except for sexual assault. And there I think the court struggled with that. If you are a university that is determined that you were equipped to do that, why can't you do that here. Now, I can think of lots of reasons why they may have determined that they cannot do that here, and that the issue was serious enough so that they did not want to test their model in this case, but I do not think that it is similar to the systems that most universities are employing. They are not having live trials to address all student misconduct.

Senator MURRAY. Okay. Ms. Meehan, let me ask you, do the majority of ACE schools require all students to undergo a live cross-examination, or do they use other methods?

Ms. MEEHAN. I do not have a good way to determine exactly what processes all of the different schools use, but I will say that our members had substantial concern about the procedure laid out in the NPRM. And speaking with——

The CHAIRMAN. What do you mean——

Senator MURRAY. From Secretary DeVos's proposed rule.

The CHAIRMAN. Yes, don't do these initials.

[Laughter.]

Ms. MEEHAN. I am sorry.

The CHAIRMAN. We are—with initials.

Ms. MEEHAN. Apologies, yes. And we had concerns about the chilling effect——

The CHAIRMAN. About the proposed rule?

Ms. MEEHAN. About the proposed rule. We had concerns about the chilling effect that could have in the willingness of survivors to come forward and participate. The rule also excludes the testimony of any witness or party who refuses to participate in that live hearing with direct cross-examination, and that also raised a lot of concerns for us.

Senator MURRAY. Yes. I just have a few seconds, but can you tell me any examples where schools have found ways to access credibility without a live cross-examination?

Ms. MEEHAN. Absolutely. There are many ways to do it. Written questions is one way. Posting questions indirectly to the hearing officer, and that the hearing officer then asks them. So, I think there is a lot of options to get at the truth of the matter that do not require that method.

Senator MURRAY. Okay. Thank you. Thank you very much.

The CHAIRMAN. Thank you, Senator Murray. Senator Isakson.

Senator ISAKSON. Mr. Chairman, I am very happy to be here because I have dealt with this subject a lot in my lifetime. I am sorry I have but it is probably the most important thing we will talk about this year, thanks to our country, thanks to our children, thanks for our marriages, etc. I am happily married for 51 years to a lovely lady who has taught me a lot. Most things, I will tell you now, that I have done this right because she has taught it to me. She was a teacher and a good teacher. But I have also had a lot of experiences.

I was chairman of the State Board of Education for the eighth largest state in the country, and I dealt with teachers' certification and employment. And sexual harassment was a common problem, either a student versus teacher, or teacher versus student, more often than not, which is a shame. I went to a large Southern university myself. I was member of a fraternity, which I will not name them. I am not going to name any names. But my freshman year in 1962 which was not that hate Ashby years, this was back when we did not even know what marijuana was and did not drink beer too much. And really behaved pretty normally, unlike today. And a young man or a senior in my fraternity had sex with a girl in his room, a woman, in his room on the second floor of the fraternity house in 1962. And we kicked him out of the fraternity for good. That is a pretty harsh punishment. You would not think that would happen today, and it probably would not happen today, but back then our standards were stronger.

Our standards as a culture have gone down since 1962. That is one of the—you as teachers or responsible person are put in a position of making judgments you really should not have to make. Kids ought to be raised better than they are, but we have not done that as well, so you have to confront some very difficult situations. I ran a company with a thousand women. They worked for the company. It was a sales organization.

Sexual harassment was a tool that buyers and sellers and people involved in a sales transaction and others would take advantage of it if they thought it could help them make a sell, not make a sell, do etc., etc. So, I have dealt with it in classrooms as a parent, fraternity houses as a member of the fraternity, my own household as a father of three and married to wonderful woman, and every place in between, and I just want to offer you a few—one, I think everybody on this panel has been terrific. And I am not going to name anybody over others, but I will tell you this, Ms. Graves had a great point, Ms. Hamill did so. I appreciate the openness of everybody's testimony. I appreciate yours, Ms. Meehan, Dr. Howard, and Ms. Gersen, all of you. But I want to tell you a couple things.

You should not turn the university into a courtroom, but you should absolutely quickly, and I use that definition respectfully, quickly when you are given a complaint against a student for sexual harassment, apply your procedures to that sexual harassment immediately. Too many cases get put away. Our businesses love to put off equal opportunity in cases because EEOC will not let you drag them out until you finally write them a $500 check and they go away. I know how that works. I was in business for a long time. You cannot allow that. Timing is everything, and on sexual harassment, people do not report them as quickly as they should sometimes. That makes it difficult to prove, again. You should have a culture in a university that encourages immediate accusal or presentation of evidence if somebody thinks they were a victim of sexual harassment. But not so good that it is used as a vindictive tool for something to get a point across.

I have seen that happen in my job in education from time to time where one student wants to get another student, so she says or he says or somebody says, somebody did x. And the fact that they charged him with it and it got out—it was a tool, a social tool, not really a responsible tool, which is why you have got to be very careful with what we are playing with right here. And third, you have to have the person who is accused come before the responsible persons at the institution and talk about the issue.

I do not think you have to have a trial and I do not think you have to have a public display, but you absolutely have to have a culture in your company that requires the manager or the person responsible for that individual and that individual to meet on the policies of that company that you think have been violated or they have been accused of violating. And you will 9 times out of 10 figure out what is going on. But it has go to quick, it has got to be decisive, and you have got to make that person who is most in contact with the accused, like their supervisor or their teacher in a room or whatever, to be the person that does it. Do not—everybody wants to split this up. College professors hate this. They do not anymore want to talk about sexual harassment. They fly to the moon. They run away from that responsibility. Well, everything does. I do not like it either and I have had to do it.

I had to let the best employee in my company, in sales, go many years ago because of something she did that was just inexcusable, and it came out. It came out because I confronted her with it in a respectful way hoping it was wrong, and it was right. And she

thought I would never fire her because of how much she did in business, and I did. So, the pressures are all over the place. They are not just between the accused and the person doing the accusing, but they are with everybody. So, speed is absolutely essential but not so fast that you overlook facts. Filing quickly ought to be—you out to have a statute of limitations. I personally think, Mr. Chair. If something is going to file, I know a lot of you do not like those because the Lilly Ledbetter case and things like that, but this is not Lilly Ledbetter. This is accusing somebody of a terrible, awful thing and if somebody did it, they ought to be called, complained when they did it, and company will call it out quickly. And institutions need to deal with them in an expeditious manner.

I have used all my time talking myself and I did not want to do that, but I wanted you to know, there is no easy answer to this subject. But there are a few things that I can tell you in my 35 years in public life and business, that have helped me. And that is what I have tried to suggest to you. Do not—we cannot as a Committee run away from this issue. You cannot run away from us while we are deciding it. The Chairman is doing a great job and the vice chairman is doing a great job of getting the facts out on the table and I am going to stay in this to the bitter end. But I hope when I leave I can say this is one of our achievements. For everybody who went to a college or university and everybody that was employed by somebody knew what was right and was wrong and knew there was going to be consequences if they did not behave. It is really that simple. It is not as complicating as everybody makes it.

The last thing I would say is, I read Ms. Ginsburg's opinions on a lot of things and on sexual harassment, I learned more from what she wrote than anybody. And I had to depend on that in certain cases. So, I commend her to you. I was layman not a lawyer, reading something I needed to learn. Her writings were very good, are very good job, and she does a good job.

Thank you, Mr. Chairman. I have talked too much. I yield back the floor.

The CHAIRMAN. Thank you, Senator Isakson.

Senator Hassan.

Senator HASSAN. Well, thank you, Mr. Chair and Ranking Member Murray, and thank you to the witnesses for being here. I am really pleased to be here to talk about campus safety because obviously students? success and students? safety go hand in hand, and as we work to reauthorize the Higher Ed Act, we have to find ways to protect students from harm. And today this hearing is about campus sexual assault, obviously a very important issue, but I just, before I start asking questions, want to take a moment to recognize a couple of other issues we have to consider during the reauthorization process.

One is substance misuse on campus, and the other is mental health issues on campus. On substance misuse, Senator Tester and I introduced a bill last Congress to ensure that campuses with high rates of substance misuse are able to provide impacted students with the treatment and support that they need. And on mental health, I recently heard from the University of New Hampshire's Chief of Police that there is no greater challenge that he sees on

campus than issues related to the mental health of students. They have transported 63 students, since the beginning of the school year in our flagship campus, to a psychiatric facility. It is stunning.

That is why last Congress I helped introduce the Higher Education Mental Health Commission Act that take steps to better meet the needs of students facing mental health issues. So, I look forward to focusing on those issues among others during our ongoing discussion about the Higher Ed Act. Ms. Goss Graves, I wanted to follow-up a little bit on what Senator Murray was asking about because one of my overarching concerns with the Title IX proposed rule is the potential harmful impact of requiring live cross-examination of survivors who come forward with allegations.

If you can try to be quick in your answers just because I am, like everybody else, trying to move through 5 minutes. Does a live hearing that includes cross-examination have the potential to re-traumatize survivors?

Ms. GOSS GRAVES. It absolutely does. The first thing that we should think about is that because these are not courtrooms and because the Clery rule says an advisor of your choice, it could be your fraternity brother, a parent, a teammate who is asking these questions. There aren't rules that ensure that it is not a traumatizing——

Senator HASSAN. So just, I am assuming from some things I have read and kind of from my own experience that just being asked to relive a traumatic experience in itself is traumatic, and you are saying then without rules and guardrails, it can be even worse?

Ms. GOSS GRAVES. It is precisely why in other settings there is a lot of work to put guardrails in place, in actual courtrooms, in police interviews. There is a lot of work to make sure that they are less traumatizing.

Senator HASSAN. So that is important for us to understand. I also want to take a moment here to discuss traumatic memories because that is another issue. There is extensive research that demonstrates that traumatic memories, like those resulting from an assault, are often distorted and result in fragmented and disorganized memories that are missing details. So, can you explain how cross-examination in these cases could result in inaccurate information?

Ms. GOSS GRAVES. That is right. Recalling experiences of sexual violence is not necessarily linear, right, and one of the things that we have learned is that some things come back in fragments, sometimes the ability to tell the story in a way that sounds—that allows the person who is asking the question to have the precise answer is not what you are going to get, but that also does not mean that it did not happen and it does not mean that you are absolutely getting to the truth. That is why you have experts who are trained in engaging people who have experienced this type of trauma. It is the best course.

Senator HASSAN. Okay. Well, thank you for that. I will submit additional questions to the record about other techniques for getting at the truth in situations like these, but I did want to turn just briefly to the economic impact of campus sexual violence on our campuses. Researchers at the University of New Hampshire's Prevention Innovations Research Center have looked at these long-

term implications of campus sexual assault. Research shows that roughly one-third of survivors leave their studies having long-term earning and career implications for them and our entire economy. Today happens to be equal pay day, the day that marks how far into a new year women have to work to earn what men have already earned in the previous year. In your opinion, do you think that, Ms. Graves, do you think that campus sexual assault has long-term implications to many survivors' future economic potential?

Ms. GOSS GRAVES. There is no question. We have had clients who have not finished college. We have had clients who have dropped out and become homeless. The specific short-term impact is there, but it is also a long-term impact. It means people are not taking the majors that they want to have just avoid the person who attacked them.

Senator HASSAN. Well, thank you for that. And Mr. Chair, I will also submit to the record questions about the particular circumstance of students on campus who experience disabilities because they are disproportionately subjected to sexual violence. Senator Casey and I, this morning, are putting in the SECURE Act, again, to focus on how to make sure campus processes are particularly suited and adjusted for students who experience disabilities. And I will submit further questions about that for the record. Thank you.

The CHAIRMAN. Thank you, Senator Hassan.

Senator Smith.

Senator SMITH. Thank you, Chair Alexander and also Ranking Member Murray, and I am so grateful for this hearing and for all of you being here today to testify. I am interested in honing in on this question of geography, which is part of the way that this proposed rule is written. Secretary DeVos's proposed rule would significantly alter the scope of Title X enforcement when it comes to geography, and it would essentially say, it exactly says, that a college would be required to dismiss a complaint about allegations if that allegation occurs off-campus and is not part of an institution's program or activity. I want to just understand this a little bit.

Let me start with you Professors Gersen. Under this guidance, if the student was sexually assaulted at an off-campus house party, at a private residence say by classmate, would the school be required to dismiss that complaint under the proposed rule?

Ms. GERSEN. Under the proposed rule, unless that off-campus place had some connection to the school's program or activity, that would not fall within the jurisdiction of the school.

Senator SMITH. What if for example that off-campus party or residence, a student in undergrad was assaulted by a graduate student, like a TA, for example. Would the proposed rule in that case require that allegation be dismissed?

Ms. GERSEN. The proposed rule would require a dismissal of that allegation regardless of who it was that was—who it was, the perpetrator. So even if it was two fellow students at an off-campus location.

Senator SMITH. Okay. So, I am trying to understand what due process rights are protected by this narrowing of the scope of Title X enforcement as it relates to geography. I mean what is the—why

would you do that? I would love to hear from Professor Gersen, anybody.

Ms. GERSEN. I think there have risen some concerns about having jurisdiction be absolutely everywhere, and so there are actually legitimate concerns about let us say 25 year old allegations of incidents that may have happened off-campus, maybe even hundreds of miles away. And we are seeing some schools actually taking jurisdictions over those kinds of cases. So, this is about statute of limitations and it is about how do you limit the scope. I think that the proposed rule has gone too far and does not include enough, but there clearly is some kind of balance that should be struck.

Ms. GOSS GRAVES. If I could just add. The Department of Justice's recent study said that 95 percent of sexual assaults occur off-campus. So really the way that I see this proposed rule is limiting the liability of schools in limiting the types of things that they would have to respond to, but it is not good for schools, of course, because they want to know if they have a problem on their campus. The other thing is the relationship between what happens on campus and then what happens the next day on campus is so interrelated.

If there is an assault off-campus, and you are sitting next to the person in class the next day, that harm is continuing, or if you are harassed online constantly that may—I mean with our phones, that may happen while you are on campus or while you are off-campus. So, the way that they have defined this has done nothing but really narrow it to very few incidents that actually a school would be responsible for.

Senator SMITH. Title IX protects a person's right to educational opportunity, and if that right is infringed on because of what happens to you off-campus, for example over the phone or at an off-campus party, there still is a responsibility to protect that student from sexual discrimination for example, even though it does not happen physically on campus or related to the programming of the campus.

Ms. GOSS GRAVES. That is right. The reason that courts have found that is because they acknowledge the connection between what is happening on campus, the program and activities that are happening on campus, and the relationship between the harassment what is happening off, and that sometimes they are so intertwined you cannot separate them.

Senator SMITH. Right. Thank you. Chair Alexander, you had raised the question of geography as one of the three things that you were hoping to look at and I agree with you. I think it is very important and this is, I think, helpful to understand that a strictly arbitrary definition of only on campus probably has the goal of limiting liability but not to limiting discrimination. Thank you.

The CHAIRMAN. Thank you, Senator Smith. And thanks for pursuing that line of questioning.

Senator Kaine.

Senator KAINE. Thank you, Mr. Chair, and thanks to the witnesses. First, Mr. Chair, I would like to introduce into the record a letter that I sent to Secretary DeVos on January 29th about the proposal, and also a lengthy letter that was sent to the Secretary

by our State Council of Higher Education for Virginia on the 28th of January. If I could enter those on the record.

The CHAIRMAN. So, ordered.

[The following information can be found on page 144 in Additional Material:]

Senator KAINE. Thank you all for your testimony. This has been helpful. There are two areas that I want to dig into. And the first is the deliberate indifference standard. I am trying to understand how this proposal would sort of change the equity of the existing rules. So, I want to make sure I understand this, and Ms. Goss Grave maybe I will start with you because your testimony sort of digs into this.

As I read it, the standard under which a college might be liable for their own actions or inactions prior to this proposal was if a college knew or should have known about activity that would meet the harassment definition, then they are required to take immediate and effective corrective action. They are required to take reasonable steps to immediately and effectively correct what they know happened. So that is sort of the current standard. But the proposed standard is, a school will only be held responsible for a response to sexual harassment if its response is clearly unreasonable in light of the known circumstances.

Talking about burdens of proof can be a little bit wonky, but instead of an affirmative obligation on the college, if you know or should have known, you have to immediately take reasonable corrective steps to—you are not going to be held liable unless your actions are clearly unreasonable. That seems to me to be a pretty significant shift in the landscape in terms of what a university's obligation and potential liability would be. Am I reading that correctly?

Ms. GOSS GRAVES. That is correct. I mean, in 2001, the Department of Education put their guidance to notice and comment and had that standard that is more similar to the standard in workplaces of when——

Senator KAINE. If it could—2001, so this was during the Bush administration——

Ms. GOSS GRAVES. It was actually the tail end of the Clinton administration but maintained during the Bush administration and maintained during the Obama administration.

Senator KAINE. There has been a consistent rule that this would alter.

Please continue.

Ms. GOSS GRAVES. Right. Several ones. That is right. And the standard for damages, which was spelled out by the Supreme Court in the Gebser case and in the Davis case was that higher standard. And the reason they did it was they said, if you are going to pay damages, we are going to say that there is a higher standard. We are going to leave it however for the Department of Education to outline what it thinks is the better standard that it should use in its own enforcement, and what is the better standard that should guide schools. So, the court distinguished between damages and what the Department of Education should do for its enforcement.

The Department of Education, after very careful review, including rounds of notice and comment, came up with a standard that was more similar to what happens in workplaces. So, this would

be really a way to upend things for almost 20 years, and sends, I believe, a really confusing signal to schools about at what point they intervene in harassment. All the schools that we talked to say they want to make sure that they intervene promptly and that they do so effectively. They do not want a low, low standard of was I deliberately indifferent. Did everything I do, was everything I did almost wrong except for and the purpose——

Senator KAINE. Can I ask your opinion, do others think we should switch the standard to this deliberately indifferent or a school is okay unless their actions are clearly unreasonable?

Dr. HOWARD. I think institutions have an obligation to respond. These are members of our community. These are students whose behavior is potentially impacting each other, whether it happens on or off-campus, and I think the current standard is very fair.

Senator KAINE. Let me switch to a second topic, if there is no others on this. Ms. Meehan, I was really interested in your testimony and you alluded to it in your oral testimony without getting into, hey, we ought to be focusing on prevention. I am really interested in these processes, but we do have an opportunity in the Higher Ed Act to do things that is about prevention, and you have some examples on page nine of your testimony. You just happened to pick one from Washington State and Tennessee. I wonder how that happened?

[Laughter.]

Senator KAINE. But assure us that there are some good models out there, there are some things that we could draw in, and that university administrators can draw on to actually stop this before it happens. I would love to not have to worry about issues like cross-examination because, men, I would love to have such great prevention programs that we really do a good job there. So, give us some assurance.

Ms. MEEHAN. Yes. Well, we all would like that. And I mentioned in my testimony the work of NASPA, which is the student affairs professionals. They have an initiative called Culture of Respect that has a lot of great resources. They have put together a matrix that outlines some of the major prevention efforts already underway that focus on bystander intervention and things like. Green Dot, I also mentioned as one of the programs that the University of Washington uses, but also the University of Virginia uses. And that is a program that helps, tries to use peer influencers to really change the culture on a campus to get everyone doing something proactive about this problem.

Senator KAINE. Excellent. Thank you so much.

Thanks, Mr. Chair.

The CHAIRMAN. Why did you mention the University of Virginia?

[Laughter.]

The CHAIRMAN. Who we had hoped to play in next weekend but are not. But that is another issue.

Senator Casey.

Senator CASEY. Mr. Chairman, thank you very much. I want to thank the witnesses for being here. I am a little back-and-forth today. We have two hearings that are conflicting. So, I want to first start with something for the record that I have to make sure that we get made part of the record. I would ask that the following doc-

uments be included in the hearing record. No. 1, a letter from the National Council on Disability and accompanying report, "Not on the Radar." No. 2, a letter from S. Daniel Carter and Taylor Parker of SAFE Campuses, LLC. And third, a letter from Eva Amar, parents against campus crime. I want to make sure they are part of the record.

The CHAIRMAN. So, ordered.

[The following information can be found on pages 152-225 and 226 in Additional Material:]

Senator CASEY. Thank you, Mr. Chairman. Today we are introducing legislation, the Safe Equitable Campus Resources and Education Act, or so called SECURE Act. Senator Hassan and I, I am sure this may have already been mentioned but I want to make sure that is on the record. Grateful to be working with Senator Hassan on this. This bill improves on the Campus SAVE Act, my legislation from a number of years ago, and of course the foundational Clery Act, specifically looking at how to strengthen the protections for students with disabilities on campus.

In early '18, the National Council on Disability released an expansive report entitled, I do want to just refer to it, "Not on the Radar, sexual of college students with disabilities." This report found that one in three college students with disabilities were victims of sexual assault, and that of these victims—that these victims often faced additional hurdles in seeking justice and help as a result of their disability. The SECURE Act will make target improvements to the Clery Act to ensure that individuals with disabilities are provided with the same comprehensive support and protections as their peers, and that systems in place to respond to the needs of victims include the accommodations that may be needed by individuals with disabilities.

We are grateful to be introducing that today, but I know I am limited on time, but Ms. Graves, I wanted to ask you a question about the preponderance of the evidence standard. I have long advocated for that standard as the most appropriate standard for institutions of higher education for using campus conduct proceedings related to sexual violence. It is of course part of the Campus SaVE Act. But until the recent proposed rule, the Department of Education at one point seemed to agree with me. I know you have reviewed this already in both your testimony and otherwise, but what do you think is the most appropriate standard for such proceedings, and why?

Ms. GRAVES. I agree that it is the preponderance of evidence standard is the general standard that is used in civil claims, including civil rights violations of which this is. It is the standard that would be applied if we were in actual courtrooms, right, and you were bringing a Title IX claim, they would apply the preponderance standard. It is the standard that is used in employment situations of discrimination and harassment.

One of our concerns is putting this issue in a different space where you would apply a heightened and more burdensome, and a unique standard for sexual violence, a standard that you probably would not apply for other types of misconduct, for other forms of discrimination, including things like racial harassment or disability harassment.

Senator CASEY. Well, I appreciate that, and I am grateful that so many people are willing to push hard on these issues because for a lot of years too many institutions of higher education were not getting the job done, and I think that the change that we have tried to bring about has been essential. I have a couple more questions for the record, but I will submit those. Mr. Chairman, thank you very much.

The CHAIRMAN. Thank you, Senator Casey.

Senator Baldwin.

Senator BALDWIN. Thank you, Mr. Chairman, and thank you to all of our panelists for being here today. We owe every student the ability to learn in a safe environment free of sexual harassment, harassment in general, assault, bullying, etc. And we also know that this problem is very pervasive and has been, well not getting the attention that it deserves for many, many years.

We also have to ensure that there is a fair, transparent, and unbiased process for addressing these cases. And so, we have been discussing the proposed rule that the Department of Education issued last year. There is elements that we have been discussing throughout this hearing that I find very concerning. And so, as we approach the Higher Education Act reauthorization, I think we have to be very careful in understanding the proposed rule's approach, and avoiding mistakes, codifying mistakes that we see at this point.

I am going to start by following on the Chairman's line of questioning regarding the proposed rule's definition of harassment, and I want to note as a tangent that a couple years back, the Congress decided that the entire Congress and its staff should get training in understanding sexual harassment and harassment generally on the basis of other protected categories. And I am mindful of that because we just had an all staffs retreat and everyone in my staff and managers got a little bit of additional training. And there was a lot of focus on the fact that harassment, when it is severe or pervasive, yet the rule that has been proposed for campus is severe and pervasive.

Our discussion in our staff because when you are going through a training you can ask questions, etc. That is really different—and, in this case. So, I would start with you, Ms. Goss Graves, what do you believe would be the consequences for students on college campuses across the country of adopting this particular definition of sexual harassment, and particularly what would be the consequence because it is inconsistent with what applies, say, in the workplace?

Ms. GOSS GRAVES. I think a big consequence is that fewer students will report. One of the reasons that students already do not report, is that they believe their own experiences are not severe. There was a study that showed that recently. And I also think it sends a particular message about the value of their experiences that they are having in schools and the ability for them to be prepared for what they need to know in the workplace. Schools should want to be teaching and applying the standard that their eventual students, who will be eventual workers, will have to use in the workplace, not suggesting that there is something very different.

The last thing I will say is that applying that standard will be very, very difficult if it is an, and, versus an, or. One of the reasons you have an, or, is because it is all sort of a spectrum, right. You could have a few incidents that by themselves actually do not meet the standard but if done again and again and again, all of a sudden, you have a situation that you need to address. You should not wait until someone is basically dropped out of school before deciding that the standard, okay it is both pervasive and severe, and we will finally address it. That is not where schools want to be.

Senator BALDWIN. A question for you, Ms. Meehan. You hear feedback about this proposed rule from many institutions. I am curious what you have heard both about the evidentiary standard, clear and convincing versus preponderance, and about the question that I just asked with regard to the definition being severe and persistent versus severe or persistent. I am sure there is a wide spectrum, but I—if you can summarize.

Ms. MEEHAN. Yes. We did not comment on the specific and, or, or distinction in our comment letter, and I think one of the reasons why that did not surface as one of the issues that the community wanted to talk about is in part because in an employment context and under Title VII, the or standard is already present. So, this is a case where potentially the proposed rule is setting up a different standard than the standard that we will have to apply in other context. So, I think that could be confusing. And there are also a number of institutions that have, for their own purposes, defined sexual harassment on their campus using or.

Your second question regarding the standard of evidence, we did comment on that and we had concerns about particular language around the—there were some restrictions put on the freedom of institutions to choose between those two standards. And we heard from a number of institutions that felt that the way that it was structured, the fact that the standard had to be the same across all disciplinary processes with the same serious conduct violation, and also across employee and student conduct proceedings, that in some cases this was going to create a de facto situation where you were going to be forced to go with a clear and convincing standard on your campus. And many campuses have adopted preponderance of evidence. There are state laws requiring preponderance of evidence. So, you are again setting up a potential conflict between what institutions are required to do and what the new rule might have them do.

The CHAIRMAN. Okay.

Senator BALDWIN. Thank you.

The CHAIRMAN. Thank you, Senator Baldwin.

Senator Rosen.

Senator ROSEN. Thank you. Thank you Chairman. I appreciate all of you being here today. I would like to submit for the record two letters. One from the Title IX coordinator from the University of Nevada Reno that discusses her concerns with this new proposal, and one from the chancellor of higher—from Dr. Thom Reilly. He is a Nevada System of Higher Education Chancellor, where he outlines the following in concerns about the live hearings and the higher education context that we have discussed. About, as we have discussed again, the new regulations. It would more narrowly

define sexual harassment. The requirement to provide an advisor, and the examination of evidence. So, I respectfully would like to submit these for the record.

The CHAIRMAN. So, ordered.

[The following information can be found on page 229 in Additional Material:]

Senator ROSEN. Thank you. And so, as we have heard today, the proposed rule significantly narrows the definition of sexual harassment. You have just been talking about it, the word, and it really makes a big different. And like I said, the chancellor submitted his concerns. The provision would effectively allow schools to turn away students who fall short of this new definition—turn away the reporting their behavior. So, could this make the victims question themselves, wonder, is this bad enough to report, decreasing the chances, you think, of reporting harassment, and increasing the chances that the behavior could escalate?

Ms. GERSEN. Absolutely. That is the case. I would note however that no matter where you draw the definition, there will be people who fall inside it, people who fall outside of it. And the people who fall outside of it will always question, is this an experience that is worth reporting. And so, it is a problem that will occur. I think the main question is really objectively, where do we want to draw the line so that it is an appropriate standard that catches the kind of conduct that affects education in a way that we are concerned about.

Senator ROSEN. Well, let us talk about people who potentially fall outside of it. UNLV is tied for the Nation's most ethnically diverse campus. Many students of color, first generation students, older students, part-time students, all of them face barriers just in their daily life, their challenges, perhaps inherent bias or other kinds of harassment. So, do you think this definition is going to have an effect on students who already may be facing discrimination or other institutional barriers?

Ms. GERSEN. I do. I think it is going to have a very negative effect to have a definition that says severe and pervasive. It just simply does not cover enough conduct that really actually impairs someone's access to education. That is the main concern.

Senator ROSEN. Thank you. I would like to move on to talking about, as we have discussed earlier, a little bit about the hearings that we have, and about having to require advisers. So, one of our Title IX coordinators from Nevada University recently stated her school is not equipped to be and does not wish to be a judicial body. So, if the university is required to provide advisors to each person to manage a quasi-judicial process, what is the financial obligation to the institution, who should bear the cost, and how do we monitor these program's effectiveness and fairness?

Ms. GOSS GRAVES. So the Clery Act requires right now that students be allowed to bring in an advisor of their choice, but if schools are actually going to turn themselves into bodies that are having trials, I think it is critical that both sides have access to counsel. So not just an advisor, to attorneys, so that the process is more informed, so that they understand what is happening with the process. It you are having cross-examination, the idea that you would have cross-examination without someone to be able to object

in real-time to questions that are unfair. All of these things have to spin out about what it looks like in practice versus whatever idea people have about what is happening for schools.

Senator ROSEN. Thank you. I yield back.

The CHAIRMAN. Thank you, Senator Rosen. This has been very helpful to me, and I thank you for your careful analysis. I think Senator Murray and her staff are working with our staff to create an environment where we can have this kind of discussion on an issue that is not so easy to have a discussion on in some form. So, I thank you for that. Let me ask a couple of more questions. Dr. Howard, you operate in a state where if a student wants it, they are entitled to cross-examination, right? Your public university and the state law says so.

Dr. HOWARD. That is correct.

The CHAIRMAN. Did you say that in most cases they do not opt to do that?

Dr. HOWARD. They usually do not opt for what we call the UAPA process.

The CHAIRMAN. Do you offer them the opportunity? Do they know they have that opportunity?

Dr. HOWARD. Yes.

The CHAIRMAN. The Clery Act says they may have an adviser, so do most of them have an adviser? Do you provide the advisor?

Dr. HOWARD. We do not provide an advisor. We allow students to select an advisor of their choosing.

The CHAIRMAN. Is that often a lawyer?

Dr. HOWARD. In recent years, more likely than not it is.

The CHAIRMAN. Then, how do you comply with the—it sounds to me like you really allow for cross-examination, but you do it in a less burdensome way. Would you go back over that again?

Dr. HOWARD. Sure. And to begin with, I think the way our committee, the judicial board frames it, we allow questioning. We do not call it cross-examination. We allow both parties to be screened so they do not see each other to function——

The CHAIRMAN. You mean a screen between the parties?

Dr. HOWARD. Yes. So, they can be——

The CHAIRMAN. Are they comfortable with that?

Dr. HOWARD. We allow that, or we allow them to operate from another room via Skype or some other——

The CHAIRMAN. They can be in another room. They can see each other or not see each other?

Dr. HOWARD. Correct.

The CHAIRMAN. What do most opt to do?

Dr. HOWARD. Most often the screening. To be in the same room, safely screened from each other. We allow them to ask questions of each other, any witnesses. That is generally done through the chair. So, my question might be directed to you, the response would be directed to you——

The CHAIRMAN. That is what Senators are supposed to do, but sometimes we do not. But, so if I wanted to pose a question to Senator Murray, I would do that through you rather than directly?

Dr. HOWARD. Correctly, yes.

The CHAIRMAN. Okay. How does that work? Do you feel—how would you change the law or the proposed rule in order to make your system fair to the accused and fair to the accuser?

Dr. HOWARD. I think we feel our system works quite well. We have concerns about involving additional advisors, especially lawyers, to be able to more directly cross-examine one another——

The CHAIRMAN. That is allowed now, right, by the law?

Dr. HOWARD. By the recent Sixth Circuit decision, they can——

The CHAIRMAN. We are interpreting the cross-examination.

Dr. HOWARD. Yes. They can have the adviser do that. We have not had a hearing since that decision where we have used that, but it is present.

The CHAIRMAN. But would not your state law require you to do that too?

Dr. HOWARD. In the UAPA option, absolutely.

The CHAIRMAN. What does UAPA mean?

Dr. HOWARD. University Administrative Procedures Act. It is a more legalistic process. It is handled through the Attorney General's Office in the State of Tennessee, and so students can choose that option versus a university hearing board, which is mainly what I have been discussing today.

The CHAIRMAN. What standard of evidence do you use?

Dr. HOWARD. In our university judicial process, it is preponderance. The UAPA offers a higher standard.

The CHAIRMAN. Which is clear and convincing?

Dr. HOWARD. Correct.

The CHAIRMAN. You would have to use the clear and convincing, under the state law, if the students insisted on it? Is that right?

Dr. HOWARD. If the student selects that hearing option, correct.

The CHAIRMAN. Ms. Hamill, you have heard some of the witnesses disagree with you on "cross-examination or live examination" and whether it is necessary or not, or whether it is provided. What would your argument be about why an accused person needs the kind of cross-examination you talk about? It has been said and I am sure it must be maybe true, must be true that there is no worse experience than a sexual assault. The second worse might be to be accused unfairly of, or inaccurately, of sexual assault.

What do you recommend we do about the live hearing requirement to cross-examine, the Sixth Circuit opinion, the reluctance some of the other witnesses have to allow lawyers to examine the accuser or the accused and adverse witnesses? What would you say about that, and what would be the minimum protection for your client, let's say it is an accused, without unnecessary burdens on the university or unfairness to the accuser?

Ms. HAMILL. First of all, I think I am heartened that there is more of an emphasis on informal resolution, so hopefully many of these matters would be resolved before a hearing, but a hearing would probably be where the most significant, most—the situation were an accused student is facing the most significant consequences of either expulsion or suspension. They also likely involve issues of credibility, so I think it is very important that there be a way to get at the full truth.

The other piece is that we are in a system, these are not court systems. There is no subpoena power. You do not have discovery.

You do not have rules of evidence, so that often times you actually have a somewhat incomplete record as you go into a hearing. And so, one of the ways to certainly probe the narrative is to be able to have some form of cross-examination. I think it is important to recognize that lawyers have been in these rooms for the last five or 6 years, and schools have known how to limit.

In other words, you do not harass you. You do not do the things. The school has very clearly layout what a lawyer is and is not allowed to do and there is——

The CHAIRMAN. Well under the current Clery regulation, a school may restrict what a lawyer may be allowed to do. Is that correct?

Ms. HAMILL. Absolutely. And basically, I wouldn't ever speak in a hearing. It is all the student that I am advising who is going to be doing the speaking, an opening, a closing, handing up questions to be asked indirectly. And so, I think that anybody who also thinks that it would be effective to bully witnesses, in these proceedings you are not going to be getting—you are not going to be advocating for your client very well if you are using bullying tactics. They would not go over well in these proceedings. I can tell you that from tons of experience in having dealt with the decision-makers in these hearings. So, I think you can set up guardrails that would be appropriate and that would keep a decorum and a dignity and a respectfulness to the process.

The CHAIRMAN. I will give—let Senator Murray have all the time she wants, but let me, Ms. Goss Graves, do you agree that under the Clery Act a student may have an advisor in such a proceeding? Right?

Ms. GOSS GRAVES. That is correct.

The CHAIRMAN. That advisor maybe a lawyer?

Ms. GOSS GRAVES. That is correct.

The CHAIRMAN. Do you think it is okay for the lawyer to submit written questions to a neutral party who then asks the questions of the other party?

Ms. GOSS GRAVES. Do I think it is okay for the lawyer——

The CHAIRMAN. I mean, I am trying to narrow down here what the concern is. If there are questions to be asked, there is a neutral party, an accused, and accuser. So, if the accused has questions, I assume it would be appropriate in your thinking to give those questions to the neutral party——

Ms. GOSS GRAVES. Yes.

The CHAIRMAN. You can ask the accuser those questions?

Ms. GOSS GRAVES. Yes, I understand your question. So, if you are using a hearing format and submitting questions is one way, having people write comments on statements is another. There are lots of ways that people test the veracity of a statement.

The CHAIRMAN. But what you object to is allowing the——

Ms. GOSS GRAVES. The cross-examination.

The CHAIRMAN. Allowing the accused to ask the accuser the questions, right?

Ms. GOSS GRAVES. That is right. The trauma from having the person who you said just raped you, ask you a series of questions directly. That in and of itself—you would not see that in most courtrooms, nor would you want their best friend, their fraternity

brother, their father, any of those people being directly asking you questions about the assault you said happened.

The CHAIRMAN. In a courtroom you would not see that?

Ms. GOSS GRAVES. You would not see that. I mean——

The CHAIRMAN. If you were accused of raping in a state court, you would not see?

Ms. GOSS GRAVES. You would have an attorney. I mean like I have to say it would be extraordinary, so to picture this, for a judge to allow the person who you said raped you to interrogate you on the stand.

Then Chairman. I see. Well would it be appropriate narrowing it down for the lawyer for the accused to ask the accuser directly the questions?

Ms. GOSS GRAVES. So that does happen in court settings with tremendous safeguards that are definitely not in these school proceedings.

The CHAIRMAN. Could you——

Ms. GOSS GRAVES. Specially around—this is one of the reasons why we have the range of rape shield laws. The range of meaningful training for everyone from judges to attorneys to police around how to ask questions in these settings. How to do it in a way that is frankly trauma-informed, and that does not rely on rape myths about, what were you doing, what were you wearing, why were you drinking, that are blaming victims for what they have experienced.

The CHAIRMAN. Ms. Hamill, going back to you and then I will go to Senator—well, I have one other question, but it will still be your view that be properly defended, an accused person in a sexual assault hearing on campus would need to be allowed to have his or her lawyer directly ask questions of the accuser. Is that right?

Ms. HAMILL. I do think so, and I think that advisers could. It does not always have to be a lawyer, you could have advisers who are trained on campus to advocate for the students in these proceedings, but to have an advocate be asking those questions, and then you have the protections of a partition or closed circuit, TV, or anything like that can make the process easier frankly for both parties.

The CHAIRMAN. Okay. And my last. Ms. Meehan, Senator Kaine used the word should have known, what a campus should have known in thinking about what responsibilities a campus, an institution has to follow-up on something. Does your community have any comment about should have known? That could be a broad responsibility for somebody, but what are the limits on that, knowing about—having a designated person be informed of a sexual assault promptly, specifically, that is one thing. That is knowing about it. For anybody on the campus to be saddled with the idea of should have known of something, that is another thing. What comment would you have on that?

Ms. MEEHAN. Yes. I mean, it can be hard for campuses to be aware. Some campuses have thousands of employees, and to be aware of what all of them know can be a difficult thing, but obviously I think the focus, the proposed rule, does make clear that one of the people you can report to is the Title IX coordinator. And there have been a lot of efforts to try to make sure that all sur-

vivors know that is the person that they can go to on their campus to start a process to get supportive services and so on.

The CHAIRMAN. Okay. Senator Murray, and then we will conclude.

Senator Murray.

Senator MURRAY. Yes. I just, I want to go back to the question you were asking before this about this semi-court kind of thing that the rule requires, and I want to make it clear. Ms. Graves let me ask you. The ruling or the rules that Secretary DeVos has put out would allow or require actually for somebody to submit to live examination, and it could be by a live examination by a friend or a coach or their dad. Correct?

Ms. GOSS GRAVES. That is correct.

Senator MURRAY. That is what we find objectionable with her rules.

Ms. GOSS GRAVES. That is right.

Senator MURRAY. Dr. Howard talked about allowing someone to choose that. Would her rules allow you to choose it or not, to choose a live?

Ms. GOSS GRAVES. Well, so there is nothing that prevents people from opting into that type of process. Her rules would mandate it. It would require it.

Senator MURRAY. Okay. I just want to make that clear. I also want to ask, reporting in sexual harassment is really difficult and students often do not believe their school is going to handle the issue correctly, with seriousness and sensitivity. They worry about backlash from teachers, peers, friends, whoever else was at the party. And that I think is, we have to really understand that. I think we have to make it easier to report sexual harassment, not make it harder. And that is what I fear Secretary DeVos's proposed 10 line rule would do when it only require schools to respond to reports of campus sexual assault that were made specifically to a very small group of campus officials. I am doubting most kids know who their Title IX coordinator is.

I would think that survivors would reasonably expect schools to respond if they report to their college professor, for example, or their adviser, or their coach, or some other trusted adult, but DeVos's proposed rule actually would not require schools to take those actions seriously if you said it to your professor or someone that you felt was the person the you should report to. So, Ms. Graves, let me ask you, what do you think is the appropriate expectation for schools' responses? In what situations should schools be responsible for responding to reports of sexual harassment?

Ms. GOSS GRAVES. The reason the standard is knew or should have known is to discourage schools from burying their heads in the sand from the sorts of harassment and violence that they kind of know about and could be preventing and getting ahead of it. So, if you are telling someone, if you have told your professor, or your RA, or the person who you see in a position of authority to you, many students are going to expect that person will do something important with that information.

Senator MURRAY. Right. Ms. Gersen, do you want to comment on that at all?

Ms. GERSEN. Yes. I do think that this is a tricky thing for schools because they have to be clear about which people within their structure, which employees, are designated as people who will be expected to report. And so, some schools, such as the university I teach at, has a kind of mandatory reporter role for professors such as myself. So, if I hear about an incident, I have the obligation to report it according to the school rules. And so, I think that is one of the things that helps schools understand what the lines of authority are, and as long as those things are clear, then you can have a rule that says knows or should have known that does not impose too much of an undue burden on schools.

Senator MURRAY. Okay. Thank you. Thank you to all of you for your testimony. And obviously this is an issue we are going to continue to grapple with, and we will have more questions, but appreciate all of them. Mr. Chairman, I would like to request unanimous consent to enter into the record letters from psychologist, survivors and families, advocates, and more than 90 law professors presenting their views about what makes a fair process for responding to campus sexual assault and violence.

[The following information can be found on page 93 in Additional Material:]

The CHAIRMAN. Thank you, Senator Murray. And Ms. Meehan, I wish you would, on Senator Murray's last question, if you could follow-up with that on the points of view of the universities. I think, as Ms. Gersen says, that is tricky. These are serious accusations and if you are going to be responsible for a campus of 35,000 people, of any sort of should have known responsibility, that too is tricky. So, I would be interested in what the campuses themselves think about that.

Thanks to each of you. I hope you will let us know any thoughts you have about after you go home and say, I wish I would have said x, or somebody said y, and I should have said z. It would be helpful to us to have that. We sometimes have follow-up letters, they do not have to be long, that says please do this. You can see we are dealing with a fairly small number of issues, actually, and some of them may be something we can address, a couple of them are hard to agree on, but this has been very, very helpful.

I hope you would allow us or our staffs to call on you over the next couple of months if we get into further discussions on the Committee and need your advice or your comment about language that we may be writing. The hearing record will remain open for 10 days. Members may submit additional information within that time if they would like.

The CHAIRMAN. Our Committee will meet again on Wednesday, April 10 for another hearing on higher education. Thank you for being here. We will stand adjourned.

# ADDITIONAL MATERIAL

**Comment from 93 Law Professors Regarding Proposed Rulemaking Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Office of Civil Rights, Department of Education**

This proposed rulemaking with regard to the treatment of sexual harassment under Title IX raises a wide range of substantive problems; many of its provisions obstruct, rather than effectuate Title IX, and rest on inaccurate descriptions of relevant Supreme Court decisions or exceed the regulatory authority of the Department. This comment raises a distinct type of objection to the proposed regulation: that in a large number of important respects the proposal is so unclear as to provide insufficient guidance to recipients about their new obligations, to victims and alleged harassers regarding their rights and responsibilities, and to the public as a whole as to what is being proposed.

Because Title IX, which is the basis of the Department's rulemaking authority, is spending clause legislation, it is essential that any regulation make clear to recipients what obligations they are assuming if they accept federal financial assistance. Rather than regulating schools or other educational institutions broadly, Title IX instead requires institutions which accept federal educational assistance to agree to comply with specific conditions that are attached to that funding. The requirement of clarity is not controversial; indeed, the NPRM itself notes that recipients are entitled to clear notice of their obligations under Title IX. The NPRM relies on this principle for its requirement that a recipient need not do anything at all about specific instances of sexual harassment until and unless the appropriate official gets certain specific information about that harassment. But in many respects the proposed regulation itself creates confusion instead of clarity. Its newly devised, interrelated provisions pose a large number of novel questions regarding what a recipient would have to do if the regulation were finalized. As proposed, these provisions make it impossible for even experienced attorneys to advise a recipient on its compliance with Title IX with any confidence regarding what the answers to those questions may be or what the recipient would be obligated to do if it accepts federal financial assistance. That uncertainty is particularly serious because the Department is proposing to issue regulations, rather than issue a less formal and less binding guidance.

Clarity is especially important because of the contentious nature of sexual harassment claims. Complainants and respondents usually have a substantial personal stake in any report of sexual harassment that a recipient addresses. Whatever a recipient does, either the complainant or the respondent is likely to object or challenge, and complainants and respondents alike have with significant frequency sued recipients because of the manner in which a sexual harassment complaint was handled. In this context, uncertainty about the meaning of a Title IX regulation is certain to provoke increased and more intractable litigation. When an ambiguous provision bears on a recipient's action in a particular case, the party unhappy with the outcome has every reason to focus on that provision and to argue that the recipient's action was inconsistent with the correct interpretation. Uncertainty about the meaning of applicable regulations will significantly increase the grounds on which potential plaintiffs and their attorneys will see a basis for litigation, and will multiply the issues in those cases.

Clarity is also essential because the Department proposes to issue binding and highly specific regulations, rather than more generally phrased Guidelines. Past experience with earlier guidances demonstrates the great difficulty in framing standards whose meaning would be clear, and sensible, in the wide variety of circumstances in which sexual harassment, and sexual harassment complaints, can arise. Because of the binding and specific nature of the proposed regulation, uncertainty about the meaning of each word and phrase, and about the inter-relationship of provisions, can be highly problematic. This ill-considered approach denies recipients flexibility in applying broadly framed guidelines to unforeseen situations and replaces that freedom with vexing issues of construction. Because much of this regulatory scheme has been made up out of whole cloth, the Department has no body of experience illustrating the practical questions that have arisen out of similarly schemes.

Clarity is vital to sexual harassment victims and students accused of sexual harassment as well. In the past, although some institutions have made earnest efforts to prevent and correct sexual harassment, other schools turned a blind eye to sexual harassment, looking for ways to avoid taking serious action, or even any action, on

a complaint, and in some instances ignoring pervasive ongoing sexual misconduct. Others have found it difficult to find the resources to learn about what Title IX requires and to adjust their policies, procedures, services, and prevention programs in a manner that both complies with their Title IX obligations and responds to their institution's and community's needs related to this harassment. This history, both recent and longstanding, has led some schools to fail to comply with Title IX in ways that harm both victims and accused students. Because the proposed regulations could be interpreted to forbid some steps to prevent and correct sexual harassment, those officials who would prefer to do as little as possible about sexual harassment will be able to find language throughout these proposals that could be construed as providing a federally-endorsed excuse for inaction. More importantly, the larger group of institutions that have relatively recently devoted significant resources to understanding and meeting their obligations under Title IX—in some cases making and correcting errors along the way that harmed both victims and accused students—will have to redo almost all of that work to adjust to a new legal landscape that not only is drastically changed but also lacks clarity. The lack of clarity, in particular, will virtually guarantee that such institutions will make even more costly errors, potentially harming accused students, student victims, or both, as they struggle to understand and adjust to these shifting regulatory sands.

Uncertainty about the meaning of the proposed regulations has also seriously undermined the notice and comment process. At recipient institutions, lawyers and non-lawyers alike are struggling to understand what their schools would be required, forbidden, and permitted to do under the proposal. They are finding it difficult to comment on the proposed regulations except in general terms because many specific details are unclear. Neither recipients nor any other interested parties should be asked to imagine all the possible meanings of dozens of inter-related provisions, and then offer comments on each hypothetical and combination of hypotheticals.

We set out below 80 material questions that we have been able to identify about specific provisions in the proposed regulation. It may well be that the Department never thought about some of these issues when it issued the proposal; that would, in a sense, be understandable because it appears that this entire regulatory scheme was created out of whole cloth, with little evidence of experience regarding how a particular provision might work in practice, how provisions would inter-relate, or what particular terms would mean in the real world. Provisions with wording that seems straightforward in the abstract are often vexingly unclear when read in light of the wide variety of problems of sexual harassment that actually occur at educational institutions, and of the manner in which those institutions address other types of misconduct. The time for the Department to figure all this out is before the regulation is promulgated, indeed, it is before the public is asked to comment on the proposal.

**Questions Regarding The Meaning of The Proposed Regulation**

*Program and Activity*

(1) If a victim is sexually assaulted by a fellow student outside of a recipient's education program or activity, but the accused rapist's subsequent presence in that program or activity (e.g., on campus) creates a hostile environment in the program or activity that effectively denies the victim equal access to the education program or activity, does that combination of circumstances constitute "sexual harassment in an education program or activity" under sections 106.44(a), 106.44(b)(4) and 106.45(b)(3)?

(2) If a victim is sexually assaulted by a fellow student outside of a recipient's education program or activity, and the victim is thereafter, in the program or activity, taunted or otherwise harassed with regard to that assault, must the recipient take into account the earlier sexual assault in determining whether the harassment effectively denied the victim equal access to the program or activity and thus constituted sexual harassment, as defined in section 106.30, in that program or activity under sections 106.44(a) and 106.44(b)(4) and 106.45(b)(3)?

(3) If a recipient ordinarily exercises disciplinary power over student misconduct outside a program or activity, may the recipient decline to do so if the misconduct is sexual harassment, or would making such a gender-based exception constitute discrimination on the basis of sex in violation of section 106.31 and/or Title IX itself? For example, if under its student code a recipient would punish a student for assaulting another student outside

a program or activity, may the recipient ignore student-on-student sexual assault outside its education program or activity?

(4) If a recipient chooses to address a complaint involving sexual harassment that did not occur in a program or activity, do the proposed regulations impose any standards or procedures to be followed in doing so? If so, what are those standards and/or procedures?

(5) Title IX forbids discrimination "under" an education program or activity. Sections 106.44(a) and 106.44(b)(2) refer to sexual harassment "in" an education program or activity, and section 106.45(b)(3) refers to sexual harassment "within" a program or activity. Do "in" and "within" in those proposed sections mean something different than "under" in Title IX, and if so what is the difference in meaning?

(6) Title IX forbids "discrimination" under an education program or activity. Sections 106.44(a) and 106.44(b)(2) refer to "sexual harassment" in an education program or activity. If sexual harassment occurred outside an education program or activity, but resulted in discrimination under the education program or activity, would a recipient be required to respond to that situation?

(7) Under Title IX an individual may not be "excluded" from a federally assisted program or activity on the basis of gender. If a recipient knows that sexual harassment which did not occur "in" its education program or activity nonetheless effectively excludes the victim from equal access to that program or activity, is the recipient required to respond?

*Sexual Harassment and Equal Access*

(8) If a recipient chooses to address a complaint involving unwelcome conduct on the basis of sex that did not effectively deny the complainant equal access to the recipient's education program or activity, and that is not otherwise "sexual harassment' as defined in section 106.30, do the proposed regulations impose any standards or procedures to be followed in doing so? If so, what are those standards and/or procedures?

(9) If a recipient exercises disciplinary power over student misconduct that does not affect the complainant's access to its program or activity, may the recipient decline to do so for sexual harassment, or would making such a gender-based exception constitute discrimination on the basis of sex in violation of section 106.31 or Title IX itself? For example, if under its student code a recipient would punish a student for harassing another student even if the harassment did not affect access, may the recipient refuse to respond to sexual harassment unless it affects equal access?

*Quid Pro Quo Harassment*

(10) Under section 106.30 an employee "conditioning the provision of an aid, benefit, or service of the recipient on an individuals' participation in unwelcome sexual conduct" is sexual harassment per se, regardless of whether or not it effectively denied that individual equal access to the recipient's education program or activity. Does "conditioning" in section 106.30 mean

(a) only an express quid pro quo demand,

(b) a subjective intent on the part of the employee to deny the aid, etc., if the individual refuses to participate, even if not communicated at the time,

(c) action by the employee which the individual reasonably perceived to contain a threat of denial of an aid, etc., and/or

(d) withholding an aid, benefit or service because an individual declined to participate in unwelcome sexual conduct?

*Retaliation*

(11) Does the act of retaliating against an individual because he or she declined to participate in or objected to unwelcome conduct on the basis of sex constitute misconduct to which a recipient must respond because that retaliation itself would constitute unwelcome conduct on the basis of sex under section 106.30, e.g. in light of Jackson v. Birmingham Bd. of Ed., 544 U.S. 167 (2005)?

(12) If a recipient has a policy forbidding false statements in connection with an investigation, section 106.45(b)(2)(i)(B) requires that the policy to be disclosed to the complainant and respondent. If a recipient has a policy forbidding retaliation against an individual for reporting or filing a formal

complaint about sexual harassment, or for providing information in connection with an investigation of sexual harassment, what, if any, is the recipient's duty to disclose this policy? Would it be inconsistent with the requirement of "equitable" treatment in section 106.8(c) and 106.45(b)(1)(i) for the recipient to fail to disclose that policy?

(13) How does the limitations under section 106.45(b)(3)(iii), that prohibits a recipient from restricting "the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence" interrelate to the obligation to prevent and address retaliation? For example, may a respondent have a private investigator speak to large numbers of campus community members to obtain information about his or her sexual history?

*Knowledge by A Person With Authority To Institute Corrective Measures*

(14) If a recipient has actual knowledge that a student or employee has been subjected to unwelcome conduct on the basis of sex, or of an allegation of such misconduct, but does not know whether or not the misconduct effectively denied the victim equal access to the recipient's education program or activity, must the recipient respond under sections 106.44(a) and 106.44(b)(4), at least to seek the missing information? If the recipient need not and chooses not to respond to that unwelcome conduct or an allegation thereof, does the respondent have an obligation to inform the complainant of the nature of the missing and needed additional information regarding denial of equal access?

(15) If a recipient has actual knowledge that a student or employee has been subjected to sexual harassment as defined in section 106.30, but does not know whether or not the sexual harassment occurred in the recipient's education program or activity, must the recipient respond under sections 106.44(a) and 106.44(b)(2), at least to seek the missing information? If the recipient need not and chooses not to respond to that sexual harassment or an allegation thereof, does the recipient have an obligation to inform the complainant of the nature of the missing and needed additional information regarding whether the sexual harassment occurred in its educational program or activity?

(16) Is a recipient required to notify employees and students, in light of the definition of recipient in section 106.30, that it is not obligated to address sexual harassment in its education program or activity if the harassment is only reported to a person who lacks authority to institute corrective measures?

(17) Must a recipient notify employees and students as to the identity of the persons who have authority to institute corrective measures within the meaning of section 106.30?

(18) Is a recipient required to notify employees and students when a person to whom they could ordinarily take complaints, such as a dormitory resident adviser, a coach or a counselor, is not a person with authority to institute corrective measures under section 106.30?

(19) Must a recipient direct any of its employees who have knowledge of what could be sexual harassment (or an allegation thereof), but who are not themselves persons with the authority to institute corrective measures, to notify (in the absence of a request for confidentiality) a person who does have authority to institute corrective measures? If so, which employees must be so directed?

(20) Under section 106.8(c), which requires that a recipient notify students and employees regarding how to report sex discrimination and how to file a complaint of sex discrimination, must the person to whom reports or complaints are to be made be a person with authority to institute corrective measures within the meaning of section 106.30?

*Informal Resolution*

(21) If a recipient is required only to provide the "parties" with written notice regarding the informal process, would parties mean the complainant and respondent as defined by section 106.44(e)(2) & (3) only? If so, what if one or both of the complainant and respondent is a minor or person who is legally incompetent? Would parents and/or guardians get such notice as required under § 106.45(6)?

*Formal Complaint*

(22) If an individual makes a complaint that is not a formal complaint as defined in section 106.30, because it is an oral complaint or an unsigned written complaint, and the recipient declines to treat it as a formal complaint, would it be clearly unreasonable under section 106.44(a) and 106.44(b)(4) for a recipient to fail to notify the complainant that it is declining to do so, or to fail to notify the complainant as to what additional action the complainant must take to file a formal complaint?

(23) Does the duty in section 106.44(a) and 106.44(b)(4) to not respond with deliberate indifference require a recipient to advise a complainant that the handling of a complaint will be subject to different requirements, procedures or standards depending on whether or not the complaint is written and signed, and thus a formal complaint governed by section 106.45, or a non-formal complaint subject only to the general requirement in section 106.44(a) and 106.44(b)(4) that the recipient not act with deliberate indifference? If so, to what extent must the recipient explain the differences in procedures? If such notification is not required, is it permissible?

(24) If a written and signed complaint alleges sexual harassment in the recipient's education program or activity, but does not specifically request initiation of the recipient's grievance procedures as required by the definition of formal complaint in section 106.30, and the recipient declines to treat it as a formal complaint, do sections 106.44(a) and 106.44(b)(4) require the recipient to notify the complainant that it is doing so, and to notify the complainant as to what additional language is needed to turn the complaint into a formal complaint?

(25) If a recipient understands that individuals complaining about sexual harassment are deterred from or uncomfortable making signed written statements, must the recipient treat oral complaints, or non-signed written complaints, as formal complaints so long as they are made to the official to whom formal complaints would be made?

(26) If an institution of higher education notifies a person asserting sexual harassment that he or she can file a formal complaint, and offers supportive measures as defined in section 106.30, must the institution notify that person that if he or she accepts any supportive measure, the institution will under section 106.44(b)(3) be absolved of any further responsibility to address the asserted sexual harassment?

(27) Do sections 106.44(a) and 106.44(b)(4) forbid an employee of a recipient from discouraging or delaying an individual from filing a formal complaint or from otherwise reporting what could be sexual harassment?

(28) If a person authorized to institute corrective measures knows of sexual harassment (as defined in section 106.30), or allegations or a report of such sexual harassment, in a recipient's education program or activity, but no formal complaint as defined in section 106.30 is filed, do the regulations establish any standard regarding how the recipient must respond other than the general requirement in sections 106.44(a) and 106.44(b)(4) that the response must not be "deliberately indifferent"?

(29) If a student gives to a person authorized to institute corrective measures a document alleging that he or she was subjected to sexual harassment (as defined in section 106.30) by a respondent about conduct within the recipient's education program or activity and requesting initiation of the recipient's grievance procedure consistent with section 106.45, is the recipient required by section 106.44(a) or 106.44(b)(4) to conduct an investigation?

(30) If a student makes a verbal report to a person authorized to institute corrective measures alleging that he or she was subjected to sexual harassment (as defined in section 106.30) by a respondent about conduct within the recipient's education program or activity and requesting initiation of the recipient's grievance procedure consistent with section 106.45, is the recipient required by section 106.44(a) or 106.44(b)(4) to conduct an investigation?

*Training*

(31) Section 106.45(b)(1)(iii) requires that coordinators, investigators, and decision-makers receive training on "the definition of sexual harassment." As used in this section, does "sexual harassment" refer to

(a) sexual harassment as defined in section 106.30,

(b) sexual harassment as defined in "the recipient's sexual misconduct policy," which under section 106.45(b)(2)(i)(B) is the standard about which the parties are notified, and which under sections 106.45(b)(4)(ii)(A) and 106.45(b)(4)(ii)(D) is the standard that the decision-maker applies, or

(c) both.

(32) If the scope of the sexual harassment forbidden by the recipient's sexual misconduct policy is broader than the definition of sexual harassment in section 106.30, must coordinators, investigators and decision-makers be trained on the narrower section 106.30 definition? If the scope of the sexual harassment forbidden by the recipient's sexual misconduct policy is broader than the definition of sexual harassment in section 106.30, under what circumstances would a coordinator, investigator or decision-maker apply the narrower section 106.30 standard?

*Mandatory Dismissal*

(33) If, following the filing of a formal complaint, a recipient concludes that a complainant is the victim of ongoing unwelcome conduct on the basis of sex (for example, his or her teacher on made several lewd remarks to the complainant) but the conduct has not yet continued long enough to effectively deny the victim equal access to the recipient's education program or activity and thus constitute sexual harassment as defined in section 106.30, is the recipient required, or permitted, to dismiss the complaint under section 106.45(b)(3), and to compel the victim to endure the continuing unwelcome conduct on the basis of sex until it has reached the point at which that misconduct effectively denies the victim equal access to the recipient's program or activity, at which time a new formal complaint could be filed and would be acted on?

(34) Prior to dismissing a formal complaint under section 106.45(b)(3), does the requirement in sections 106.b(c) and 106.45(b)(1)(i) that a recipient handle a complaint in an "equitable" manner, the requirement in sections 106.44(a) or 106.44(b)(4) that a recipient not act with deliberate indifference, or the requirement in section 106.45(b)(1)(iii) that officials be trained to "ensure due process for all parties," require that the recipient first

(a) notify the complainant that it is considering such a dismissal,

(b) notify the complainant of the relevant standard regarding the meaning of "sexual harassment" or "in an education program or activity," and/or

(c) provide the complainant an opportunity to adduce argument or evidence to show that dismissal would not be warranted under those standards?

(35) If a recipient dismisses a complaint under section 106.45(b)(3), must the recipient provide the complainant with a written explanation of that decision, including a statement of any findings of fact supporting the decision?

(36) If a recipient permits a respondent to appeal a determination of responsibility, must the respondent permit a complainant to appeal a dismissal under section 106.45(b)(3), and if so must the recipient notify the complainant of that right?

(37) If whether a formal complaint is subject to dismissal under section 106.45(b)(3) turns on a dispute of material fact, must that dispute be resolved under the general standards and procedures in section 106.45, or should or may the recipient use some other standard and procedure?

(38) If a recipient, as required by section 106.45(b)(3), dismisses a formal complaint because the conduct did not constitute sexual harassment as defined in section 106.30, may the recipient then entertain under its own code a new complaint regarding the misconduct alleged, so long as that new complaint is not a formal complaint as defined in section 106.30?

(39) If a recipient, as required by section 106.45(b)(3), dismisses a formal complaint because the conduct did not occur in an education program or activity, may the recipient then entertain under its own code a new complaint regarding the misconduct alleged?

(40) Sections 106.44(a) and (b)(1) refer to "sexual harassment" in an education program or activity. Section 106.45(b)(3) refers to "conduct" in an education program or activity. Title IX refers to "discrimination" in an education program or activity. Do "sexual harassment" and "conduct" mean the same thing? Do they mean the same thing as "discrimination"? For exam-

ple, if a sexual assault outside the education program or activity combined with the subsequent presence of the perpetrator in the program or activity to discriminate against the victim, would that be within the scope of section 106.45(b)(3)?

*Interim Protective Measures*

(41) Do the proposed regulations in any way restrict what interim measures a recipient may take with regard to sexual harassment in an education program or activity prior to a determination of responsibility at the conclusion of the grievance process?

(42) Is a recipient barred (e.g. by section 106.44(d)) from putting a student employee on administrative leave prior to a determination of responsibility? If so,

(a) Does "student" include a regular employee who is taking any class?

(b) Does "student" include a graduate student employee who has completed all coursework and oral examinations, but still has to complete his or her thesis or dissertation?

(c) Does this rule preclude consideration of a pending complaint of sexual harassment, or a prior report of sexual harassment that was not resolved on the merits, in determining whether to hire a student as an employee or to renew his or her appointment?

(d) Does this bar apply even though the school under its own procedures might put a student employee on administrative leave for misconduct other than sexual harassment?

(e) Does the bar apply to misconduct that is otherwise outside the scope of the proposed regulations because the unwelcome conduct on the basis of sex did not effectively deny a person equal access to the recipient's education program or activity and/or was not otherwise within the section 106.30 definition of sexual harassment?

(f) Does the bar apply to misconduct that is otherwise outside the scope of the proposed regulations because the sexual harassment did not occur in a program or activity?

(43) Is a recipient barred (e.g., by the definition of supportive measures in section 106.30) from taking any disciplinary action against a respondent for sexual harassment in its education program or activity prior to a determination of responsibility? If so:

(a) Does the bar apply to misconduct that is otherwise outside the scope of the proposed regulations because the unwelcome conduct on the basis of sex did not effectively deny a person equal access to the recipient's education program or activity and/or was not otherwise within the section 106.30 definition of sexual harassment?

(b) Does the bar apply to misconduct that is otherwise outside the scope of the proposed regulations because the sexual harassment did not occur in a program or activity?

(c) Does the bar apply to interim disciplinary action for sexual harassment even though the recipient takes interim disciplinary action for other conduct code violations?

(d) May a respondent challenge an interim facially non-disciplinary action on the ground that the recipient's covert motive for taking that action was to discipline the respondent?

(44) Do the proposed regulations in any way restrict what interim measures a recipient may take with regard to sexual harassment in an education program or activity prior to a determination of responsibility at the conclusion of the grievance process?

(45) Is a recipient barred (e.g., by section 106.44(c)) from removing a respondent from its education program or activity on an emergency basis for sexual harassment in that program or activity unless that recipient determines that the respondent poses an "immediate threat" to the health or safety of students or employees? If so:

(a) What does "safety" mean, e.g., is it any crime? Could it encompass non-criminal activity?

(b) What does "health" mean, e.g., would it include the mental health of the complainant?

(c) What does "immediate" mean, e.g. must a recipient afford a hearing to a removed respondent in a shorter period of time ("immediate") than the period of time within which the recipient must afford a complainant a hearing ("reasonably prompt" under section 106.45(b)(1)(v))?

(d) Does the bar apply to misconduct that is otherwise outside the scope of the proposed regulations because the unwelcome conduct on the basis of sex did not effectively deny a person equal access to the recipient's education program or activity and/or was not otherwise within the section 106.30 definition of sexual harassment?

(e) Does the bar apply to misconduct that is otherwise outside the scope of the proposed regulations because the sexual harassment did not occur in a program or activity?

(f) Does the additional requirement that a post-removal opportunity to challenge the removal be provided "immediately" mean that a removed alleged sexual harasser is entitled to an opportunity to be heard in a shorter period of time than the "prompt" time frame for acting on a complaint by an alleged sexual harassment victim?

(46) Are recipients barred (e.g., by the definition of supportive measure in section 106.30) from imposing interim non-mutual no-contact orders (e.g., permitting a student to contact a faculty member respondent, but not vice versa). If so, does the bar apply to misconduct that is otherwise outside the scope of the proposed regulations, because the unwelcome conduct on the basis of sex did not effectively deny a person equal access to the recipient's education program or activity and/or was not otherwise within the section 106.30 definition of sexual harassment, or because the sexual harassment was not in the recipient's education program or activity?

(47) Is the presumption of non-responsibility in section 106.45(b)(1)(iv) and section 106.45(b)(2)(i)(B) conclusive until there has been a determination regarding responsibility at the conclusion of the grievance process, i.e. does it preclude a recipient in deciding whether to provide some interim protective measure from making a preliminary determination of responsibility? If so, does that bar apply to unwelcome conduct on the basis of sex that is not otherwise within the scope of the proposed regulations because the respondent's unwelcome conduct on the basis of sex that did not effectively deny a person equal access to the recipient's education program or activity and was not otherwise within the section 106.30 definition of sexual harassment, or to sexual harassment did not occur in a program or activity?

*Clear and Convincing Evidence Standard*

(48) In resolving a complaint of sexual harassment, does section 106.45(b)(4)(i) permit a recipient to apply a clear and convincing evidence standard even though the recipient instead uses a less-demanding preponderance of the evidence standard for

(a) all other student conduct code violations,

(b) all or some other complaints of harassment by students,

(c) all or some other complaints of discrimination by students,

(d) all or some other conduct code violations by students that carry the same maximum disciplinary sanction,

(e) a complaint that the individual who alleged sexual harassment had made an inaccurate statement?

(49) Under section 106.45(b)(4)(i), a recipient may not use a preponderance of the evidence standard unless it uses that standard for "conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction." Does this bar to the use of the preponderance standard apply when a clear and convincing standard is used for

(a) all conduct code violations that carry the same maximum disciplinary sanction,

(b) a majority of conduct code violations that carry the same maximum disciplinary sanction,

(c) more than one but less than a majority of conduct code violations that carry the same maximum disciplinary sanction, or

(d) even a single other conduct code violation that does not involve sexual harassment but carries the same maximum disciplinary sanction?

(e) a penalty phase only (such as to impose expulsion), but not for lesser penalties or to make findings of whether misconduct occurred,

(f) student infractions that are governed under a separate policy from the student conduct code (such as an honor code), but not for misconduct governed by the student conduct code,

(g) student conduct code violations, but not for other forms of discrimination and harassment by students?

(50) Does this bar apply to complaints about unwelcome sexual conduct that are not otherwise within the scope of the proposed regulation because the conduct was not sexual harassment as defined in section 105.30, or because the sexual harassment did not occur in the recipient's education program or activity?

(51) Under section 106.45(b)(4)(i), a recipient must "apply the same standard of evidence for complaints against students as it does for complaints against employees." Is a recipient required to use a clear and convincing standard for complaints of sexual harassment by students if a clear and convincing standard is applied to

(a) all complaints against employees,

(b) complaints against a majority of employees,

(c) complaints against even a single employee

(d) complaints about some but not all types of misconduct by employees,

(e) a complaint about even a single type of misconduct,

(f) complaints about some forms of employee misconduct, but not complaints alleging discrimination and/or harassment by employees towards students,

(g) complaints about some forms of employee misconduct, but not complaints alleging discrimination and/or harassment by employees towards other employees,

(h) some, but not all, aspects of complaints against employees (e.g., where the preponderance standard is used to determine whether misconduct occurred, but a clear and convincing standard is required for some forms of discipline against a class of employees, such as revoking tenure for tenured faculty)?

(52) Does the bar to applying a preponderance standard to student sexual harassment unless the recipient uses that standard for "conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction" apply to complaints about unwelcome sexual conduct that is not otherwise within the scope of the proposed regulation because the conduct was not sexual harassment as defined in section 105.30, or because the sexual harassment did not occur in the recipient's education program or activity?

*Cross Examination and Questions Under Section 106.45(b)(3)(vi)*

(53) Under section 106.45(b)(3)(vii), must a recipient permit all cross-examination questions that are relevant and outside the rape shield exclusion?

(54) Under section 106.45(b)(3)(vi), must a recipient ask all questions proposed by a party that are relevant and outside the rape shield exclusion?

(55) May a recipient bar a cross-examination question, or refuse to ask a question posed by a party, on the ground that it is misleading, e.g. that it assumes a fact not in evidence?

(56) May a recipient bar a cross-examination question, or refuse to ask a question posed by a party, on the ground that it is repetitive, e.g. the question has already been asked and answered?

(57) May a recipient bar a cross-examination question, or refuse to ask a question posed by a party, on the ground that it seeks privileged information, e.g. that it asks a witness what he or she told his or her attorney or his or her section 106.45(b)(3)(iv) advisor?

(58) May a recipient bar a cross-examination question, or refuse to ask a question posed by a party, on the ground that it is abusive?

(59) Under section 106.45(b)(3)(vii), a decision-maker may not rely on any statement of a party or witness if the party or witness "does not submit to cross-examination" at the hearing. Does "does not submit to cross-examination" refer to

(a) a refusal to answer even a single question on cross examination, a refusal to answer a significant number of cross-examination questions, or only a refusal to answer all cross-examination questions,

(b) all refusals to answer, or only to refusals based on certain objections (e.g. self-incrimination) but not others (e.g., privacy, attorney-client privilege)?

(60) If a recipient poses questions to a party or witness under section 106.45(b)(3)(vi), and the party refuses to answer (e.g., on grounds of self-incrimination), may the decision-maker nonetheless rely on the statements of that party or witness?

*Duty of Recipient*

(61) Under sections 106.44(a) and 106.44(b)(4), may a recipient instruct its officials that, in responding to allegations of sexual harassment in an education program or activity, they are not required to make a diligent, good faith effort to identify and correct any sexual harassment, but need only to act in a manner that is not clearly unreasonable?

(62) Under sections 106.44(a) and 106.44(b)(4), may a recipient instruct its officials that, in responding to a formal complaint of sexual harassment, they may act in a manner that is clearly unreasonable (e.g., in assessing the evidence), so long as they comply with the procedural requirements of section 106.45 and thus fall into the safe harbor in section 106.44(b)(1) or section 106.44(b)(2)?

(63) Is sexual harassment (as defined in section 106.30) in an education program or activity of the recipient by a student or employee of the recipient against a person in the United States a violation of either

(a) Title IX,

(b) any existing regulation, or

(c) the proposed regulation?

For example, if a college president told an applicant that she would not be admitted unless she participated in unwelcome sexual conduct, would that quid pro quo demand violate Title IX itself or an existing or proposed regulation? Would the answer depend on whether the victim acquiesced and was admitted, or refused and was rejected?

(64) Does intentional discrimination on the basis of sex by a recipient in the manner in which it responds to a report or complaint of sexual harassment violate the proposed regulation (e.g. section 106.45(a)), an existing regulation, or Title IX itself? If so, would the "safe harbor" in section 106.44(b)(1), section 106.44(b)(2), or section 106.44(b)(3) bar such a claim?

(65) Does the duty of a recipient under sections 106.44(a) and 106.44(b)(4) to respond to sexual harassment in a manner that is not clearly unreasonable apply to the decision-maker's factual determination as to whether the respondent was responsible for the alleged sexual harassment? If so, is that duty inapplicable

(a) if the recipient follows the procedures in section 106.45 and thus falls within the safe harbor in section 106.44(b)(1) or section 106.44(b)(2), or

(b) because of section 106.44(b)(5)?

(66) Does the duty of a recipient under sections 106.44(a) and 106.44(b)(4) to respond in a manner that is not clearly unreasonable apply to the decision maker's determination regarding whether, and in what manner, to discipline a respondent whom the decision maker concludes is responsible for sexual harassment. If so, is that duty inapplicable if the recipient follows the procedures in section 106.45 and thus falls within the safe harbor in section 106.44(b)(1) or section 106.44(b)(2)?

(67) Does the duty of a recipient under section 106.44(a) and 106.44(b)(4) to respond to sexual harassment in a manner that is not clearly unreasonable include consideration of whether the recipient's response may fail to protect individuals other than the complainant from future sexual harassment? If so, would the safe harbor in sections 106.44(b)(1), 106.44(b)(2) or 106.44(b)(3) apply even if the recipient, by failing to do more than required by those sections, created a clearly unreasonable risk of sexual harassment of others? For example, if a student reported that she had been forcibly raped by a faculty member, and then accepted a supportive measure and

did not file a formal complaint, could the institution be liable if it took no further action and the faculty member then forcibly raped another student?

*Delays Regarding Formal Complaints*

(68) Section 106.45(b)(1)(v) provides that the existence of concurrent law enforcement activity may constitute good cause to extend the timeframe for responding to a formal complaint, e.g. suggesting that if law enforcement officials indicate that they are about to make public material information regarding an alleged sexual assault. May a recipient

(a) defer action on a formal complaint until the police close a pending investigation,

(b) defer action on a formal complaint until the final resolution of a pending criminal proceeding, or

(c) defer action because of concurrent law enforcement activity even when there is no substantial reason to believe that law enforcement will soon make public significant information relevant to the formal complaint?

(69) Section 106.45(b)(1)(v) requires "reasonably prompt time frames for the conclusion of the grievance process." (Emphasis added). Does this provision, or any other provision in the proposed regulations, establish any standard regarding how long a recipient may delay before initiating its grievance process after it has received a formal complaint that "request[s] initiation of the recipient's grievance procedures" (see the definition of "formal complaint" in section 106.30)?

*Harassment on Multiple Grounds*

(70) If a formal complaint alleges that the complainant was harassed both because of gender and because of some other characteristic (e.g., repeatedly subject to an epithet that was both misogynistic and racist, or abusive action with multiple motives), does the mandatory dismissal provision in section 106.45(b)(3) require the recipient to dismiss that aspect of the complaint asserting the non-gender aspect of the harassment, and deal with the two aspects of the harassment in separate proceedings?

(71) If not, in the investigation and resolution of that formal complaint,

(a) would any requirement of clear and convincing evidence, under section 106.45(b)(4), apply to the non-gender aspect of the complaint,

(b) would any limitations on interim remedies apply to the non-gender aspect of the complaint, or

(c) would the right of cross-examination, under section 106.45(b)(3)(vii), apply to the non-gender aspect of the complaint?

*Remedial Action by Recipient*

(72) Section 106.45(b)(1)(i) requires that remedies "must be designed to restore or preserve access to the recipient's program or activity." Is a recipient required to take any remedial or other action if, when the determination of responsibility is finally made, no action to restore or preserve access is relevant because

(a) the student complainant has graduated,

(b) the student complainant has withdrawn from the school and does not wish to return,

(c) the student complainant is no longer in a class with the respondent teacher, or

(d) the employee-complainant has resigned and does not wish to return?

(73) Does the word "designed" in section 106.45(b)(1)(i) and section 106.45(b)(5), which provide that a remedy must be "designed" to restore or preserve the complainant's access to the recipient's education program or activity, mean:

(a) that the remedy must objectively be reasonably likely to restore or preserve such access, or

(b) that the decision-maker must have had a subjective intent to restore or preserve such access, or

(c) both?

(74) Under section 106.45(b)(1)(i), so long as a remedy is designed to restore or preserve access, or if no such restorative or preservative action is warranted, are there any circumstances in which a recipient is required to dis-

cipline the respondent found responsible for the sexual harassment at issue? If so, in what circumstances would that obligation exist?

*Appeals*

(75) Section 106.45(b)(5) provides, regarding appeals:

In cases where there has been a finding of responsibility, although a complainant may appeal on the ground that the remedies are not designed to restore or preserve the complainant's access to the recipient's education program or activity, a complainant is not entitled to a particular sanction against the respondent.

May a complainant appeal the sanction imposed on the respondent, other than on the ground that the sanction was not designed to restore or preserve the complainant's access to the recipient's education program or activity?

*Remedial Action by OCR*

(76) In response to a complaint from an individual asserting that he or she was subject to sexual harassment in an educational program or activity receiving federal financial assistance, will the Assistant Secretary under section 106.3(a) determine whether such sexual harassment occurred, or instead determine only:

(a) whether the sexual harassment was known to a person with the authority to institute corrective measures on behalf of the recipient, or there was a formal complaint, and if so

(b) whether the recipient was within the safe harbor in sections 106.44(b)(1), 106.44(b)(2), or 106.44(b)(3), and if not

(c) whether

(i) the recipient's response to that knowledge was deliberately indifferent, and

(ii) the recipient violated a procedural requirement in section 106.45?

*Required Reports*

(77) Section 106.45(b)(7)(i)(A) requires that a recipient maintain records of every "sexual harassment investigation."

(a) Does this include an investigation of unwelcome conduct on the basis of sex that did not effectively deny the victim equal access to the recipient's program or activity, and was not otherwise sexual harassment within the meaning of section 106.30?

(b) Does this include an investigation of sexual harassment that did not occur in the recipient's education program or activity?

(78) Section 106.45(b)(7)(i)(A) requires that a recipient maintain records of any actions taken "in response" to any report or formal complaint of sexual harassment.

(a) Is a recipient required to maintain a record of a report or formal complaint of sexual harassment if the recipient failed to take any such action at all in response to that report or formal complaint?

(b) Does this requirement apply only to reports or formal complaints that were known at the time to an individual with authority to institute corrective measures?

(c) Does this requirement include reports of responses to allegations of unwelcome conduct on the basis of sex that were not within the section 106.30 definition of sexual harassment, or to reports of sexual harassment that was not within a recipient's education program or activity?

*Relationship to Title VII*

(79) Is a recipient required to comply with a provision of the regulation where doing so would, with regard to a pending or potential Title VII claim by an employee of the recipient, (a) impair its affirmative defense under Faragher v. City of Boca Raton, 524 U.S. 775 (1998), and Ellerth v. Burlington Industries, Inc, 524 U.S. 742 (1998), or (b) constitute or be evidence of negligence in responding to sexual harassment?

*Notification of Policy by Educational Institutions Controlled by Religious Organizations*

(80) Section 106.8(b)(1) requires all recipients to notify applicants, students, employees and others "that it does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required

by Title IX and this part not to discriminate in such a manner." Section 106.12(a) states that "[t]his part" (presumably including section 106.8(b)(1)) "does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would be consistent with the religious tenets of such organization." Is an educational institution within the scope of section 106.12(a) required to

(a) notify applicants, students, employees and others that it does not discriminate on the basis of sex, even though that is not true, or

(b) notify applicants, students, employees and others that it does not discriminate on the basis of sex, except in circumstances identified in that notification that are permissible because of section 106.12(a)?

**Concluding Remarks**

We are convinced that this list, despite including 80 questions, is incomplete. If these regulations are finalized in even close to their proposed form, many more questions will arise the moment any institution attempts to comply with them. The recent history of OCR enforcement of Title IX regarding sexual harassment has been characterized by educational institutions, especially at the post-secondary level, asking so many compliance questions of OCR that in only three years after issuing the 2011 Dear Colleague Letter on Sexual Violence, OCR issued a 46-page "Questions & Answers" guidance document addressing 52 of the most frequently asked questions. This number of frequently asked questions was in response to a guidance document that OCR itself made clear would not and could not be enforced in the way that it could enforce regulations subject to notice and comment. These proposed regulations would have the force of law in a manner that neither the 2011 or 2014 guidance documents did, therefore they need to be more clear, not less.

**Signed on February 15, 2019, by:**
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April 1, 2019

The Honorable Lamar Alexander
Chairman
Committee on Health, Education, Labor and Pensions
428 Senate Dirksen Office Building
Washington, DC 20510

The Honorable Patty Murray
Ranking Member
Committee on Health, Education, Labor and Pensions
428 Senate Dirksen Office Building
Washington, DC 20510

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Susan Herman
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Ronald Newman
*National Political Director*

Dear Chairman Alexander and Ranking Member Murray:

On behalf of the American Civil Liberties Union (ACLU) and our more than three million members, activists, and supporters, we submit this letter for the record of the Committee on Health, Education, Labor and Pensions' hearing on "Reauthorizing HEA: Addressing Campus Sexual Assault and Ensuring Student Safety and Rights."

As the committee considers reauthorizing the Higher Education Act, we appreciate your recognition that addressing campus sexual harassment and assault in a responsible and fair manner is essential to ensuring that students can pursue postsecondary education in an environment that is safe and upholds their rights.

Sexual harassment and assault of students is a pervasive problem that may deny or limit access to education, which is foundational to our economic life, our democracy, and equality. Schools have a responsibility under Title IX of the Education Amendments Act of 1972 to prevent and remedy sexual harassment and assault of their students that denies or limits education on the basis of sex.

Schools also have obligations to ensure students' rights to be free from discriminatory and overly punitive discipline practices, as well as their rights to a fair process in school disciplinary proceedings. Neither accused students nor those who suffer sexual harassment or assault should lose access to education

because of bias, unjust outcomes, or a lack of a meaningful opportunity to be heard and to defend oneself.

Recently, the Department of Education issued a Notice of Proposed Rulemaking that would substantially affect how postsecondary schools (as well as K-12 schools) address sexual harassment and assault. The ACLU submitted comments on this Proposed Rule, addressing both elements that limit the obligation of schools to respond to claims of sexual harassment and assault, as well as aspects of the Proposed Rule that alter the procedural requirements for handling Title IX complaints. As detailed below, we were critical of many of the new limitations on schools' responsibility to respond to complaints, but we were supportive of many of the procedural reforms. We submit these comments in full for the committee to consider and use as a resource in this hearing and its work in reauthorizing the Higher Education Act.

If you have any questions, please contact Michael Garvey, Senior Policy Analyst, at mgarvey@aclu.org or 202-675-2310; or Emma Roth, Equal Justice Works Fellow, at eroth@aclu.org or 212.284.7325.

Sincerely,

Ronald Newman
National Political Director

Vania Leveille
Senior Legislative Counsel

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[Docket ID ED-2018-OCR-0064]

January 30, 2019

Brittany Bull
U.S. Department of Education
400 Maryland Avenue SW
Room 6E310
Washington, DC 20202

*Submitted Via Federal eRulemaking Portal at www.regulations.gov*

RE: ACLU Comments in Response to Proposed Rule, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," RIN 1870-AA14.

**INTRODUCTION**

The American Civil Liberties Union (ACLU) submits these comments on the U.S. Department of Education's Proposed Rule entitled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," published in the Federal Register on November 29, 2018.

For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee to all people in this country. With more than 3 million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, gender identity or expression, disability, national origin, or record of arrest or conviction.

The ACLU's comments are informed by our commitment to the Constitution and its values, and to the civil rights statutes that further those values. Four principles animate our comments:

First, the ACLU values the right to be free from sex-based discrimination, harassment, and violence, a right central to gender justice. Enforcement of this right is essential given the nation's long history of failing to respond adequately to sexual assault and other forms of gender-based discrimination and violence, and the inequality perpetuated as a result. The Proposed Rule sets the requirements for educational institutions to prevent and remedy sexual assault and harassment that denies or limits education on the basis of sex.

Sexual harassment and assault of students is a pervasive problem. One study, conducted by the Association of American Universities, surveyed 27 campuses and found that over 26 percent of undergraduate women who responded to the survey reported experiencing nonconsensual sexual contact involving physical force or incapacitation, and nearly 62 percent of those responding reported experiencing sexual harassment.[1] The percentages were even higher for transgender students.[2] Studies also indicate that LGB students,[3] students with disabilities,[4] and students of color[5] experience sexual violence at heightened rates.

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[1] *See* ASS'N OF AM. UNIVS., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT, at xii–xvi (2017), https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf.

[2] *Id.* at xiii-xvi.

[3] *Id.* at xx.

[4] *Id.*

[5] Robert W. S. Coulter et al., *Prevalence of Past-Year Sexual Assault Victimization among Undergraduate Students: Exploring Differences by and Intersections of Gender Identity, Sexual Identity, and Race/Ethnicity*, 18 PREVENTION SCI. 726, 728–30 (2017).

Sexual harassment and violence have serious consequences for education and equality, and any Title IX rules must recognize the scope and gravity of the problem.

Second, the ACLU values due process, including the right to a fair process in school disciplinary proceedings and the right to be free from discriminatory and overly punitive discipline practices. Due process requires, at a minimum, notice and a meaningful opportunity to be heard. Where serious educational consequences are at stake, school disciplinary proceedings should provide a fair process for assessing credibility, including cross-examination of adverse witnesses, and a chance to review exculpatory and inculpatory evidence. The Final Rule should be designed to protect fairness to, and the rights to education of, both the respondent and the complainant.

Third, the ACLU is motivated by its commitment to education, which is foundational to our economic life, our democracy, and equality. Addressing discriminatory barriers to education – whether rooted in sex, race, immigration status, or disability – is therefore critical. By the same token, fair process in disciplinary proceedings is particularly important, so that neither accused students nor those who suffer sexual harassment or assault lose access to education because of bias, unjust outcomes, or a lack of opportunity to be heard.[6]

Fourth, the ACLU values consistency in the treatment of discrimination claims. Federal law prohibits educational institutions receiving federal funding from discriminating on the basis of sex, race, national origin, and disability. Absent a compelling reason, the Department should not single out complaints involving sex discrimination or harassment for different standards than complaints involving other forms of discrimination or harassment. The Department's Proposed Rule for responding to sexual harassment under Title IX, however, departs repeatedly from the rules for responding to racial harassment under Title VI, without any explanation for the divergent treatment. There should be no double standard for sex discrimination.[7]

We appreciate that some of these principles can come into conflict. Conventional wisdom all too often pits the interests in due process and equal rights against each other, as though all steps to remedy campus sexual violence will lead

[6] While these comments are focused on this Title IX Proposed Rule, the ACLU has also opposed the Department's recent actions to roll back civil rights protections in education for transgender students and students with disabilities, as well as its recent rescission of Title VI guidance on race discrimination in school discipline.

[7] As a matter of fundamental fairness, the ACLU believes that the procedures applicable to Title IX grievance proceedings ought to apply to all school disciplinary proceedings where similar penalties are at stake. We recognize that the Department only has jurisdiction over school discipline pursuant to civil rights statutes, but recommend that schools adopt consistent procedures for all proceedings involving potentially serious consequences. Students' complaints alleging sex discrimination, including sexual harassment and assault, must not be treated differently than other complaints.

to deprivations of fair process for the respondent, and robust fair process protections will necessarily disadvantage or deter complainants. There are, however, important ways in which the goals of due process and equality are shared. Both principles seek to ensure that no student—complainant or respondent—is unjustifiably deprived of access to an education. Moreover, both parties (as well as the schools themselves) benefit from disciplinary procedures that are fair, prompt, equitable, and reliable.

Applying these principles, the ACLU believes the Proposed Rule undermines Title IX by substantially reducing the responsibility of institutions to respond to claims of sexual harassment and assault. The Proposed Rule employs an unduly narrow definition of sexual harassment, allows schools not to investigate incidents that they reasonably should have known about, precludes schools from conducting investigations that would often be necessary to determine whether an incident constitutes sexual harassment, relieves schools of the obligation to investigate most student-on-student harassment or assaults that occur off campus even where they have continuing effects on campus, and allows schools to adopt unreasonable responses to complaints, holding them responsible only if their actions are "deliberately indifferent." If these provisions were to take effect, institutions would have fewer obligations to investigate claims of sexual harassment than they do when confronted with claims of racial harassment and the Department would hold fewer schools accountable for ensuring that campuses are free from sexual harassment and assault. The Department itself anticipates a 32 percent reduction in investigations due to the requirement that recipients only investigate formal complaints.[8] In these ways, the Proposed Rule will roll back critical civil rights protections for victims of sexual harassment and assault.

At the same time, the ACLU supports many of the increased procedural protections required by the Proposed Rule for Title IX grievance proceedings, including the right to a live hearing and an opportunity for cross-examination in the university setting, the opportunity to stay Title IX proceedings in the face of an imminent or ongoing criminal investigation or trial, the right of access to evidence from the investigation, and the right to written decisions carefully addressing the evidence. As noted below, we believe some of these provisions should be modified in several respects. Some provisions do not go far enough in protecting fair process rights, and others require amendments to ensure equitable treatment of both respondents and complainants and to conform to procedures governing other forms of harassment or discrimination.

More specifically, the ACLU recommends that the standard of proof for such proceedings should mirror the standard governing virtually all other civil proceedings, requiring proof by a preponderance of the evidence; that the right to cross-examination should be modified to guard against abusive questioning, to

[8] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462-01, 61,487 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106) [hereinafter, Proposed Rule, 83 Fed. Reg. at ____ ].

afford both students lawyers if they so choose, and to apply only when serious sanctions are possible; that the provision governing concurrent criminal proceedings should be strengthened to further safeguard respondents' rights against compelled self-incrimination; that the provision guaranteeing access to evidence collected by investigation should be clarified to provide that irrelevant and privileged information and communications are not subject to disclosure absent a showing of particularized relevance; and that the appeal provision be clarified to ensure that complainants are entitled to appeal sanctions on the ground that they are insufficient to restore equal access to the recipient's educational programs or activities.

This Comment proceeds in two parts. Part I addresses the elements of the Proposed Rule that limit the obligation of schools to respond to claims of sexual harassment and assault. Part II addresses the aspects of the Proposed Rule that amend the procedural requirements for handling Title IX complaints.[9]

## I. THE PROPOSED RULE UNDULY NARROWS RECIPIENTS' RESPONSIBILITY TO REMEDY AND PREVENT SEXUAL HARASSMENT AND ASSAULT.

The Proposed Rule will undermine the central purpose of Title IX by unduly narrowing schools' obligations to students who file complaints of sexual harassment and assault. Title IX was enacted to protect equal access to education free from sex discrimination, which has long been recognized to include sexual harassment and assault. The Proposed Rule would shield schools from responsibility for addressing conduct that may well deprive students of equal access to education on the basis of sex, including sexual orientation and gender identity.

Robust investigations and responses to complaints of sexual harassment and assault are critical to ensuring that complainants can access education. Experiences of sexual harassment and assault are often disruptive to students' educational lives — causing them to drop classes or change majors, transfer schools, avoid particular people or places, stop participating in activities, or even drop out of school altogether — along with a host of other potential effects on students' mental, emotional, and physical health.[10]

The Proposed Rule reduces the obligations of schools to respond to complaints in several ways. It defines sexual harassment unduly narrowly, providing that schools need respond only to harassment that is "so severe, pervasive, and objectively offensive that it effectively denies" access to education. This leaves schools free to ignore severe sexual harassment if it is not also pervasive, or pervasive sexual harassment if it is not also severe. And by requiring dismissal without investigation of any complaint that does not on its face meet this

[9] These comments address only the issues the ACLU finds most critical.

[10] *See* Dana Bolger, *Gender Violence Costs: Schools' Financial Obligations under Title IX*, 125 YALE L.J. 2106, 2109–10 (2016).

demanding standard, the Proposed Rule exceeds the Department's authority and impedes effective investigation of sexual harassment complaints. The Proposed Rule requires schools to respond only when a formal complaint is filed with a narrow set of officials, and not when the school has reason to know of sexual harassment (because, for example, a complaint was made to a faculty member). It provides that schools fully satisfy their Title IX obligations even when they respond unreasonably to complaints of sexual harassment or assault, providing that schools will be found non-compliant only if they act with "deliberate indifference," or "clearly unreasonably." And the Proposed Rule provides that schools need not respond at all to most sexual assault or harassment that occurs off campus, even if it occurs between two students and has continuing effects on campus. These proposed changes mean that schools will investigate fewer complaints and the Department will hold fewer schools accountable.

In these respects, the Proposed Rule creates a double standard for sex discrimination claims. Under the proposed rule, schools would have less responsibility to respond to claims of sexual harassment under Title IX than to claims of racial harassment under Title VI, and students alleging sexual harassment would have to meet higher standards under Title IX than employees alleging sexual harassment in the workplace must meet under Title VII. These disparities lack justification, particularly as "Title IX was patterned after Title VI,"[11] Title IX's drafters "explicitly assumed that it would be interpreted and applied as Title VI had been,"[12] and the courts rely on Title VII when analyzing Title IX's substantive reach.[13]

The Department justifies three of its heightened standards—narrowing the definition of "sexual harassment," requiring that schools respond only where they have actual notice of complaints, and limiting findings of non-compliance to instances where schools are "deliberately indifferent"—by pointing to two Supreme Court decisions, *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), and *Gebser v. Lago Vista Independent School District,* 524 U.S. 274 (1998). But

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[11] *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694 (1979).

[12] *Id.* at 695 (1979) ("Except for the substitution of the word 'sex' in Title IX to replace the words 'race, color, or national origin' in Title VI, the two statutes use identical language to describe the benefited class. Both statutes provide the same administrative mechanism for terminating federal financial support for institutions engaged in prohibited discrimination."); *see also Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998) ("[Title IX] was modeled after Title VI of the Civil Rights Act of 1964, which is parallel to Title IX except that it prohibits race discrimination, not sex discrimination, and applies in all programs receiving federal funds, not only in education programs.") (internal citations omitted); 117 CONG. REC. 30408 (1971) (statement of Sponsor Sen. Bayh) ("The same [enforcement] procedure that was set up and has operated with great success under the 1964 Civil Rights Act, and the regulations thereunder would be equally applicable to discrimination [prohibited by Title IX].").

[13] *See, e.g.*, *Franklin v. Gwinnett*, 503 U.S. 60, 75 (1992) (citing a substantive rule from a Supreme Court case on sexual harassment under Title VII and stating "the same rule should apply" when a student is sexually harassed).

those cases set forth standards of liability for private individuals suing schools for monetary damages for violating Title IX.[14] The Department acknowledges that it is not required to import the standards for private damages actions to the distinct context of administrative enforcement.[15] Indeed, the Department has long recognized that different standards should apply to administrative enforcement.[16] While private suits impose damages after the fact, administrative enforcement is more measured; the Department does not issue final determinations of non-compliance or impose sanctions without first providing schools with the opportunity to achieve voluntary compliance with Title IX.[17] Further, while private lawsuits for monetary damages are intended to remedy past harms by making victims whole, the Department's enforcement actions aim to prevent future harms by ensuring schools maintain safe and equitable learning environments. Thus, the standards for private damages suits need not, and should not, govern recipients' responsibilities vis-a-vis administrative enforcement by the Department.

**1. The Proposed Rule's Definition of Sexual Harassment is Inappropriately Narrow, and Its Limit on Investigations Is Unfounded.**

*§§ 106.30, 106.45(b)(3)*

Proposed Rule § 106.30 defines sexual harassment as: "(1) [a]n employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; (2) [u]nwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program

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[14] *See Gebser*, 524 U.S. at 286; *see also Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 639 (1999) ("Here, however, we are asked to do more than define the scope of the behavior that Title IX proscribes. We must determine whether a district's failure to respond to student-on-student harassment in its schools can support a private suit for money damages.").

[15] Proposed Rule, 83 Fed. Reg. at 61,466 (stating that the Department "could have chosen to regulate in a somewhat different manner than the Supreme Court").

[16] *See* U.S. Dep't of Educ., Office of Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (Jan. 19, 2001), https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html ("The *Gebser* Court recognized and contrasted lawsuits for money damages with the incremental nature of administrative enforcement of Title IX. In *Gebser*, the Court was concerned with the possibility of a money damages award against a school for harassment about which it had not known. In contrast, the process of administrative enforcement requires enforcement agencies such as OCR to make schools aware of potential Title IX violations and to seek voluntary corrective action before pursuing fund termination or other enforcement mechanisms."); *see also* Brief for the United States as Amicus Curiae, *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999) (No. 97-843).

[17] 20 U.S.C. § 1682 (1972) ("[N]o such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.").

or activity; or (3) [s]exual assault, as defined in 34 C.F.R. § 668.46(a)."[18] Additionally, Proposed Rule § 106.45(b)(3) states, "If the conduct alleged by the complainant would not constitute sexual harassment as defined in section 106.30 even if proved . . . , the recipient *must* dismiss the formal complaint with regard to that conduct" without any investigation.[19]

Subsection (2) of this definition, which describes what is commonly known as "hostile environment" sexual harassment, is unduly restrictive in two respects.

First, the proposed definition limits harassment to unwelcome conduct that is "severe, pervasive, *and* objectively offensive." (Emphasis added.) That standard impermissibly excludes conduct that should trigger an obligation to respond. It could mean, for example, that a school could view complaints involving a threat of rape – severe but not pervasive – or repeated harassing comments or conduct – pervasive but not severe – beyond its obligation to investigate under Title IX.[20] Moreover, if recipients are required (and indeed, permitted) to investigate only "severe, pervasive, and objectively offensive" complaints of sexual harassment, they will not respond to less extreme complaints until the harassment escalates and students suffer severe harm.

Second, the definition reaches only conduct that "effectively denies" access to education. It does not include conduct that may *limit* a student's ability to participate in a recipient's education on the basis of sex, but not deny access altogether. But Title IX includes a 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 . . . ."[21] And Title IX implementing regulations have always recognized that recipients violate Title IX when they "[d]eny any person any . . . aid, benefit, or service" *or* "limit any person in the enjoyment of any right, privilege, advantage, or opportunity."[22]

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[18] Proposed Rule, 83 Fed. Reg. at 61,496. Sexual assault, defined in subsection (3) by reference to the Clery Act, includes "[a]n offense that meets the definition of rape, fondling, incest, or statutory rape . . ." 34 C.F.R. § 668.46 (2015).

[19] *Id.* at 61,498 (emphasis added); *see also id.* at 61,475 ("[P]roposed paragraph (b)(3) would require recipients to dismiss a formal complaint or an allegation within a complaint without conducting an investigation if the alleged conduct, taken as true, is not sexual harassment as defined in the proposed regulations or if the conduct did not occur within the recipient's program or activity.").

[19] *Id.* at 61,496 (emphasis added).

[20] *See, e.g.*, *Hawkins v. Sarasota Cty. Sch. Bd.*, 322 F.3d 1279, 1281 (11th Cir. 2003) (affirming the district court's dismissal of a complaint for failure to allege "severe, pervasive, and objectively offensive conduct," despite allegations that male student repeatedly harassed three female students by chasing them to touch their chests, jumping on one female student to rub his body on hers, and telling them he wanted to "suck [the girls'] breasts till the milk came out" and wanted the girls to "suck the juice from his penis").

[21] 20 U.S.C. § 1681 (emphasis added).

[22] 34 C.F.R. § 106.31(b).

The Proposed Rule's definition creates a double standard, treating sexual harassment under Title IX less seriously than racial harassment under Title VI. The Proposed Rule imposes a substantially reduced obligation on schools to investigate sexual harassment complaints than the Department imposes for students claiming racial harassment in violation of Title VI. The Department defines racial and national origin harassment as "unwelcome conduct based on a student's actual or perceived race or national origin." [23] It states, "Title VI requires an educational institution to respond to racial or national origin harassment that is sufficiently serious to deny *or limit* a student's ability to participate in or benefit from the recipient's education programs and activities (i.e. creates a hostile environment)."[24] Thus, racial harassment, unlike sexual harassment, need not be "severe, pervasive, and objectively offensive" nor must it effectively deny access to education in order to trigger an obligation to investigate. The disparity between the Department's definitions of sexual harassment and racial harassment lacks justification.

Under the Proposed Rule's narrow definition, moreover, students would be forced to endure more extreme sexual harassment at school than employees must endure in the workplace. Under Title VII, sexual harassment is actionable when it is "sufficiently severe *or* pervasive to *alter* the conditions of the victim's employment . . . ."[25] Thus, a school would be required by Title VII to take action if a teacher lodged a complaint about severe or pervasive sexual harassment yet would be required to dismiss a Title IX complaint filed by a student about identical conduct. Again, the Department offers no explanation for this result.

These problems with the overly narrow definition of sexual harassment are exacerbated by subsection 106.45(b)(3), which provides that schools not only need not, but *must* not, investigate complaints that do not on their face meet these standards. It states that recipients "must dismiss" formal complaints or allegations within a complaint without conducting an investigation if the conduct as alleged does not satisfy the Rule's definition. As the Department explains, "proposed paragraph (b)(3) would *require* recipients to dismiss a formal complaint or an

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[23] U.S. Dep't of Educ., Office of Civil Rights, *Frequently Asked Questions on Race and National Origin Discrimination* (Sept. 25, 2018), https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/race-origin.html [hereinafter U.S. Dep't of Educ., *FAQ on Racial Harassment*].

[24] *Id.*; *see also* U.S. Dep't of Educ., Office of Civil Rights, *Investigative Guidance on Racial Incidents and Harassment Against Students* (Mar. 10, 1994), https://www2.ed.gov/about/offices/list/ocr/docs/race394.html (defining a racially hostile environment as "harassing conduct (e.g., physical, verbal, graphic, or written) that is sufficiently severe, pervasive *or* persistent so as to *interfere with or limit* the ability of an individual to participate in or benefit from the services, activities or privileges provided by a recipient") (emphasis added) [hereinafter U.S. Dep't of Educ., *1994 Racial Harassment Guidance*].

[25] *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986) (internal quotations and brackets omitted) (emphasis added); *see also* U.S. Equal Emp't Opportunity Comm'n, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 18, 1999), https://www.eeoc.gov/policy/ docs/harassment.html.

allegation within a complaint *without conducting an investigation* if the alleged conduct, taken as true, is not sexual harassment as defined in the proposed regulations or if the conduct did not occur within the recipient's program or activity."[26]

There are two fundamental problems with this dictate. First, the Department has no authority to forbid schools from investigating matters that affect their institutions. Title IX affords the Department authority to *require* schools to respond to sexual harassment. But the Department cannot *preclude* schools from investigating conduct simply because it does not rise to the level of sexual harassment that triggers an obligation under Title IX. If a student alleges sexual conduct, for example, that violates the school's own internal rules, surely the school has authority to investigate—whether or not the incident amounts to sexual harassment under Title IX.[27]

Second, an investigation will often be necessary to determine whether an alleged incident rises to the level of sexual harassment that requires a formal response under Title IX. An investigation may, for example, reveal conduct that on its face did not appear to be pervasive was in fact pervasive, or was more severe than initially appeared. A rule that forecloses recipients from investigating less extreme complaints until the harassment escalates and students suffer severe harm is contrary to the purpose of Title IX.

Therefore, the ACLU makes three recommendations.

First, in place of Proposed Rule § 106.30(2), the Department should require recipients to respond to sexual harassment defined as "unwelcome conduct of a sexual nature that is sufficiently severe or pervasive to deny or limit a student's ability to participate in or benefit from the school's program based on sex." This standard would match definitions of harassment under Title VI and Title VII.[28]

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[26] Proposed Rule, 83 Fed. Reg. at 61,475 (emphasis added).

[27] Indeed, because the Proposed Rule provides that the recipient's treatment of the respondent may constitute discrimination on the basis of sex, the Proposed Rule also creates a risk that, should a university investigate a claim that does not meet the definition established by the Proposed Rule, the respondent could assert that the university had violated Title IX regulations by doing so. Proposed Rule § 106.45(a). For example, a school that investigates an off-campus rape, or any other incident that does not clearly fall within the Department's definition, violates the Proposed Rule. *See infra* Section I.4.A school that fails to investigate an on-campus rape, or any other incident of sexual harassment covered by the Department's definition, violates the Proposed Rule only if its failure is 'clearly unreasonable.' *See infra* Section I.3. Faced with this discrepancy, schools may lean against investigating close cases.

[28] Any definition of sexual harassment must, of course, respect First Amendment constraints. Although speech that creates a "hostile or offensive environment" based on sex may be protected under the First Amendment, that protection sometimes gives way to the government's compelling interest in ensuring equal access to education. *See DeJohn v. Temple Univ.*, 537 F.3d 301, 320 (3d Cir. 2008). The "severe or pervasive" standard reflects that the government may proscribe some protected speech in the educational context in order to vindicate its interest in ensuring equal access

Second, the ACLU urges the Department to modify Proposed Rule § 106.45(b)(3) to make clear that recipients must investigate all non-frivolous complaints of sexual harassment, as defined in the paragraph above[29]— even if they do not immediately appear to meet the revised definition—and that recipients are permitted to investigate conduct that may violate their own school policies regardless of whether it amounts to sexual harassment as defined in the Proposed Rule.

Third, as to Proposed Rule § 106.30(3), which defines "sexual assault," the ACLU recommends that it include dating violence, domestic violence, and stalking as defined in the Clery Act regulation, 34 C.F.R. § 668.46(a), when committed on the basis of sex. These forms of conduct should also trigger a school's obligation to respond where they rise to the level of denying or limiting a student's ability to participate in or benefit from an educational program or activity.

**2. The Proposed Rule Should Require Schools to Respond to All Complaints of Which They Actually Knew or Reasonably Should Have Known.**

*§§ 106.44(a), 106.30, 106.45*

Proposed Rule § 106.44(a) provides that recipients can be found responsible for failing to adequately respond to sexual harassment and assault only when they have "actual knowledge" of the harassment and assault.[30] Proposed Rule § 106.30 defines "actual knowledge" as "notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to a teacher in the elementary and secondary context with regard to student-on-student harassment."[31] And Proposed Rule § 106.45 only requires recipients to launch investigations and institute grievance proceedings in response to "formal complaints."[32]

The Proposed Rule's definition, if adopted, would dramatically limit recipients' obligations to respond to claims of sexual harassment and assault, and would again create a different and unjustifiably higher standard for claims of sexual harassment and assault under Title IX than for claims of discrimination under Title VI and Title VII.

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to education, even if that speech might be protected in other settings. The standard also reflects that, even in the educational context, the government may not prohibit or punish core protected expression, such as political speech. *Id.*

[29] *See, e.g.*, U.S. Dep't of Educ., *FAQ on Racial Harassment*, *supra* note 23 ("When an educational institution knows or reasonably should know of *possible* racial or national origin harassment, it must take immediate and appropriate steps to investigate or otherwise determine what occurred.") (emphasis added).

[30] Proposed Rule, 83 Fed. Reg. at 61,466.

[31] *Id.*

[32] *Id.* at 61,471–72.

Under Title VI, "[w]hen an educational institution *knows or reasonably should know* of possible racial or national origin harassment, it must take immediate and appropriate steps to investigate or otherwise determine what occurred."[33] The Department's 1994 Investigative Guidance on Racial Incidents and Harassment Against Students states, "A recipient is charged with constructive notice of a hostile environment if, upon reasonably diligent inquiry in the exercise of reasonable care, it should have known of the discrimination."[34] Here, again, the Department offers no justification for applying different standards under Title IX and Title VI.

Similarly, under Title VII, employers are "responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) *knows or should have known* of the conduct, unless it can show that it took immediate and appropriate corrective action."[35] Under these conflicting standards, a school would be responsible under Title VII for failing to address sexual harassment of a teacher by a teacher about which it reasonably should have known, but would not be responsible under Title IX for failing to address sexual harassment of a student by a teacher in identical circumstances. Thus, constructive notice is sufficient to require a response to sexual harassment in employment, as well as to racial harassment in education, but *not* to sexual harassment in education.

The "actual notice" standard that the Proposed Rule adopts would frustrate the purpose of Title IX. In both the K-12 context and higher education context, schools would not be responsible for failing to address complaints of sexual harassment and assault made to non-teacher employees such as campus security guards, guidance counselors, or athletics coaches. Additionally, in the higher education context, colleges and universities would not be responsible for failing to address complaints of sexual harassment and assault made to professors. But many students disclose sexual harassment and assault to employees who do not have the authority to institute corrective measures, both because students seek help from the adults they know and trust the most, and because students may not be informed about which employees have authority to address the conduct.

In addition, while in the K-12 context actual knowledge is more readily imputed, it is still unduly narrow. The Proposed Rule states that reporting to teachers of peer-on-peer harassment constitutes actual knowledge. It makes no such provision for reports to teachers of employee-on-student harassment. This means a school would be held responsible if a seventh grader told a teacher that she was sexually assaulted by a classmate, but not if a seventh grader told her English

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[33] U.S. Dep't of Educ., *FAQ on Racial Harassment*, *supra* note 23 (emphasis added).

[34] U.S. Dep't of Educ., *1994 Racial Harassment Guidance, supra* note 24.

[35] 29 C.F.R. § 1604.11(d) (describing the standard that applies for coworker-on-coworker harassment) (emphasis added).

teacher that she was sexually assaulted by her math teacher. This differentiation lacks any justification.

The ACLU recommends that the Department modify the notice standard so that a recipient's responsibilities are triggered if it knows, *or reasonably should have known*, about the harassment. A recipient "reasonably should have known" about the harassment if any faculty or staff member knows of the incident or would have known of the incident upon reasonably diligent inquiry in the exercise of reasonable care. This would ensure consistency across Title IX, Title VI, and Title VII.

At the same time, the Rule should ensure that schools can designate a set of staff members who are exempt from mandatory reporting, such as mental health counselors, specified residential advisors, and clergy. This exemption is necessary so that students can seek confidential advice and support from designated staff without triggering formal grievance proceedings. Schools should clearly communicate to students which staff are and are not mandatory reporters.

### 3. The Proposed Rule Inappropriately Allows Schools to Adopt Unreasonable Responses to Sexual Assault and Harassment.

*§ 106.44(a)*

Proposed Rule § 106.44(a) provides that recipients will be found responsible for failing to respond adequately to sexual harassment and assault in violation of Title IX only when they respond in a manner that is "clearly unreasonable in light of the known circumstances."[36] This standard, also described as "deliberate indifference," unduly limits schools' responsibility to provide an educational environment free from discrimination and harassment, and is inconsistent with the standard the Department imposes under Title VI.

Under the "clearly unreasonable" or "deliberate indifference" standard, recipients could act unreasonably and still avoid Department of Education scrutiny under Title IX. Recipients could avoid Department oversight by launching perfunctory investigations or instituting remedies that failed to adequately address an ongoing hostile environment, so long as their actions were not "clearly unreasonable."[37] While the ACLU recognizes the need to afford universities

[36] Proposed Rule, 83 Fed. Reg. at 61,467–70.

[37] *See, e.g.*, *Rost v. Steamboat Springs Re-2 Sch. Dist.*, 511 F.3d 1114, 1121–24 (10th Cir. 2008) (holding that the school district was not deliberately indifferent when it deferred to law enforcement and failed to launch any independent investigation or impose any disciplinary measures in response to allegations that four male students repeatedly sexually harassed a female student with learning disabilities including forcing her to perform oral sex); *Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380, 387–89 (5th Cir. 2000) (holding the defendant's actions were not "clearly unreasonable" when the principal took no action beyond having a single, undocumented conversation with a third-grade

discretion in how they respond, a "reasonableness" standard affords sufficient discretion without undermining Title IX's purpose.

The Department has never used a deliberate indifference standard when evaluating recipients' responses to racial harassment under Title VI. The Department states that under Title VI, a recipient "must take prompt and effective steps *reasonably calculated* to end the harassment, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects."[38] The Department used a similar standard in its 1994 Investigative Guidance on Racial Incidents and Harassment Against Students.[39]

In its 2001 Sexual Harassment Guidance, the Department similarly required recipients to take "prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again."[40] Under this standard, a recipient would be found in violation of Title IX if its response to a complaint of sexual harassment was "unreasonable," even if it was not "clearly" so.

The ACLU recommends that the Department maintain the standard from its 2001 Guidance. This standard would ensure that schools have flexibility and discretion when responding to complaints of sexual harassment. As the 2001 Guidance recognized, "What constitutes a reasonable response to information about possible sexual harassment will differ depending upon the circumstances."[41] The fact that the Department would have responded differently would not be a basis for a finding of noncompliance unless the Department found further that the school's response was unreasonable. But under this standard, unlike a deliberate indifference standard, the Department would be permitted to hold recipients

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teacher about allegation that he had sexually abused a student despite the fact that the conversation was "ineffective in preventing [the teacher] from sexually abusing [additional] students"); *Wills v. Brown*, 184 F.3d 20, 41–42 (1st Cir. 1999) (holding university's response was not clearly unreasonable when it recommended that a visiting professor remain on the faculty and receive a raise despite multiple complaints that he had sexually harassed and assaulted students).

[38] U.S. Dep't of Educ., *FAQ on Racial Harassment*, *supra* note 23 (emphasis added).

[39] U.S. Dep't of Educ., *1994 Racial Harassment Guidance, supra* note 24 ("Once a recipient has notice of a racially hostile environment, the recipient has a legal duty to take reasonable steps to eliminate it. Thus, if OCR finds that the recipient took responsive action, OCR will evaluate the appropriateness of the responsive action by examining reasonableness, timeliness, and effectiveness. The appropriate response to a racially hostile environment must be tailored to redress fully the specific problems experienced at the institution as a result of the harassment. In addition, the responsive action must be reasonably calculated to prevent recurrence and ensure that participants are not restricted in their participation or benefits as a result of a racially hostile environment created by students or non-employees.").

[40] U.S. Dep't of Educ., Office of Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (Jan. 19, 2001), https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html.

[41] *Id.*

accountable when they failed to launch meaningful investigations or take necessary remedial action.

**4. The Proposed Rule Should Require Schools to Address Off-Campus Harassment When It Has the Effect of Limiting or Denying Access to Education on Campus.**

*§§ 106.30, 106.45(b)(3)*

Proposed Rule § 106.45(b)(3) limits the definition of sexual harassment in section 106.30 to conduct that occurred "within the recipient's program or activity" and states that "the recipient *must* dismiss the formal complaint" if the conduct occurred outside these bounds.[42]

This provision erroneously makes recipients' responsibility contingent on where the harassment occurred, rather than on its effect on the educational environment. Sexual harassment or assault can have the same effect on access to education whether it occurs in a dorm room or an off-campus apartment. A school's obligations should be based on the effect an incident has on campus, not where it happened. While the Proposed Rule recognizes that some off-campus locations meet its standard, such as school-sponsored fraternities, it would improperly exclude many other incidents of sexual harassment and assault that create a hostile educational environment.[43]

The vast majority of college students live off campus—approximately 87 percent[44]—and many college sexual assaults occur at off-campus parties.[45] Limiting schools' obligations to address such conduct will frustrate the purpose of Title IX. Recipients have an obligation to ensure that students are not limited in or prevented from learning because of sex discrimination, including sexual harassment and assault, regardless of where it occurred.

Again, the problems with this provision are compounded by the Proposed Rule's requirement that recipients "*must* dismiss," without investigation, claims involving conduct that occurs outside the recipient's program or activity.[46] In other words, the Proposed Rule would *require* a recipient to dismiss a claim of a rape at an off-campus party without an investigation. However, an investigation may be

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[42] Proposed Rule, 83 Fed. Reg. at 61,498 (emphasis added).

[43] *Id.*

[44] 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.

[45] United Educators, *Facts from United Educators' Report on Confronting Campus Sexual Assault: An Examination of Higher Education Claims* (Jan. 2015), https://www.ue.org/sexual_assault_claims_study.

[46] Proposed Rule, 83 Fed. Reg. at 61,498 (emphasis added); *see also id.* at 61,475 ("[P]roposed paragraph (b)(3) would *require* recipients to dismiss a formal complaint or an allegation within a complaint *without conducting an investigation* if the alleged conduct . . . did not occur within the recipient's program or activity.") (emphasis added).

necessary to determine if the conduct created a hostile environment on campus in violation of Title IX.[47] Further, as noted above, the Department lacks authority to forbid schools from investigating student or employee conduct that may violate the schools' own disciplinary code.[48]

The ACLU recommends that the Department strike the language in section 106.45(b)(3) limiting the definition of sexual harassment to incidents that occurred "within the recipient's program or activity." The ACLU recommends the Department adopt the following language instead:

> Where a recipient has authority over the respondent (e.g., a student or employee of the recipient), the recipient must take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again, regardless of where the incident took place, where the incident may deny or limit access to the recipient's programs or activities.
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> Where a recipient lacks authority over the alleged perpetrator (e.g., not a student or employee of the recipient), the recipient must provide reasonable accommodations and other supportive measures to a complainant, including, where appropriate, barring the alleged perpetrator from campus.[49]

**5. The Proposed Rule Should Be Modified to Encourage Interim Measures That Are Proportional to the Alleged Harm and Reasonably Necessary to Preserve Access to Education.**

*§§ 106.30, 106.44(c)*

The Proposed Rule provides for supportive and emergency measures recipients may take to ensure access to education and safety before or in the absence of a final determination with respect to Title IX complaints. Section 106.30 defines "supportive measures" as "non-disciplinary, non-punitive individualized services offered . . . to the complainant or the respondent before or after the filing of

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[47] *See supra* Section I.1 (discussing the importance of investigations for determining whether an alleged incident requires a formal response under Title IX).

[48] *Id.*

[49] This standard comports with Title VII requirements that employers respond to the harassing conduct of non-employees such as customers. *See* 29 C.F.R. § 1604.11(e) ("An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action."); *see also Freeman v. Dal-Tile Corp*, 750 F.3d 413, 424 (4th Cir. 2014) (reversing grant of summary judgment for employer where the employer had knowledge of the third-party harassment of the plaintiff yet failed to protect the plaintiff by restricting the third-party's access to the premises).

a formal complaint or where no formal complaint has been filed."[50] The Proposed Rule states,

> Such measures are designed to restore or preserve access to the recipient's education program or activity, without unreasonably burdening the other party; protect the safety of all parties and the recipient's educational environment; and deter sexual harassment. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.[51]

In section 106.44(c), the Proposed Rule separately provides for "emergency removal" where "the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the health or safety of students or employees justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal."[52]

Interim measures can be critical for complainants' ability to continue their education immediately following an incident of sexual harassment or assault in the absence of a final determination. Of sexual assault survivors who participated in a Relationship and Sexual Violence program, over 34 percent subsequently dropped out of college, a significantly higher rate than the average university dropout rate.[53] Recipients must do what they can to remedy a hostile environment in the interim, before reaching a final determination with respect to the alleged conduct.

The two distinct sections on supportive measures and emergency removal could, however, lead to confusion among recipients about what steps they can take to protect a complainant's safety and access to education prior to or in the absence of a final determination regarding responsibility. In particular, the Proposed Rule is not clear about what constitutes an "immediate threat to the health or safety of students" that would justify emergency removal from campus, and it does not consider preserving access to education as a potential rationale for removal as it does for other interim measures. The Proposed Rule is also not clear about what standards a recipient should employ to determine the "reasonableness" of supportive measures that would impose a disproportionate burden on the respondent. For example, although the Proposed Rule lists mutual restrictions on

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[50] Proposed Rule, 83 Fed. Reg. at 61,469.

[51] *Id.*

[52] *Id.* at 61,471.

[53] 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), https://doi.org/10.1177/1521025115584750.

contact as a permissible supportive measure, it is unclear when, if ever, recipients can impose one-sided no contact orders as a supportive measure.

The ACLU recommends that the Department replace the sections on supportive measures and emergency removal with a single section on interim measures. The section should explain that recipients may impose interim measures that burden the respondent—such as no-contact orders or removal from campus—when those burdens are proportional to the alleged harm and are the least burdensome alternative that will protect the interests in (1) restoring or preserving access to the recipient's education program or activity, (2) protecting the physical and mental health or safety of students in the recipient's educational environment, or (3) deterring sexual harassment.[54] The section should also mandate notice and an opportunity to be heard regarding interim measures that burden the respondent or complainant.

To address these concerns, the ACLU recommends that the Final Rule state:

> Interim measures, which are implemented before a final determination with respect to the alleged conduct, must be non-punitive measures that are reasonably necessary to restore or preserve access to the recipient's education program or activity, protect the physical and mental health or safety of students in the recipient's educational environment, and/or deter sexual harassment.
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> Interim measures may include, but are not limited to: counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, no-contact orders, changes in work or housing locations, voluntary leaves of absence, directions to stay away from certain areas of campus, suspension, increased security and monitoring of certain areas of the campus.
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> Interim no-contact orders must not be imposed in a retaliatory manner. No-contact orders may be one-sided or mutual. However, recipients should not default to mutual no-contact orders and should instead carefully consider the individual circumstances of the situation, including the burden placed on the complainant by issuing a mutual no contact order. After a finding of responsibility is made against the respondent, schools may not impose mutual no contact orders.
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> Interim measures must be proportional to the nature of the alleged harm and reasonably necessary to further the interests noted above without unreasonably burdening either party. Suspension or removal

[54] The Department recognizes that these interests justify supportive measures. *See* Proposed Rule, 83 Fed. Reg. at 61,471.

should be reserved for extraordinary circumstances. To the extent feasible, interim measures should be kept confidential.

Where the recipient imposes interim measures, the recipient must provide notice and an opportunity to be heard about whether less burdensome or different interim measures would be adequate to protect the interests in preserving or restoring access to education. Whenever possible, the recipient must provide the students with notice and an opportunity to be heard prior to imposing the interim measures. Under exigent circumstances, the recipient may provide the parties with notice and an opportunity to be heard promptly after imposing the interim measures.

**6. The Proposed Rule's Provision on Informal Resolution Should Be Modified to Ensure Participation is Not Coerced, and Students Maintain the Right to Access a Formal Process.**

*§ 106.45(b)(6)*

Proposed Rule § 106.45(b)(6) provides that "the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication," and outlines a notice requirement regarding the allegations, nature of the informal resolution process, and the consequences.[55] The Proposed Rule also states that if there are "circumstances under which [the informal resolution process] precludes the parties from resuming a formal complaint arising from the same allegations," the parties must be notified of these circumstances.[56]

The ACLU supports schools having an option for resolving complaints informally. To be truly voluntary, however, both parties must have the right to withdraw from the informal process at any time. The ACLU recommends adopting the following language to ensure implementation of informal procedures is fair, impartial, and fully voluntary:

Informal resolution should only be entered into where there is voluntary, informed written consent from both parties. Informal resolution must be affirmatively opted into by both parties in order to be truly voluntary. Under no circumstances should a decision to enter into an informal resolution process preclude a complainant or respondent from withdrawing and resuming the formal process. Each party must be advised of their rights without the other party present, including that they have a right to withdraw from the informal resolution process at any time, and that the complainant has a right to

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[55] Proposed Rule, 83 Fed. Reg. at 61,479.
[56] *Id.*

pursue a formal complaint. The facilitator during the informal resolution process must be a trained and neutral third party.

**7. The Department Should Ensure That Students Have Notice When Recipients Seek Religious Exemptions from Title IX.**

*§ 106.12*

Title IX creates an exemption for educational institutions "controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization."[57] The Proposed Rule provides that "an educational institution *may*—but is not required to—seek assurance of its religious exemption by submitting a written request for such an assurance to the Assistant Secretary."[58] It further provides that "if an institution has not sought assurance of its exemption, the institution may still invoke its religious exemption during the course of any investigation pursued against the institution by the Department."[59]

Students and prospective students should know what protections the law provides against discrimination. The rules now in place fail to protect that interest fully, and the Proposed Rule would only diminish the already insufficient protections. The Department offers no justification for allowing religious institutions to conceal from current and prospective students the exemptions they assert. In the absence of any notice, students will reasonably assume that all educational institutions receiving federal funding are bound by Title IX.

Existing rules require schools to advise students and prospective students of the institutions' obligation not to discriminate based on sex.[60] The existing rules thus value students' understanding of the protections the law affords. There is, however, today no express requirement that students be told when those protections do not apply as a result of exemptions claimed by schools controlled by religious organizations. Knowledge of protections and exemptions permits students to assess whether the school will be safe for them and when a complaint of discrimination is appropriate. This information is important to all students and prospective students, but especially to those who might suffer sex discrimination in an institution covered by Title IX, including women, LGBTQ students, pregnant or parenting students, and students seeking birth control or other reproductive health services.

In addition, while the rules have provided for nearly four decades that institutions asserting an exemption notify the Department, there is no provision requiring the Department to publish that information. There is thus no way to assess how the statute is enforced or to contest whether the exemptions are being properly claimed.

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[57] 20 U.S.C. § 1681(a)(3).
[58] Proposed Rule, 83 Fed. Reg. at 61,482 (emphasis added).
[59] *Id.*
[60] 34 C.F.R. § 106.9(a).

The ACLU therefore recommends that the Department strike the proposed revision that removes the requirement that institutions advise the Department of any exemption they claim. Further, the Final Rule should require both that the Department publish annually the list of institutions that have been granted exemptions, and that institutions notify students of any exemptions as part of alerting students to the scope of the school's responsibility under Title IX.

## II. THE PROPOSED RULE PROVIDES IMPORTANT PROCEDURAL PROTECTIONS IN TITLE IX DISCIPLINARY PROCEEDINGS, BUT SHOULD BE MODIFIED TO FURTHER FAIR PROCESS AND EQUITY AND TO AVOID ABUSE.

The ACLU has long been committed to ensuring fair process in school disciplinary proceedings, including proceedings under Title IX,[61] and commends the Department's efforts to guarantee fair process in Title IX grievance proceedings. Similar fair process procedures should apply in all school grievance procedures involving student-on-student conduct, such as harassment on the basis of race. The Proposed Rule provides several important protections to the process, including live hearings, the right of cross-examination, access to evidence, and the requirements for reasoned, written judgments. These are essential to ensure that respondents have a meaningful opportunity to defend themselves, and to ensure fairness for both parties.

As detailed below, the ACLU nonetheless recommends several changes to improve these provisions and to ensure equity and deter abuse. In particular, we recommend a preponderance of the evidence standard for Title IX hearings, the standard that applies in virtually all civil proceedings, including Title IX cases in court. We support live hearings and cross-examination in higher education where serious sanctions are possible, and we urge the Department to require universities to provide counsel for both parties for the hearing if either party requests counsel. We suggest that the provision permitting delay of proceedings where there are imminent criminal proceedings should be strengthened to require such delay, accompanied by proportional, fair, and effective interim measures where necessary to preserve access to education. We support access to evidence of the investigation, but recommend that the Final Rule make clear that privileged and other sensitive evidence should not be disclosed absent a showing of particularized relevance. And the ACLU supports appeal rights for both sides, but recommends a clarification in the scope of the appeal.

Although the Due Process Clause applies only to *public* universities, colleges, and schools, the principles of due process and fundamental fairness should govern all Title IX grievance proceedings, just as they should govern other student-on-

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[61] *See, e.g.*, ACLU, *Re: Campus Sexual Assault: The Role of Title IX* (June 2, 2014), https://www.aclu.org/sites/default/files/field_document/aclu_statement_for_roundtable_on_campus_sexual_assault_and_the_role_of_title_ix_on_letterhead_final_6.2.14.pdf.

student grievance proceedings, regardless of whether the recipient is a public or private entity. A fair Title IX process is necessary not only to protect the interests of complainants and respondents, but also to promote the fairness and legitimacy of the recipient's investigatory process, hearings, and outcomes.

It is also important to emphasize that Title IX grievance proceedings are school disciplinary proceedings, not criminal prosecutions. Our comments thus draw on the procedures and principles governing civil litigation, which more closely approximate a Title IX grievance proceeding. Finally, while these comments pertain to the Department's Proposed Rule under Title IX, the ACLU believes that the Department should adopt consistent procedures for all civil rights claims under its purview. In addition, schools should adopt consistent procedures for all disciplinary proceedings where similar penalties are at stake, whether or not they involve civil rights claims.

**1. The Proposed Rule Should Require Recipients to Use a Preponderance of the Evidence Standard.**

*§ 106.45(b)(4)(1)*

Proposed Rule § 106.45(b)(4)(1) states that, to determine responsibility in a Title IX grievance proceeding, "the recipient must apply either the preponderance of the evidence standard or the clear and convincing evidence standard, although the recipient may employ the preponderance of the evidence standard only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction."[62] The Proposed Rule further states that "[t]he recipient must also apply the same standard of evidence for complaints against students as it does for complaints against faculty."[63]

By authorizing recipients to impose a clear and convincing evidence standard instead of a preponderance standard, the Proposed Rule frustrates the purpose of Title IX. Under that standard, even where it is more likely than not that the respondent sexually harassed or assaulted a complainant, the school would have no obligation to provide a remedy. The preponderance standard is the appropriate standard of proof to apply for complaints involving peer-on-peer harassment or disputes, including Title IX grievance proceedings, for two reasons.

First, it "is the burden of proof in most civil trials" and requires the factfinder to determine that the complaint is more likely true than false.[64] The preponderance standard is used in civil litigation involving discrimination under Title IX, as well as under Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment and Title VI, which prohibits discrimination on the basis of race in federally-funded programs. Indeed, we are aware of no other circumstance in which discrimination claims are subjected to a "clear and convincing" standard. The

[62] Proposed Rule, 83 Fed. Reg. at 61,499.
[63] *Id.*
[64] *Preponderance of the Evidence*, BLACK'S LAW DICTIONARY (10th ed. 2014).

Department has not adequately explained why it has departed from the norm for adjudicating discrimination claims.

Second, the preponderance standard makes sense because it treats the complainant and the respondent equitably. That is why it is used in civil litigation, where there is no *ex ante* reason to favor one side over the other. A "clear and convincing" standard tips the scales against the complainant. In Title IX grievance or disciplinary proceedings, both the complainant and the respondent have a significant interest in access to education. Serious disciplinary sanctions will undoubtedly affect a respondent's access to education. And, as the Department acknowledges, a school's failure to address sexual harassment or assault will affect the complainant's access to education.[65] For that reason, Proposed Rule § 106.45(b)(1)(i) obliges schools to "[t]reat complainants and respondents equitably."[66] A preponderance standard provides the most equitable approach for resolving the complainant's and respondent's equal interests in access to education.[67]

This principle was reflected in practice even before the Department issued its 2011 guidance: A 2002 survey of institutions of higher education found that 80 percent of schools with written policies addressing the standard of proof for sexual assault cases employed the preponderance of the evidence standard.[68] Proposed Rule § 106.45(b)(4)(1) deviates from this principle by allowing recipients to adopt either a preponderance of the evidence or a clear and convincing standard.

Moreover, the Proposed Rule allows recipients to treat Title IX sexual harassment complaints less equitably than other complaints involving peer-on-peer harassment. It allows recipients to adopt a clear and convincing evidence standard for complaints regarding sexual harassment under Title IX, while employing the less stringent preponderance of the evidence standard for all other disciplinary proceedings, *even if* other disciplinary proceedings carry an equal or greater maximum disciplinary sanction. At the same time, it allows recipients to adopt a preponderance standard "*only if* the recipient uses that standard for conduct code

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[65] Proposed Rule, 83 Fed. Reg. at 61,473 ("[B]ecause the complainant's access to the recipient's education program or activity can be limited by sexual harassment, an equitable grievance procedure will provide relief from any sexual harassment found under the procedures required in the proposed regulations and restore access to the complainant accordingly.").

[66] *Id.* at 61,497.

[67] Some argued that when grievance proceedings lacked other procedural safeguards, a "clear and convincing" standard was a safeguard against unjust results. But the proper way to deal with inadequate procedures is to remedy those procedural deficiencies. The Proposed Rule, with the ACLU's recommended modifications, would provide important additional protections. *See* Elizabeth Bartholet et al., *Fairness For All Students Under Title IX*, at 3–6 (Aug. 21, 2017) (recommending that schools "[u]se a preponderance of the evidence standard *only if* all other requirements for equal fairness are met"), https://dash.harvard.edu/bitstream/handle/1/33789434/Fairness%20for%20All%20Students.pdf (emphasis added).

[68] 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.

violations that do not involve sexual harassment but carry the same maximum disciplinary sanction."[69] The Proposed Rule thus affirmatively authorizes schools to adopt a double standard in only one direction, imposing a higher burden on sexual harassment than any other disciplinary or grievance claims.

The Proposed Rule also unjustifiably ties the standards for student-on-student harassment claims to the standard that applies to disciplinary proceedings for faculty and staff. But employees are differently situated than students, and often have protections against workplace discipline or termination that have been contractually negotiated or collectively bargained. There is no reason that such procedures should govern proceedings for peer-on-peer harassment. Yet the Proposed Rule requires recipients to "apply the same standard of evidence for complaints against students as it does for complaints against faculty."[70] The appropriate standard for equitably resolving peer harassment complaints should not depend on extrinsic factors related to faculty bargaining power. In the absence of any justification for linking these procedures, it appears to be an effort by the Department to require a "clear and convincing" standard.

The ACLU therefore recommends that the Department modify Proposed Rule § 106.45(b)(4)(1) to state that recipients shall apply the preponderance of the evidence standard to Title IX grievance proceedings.[71]

**2. The Proposed Rule's Provision for Live Hearings and Cross-Examination in the University Setting Should Be Modified to Ensure Effective Cross-Examination and Equity and to Avoid Abuse.**

*§ 106.45(b)(3)(vii)*

Proposed Rule § 106.45(b)(3)(vii) states in relevant part: "For institutions of higher education, the recipient's grievance procedure must provide for a live hearing. At the hearing, the decision-maker must permit each party to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at a hearing must be conducted by the party's advisor of choice, notwithstanding the discretion of the

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[69] Proposed Rule, 83 Fed. Reg. at 61,499 (emphasis added).

[70] *Id.*

[71] Whether a "preponderance" or "clear and convincing" standard of proof applies, respondents cannot be held responsible or punished absent a determination that the standard of proof has been met. Under either standard, if the evidence is in equipoise, the respondent prevails. In light of that, the adoption of a presumption of nonresponsibility, as set forth in Proposed Rule § 106.45 (b)(1)(iv), is unnecessary and potentially confusing. The presumption of nonresponsibility is a concept that appears nowhere else in the law and may be confused with the presumption of innocence, a concept associated with the criminal process, where a defendant is presumed innocent until proven guilty "beyond a reasonable doubt." That presumption does not apply in civil proceedings. Proposed Rule § 106.45(b)(1)(iv) should therefore be stricken or clarified to state that a respondent may not be disciplined or held responsible absent a finding that the applicable standard of proof has been satisfied.

recipient under section 106.45(b)(3)(iv) to otherwise restrict the extent to which advisors may participate in the proceedings."[72]

The ACLU supports the requirement of a live hearing and an opportunity for cross-examination in higher education to assess credibility where serious sanctions such as expulsion, suspension, or notation on a student's permanent school record are possible.[73] These are critical safeguards.

The ACLU urges the Department, however, to modify section 106.45(b)(3)(vii) in several respects to address concerns about effectiveness, equity, and abuse. First, to guard against abusive questioning in the formal hearing process, we urge the Department to modify the Proposed Rule to provide that the decision-maker—or at least one decision-maker in the case of a panel—be a lawyer appropriately trained to adjudicate Title IX disputes. Second, to ensure effective questioning and equity, the Final Rule should require recipients to provide a lawyer to either party upon request. Third, to ensure fairness, the Final Rule should provide that the representative of the complainant or the respondent cannot be someone who exercises academic or professional authority over the other party. Finally, the Final Rule should make clear that the requirements of live hearing and cross-examination apply only where the potential sanctions are serious—including expulsion, suspension, or a permanent notation on the student's record. The rationale for these positions follows.

Due process requires the government to provide notice and an opportunity to be heard before depriving someone of their life, liberty, or property interests.[74] The Supreme Court has applied this fundamental requirement of due process to suspension or expulsion from public schools.[75] In *Goss v Lopez*, the Court held that a public school student facing suspension must be afforded a hearing, "an explanation of the evidence the authorities have and an opportunity to present his side of the story."[76] *Goss* does not explicitly state that hearings at the public school level must have live testimony, and private universities are not bound by the constitutional requirements of due process in any event. But in the college or university setting, where the participants are usually adults, live hearings provide the most transparent mechanism for ensuring all parties have the opportunity to submit, review, contest, and rebut evidence to be considered by the factfinder in reaching its

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[72] Proposed Rule, 83 Fed. Reg. at 61,474. The Proposed Rule also provides: "At the request of either party, the recipient must provide for cross-examination to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party answering questions." The ACLU believes this is an important protection and urges that it remain in the Final Rule.

[73] The ACLU agrees with the Department that live hearing and cross-examination should not be required at the K-12 level.

[74] *Goldberg v. Kelly*, 397 U.S. 254 (1970).

[75] *Goss v. Lopez*, 419 U.S. 565, 581 (1975).

[76] *Id.*

determination.[77] Such a process is essential to student disciplinary proceedings where two students' interests are at stake and the possible sanctions are serious.

The Proposed Rule also appropriately guarantees a right of cross-examination in the university setting. Cross-examination is an essential pillar of fair process. Although the Supreme Court has not required cross-examination in the school discipline context, in other contexts the Court has held, "where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."[78] In cases that turn exclusively or largely on witness testimony, as is often the case in peer-on-peer grievances, cross-examination is especially critical to resolve factual disputes between the parties, and to give each side the opportunity to test the credibility of adverse witnesses.[79] The right will be valuable for complainants and respondents, and serves the goal of reaching legitimate and fair results.

While the ACLU supports live hearings and cross-examination in the university context, it believes the cross-examination right would be substantially improved if section 106.45(b)(3)(vii) were modified in several respects to further ensure equity and to prevent abuse.

First, to ensure fair proceedings and guard against abuse, the ACLU recommends that the Final Rule require that the decision-maker—or at least one in the case of a panel—be a lawyer and require that all decision-makers be trained in conducting Title IX hearings, including the appropriate scope and limits of cross-examination.[80] Under the Proposed Rule, cross-examination would be conducted by

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[77] *See* AM. BAR ASS'N, ABA CRIMINAL JUSTICE SECTION TASK FORCE ON COLLEGE DUE PROCESS RIGHTS AND VICTIM PROTECTIONS: RECOMMENDATIONS FOR COLLEGES AND UNIVERSITIES IN RESOLVING ALLEGATIONS OF CAMPUS SEXUAL MISCONDUCT 3 (2017) (expressing a preference for the "adjudicatory model," defined as "a hearing in which both parties are entitled to be present, evidence is presented, and the decision-maker(s) determine(s) whether a violation of school policy has occurred").

[78] *Goldberg*, 397 U.S. at 269.

[79] *See* AM. BAR ASS'N, *supra* note 77, at 9 n.63 (citing *Doe v. Brandeis Univ.*, No. 15-11557-FDS, 2016 WL 1274533, at *35 (D. Mass. Mar. 31, 2016)).

[80] The ACLU suggests that the Department look to the standards adopted by Columbia and Harvard for guidance as to appropriate training. Columbia provides that "[a]ll panelists receive relevant training at least once a year. In addition to training on how the adjudicatory process works, the training will include specific instruction on how to evaluate evidence impartially and how to approach students about sensitive issues that may arise in the context of alleged gender-based misconduct." COLUM. UNIV., GENDER-BASED MISCONDUCT POLICY AND PROCEDURES FOR STUDENTS 29 (2017), http://studentconduct.columbia.edu/documents/GBMPolicyandProceduresforStudents2017-18.pdf. Harvard provides that "[a]ll panelists shall be trained in evaluating conduct under the Policy and these procedures, including applicable confidentiality requirements, have relevant expertise and experience, be impartial, unbiased, and independent of the community (i.e., not current students, faculty, administrators, or staff of Harvard University), will disclose any real or reasonably perceived conflicts of interest or recuse themselves in a particular case, as appropriate, and to the extent feasible reflect the value of diversity in all its forms and meet such other criteria as the Title IX Committee . . . may from time to time establish." HARV. LAW SCH., HLS SEXUAL HARASSMENT

the complainant's and respondent's advisor of choice. The cross-examination would thus often be conducted by non-lawyers, individuals who may share some personal connection to the party (e.g., a family relative, friend, or mentor), and individuals who have little or no understanding of cross-examination. Unlike lawyers, these advisors would not be bound by the rules of professional conduct. Modification of the Proposed Rule is necessary to avoid the real risk that the chosen advisor will conduct a cross-examination that is ineffectual, abusive, or not conducive to facilitating an accurate factual determination by the factfinder.

Second, to ensure students have access to competent representation without regard to financial circumstance, the Rule should provide that a recipient must provide a lawyer to either party upon request for the live hearing. A proceeding in which one side is represented by a lawyer and the other by a non-lawyer representative creates too much risk of unfairness.

Third, the Final Rule should provide that a student's representative in the hearing cannot be a person who exercises academic or professional authority over the other student, and must agree to a code of conduct prohibiting hostile, abusive, and irrelevant questioning of witnesses.

Fourth, the requirement of a live hearing and cross-examination should be limited to proceedings where the potential sanctions are serious, including expulsion, suspension, or a permanent notation on the student's record. The Final Rule should make clear that these protections need not be provided if the recipient rules out serious sanctions at the outset.

Finally, the ACLU recommends modifications to the provision stating that a recipient must not rely on any prior statement of a party or witness who does not submit to cross-examination. The Proposed Rule provides: "If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility."[81] While it is generally appropriate for a recipient to disregard statements made by a party or witness who does not submit to cross-examination, that rule should not apply when a party has previously made a statement against their interest. No party should be able to avoid introduction of their own prior statements against interest by declining to testify at the hearing. Thus, the Final Rule should include an exception for prior statements against interest when offered by the opposing party or the recipient.[82]

**3. The Provision on Delays Due to Concurrent Criminal Proceedings Should Be Strengthened to Safeguard the Respondent's Ability to**

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RESOURCES AND PROCEDURES FOR STUDENTS 9–10 (2014), https://hls.harvard.edu/content/uploads/2015/07/HLSTitleIXProcedures150629.pdf.

[81] Proposed Rule, 83 Fed. Reg. at 61,498.

[82] *See* FED. R. EVID. 804(b)(3).

**Defend Against Criminal Prosecution and the Complainant's Access to Interim Measures.**

*§ 106.45(b)(1)(iv)*

Proposed Rule § 106.45(b)(1)(v) states that a recipient must resolve Title IX grievance complaints and appeals within a reasonably prompt timeframe, but "allows for the temporary delay of the grievance process or the limited extension of timeframes for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of the parties or witnesses, concurrent law enforcement activity, or the need for language assistance or accommodation of disabilities."[83] This is an important safeguard but does not go far enough to protect respondents' and complainants' rights.

The Proposed Rule *allows* recipients to delay proceedings due to concurrent law enforcement activity. The ACLU believes that more protections are needed to ensure that a Title IX grievance proceeding does not jeopardize a respondent's defense against criminal prosecution. Thus, the Proposed Rule should *require* recipients to delay proceedings when a respondent so requests in the face of imminent criminal investigation or prosecution. And in the rare instance where a respondent agrees to proceed with the grievance procedure while facing a criminal investigation or prosecution, the Department should prohibit recipients from drawing adverse inferences based on the respondent's silence during the Title IX grievance proceeding.

At the same time, to ensure that recipients adequately address the needs of complainants during any such delays, recipients should be required to implement interim measures necessary and appropriate to protect a complainant's access to education while grievance proceedings are delayed.[84] The rationale for these recommendations follows.

Delay protects against self-incrimination. In some cases, a law enforcement investigation or criminal prosecution may arise before or during Title IX grievance proceedings. The Fifth Amendment to the U.S. Constitution states that no person "shall be compelled in any criminal case to be a witness against himself," and courts have long recognized that suspects and defendants have a right to remain silent during law enforcement investigations and criminal proceedings.[85] In addition, in criminal prosecutions, no adverse inferences may be drawn from a defendant's refusal to testify.[86]

But adverse inferences may be drawn from a person's invocation of their Fifth Amendment right to remain silent during administrative proceedings, so long

[83] Proposed Rule, 83 Fed. Reg. at 61,497.
[84] *See supra* Section I.5 (discussing interim measures).
[85] *See, e.g.*, *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).
[86] *Carter v. Kentucky*, 450 U.S. 288 (1981).

as the government does not directly punish the refusal to testify.[87] Moreover, testimony elicited in administrative proceedings may be introduced in subsequent criminal proceedings.[88]

This puts a student who faces the prospect of parallel Title IX and criminal proceedings "on the horns of a legal dilemma: if he mounts a full defense at the disciplinary hearing without the assistance of counsel and testifies on his own behalf, he might jeopardize his defense in the criminal case; if he fails to fully defend himself or chooses not to testify at all, he risks loss of the college degree . . . and his reputation will be seriously blemished."[89] Respondents who face parallel Title IX and criminal proceedings will thus often be forced to prioritize their defense in one proceeding (usually the criminal proceeding) to the detriment of their defense in the other. To avoid similar problems, civil proceedings that overlap with criminal proceedings are often stayed pending the outcome of the criminal trial.[90]

The Department recognizes these concerns in its Proposed Rule by allowing recipients to delay Title IX grievance proceedings due to concurrent law enforcement activity. The ACLU recommends that the Proposed Rule be strengthened, however, to make clear that where there is an imminent law enforcement investigation or criminal prosecution, and a respondent requests a delay, the recipient *shall* grant an appropriate delay of grievance proceedings. The Rule should also clarify that a recipient may not refer a complaint to law enforcement for the purpose of delaying the recipient's own Title IX investigation.

The Department should further provide that, when a respondent requests a delay of Title IX grievance proceedings, a recipient *shall* implement any interim measures pursuant to Proposed Rule §§ 106.30, 106.45(b)(1)(viii), necessary to protect the complainant's access to education.

In cases where the respondent chooses to go forward with the grievance proceeding in the face of an imminent law enforcement investigation or criminal

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[87] *Baxter v. Palmigiano*, 425 U.S. 308 (1976).

[88] *See, e.g.*, *Gabrilowitz v. Newman*, 582 F.2d 100 (1st Cir. 1978); *Watson v. Cty. of Riverdale*, 976 F. Supp. 951 (C.D. Cal. 1997); *Hart v. Ferris State Coll*, 557 F. Supp. 1379 (W.D. Mich. 1983).

[89] *Gabrilowitz v. Newman*, 582 F.2d 100, 103 (1st Cir. 1978). The dilemma persists even if the student has legal counsel at the disciplinary proceeding.

[90] Kimberly J. Winbush, *Annotation, Pendency of Criminal Prosecution as Ground for Continuance or Postponement of Civil Action to which Government is not Party Involving Facts or Transactions upon which Prosecution is Predicated—Federal Cases*, 34 A.L.R. Fed. 2d 85, § 2 (2009) (collecting cases) ("Parties facing parallel civil and criminal proceedings are in an unenviable position, primarily since the scope of civil discovery is so much broader than that in the criminal realm, and thus a party's defense of civil claims may threaten the Fifth Amendment privilege against self-incrimination, particularly vis–à–vis testimony that would impact the criminal proceedings. Accordingly, courts have held that the pendency of parallel or related criminal proceedings may provide a basis for postponing the civil proceeding under certain conditions, after the weighing of competing interests.").

prosecution, the Department should make clear that recipients may not draw adverse inferences from a party's silence during Title IX grievance proceedings.[91]

The ACLU therefore recommends that the Department amend section 106.45(b)(1)(v) in relevant part to state that:

> (i) a recipient shall not draw adverse inferences from a party's silence during Title IX grievance proceedings; (ii) where there is an imminent law enforcement investigation or criminal prosecution, a respondent may request and a recipient shall grant an appropriate delay of grievance proceedings; (iii) when a respondent requests such a delay of Title IX grievance proceedings, a recipient shall implement interim measures as necessary to protect the complainant's access to education; and (iv) a recipient may not refer a complaint to law enforcement for the purpose of delaying the recipient's own Title IX investigation.

**4. The Provision for Access to Evidence Not Used in the Proceeding Should Make Clear That Irrelevant and Privileged Information is Not Subject to Disclosure.**

*§ 106.45(b)(3)(viii)*

As the Department recognizes in the Notice of Proposed Rulemaking, "[t]o maintain a transparent process, the parties need a complete understanding of the evidence obtained by the recipient and how a determination regarding responsibility is made."[92] Thus, Proposed Rule § 106.45(b)(3)(viii) "would require recipients to provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including evidence upon which the recipient does not intend to rely in making a determination regarding responsibility."[93]

The Proposed Rule appropriately reflects that transparency regarding both evidence and procedure is a necessary component of any fair adjudicative proceeding. However, the ACLU suggests that the Proposed Rule be modified to make clear that the right of access does not extend to evidence that is irrelevant or that would ordinarily be protected against disclosure in litigation (e.g., due to claims of privilege).

The ACLU agrees that the parties should enjoy broad access to any evidence in the recipient's possession that bears on the complaint under review. However, just as discovery requests in civil litigation are limited "to any nonprivileged matter

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[91] *See* HARV. LAW SCH., *Sexual Harassment Resources & Procedures for Students* § 2.5 (2014), https://hls.harvard.edu/content/uploads/2015/07/HLSTitleIXProcedures150629.pdf.

[92] Proposed Rule, 83 Fed. Reg. at 61,476.

[93] *Id.*

that is relevant to any party's claim or defense and proportional to the needs of the case,"[94] access to information that is irrelevant or privileged must be protected from disclosure in Title IX grievance proceedings. Such evidence would include, but is not limited to, medical records, therapy notes, prior sexual history, and other communications ordinarily protected against disclosure, such as communications covered by the attorney-client, doctor-patient, priest-penitent, and other applicable legal privileges, except where there is a showing of particularized relevance.[95]

The ACLU accordingly recommends that the Department supplement the Proposed Rule to make clear that recipients must not provide the parties with access to information that is either irrelevant or privileged under applicable law.

**5. The Proposed Rule Should Be Clarified To Avoid Confusion and Ensure Equal Appellate Rights.**

*§ 106.45(b)(5)*

Proposed Rule § 106.45(b)(5) provides that a recipient may offer an appeal, but that "[i]f a recipient offers an appeal, it must offer an appeal to both parties."[96] The ACLU agrees with this principle. As the Department recognizes, for both complainants and respondents, the outcome of a Title IX grievance "represents high-stakes, potentially life-altering consequences deserving of an accurate outcome."[97] Allowing both complainants and respondents to appeal a recipient's initial determination regarding a Title IX grievance appropriately "reflect[s] that each party has an important stake in the reliability of the outcome."[98]

The Proposed Rule further states that "[i]n cases where there has been a finding of responsibility, although a complainant may appeal on the ground that the remedies are not designed to restore or preserve the complainant's access to the recipient's education program or activity, a complainant is not entitled to a particular sanction against the respondent."[99] The latter qualification properly reflects the Supreme Court's holding that Title IX does not confer on complainants a

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[94] FED. R. CIV. P. 26(b)(1).

[95] The language of the Proposed Rule governing sexual history should be similarly narrowed. It currently provides: "With or without a hearing, all questioning must exclude evidence of the complainant's sexual behavior or predisposition, unless such evidence about the complainant's sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent." Proposed Rule, 83 Fed. Reg. at 61,498. All questioning as to prior sexual history should be barred absent a showing of particularized relevance. Even disclosure of evidence concerning a prior sexual relationship between the respondent and the complainant, without a showing of particularized evidence, infringes the rights of the complainant.

[96] Proposed Rule, 83 Fed. Reg. at 61,478.

[97] *Id.* at 61,479.

[98] *Id.*

[99] *Id.*

statutory "right to make particular remedial demands" of recipients.[100] As long as a recipient restores or preserves equal access to education, it has discretion about which remedy or sanction to provide. To avoid any confusion, the ACLU recommends that the Department specify that while complainants are not entitled to particular sanctions, they are entitled to argue that the particular sanctions imposed are insufficient "to restore or preserve the complainant's access to the recipient's education program or activity." Some might otherwise read the Proposed Rule as drawing a distinction between "remedies" and "sanctions," and as prohibiting a complainant from arguing that the sanctions imposed are insufficient.[101]

The ACLU accordingly recommends that the Department revise the Proposed Rule to state: "In cases where there has been a finding of responsibility, although complainant is not entitled to a particular remedy or sanction against the respondent, the complainant may appeal on the ground that the remedies or sanctions are not designed to restore or preserve the complainant's access to the recipient's education program or activity."

**CONCLUSION**

For the reasons stated above, the ACLU objects to the Rule as proposed, and recommends that the Department modify the Rule consistent with these comments. If you have any questions, please contact Michael Garvey at mgarvey@aclu.org or 202-675-2310.

Sincerely,

David Cole
National Legal Director

Faiz Shakir
National Political Director

Louise Melling
Deputy Legal Director

Jeffery P. Robinson
Deputy Legal Director

Lenora Lapidus
Director
Women's Rights Project

Emma Roth
Equal Justice Works Fellow
Women's Rights Project

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[100] *Davis v. Monroe Cty. Sch. Bd.*, 526 U.S. 629, 648 (1999).

[101] *See* AM. BAR ASS'N, *supra* note 77 at 3 (recommending that grounds for appeal should include "the imposition of a sanction disproportionate to the findings in the case (that is, too lenient or too severe)"); Elizabeth Bartholet et al, *supra* note 67 at 5–6 (arguing that recipients must "[a]llow appeals on any grounds, rather than limit them narrowly")..

WASHINGTON SCHOOL OF LAW
UNIVERSITY OF WASHINGTON
*March 27, 2019*

Hon. Lamar Alexander, Chairman
Hon. Patty Murray, Ranking Member
*U.S. Senate Committee on Health, Education, Labor, and Pensions,*
*428 Senate Dirksen Office Building,*
*Washington, DC.*

DEAR CHAIRMAN ALEXANDER, AND RANKING MEMBER MURRAY:

At the hearing to be held on April 2, 2019, the witnesses will offer a variety of views about the wisdom and legality of the regulations proposed by the Department of Education regarding the manner in which educational institutions that receive federal financial assistance should carry out their obligations under Title IX regarding sexual harassment. The controversy regarding how educational institutions should deal with sexual harassment is exceedingly complex, and the efforts of any one administration to establish a detailed set of standards is likely to be reassessed and altered by a subsequent administration. The policy of Secretary DeVos is based, to a significant degree, on her disapproval of the Title IX sexual harassment guidance of the Obama administration, and there will undoubtedly come a time when another Secretary of Education in turn will disagree with the DeVos regulations, and will rescind or rewrite them . Continuing alterations in federal standards will impose an unreasonable burden on the affected educational institutions, and will ill-serve the interests of complainants and respondents.

The Committee should explore ways in which a degree of stability could be brought to this area of the law. Rather than leaving the entire problem to regulation by the Department of Education, resulting in regulations subject to redrafting with each change in administration, the Committee should reassess the respective roles of Congress, the Department of Education, and the courts in fashioning the standards governing how an educational institution receiving federal funds should address harassment of students, including but not limited to harassment on the basis of sex, that violates federal law.

There are several fundamental issues which the Committee could productively consider, and which the Committee might invite the scheduled witnesses to address.

*Should the constitutional due process standards be extended to students at non-public schools receiving federal financial assistance who are alleged to have engaged in harassment forbidden by federal law?*

The Department of Education, and some of those who support the proposed regulations, have argued that students facing disciplinary action for alleged sexual harassment should be accorded due process. Students at public colleges and universities, as well as at public primary and secondary schools, already have a constitutional right to due process before significant disciplinary action can be taken that would interfere with their education. The Supreme Court has held that students in state and local schools have a liberty interest in their education, and that they can only be deprived of that interest in a manner consistent with the Due Process Clause of section 1 of the Fourteenth Amendment. *Goss v. Lopez,* 419 U.S. 565 (1975).

But the constitutional guarantee of due process does not ordinarily apply to private institutions, even though they may receive substantial federal or state financial assistance. See *Rendell-Baker v. Kohn,* 457 U.S. 830 (1982). The Fourteenth Amendment's guarantee of due process forbids only the states (and their agencies and subdivisions), not private institutions, to deprive any person of life, liberty or property without due process of law. The Notice of Proposed Rulemaking recounts that there are a number of cases in which courts found that due process violations had occurred in proceedings against individuals alleged to have engaged in sexual harassment, In fact, however, many of these lawsuits did not constitutional due process at all; they were suits against private colleges and universities, and were based, not on the Fourteenth Amendment, but on contract claims or state law. Respondents at such private schools must rely on contract and state law claims precisely because they were not protected by the constitutional due process standards. State laws on which respondents rely vary widely, and the existence of a colorable contract claim would depend on the rules and practices of particular institutions.

The proposed regulations seek to address this situation by establishing a complex body of rules that would extend to respondents at private (as well as public) institutions. It is far from clear that the Department's authority to issue regulations "to effectuate" Title IX encompasses the authority to create such rules. 20 U.S.C. §

1682. And, unlike the constitutional guarantee that applies to students in public institutions, the regulatory protections proposed by the current administration could be modified or entirely rescinded by a future administration, either because it disagreed with those regulations or because it thought them outside the authority of the Department.

The Committee should consider whether Congress should by statute provide that students at private institutions facing disciplinary action for conduct that violates federal law should be accorded the procedural rights that under the Due Process Clause would apply to students at public institutions. In that context, it would be appropriate to consider whether such a statute should apply not only to harassment forbidden by Title IX, but also to harassment forbidden by Title VI and by section 504 of the Rehabilitation Act of 1973.

*Should the Department of Education be forbidden to require that students alleged to have engaged in harassment forbidden by federal law be accorded special procedural rights greater than those provided to other students under the constitutional due process standard?*

Although the Department's justification for the proposed regulations repeatedly refers to due process, the regulations go far beyond what is required by the Due Process Clause itself. Under long-established Supreme Court precedents, the Due Process Clause requires a case-specific balancing of several factors, including the seriousness of the misconduct, the magnitude of the proposed disciplinary action, and the reliability of the procedures a school proposes to use. *Mathews v. Eldridge,* 424 U.S. 319 (1976). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895 (1961). This flexible constitutional standard bears little resemblance to the proposed rigid, one-size-fits-all regulatory scheme. Some procedures in the proposed regulations would be required by the Due Process Clause in some instances, but many would often not be required, and some would never be. In the Notice of Proposed Rulemaking, and in the Department's public statements, "due process" refers to the particular procedures personally favored by the current Secretary, not to the constitutional standards.

The Committee should consider whether the Department should barred from requiring more than what the Due Process Clause mandates, and from requiring that educational institutions to accord to students alleged to have engaged in sexual harassment special procedural rights that would not be available (even if the Due Process Clause applied) to a student charged with other types of misconduct. Under the proposed regulations, for example, a student at a state school charged with sexual assault would have a more protective set of procedural rights than a student charged with other types of assault, with racial harassment, or with cheating on a test. A state institution which made such a gender-based distinction on its own initiative would be subject to challenge under Title IX itself, and a federal requirement that it do so would raise serious problems under the Equal Protection requirement of the Fifth Amendment. Moreover, unlike a statutory guarantee of constitutional due process, special procedural protections under one administration for respondents in sexual harassment cases could be replaced by a regulation with few if any protections for respondents under another administration.

If federal protections for respondents were replaced by a statutory guarantee of constitutional due process standards, the law would remain stable despite changes in the administration. Article III courts, not officials of the Executive Branch, are responsible for interpreting the Constitution. The current dispute about whether respondents should be accorded a right to cross examination, and if so under what conditions, would be resolved by the courts, not through rulemaking, and the resolution of that dispute would not change with the election results.

*Should individuals who complain about harassment forbidden by federal law be guaranteed procedural rights comparable to those accorded to individuals alleged to have engaged in such harassment?*

Although the Due Process Clause affords procedural rights to respondents facing disciplinary action for sexual harassment (or any other misconduct), the Clause does not (at least usually) provide protections for the victims of sexual harassment. A respondent has a constitutional right to due process when a school takes disciplinary action (such as suspension or expulsion) that adversely affects his or her liberty interest in an education; the courts, however, have not generally recognized a comparably protected liberty interest on the part of a complainant. Although a complainant might assert the he or she had such a liberty interest if a school's failure to deal with sexual harassment drove her out of the school, whether the courts would so hold is far from clear.

Students who complain to their schools about sexual harassment are too often denied the types of procedural protections that are accorded to respondents. The scope and effectiveness of a purely regulatory solution would necessarily vary with the policies of each administration. Under section 106.45(b)(3) of the proposed regulations, for example, a school could decide that a sexual harassment complaint was not sufficiently serious, or not sufficiently connected with a federally assisted program or activity, and summarily dismiss the complaint, without first telling a complainant that dismissal was under consideration or permitting him or her to address the proposed reason for dismissal.

The Committee should consider whether this problem should be addressed by expressly tying the level of procedural protections for complainants to the level of procedural protections accorded to respondents.

*Should institutions receiving federal financial assistance be required to exercise the same degree of care to protect students from harassment forbidden by federal law as Title VII requires those institutions to exercise to protect employees from unlawful harassment?*

The controversy surrounding the proposed regulations has highlighted an incongruous difference in the degree of protection from sexual harassment accorded by federal law to employees of educational institutions (including student-employees, such as teaching assistants or research assistants) and to students at those same institutions.

Under the Supreme Court decisions in *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742 (1998), a school is required by Title VII to use reasonable care to protect employees from sexual harassment. That obligation includes both reasonable care to prevent sexual harassment, and reasonable care to correct sexual harassment when it does occur. Title VII applies to harassment by peers, as well as to harassment by a supervisor. Under the Court's Title IX decisions in *Gebser v. Lago Vista Ind School Dist.,* 524 U.S. 724 (1998), and *Davis v. Monroe Cty. Bd. of Ed,* 526 U.S. 629 (1999), on the other hand, a school may need to do no more than avoid deliberate indifference with regard to reports of sexual harassment. Although the exact scope of the duty to protect students under Gebser and Davis is to some extent in dispute, it is clearly less demanding than the duty to protect employees under Faragher and Ellerth.

This distinction has practical consequences which are impossible to justify as a matter of federal policy. If a college or university receives a complaint that a professor sexually harassed a 30-year old teaching assistant and an 18-year old freshman, the school has a far greater incentive to protect the teaching assistant than the student. If an elementary school receives a complaint that a teacher is sexually harassing a 22 year-old student teacher, and a 12 year-old girl, the school has a greater incentive to protect the student teacher, even though the younger victim is clearly more vulnerable. If in such situations both victims were to sue the school for failing to take effective action to address the harassment, the outcome might be different depending on whether the plaintiff was an employee or only a student. A student who works in the school bookstore enjoys one level of protection while in the store, and a lesser degree of protection while in his or her dorm. A school faces potential liability if it fails to take affirmative steps to prevent harassment student-on-student harassment of a teaching assistant, but may not face liability if it does nothing (until there is a complaint or some other report) to prevent student-on-student harassment of a non-employee student.

Because this problem involves two separate federal statutes, it is one which Congress is best able to address.

Yours sincerely,

ERIC SCHNAPPER
*Professor of Law*

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STATEMENT OF SEN. BRAUN SUBMITTED FOR THE RECORD

Today's hearing shines a light on a very serious problem on college campuses regarding sexual assault. Universities and colleges need to provide a safe and supportive campus environment, while also ensuring there is a secure system in place to provide victims of sexual assault with the proper care following any incidents. As a society, we must condemn and speak out about sexual violence, educate against such behavior, and punish those who perpetrate it, all while ensuring due process occurs, which is not mutually exclusive.

Hon, Betsy DeVos, Secretary of Education
*U.S. Department of Education,*
*400 Maryland Avenue,*
*Washington, DC.*
*January 29, 2019*

DEAR SECRETARY DEVOS:

I write to express my deep concern with the Department of Education's new proposed rule for Title IX of the Education Amendments Act of 1972 (Title IX). Title IX was established to ensure that discrimination based on sex, including sexual harassment, would not impede a student's right to education. It is intended to provide crucial protections to all students and direct the response of schools that receive federal funding to reports of sexual harassment and assault. The proposed regulation serves to roll back important processes and protections for survivors of sexual assault and violence, posing a threat to student safety on campuses across the country and possibly undermining the intent of Title IX. Thus, I urge you to immediately reconsider the proposed regulation.

In September 2017, over 16,000 formal comments were submitted during the comment period on deregulation. These demonstrated overwhelming support for the Obama administration's 2011 and 2014 Title IX guidance documents. Yet, ignoring the voices of survivors and advocates, you chose to rescind these vital civil rights documents, replacing them with interim guidance that left survivors and schools in the lurch for over a year. As proposed, the Title IX rule weakens the responsibility of schools to adequately respond to instances of sexual harassment and assault.

Of particular concern, is the proposed regulation's narrowed definition of sexual harassment to only include "unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's education program or activity; or sexual assault." In accordance with this definition, students must wait and endure sexual harassment up to the point of it severely impeding their education before they may even file a complaint. This is counter to the intent of Title IX to prevent cases of sexual harassment and assault from escalating to the level of disrupting a student's education.

Additionally, under the proposed regulation, schools would only be required to investigate complaints if a survivor reports to an individual with the "authority to institute corrective measures." However, the regulation does not require schools to make these officials known to students, placing an undue burden on survivors to seek out the appropriate person with whom to file a report. This requirement will likely result in a decrease in the number of cases investigated on campuses, further discouraging survivors from coming forward with complaints. Similarly, by limiting the school's responsibility to cases in which the alleged harassment must have occurred within the school's own "education program or activity", the proposed rule fails to protect students in most off-campus housing and all incidences of online harassment. Narrowing the scope of institutional responsibility to prevent and address instances of sexual harassment and assault under Title IX will not reduce their occurrence. Instead, survivors will have weakened protections and fewer recourses to justice, resulting in diminished access to their right to education.

Overall, the entire proposed regulation undermines the original intent of Title IX to ensure that discrimination based on sex, including sexual harassment, does not impede a student's right to education. I urge you to immediately reconsider the proposed Title IX regulation.

Sincerely,

HON. TIM KAINE

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**COMMONWEALTH OF VIRGINIA**

*STATE COUNCIL OF HIGHER EDUCATION FOR VIRGINIA*

*January 28, 2019*

This memo is intended to provide formal comments pursuant to the request for public comment on the U.S. Department of Education's draft rules entitled, "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.

The comments below on the proposed regulations are provided to the U.S. Department of Education by the Sexual Violence Advisory Committee (SVAC) of the State

Council of Higher Education for Virginia (SCHEY). SCHEY is the Commonwealth of Virginia's coordinating body for higher education. In partnership with state and federal agencies, organizations, and public and private institutions, SCHEY advocates for best practices and accountability in advancing higher education in the Commonwealth. The SVAC provides guidance on sexual violence policy, response, and education in higher education to the state's policy makers, legislators, other elected officials, and college and university leaders. Membership is multi-disciplinary including administrators from Title IX offices, student affairs, academic affairs, human resources, and law enforcement, with counsel to institutions serving as legal advisors.

The SVAC is grateful to the U.S. Department of Education for the opportunity to provide comment and for the consideration of these and the many other comments submitted.

**Introduction**

In 2015, at the conclusion of a statewide gubernatorial task force and state legislation specific to campus sexual violence, SCHEY established the SVAC with representation from two and four-year public and private colleges and universities in Virginia. The Commonwealth benefits from community colleges, single-sex institutions, institutions ranging in size and type from small liberal arts colleges to large research universities, schools located on rural and urban campuses, highly resourced and under-resourced institutions, and Historically Black Colleges and Universities. Meeting regularly, the SVAC identifies programs, policies, training, and education opportunities to prevent and respond to sexual violence within the Commonwealth's institutions of higher education. The SVAC comments on the proposed regulations are the result of discussions that included colleges and universities in the Commonwealth who participated in meetings and discussions convened by the SVAC. Not all institutional representatives to the SVAC chose to participate.

The SVAC comments are categorized as follows: l. General Comments, II. Response to Specific Proposed Regulations, III. Response to Directed Questions, and IV. Cost and Implementation. In addition, the SVAC prioritized specific concerns. These concerns are incorporated throughout this document and included in comments on specific proposed regulations and in response to the directed questions. These concerns are:

- Chilling effect of legalistic procedural requirements;
- Jurisdiction;
- Regulation of perceived bias;
- Mandatory live hearings;
- Cross-examination in such live hearings;
- Role of advisors throughout the investigation and adjudication; and
- Standard of proof.

Furthermore, of significant concern to the SVAC are the increased costs likely to be associated with implementing the proposed regulations. In particular, colleges and universities with limited resources find daunting the possibility of having to implement these requirements. These costs include: hiring specialized personnel (such as advisors, hearing officers, and counsel), technology (including software purchase and launch and technology for cross-examination in hearings), the construction or renovation of space to allow for simultaneous, screened-off hearings, dedicated advisors (for both parties), training on implementation (for all involved, mediation/informal processes, and faculty/staff/students), and costs associated with increased documentation (including software purchase, launch, and maintenance).

The Commonwealth's institutions of higher education are deeply committed to responding effectively to reports of sexual harassment and violence. In addition, all institutions are dedicated to fair and equitable processes that protect the rights of all parties.

**I. General Comments**

The SVAC reviewed and discussed the proposed regulations in the context of its goal to promote effective policies and procedures for responding to reports of sexual violence keeping in mind the original intentions of Title IX. Comments below highlight the possible impact on institutions in Virginia and their ability to effectively prevent and address sex discrimination so that no person is excluded from participation in, denied the benefits of, or subject to sex discrimination in the educational

programs and activities of the Commonwealth's colleges and universities. Of particular concern is the degree to which the proposed regulations will have a "chilling effect" on individuals seeking assistance. The inclusion of legalistic procedures into conduct processes imports the adversarial nature of court proceedings into institutional processes intended to be educational. Rather than encouraging reports of sexual misconduct these processes run the risk of serving as a barrier resulting in institutional risk and an inability to preserve a safe and equitable educational environment. General comments include over-arching concerns with the understanding that each college and university within the Commonwealth is unique in culture, history, mission, size, geographic location and with access to varying levels of resources.

**I. Autonomy of Institutions of Higher Education**

The tradition of institutional autonomy in American higher education mandates that each institution support student and employee conduct and productivity within the context of the college or university's mission and history. To this end, the comments below point to ways in which the proposed regulations jeopardize institutional culture.

- Institutional policies and processes designed to guide student and employee conduct are developed within the mission, history, and legal contexts of the college or university and in concert with state and federal law and each institution's governance processes. Institutional policies and practices are not "one size fits all." An alternative would be for the U.S. Department of Education (Department) to provide expectations and guidelines, through technical assistance, for adjudicating a case and allow institutions to create the procedure that works within their culture.
- Within each institution, students and employees have distinct and separate processes for upholding and correcting conduct. Institutional legal relationships and contracts are distinct for students and for employees. The proposed regulations appear to apply the same processes, including the same standard of evidence, to both groups. Institutions must be allowed to promulgate policy and processes that comply with federal and state laws and regulations and simultaneously take into account the unique legal and contractual relationships for both students and employees. Directed question number three seeks comment regarding anything in the proposed regulations that will prove unworkable in the context of sexual harassment by employees. Requiring the same standard of evidence for both students and employees will prove unworkable for many institutions in the country.
- The proposed regulations jeopardize institutional autonomy by dictating the manner in which processes are administered. The inclusion of legalistic processes is not appropriate for colleges and universities whose primary focus for addressing misconduct is educational in nature. Institutions should not be directed to conduct "trial-like" hearings as proposed in the regulations.
- The prescriptive procedural requirements contained in these regulations will cause institutions to be inconsistent within different types of conduct/disciplinary related procedures.
- The proposed requirement that the institution will only investigate and consider formal written and signed complaints conflicts with an institution's commitment to a safe learning and working environment. Institutions are committed to preventing harm to the broader community and limiting the circumstances under which an investigation can occur limits an institution's ability to be responsive and proactive. An institution will want to act when it learns of the possibility of sexual violence in the absence of a signed formal complaint made to the Title IX Coordinator.
- Community colleges and other institutions enroll students who are under the age of 18. In addition, many institutions provide programs, host camps or other activities aimed at youth. The regulations will require careful consideration in terms of compliance with necessary laws, regulations, and expectations for attending to the needs of minors -whether they are students, or guests, of the institution.

## II. Virginia and Federal Law, Regulations, Processes and Proposed Title IX Regulations

The proposed regulations challenge the ability of the Commonwealth's institutions to administer policies and procedures compliant with other federal and state laws and regulations. In Virginia, institutions integrate compassionate, timely, and fair processes with compliance with the Clery Act, the Violence Against Women Act, the variety of Title IX compliance guidance offered since 2011, and legislation enacted in the Commonwealth of Virginia.

### Potential Inconsistencies with the Code of Virginia

- State law (Va. Code § 23 .1–900) requires that institutions make a notation on a student's academic transcript if found responsible for sexual violence under that institution's student conduct code OR if the student withdraws while under investigation for a possible sexual misconduct violation. The proposed regulations require a stated presumption of innocence by the institution throughout investigations, hearings, appeals, and sanctioning processes. The requirement that institutions state a presumption of innocence invites conflict with the state requirement that institutions note on a transcript that a student has withdrawn while under investigation for sexual misconduct and before the completion of a hearing.
- State law (Va. Code § 23.1–806) requires that a report of sexual violence that potentially rises to the level of a felony be reported within 72 hours to the Commonwealth's Attorney. The proposed regulations have the potential to prevent timely notifications.
- The proposed regulations create a conflict with the state's definition of a responsible employee. The state, following earlier Title IX guidance, has a definition that is broader than the proposed "one who has the authority to institute corrective measures" on behalf of the institution.
- State law (Va. Code § l 9.2–11.2) provides victims of crime the right to nondisclosure of certain information by law enforcement and other state entities. In some circumstances, the proposed regulation requiring the sharing of evidence might conflict with this requirement.
- Virginia's Law Enforcement Officers Procedural Guarantee Act (§9.1–500) outlines processes for the investigation of law enforcement officers charged with misconduct, including sexual harassment that might fall under Title IX. The proposed regulations might conflict with the provisions for investigating a campus law enforcement officer.

### Potential Inconsistencies with Federal Laws and Regulations

- Proposed regulations require access to records by the parties. The Family Educational Rights and Privacy Act (FERPA) and the Virginia Health Record Privacy Act (Va. Code § 32.1–127 .1 :03) protect the confidentiality of student records. The proposed regulations appear to offer access to records by all parties at various, and undetermined, moments during an investigation.
- The proposed regulations conflict with mandates in the amendments to the Clery Act from the Violence Against Women Act. The on and off-campus discrepancies require clarification. Other discrepancies between the proposed regulations, the Clery Act and the Violence Against Women Act include the definition of sexual assault, the role of stalking or relationship violence as a violation of Title IX, and varying definitions of individuals who have responsibilities for reporting within and external to the institution.
- The proposed regulations do not address the complexities of facts that are frequently associated with reports of harassment and/or sexual violence. For example, additional behaviors might play a contributing role in setting the context for sexual misconduct including alcohol violations, stalking, relationship violence, assault, hazing, and hate crimes.
- The proposed regulations treat sexual harassment policies differently than the processes used for allegations of other types of discriminatory harassment such as race, ethnicity, religion, disability, etc.

## II. Comments on Specific Language in the Proposed Regulations

### I. Recipient's response to sexual harassment (Proposed§ 106.44)

### A. Adoption of Supreme Court standards for sexual harassment

*Proposed Section 106.44(a) General; Section 106.30*

*Comment:* The proposed regulations should be modified to address two areas. First, the ability of an institution to continue to apply its existing policies and procedures to behaviors that are not subject to the requirements of the proposed regulations. Second, the regulations should address the ability of an institution to consider conduct about which it is aware, but in which the complainant is not willing to sign a formal complaint with the Title lX Coordinator.

### B. Responding to formal complaints of sexual harassment; safe harbors

*Proposed Section 106.44(b) Specific circumstances; Section 106.30*

*Comment:* The requirement "when a recipient has actual knowledge of reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment, the Title IX Coordinator must file a formal complaint" raises several questions. First, what is meant by the word "multiple"? Are two complainants considered "multiple"? Second, the regulations do not provide guidance for the receipt of multiple complaints (formal and informal) by the same complainant against the same individual or an organized group of individuals. Third, the regulations do not provide clarity on what the recipient's action ought to be when in receipt of information regarding multiple incidents (by single or multiple complainants). It is recommended that the word "must" be changed to the word "may" to allow discretion by the Title IX Coordinator where a formal complaint may not be warranted. While creating a safe harbor for universities from the Department's administrative enforcement, this particular safe harbor provision may not assist institutions when individuals sue.

## II. Grievance procedures for formal complaints of sexual harassment (Proposed § 106.45)

### A. General requirements for grievance procedures

*Proposed Section 106.45(b)(l)*

*Comment:* The requirement "that any individual designated by a recipient as a coordinator, investigator, or decision-maker not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent" is extremely broad and impossible to implement. Based on this expansive rule, many experienced professionals with expertise in the work associated with responding to reports of sexual violence will be excluded from handling cases even if they are objective. At many institutions, particularly community colleges and others with limited resources, the same professional may be required to administer several of the phases associated with responding to a complaint. At these institutions, the anti-bias requirement, as stated in the regulations, would preclude some professionals from performing their job. Universities and colleges currently partner with federal and state compliance agencies to implement policies designed to support civil and productive conduct and to maximize compliance. For example, institutions employ individuals, accountable within and external to the institution, to serve as internal auditors, research compliance officers, and health and safety personnel.

### B. Notice and investigation

*Proposed Section 106.45(b)(3) Investigations of a formal complaint*

*Comment:* Institutional jurisdictional problems are created by the proposed regulations that limit investigations to complaints "that occur within the recipient's program or activity." Colleges and universities are obligated to provide learning environments on and off-campus, domestically, and abroad that protect the rights of students to "equal access to the school's education program or activity." The directive that a complaint must be dismissed if determined not to have occurred within the institution's program or activity (and then moved over to another area of student discipline) will result in multiple concurrent processes with associated costs and potential delays and will have an adverse impact on the complainant and the respondent. The prescriptive documentation, notification, and hearing processes outlined in the proposed regulations will result in extending the time in which a case is resolved.

The proposed regulations require a live hearing, which is already the practice of many Virginia institutions. However, some colleges and universities successfully employ a single-investigator model or hybrid model that combines a single investigator with a separate decision maker or hearing panel, and appeals processes. Each institution is committed to protecting the rights of their students with robust fact-finding, hearing, and adjudication processes that are suited to their institutional mission, resources, and educational objectives.

Under §106.45(b)(3)(vii), the proposed Title IX regulations state, "the Department has determined that at institutions of higher education, where most parties and witnesses are adults, grievance procedures must include live cross-examination at a hearing. Proposed §I 06.45 (b)(3)(vii) requires institutions to provide a live hearing and to allow the parties' advisors to cross-examine the other party and witnesses" (Page #61476, Column #2, Paragraph #1). Currently, some institutions utilize the single investigator or hybrid model due to personnel constraints and to keep the emphasis on the educational goals of disciplinary processes.

Mandatory live hearings for every formal Title IX investigation place a significant burden on the administration and faculty of many institutions. A single investigator model that would satisfy a number of the proposed requirements could allow for questioning during the initial investigation process. At the initiation of an investigation, each party would be provided the oppo1tunity to question the other party or any witnesses through questions submitted to the investigators. This practice would satisfy the requirement for a cross examination process expressed in § I 06.45. In addition, once the decision-maker has made a ruling on the initial finding and recommendations of the investigation this single investigator model could offer an appeal process that includes a live hearing open to all the parties. Each party can choose to appeal the initial decision based on numerous grounds to include: the investigators exhibited unfair bias which influenced the results of the investigation; new evidence, unavailable at the time of the investigation, that could substantially impact the investigators' finding; error in the conduct of the investigation that is of such magnitude as to deny fundamental fairness; insufficient evidence to support the findings of the investigator; or the sanctions recommended by the investigators are substantially outside the parameters or guidelines set by the institution for this type of offense. This live hearing would include questioning of all parties and witnesses, as well as, providing other relevant evidence to the hearing panel. At the conclusion of the live appeal hearing, the hearing panel would make an independent recommendation to the decisionmaker concerning the findings in the case. This live appeal hearing process would also satisfy the requirement expressed in §106.45 above while allowing institutions the flexibility of utilizing the single investigator model. Institutions of higher education must retain the autonomy to choose to use the single investigator model as long as that model allows for a cross examination process during the initial investigative phase and also allows for a live appeal hearing which could be utilized by all parties if they so choose.

The proposed regulations identify advisors to the complainant and respondent as active participants in the process when engaging in cross examination in hearings. The proposed regulations set up an untenable conflict by requiring that institutions bear the responsibility for providing advisors to parties in Title IX processes who have chosen not to have an advisor for other purposes. First, to preserve equity and fairness throughout its conduct system, the institution would be required to provide advisors for parties in all types of misconduct processes: those that involve sexual misconduct and those that do not. Second, by engaging in identifying, training, and supporting advisors, the institution is subjected to questions of neutrality and impartiality. Third, by requiring that advisors engage in cross examination, the proposed regulations conflate the role of an advisor with the role of an advocate. Fourth, when an employee serves a student as an advisor, the college or university is exposed to liability.

The protections afforded by cross examination are appropriate for adversarial processes but not for educational/administrative processes. The injection of some legal elements like cross-examination without checks in place, such as the Rules of Evidence, leaves those subject to cross-examination (both respondents and complainants) open to potentially harassing lines of questioning. The stated justification for requiring cross-examination by advisors and not the parties is to avoid re-traumatize the complainant, but the proposed regulations require advisors to conduct cross-examination not just of the complainant but also of the respondent and all witnesses. This is unnecessarily broad and will result in a needlessly adversarial process and takes the focus away from the educational nature of what institutions are trying to accomplish.

Respondents, complainants, and witnesses will be subject to cross-examination also, and will be required to speak or their testimony cannot be considered. There is no flexibility under these proposed regulations. This would effectively deny the respondent the right to remain silent afforded by the U.S. Constitution. A respondent may be forced to self-incriminate in the administrative hearing, which could be used in a criminal proceeding. Additionally, institutions do not have the authority to subpoena witnesses. We can encourage students/employees to attend but have no ability to compel participation.

The requirement that "If a party does not have an advisor present at the hearing, the recipient must provide that party an advisor aligned with that party to conduct cross-examination," poses several additional questions and concerns. If one party has an attorney, it is unclear whether an institution is required to provide an attorney of the same caliber to the party needing an advisor. This proposed regulation raises the concern that individuals will expect institutions to pay for the advisor. In addition, the regulations do not address the possibility if the parties deny the use of an advisee. Would the institution be responsible for providing advisees in the absence of both parties selecting an advisee to accompany them or act on their behalf? The phrase "aligned with the interests of the party" for whom the advisor is assigned is vague and not defined.

The work of the advisor will extend beyond the hearing. The advisor must be willing and able to spend time with the party to prepare for a hearing, understand the policies and procedures of a given institution, and be willing and able to cross-examine the other party. This will require extensive training and will prove very difficult for many institutions. In addition, institutions will be required to secure counsel for the hearing officer or decision maker adding cost to the implementation of the proposed regulations.

The proposed regulations require that a decision maker must explain why information is not relevant and therefore not admissible. This requirement goes far beyond the rules of court for civil or criminal proceedings. Legal counsel for every institution will need to attend every hearing to assist non-attorney panel members due to the adversarial nature of the hearings.

Under §106.45(b)(3)(viii) the proposed regulations "would require recipients to provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint... The evidence must also be provided electronically and the parties must be given at least ten days to submit a written statement." (Page #6 I 4 76, Column #3, Paragraph #2) This requirement of evidence disclosure is comparable to the discovery process used for evidence in criminal and civil court cases. However, administrative Title IX investigations conducted by institutions of higher education differ from criminal and civil court matters in the degree of confidentiality required for all parties involved. Criminal and civil court matters are conducted in open court and are part of the public record. In almost all Title IX investigations, all parties, including the complainant and the respondent, want the matter to be held to the highest level of confidentiality. Due to the sensitive nature of the matter regardless of the outcome of the case, all the parties want to keep the matter confidential and want to limit the distribution of evidence to a minimum.

Providing the evidence to all parties in an "electronic format" even if it cannot be downloaded or copied threatens that confidentiality. Nothing would prevent the parties from having anyone without a "need-to-know" read the file that would contain evidence and witness statements about the incidents investigated. Those individuals in turn could relay this confidential information to anyone else. Institutions have no ability to enforce the confidentiality demanded by the parties in the case. In addition, it is unclear if there are file sharing platforms available that would prevent parties from taking "screen shots" of specific documents for later distribution. Currently, many institutions of higher education do provide full disclosure of all evidence in Title IX cases to all parties and their advisors through physical review of the documents in the presence of the investigators. The parties and their advisors are allowed to review all the evidence as witnessed by the investigators as many times as needed. This physical review fulfills the important mission of full disclosure to all the parties and also aligns with the inspection requirements under FERPA. Furthermore, a physical review does not place confidentiality at risk by releasing important evidence to the parties that could later be provided to others beyond the control of the institution of higher education. Any new Title IX regulations should require that Title IX procedures assure evidence is fairly and completely disclosed to all parties and their advisors; however, the regulations should also provide the institutions of higher education the autonomy to choose to disclose this evidence

through physical review as witnessed by the investigators in order to protect the confidentiality of the process.

### C. Standard of evidence

*Proposed Section 106.45(b)(4)(i)*

*Comment:* The SVAC agrees and believes strongly that institutions need to preserve the ability to determine the standard of evidence for student and employee misconduct processes. The federal government should not mandate a standard of evidence for higher education. Processes designed to address possible violations of Title IX must be consistent with processes that address possible violations of other civil rights. Institutions must be allowed to implement processes consistent across the policies and processes employed to address all forms of discrimination and discriminatory harassment. Establishing processes unique to sexual harassment might create problems with consistency and equity. Within the Commonwealth, institutions use the standard of evidence that best suits the educational mission of the college or university is consistent with institutional mission, culture, history, precedent, and practice. Please see additional comments on Directed Question #6 below.

### Proposed Section 106.45(b)(6) Informal resolution

*Comment:* Consistent with its commitment to supporting institutional autonomy, choice, and educational flexibility, the SVAC agrees that the proposed regulations must not dictate the use of informal resolution in Title IX processes. Colleges and universities must be allowed to determine whether to offer informal resolution as an option and, if so, what type of informal resolution is most appropriate.

## III. Directed Questions

**2. Applicability of provisions based on type of recipient or age of parties.**

*Comment:* Within the Commonwealth, colleges and universities serve multiple students and guests many of whom are under the age of 18. Clarifying applicability of these regulations to persons under the age of 18 is necessary. Individuals under the age of 18 are served as students and as guests in a variety of settings and in varying degrees of engagement. Institutions must be allowed to promulgate policies and processes consistent with state laws and regulations and include settings such as dual-enrollment settings (high school students enrolled in college-level courses), athletic and other types of camps and programs such as 4-H.

**3. Applicability of the Rule to Employees.**

*Comment:* The SVAC believes that institutions must preserve the ability to investigate and act on reports of sexual violence that might not include a formal complaint. In the interest of preserving a safe and equitable learning and working environment, the institution must be able to act on information received about an employee that might be beyond what is accounted for in the regulations and yet raises serious concerns. In these instances, the requirement of a formal signed complaint might be perceived as limiting the ability of the institution to act in violation of the requirements contained in Title VII of the Civil Rights Act.

The requirement that Title IX processes be uniform for students and employees does not address the fact that many employees have special access to students and their information. As an employer, colleges and universities must be able to take into consideration that some employees might use their access to students and status within the university in ways that would preclude the receipt of a formal complaint.

As mentioned above in the General Comments, the Commonwealth has the Law Enforcement Officers Procedural Guarantee Act (§9.1–500) that outlines processes for the investigation of law enforcement officers charged with misconduct, including sexual harassment that might fall under Title IX. The requirement that Title IX processes be uniform for students and employees does not allow colleges and universities to adapt processes, as necessary, for employees covered by state law and regulations.

**4. Training.**

*Comment:* As a statewide advisory committee, the SVAC agrees with the requirements for training outlined in the regulations. The SVAC has spent the past few years discussing the Commonwealth's needs for training on sexual violence for all professionals involved in responding, investigation, and adjudicating allegations. Of

particular concern are the variety of trainings available and their uneven quality and accuracy. Should the regulations include specific training requirements, colleges and universities would be well served to receive training accepted by the Department. Funding should be made available through the Department for comprehensive training. In addition, institutions would benefit from technical assistance and guidance on policies and processes deemed consistent with Department regulations and expectations.

**6. Standard of Evidence.**

*Comment:* In the Commonwealth of Virginia several institutions of higher education utilize honor systems based on the "beyond a reasonable doubt" standard, and in some cases, to the sanction of permanent dismissal from the institution. These time-honored systems have been used throughout the history of the institutions, some dating back hundreds of years, to uphold the highest standards of academic achievement and honor. Currently, within these institutions "other" conduct disciplinary systems are separated from the honor system and utilize a different standard of evidence such as the preponderance of evidence or the clear and convincing standards. Institutions must continue to have the autonomy to keep historically important honor systems that use the beyond a reasonable doubt evidence standard while bringing uniformity to other conduct disciplinary systems under either the preponderance of evidence standard or the clear and convincing standard. Please see comments above on Proposed Section I 06.45(b)(4)(i).

**9. Technology needed to grant requests for parties to be in separate rooms at live hearings.**

*Comment:* Many institutions would require additional resources for purchasing technology and making adaptations to accommodate this requirement. Schools would benefit from grant resources made available through the Department.

**IV. Cost and Implementation**

The proposed regulations have significant costs associated with their implementation. Costs include increased and specialized personnel (advisors, hearing officers, and counsel), technology (software purchase and launch, and technology for cross-examination in hearings), the creation or renovation of space to allow for simultaneous, screened-off hearings, advisors (for both parties), training implementation (all involved with process, mediation/informal processes, for faculty/staff/students), and costs associated with increased documentation (including software purchase, launch, and maintenance). An estimated calculation of costs for implementing these regulations is a range of $500,000 for institutions with few cases (0–4) to $1.8 million for institutions with many cases (up to 45). The range of costs was estimated per institution for implementation of investigation, hearing, and adjudication processes.

The Department might want to consider state and institutional budget cycles, especially in consideration of possible tuition and fee increases needed to help cover costs for implementing additional personnel and resources for addressing student complaints. It is recommended that the regulations allow for an implementation period of no less than 18 months. This would allow institutions time to accommodate budget cycles and to request additional resources for the subsequent fiscal year.

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NATIONAL COUNCIL ON DISABILITY
*April 1, 2019*

Hon. Lamar Alexander, Chairman
Hon. Patty Murray, Ranking Member
Hon. Robert P. Casey, Jr.
Hon. Maggie Hassan
*U.S. Senate Committee on Health, Education, Labor, and Pensions,*
*428 Senate Dirksen Office Building,*
*Washington, DC.*

DEAR CHAIRMAN ALEXANDER, RANKING MEMBER MURRAY, SENATOR HASSAN AND SENATOR CASEY:

I write on behalf of the National Council on Disability (NCD) to express our appreciation for the Committee's continued focus on the issue of sexual assault on college campuses. Last year the National Council on Disability published a report bringing attention to the disproportionate incidence of sexual assault against stu-

dents with disabilities as well as the discrimination that these students too often face when they report an assault. The report, Not on the Radar: Sexual Assault of College Students with Disabilities found that students with disabilities are not "on the radar" of colleges in their sexual assault prevention efforts, policies, or procedures for response and support after an assault. This includes the absence of procedures to communicate with victims who are Deaf or hard of hearing and inaccessible support services for students with mobility disabilities. As this Committee considers sexual assault on college campuses as both a personal tragedy for individual students but also as a public health crisis, we urge you to keep students with disabilities on your radar.

Following the release of Not on the Radar last year, Senators Hassan and Casey co-sponsored groundbreaking legislation, the Safe Equitable Campus Resources and Education (SECuRE) Act, in line with NCD's policy recommendations from Not on the Radar, that requires institutions to report sex offenses, domestic and dating violence and stalking involving a victim who has a disability, ensure that responses to these incidents take the needs of victims with disabilities into account, ensure that prevention and awareness programs are accessible and include people with disabilities, hold disciplinary hearings that are accessible and conducted by officials with training in working with people with disabilities. They have re-introduced the legislation in anticipation of this hearing; NCD commends the Senators as well as Congresswoman Dingell for their continued leadership on this critical issue and looks forward to continuing to educate policymakers regarding the need to include students with disabilities in efforts to prevent sexual assault on college campuses as well as to address the impact of sexual assault on students with disabilities. As part of that effort, NCD would like to submit the report, Not on the Radar: Sexual Assault of College Students with Disabilities, attached to this letter as Appendix A, for inclusion into the record of this hearing.

Respectfully,

NEIL ROMANO
*Chairman*

# Not on the Radar: Sexual Assault of College Students with Disabilities

National Council on Disability

January 30, 2018

National Council on Disability (NCD)
1331 F Street NW, Suite 850
Washington, DC 20004

***Not on the Radar: Sexual Assault of College Students with Disabilities***

National Council on Disability, January 30, 2018
Celebrating 30 years as an independent federal agency

This report is also available in alternative formats. Please visit the National Council on Disability (NCD) website (www.ncd.gov) or contact NCD to request an alternative format using the following information:

ncd@ncd.gov Email

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**National Council on Disability**

An independent federal agency making recommendations to the President and Congress to enhance the quality of life for all Americans with disabilities and their families.

## Letter of Transmittal

January 30, 2018

The President
The White House
Washington, DC 20500

Dear Mr. President:

On behalf of the National Council on Disability (NCD), I am pleased to submit this report titled *Not on the Radar: Sexual Assault of College Students with Disabilities*. Sexual assault is a public health and public safety concern with far-reaching implications, and it is well documented that this deeply personal violation leaves physical and emotional impacts that change the lives of victims. This report is the first to examine how the needs of sexual assault victims with disabilities are included in college policies and procedures and to make recommendations to Congress, federal agencies, and colleges for improvement.

Research has shown that students with disabilities are more likely than their peers without disabilities to experience sexual assault. Most recently, a study examining the prevalence of sexual assault across 27 universities and 150,000 participants found that 31.6 percent of female undergraduates with a disability were victims of sexual assault compared to 18.4 percent of undergraduate females without a disability. This means that one of every three female undergraduates with a disability had been sexually assaulted during their time at college.

NCD found, however, that students with disabilities are not "on the radar" of colleges in their sexual assault prevention efforts, policies, or procedures for response and support after an assault. This includes the absence of procedures to communicate with victims who are Deaf or hard of hearing and inaccessible support services for students with mobility disabilities. Similarly, NCD found that students with disabilities are invisible at the federal level in campus sexual assault research programs. For example, Department of Justice (DOJ) research on campus sexual assault, undertaken or funded by the Office on Violence Against Women, Bureau of Justice Statistics, and the National Institute of Justice, have not included disability as a demographic.

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NCD remains committed to advising the Administration on this issue of national significance, and in ensuring that federal policies, federally-funded research, and college sexual assault programs are inclusive of students with disabilities.

Clyde E. Terry
Chairperson

(The same letter of transmittal was sent to the President Pro Tempore of the U.S. Senate and the Speaker of the U.S. House of Representatives.)

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## Contents

## Executive Summary

Sexual assault can be devastating to victims and cause long term physical, psychological, and emotional effects, including depression, post-traumatic stress, thoughts of suicide, flashbacks, and sleep disorders.[1] The issue of sexual assault on college campuses has received increased attention since the 2007 publication of the federally funded College Sexual Assault study, which found that 19 percent of female undergraduates were victims[2] of sexual assault during their time in college. Another recent federally funded study surveyed 23,000 students across nine colleges and universities[3] and found that the prevalence of sexual assault averaged 21 percent for females across the schools.[4] Neither of these studies included disability status as a demographic and, as such, no data was gathered on the prevalence of sexual assault on students with disabilities. However, a recent large-scale study on campus sexual assault by the Association of American Universities revealed that college students with disabilities were victims of sexual violence at higher rates than students without disabilities—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.[5] This means one out of every three undergraduate students *with a disability* was a victim of sexual violence on campus.

As campuses across the United States work to prevent assaults, educate students on assault prevention, and provide supports for survivors, little is known about how colleges address the accessibility needs of students with disabilities who have suffered a sexual assault, or about the inclusivity of college programs, services, and policies to victims of assault with disabilities. This study set out to investigate the current state of campus sexual assault programs and policies and uncovered multiple barriers to students with disabilities, from reporting crime to receiving needed assistance afterward. The report includes recommendations for Congress, federal agencies, and colleges to improve reporting requirements, training, and policies and procedures to better serve students with disabilities who have experienced sexual assault on campus.

### Methods

To understand how colleges respond to, prevent, and support survivors of sexual assault with disabilities and the challenges that can emerge when providing accessible services, 30- to 60-minute telephone interviews were conducted with 34 informants, including experts on the topic of sexual assault on college campuses or sexual abuse against people with disabilities; college

professionals and staff, such as disability services administrators; Title IX coordinators; and sexual assault services administrators. Fourteen states and the District of Columbia were represented across seven of the 10 federal regions.[6] The National Council on Disability (NCD) also fielded two national questionnaires, through listservs and social media, and received 100 responses from college professionals and 34 college students with disabilities.

NCD offers full-length and comprehensive report findings and policy recommendations in Chapter 8. However, highlights of the report's key findings and recommendations include the following:

## Highlights of Findings and Recommendations

### *Key Findings*

#### Federal

- Federal-level research studies on sexual assault on college campuses, funded by the Department of Justice's Office on Violence Against Women and the National Institute of Justice, have not included disability as a demographic as they have race/nationality and sexual orientation.
- The 2014 White House Task Force report, *Not Alone,* did not include disability as a demographic in its sample campus climate survey, setting the tone for colleges and researchers to omit disability in campus climate studies as well.

#### Colleges

- Campus assault prevention and education programs are not inclusive of students with disabilities, and college staff lack awareness that such programs should be accessible to students with disabilities, and staff are not trained in disability accommodations.
- College sexual assault prevention and education programs are not fully accessible to students with disabilities.
- College websites and printed information about sexual assault resources and information are not accessible to students with visual impairments and students with print-based disabilities (e.g., dyslexia).

### *Recommendations*

#### Congress

1. Congress should amend the Clery Act including to:
   a. Require colleges to collect the number of all reported sexual assaults on students with disabilities (not just when the assaults are hate crimes) and include this information in their annual security report.
   b. Require colleges to include a statement regarding the disability-related accommodations that will be made available to students with disabilities during the reporting and disciplinary process, such as auxiliary communication aids or interpreters, and how to request those accommodations.
2. Congress should pass the Campus Accountability and Safety Act (S. 856) with the following additions:
   a. Require grant applicants under proposed Section 8, part BB, to describe how they will serve students with disabilities in their description of how underserved populations on campus will be served.

b. Add a survey question to proposed Section 19 on whether the victim had a disability at the time of the assault, and what type of disability.

3. Congress should require that research funded by the Office on Violence Against Women on campus sexual assault include students with disabilities to gather data on the problem as it pertains to students with disabilities, and to develop strategies for preventing and reducing the risk of sexual assault and effectively responding to victims with disabilities.

### Department of Education (ED)

1. ED should develop and publish a technical assistance document or training for colleges on the rights of students with disabilities to have necessary accommodations in the process of reporting assault, utilizing sexual assault support services, and in the institutional disciplinary process.

### ED Office for Civil Rights

OCR should

1. Inform colleges that they must provide required Title IX information in accessible formats to students with disabilities.
2. Encourage colleges to include information on how students can request disability-related accommodations on their Title IX web pages.
3. Encourage colleges to make outreach and educational materials regarding sexual assault services available in accessible formats, and through various outlets accessible to students.

### National Center on Safe and Supportive Learning Environments

1. NCSSLE should include information on disability, including communicating with victims with disabilities who are Deaf or hard of hearing, in its trauma-informed training programs.

### The Bureau of Justice Statistics (BJS)

1. BJS should include students with disabilities as a demographic when conducting research on sexual assault on college campuses.

### The Center for Campus Public Safety (CCPS)

1. CCPS should include information on disability, including communicating with victims with disabilities who are Deaf or hard of hearing, in their trauma-informed training programs for school officials and campus and local law enforcement.

### The Office on Violence Against Women (OVW)

1. OVW should include information on disability, including communicating with victims with disabilities who are Deaf or hard of hearing, in its trauma-informed training programs for school officials and campus and local law enforcement.
2. OVW should require all colleges that submit proposals under the *Grants to Reduce Sexual Assault, Domestic Violence, Dating Violence, and Stalking on Campus Program* to

   a. Require grantees that provide outreach and educational materials regarding sexual assault services to students to provide them in accessible formats and

inform the college community that these are available.

3. When OVW funds research on sexual assault on college campuses, require researchers to include students with disabilities as a demographic. For example, allow students to identify if they have a disability in surveys/questionnaires, etc.

### Colleges

Recommendations to ensure access to sexual assault supports and services include the following:

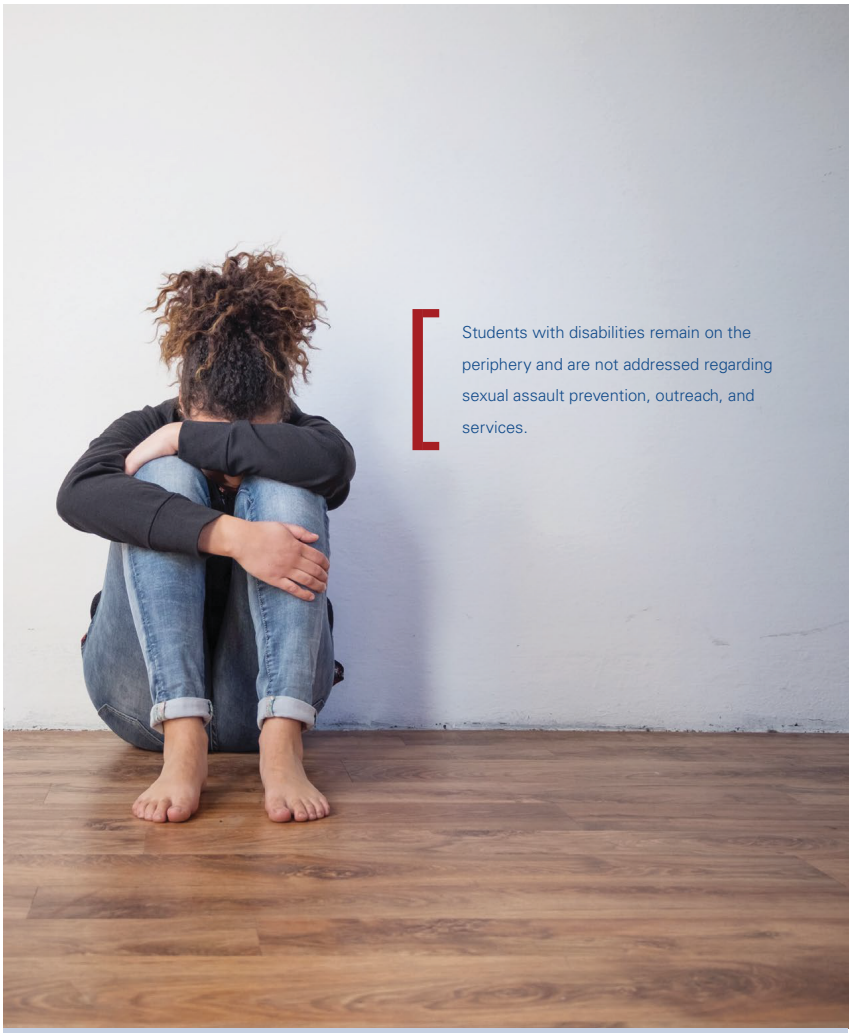
1. Include students with disabilities as a demographic in campus climate surveys on sexual assault.
2. Create crisis policies and procedures on how to provide sexual assault services to students with sensory disabilities, especially Deaf or hard of hearing students, so that students receive services within 24 hours.
3. Guarantee that sexual assault first responders and support providers have access to emergency interpreter services or other communication methods (i.e., Communication Access Real-Time Translation) so that students can communicate with staff immediately.
4. Create formal agreements with community-based providers with the expertise to support survivors with disabilities.

Recommendations to address the unique needs of survivors of sexual assault with disabilities include the following:

5. Develop and implement sexual assault prevention and support service training with messaging campaigns that are inclusive and welcoming to students with disabilities on college campuses.
6. Provide disability-related and trauma-informed practice training to prevention and first responder staff and campus security so that they understand how to effectively prevent and support students with disabilities after an incident of sexual assault.
7. Establish and maintain active collaborative relationships between Title IX, sexual assault services, counseling and health services, and disability services.
8. College Disability Service Center staff should be actively involved in college sexual assault prevention and support efforts and trained on Title IX procedures.

## Acronym Glossary

| | |
|---|---|
| ADA | Americans with Disabilities Act |
| ASL | American Sign Language |
| ASR | campus annual security reports |
| CARE | communication, action, response, evaluation |
| CART | Communication Access Real-Time Translation |
| DSS | Disability Student Services |
| ED | U.S. Department of Education |
| FERPA | Family Educational Rights and Privacy Act |
| MOU | memoranda of understanding |
| OVW | Office on Violence Against Women |
| SaVE Act | Campus Sexual Violence Act |
| SUNY | State University of New York |
| VAWA | Violence Against Women Reauthorization Act of 2013 |



> Students with disabilities remain on the periphery and are not addressed regarding sexual assault prevention, outreach, and services.

## Chapter 1: Introduction and Background

Sexual assault is a public health and public safety concern with far-reaching implications, and it is well documented that this deeply personal violation leaves physical and emotional impacts that change the lives of victims across all areas of their lives.

The subject of sexual assault on college campuses has received increased attention over the past eleven years with the federal government funding research studies seeking to gauge the prevalence of sexual assault and reporting on campuses to inform intervention strategies. But, as described later in this section, these studies have not included disability as a demographic and provide no insight into the prevalence of sexual assault on campus for students with disabilities.

*This means that one of every three students with a disability has been sexually assaulted during their time at college.*

A recent Association of American Universities' (AAU) study that examined the prevalence of sexual assault against students across 27 universities and 150,0000 participants included disability as a demographic and found that students with disabilities were victims of sexual assault on campus more often than students without disabilities: 31.6 percent of female undergraduates with a disability reported nonconsensual sexual contact involving physical force or incapacitation compared to 18.4 percent of the undergraduate females without a disability.[7] This means that one of every three students with a disability has been sexually assaulted during their time at college.

The *AAU Campus Climate Survey* is notable because it is one of the largest surveys on sexual assault and sexual misconduct in terms of both number of schools and number of students participating. Prior studies of campus sexual assault and misconduct have been implemented for a small number of colleges or for a national sample of students with relatively small samples for any particular college. Also, comparisons across surveys have been problematic because of different methodologies and different definitions. The AAU was one of the first to implement a uniform methodology across multiple colleges and to produce statistically reliable estimates for each college.[8]

The title of this report makes clear that students with disabilities are not "on the radar" of colleges in regard to policies and procedures regarding sexual assault. Similarly, students with disabilities are seemingly invisible to the Department of Justice offices that have undertaken, or funded, research studies on

campus sexual assault (Office on Violence Against Women, Bureau of Justice Statistics, and National Institute of Justice), just as they were to the White House Task Force in the 2014 sample campus climate survey.

The federally funded (National Institute of Justice) College Sexual Assault Study (CSA)[9] was a survey conducted with 6,800 undergraduate students attending two large public universities during 2005 that examined the prevalence, nature, and reporting of sexual assault experienced by students to inform the development of targeted intervention strategies. The oft quoted figure from this study represents the experience of females since entering college: 19.8 percent of female college seniors ("1 in 5") responded that they had experienced nonconsensual sexual contact involving force or incapacitation during their time in college. This study, however, did not include disability as a demographic and, as such, did not yield data on the prevalence of sexual assault on students with disabilities.

*[S]tudents with disabilities are seemingly invisible to the Department of Justice offices that have undertaken, or funded, research studies on campus sexual assault . . . , just as they were to the White House Task Force in the 2014 sample campus climate survey.*

In 2014, White House Task Force to Protect Students from Sexual Assault published a report that offered action steps and recommendations to address sexual assault on college campuses.[10] One was that colleges conduct "campus climate surveys" to help schools understand the magnitude and nature of sexual victimization experienced by students. The report included a sample campus climate survey. Unfortunately, the sample climate survey did not include disability as a demographic but did include many other categories including gender identity, race, ethnicity, and sexual orientation.[11] Had the survey included disability as a demographic, colleges would likely have included it with the other categories to include in their own climate surveys.[12]

Just two years later, the Justice Department's Bureau of Justice Statistics (BJS) released the *Campus Climate Survey Validation Study (CCSVS) Final Technical Report*, described as a key deliverable of the White House Task Force to Protect Students from Sexual Assault.[13] Funded by the Office of Violence Against Women (OVW), BJS revised the sample climate survey developed by the White House Task Force, and pilot tested it at nine diverse colleges.[14] BJS did not include disability as a demographic as it did race, ethnicity, sexual orientation, and gender identity.[15] This is noteworthy because BJS had broad input. In developing the revised survey, "a series of listening sessions were held with academic experts in campus sexual assault research, federal partners, and school administrators to obtain feedback on the survey's content and data collection methodology. In addition, a web-based instrument to be used in the CCSVS Pilot Test was drafted and reviewed by representatives from several federal agencies."[16]

Federal and state agencies have responded to the crisis of college sexual assault by enacting policies and encouraging colleges and universities to adopt recommendations and practices prescribed by research and advocacy

groups. In the last 20 years, federal laws were enacted to require colleges and universities to develop policies, provide prevention activities, and respond to sexual assault.[17] The U.S. Department of Justice defines sexual assault as "any type of sexual contact or behavior that occurs without the explicit consent of the recipient."[18] Contact or behavior without consent includes "forced touching of a sexual nature (i.e., forced kissing, touching of private parts, grabbing, fondling), oral sex, sexual intercourse, anal sex, and/or sexual penetration with a finger or object."[19]

*BJS did not include disability as a demographic as it did race, ethnicity, sexual orientation, and gender identity.*

Colleges are required to collect data on the prevalence of sexual misconduct and assault, develop specific policies to address sexual assault, and implement prevention programs and support services. In its last report in 2017, the White House Task Force to Protect Students from Sexual Assault outlined a series of recommended practices and guidelines to reduce the number of assaults and support survivors. Included in these guidelines are specific recommendations for campuses to consider the needs of diverse groups of students, including students with disabilities, and that materials and services be accessible and comply with the Americans with Disabilities Act (ADA).[20] The Department of Education, Office of Civil Rights also issued a Dear Colleague Letter that outlines colleges' responsibilities to address disability in cases of sexual violence, specifically outlining issues campuses should consider and that colleges should ensure accessibility of information and training related to sexual assault.[21]

However, little is known about colleges' current sexual assault practices and services to support survivors with disabilities that would give colleges a clear guide on how to translate the White House Task Force's recommendations into action steps. At the time of publication, NCD found only four research articles focused on the prevalence of sexual assault on college students with disabilities.[22] None of these studies focused on how colleges served students. If colleges are to equitably prevent and respond to sexual assault incidents, the lack of research on what types of accommodations and supports students with disabilities need and/or lack may perpetuate discrimination against these students.

The purpose of this study is to explore and raise awareness of how students with disabilities fare under existing college practices and services related to sexual assault. After examining the current landscape, potential policy solutions and action steps are proposed, which Congress, the Federal Government, and colleges can take to support survivors with disabilities and reduce their trauma.

## Chapter 2: Purpose and Scope

The purpose of this report is to raise awareness of sexual assault against students with disabilities on college campuses by examining college policies and practices that should protect students with disabilities who have experienced sexual assault, college policies and practices aimed at educating students on sexual assault prevention, and the availability of survivor services on campus that are physically and programmatically accessible to students with disabilities who are victims of sexual assault. This report also provides recommendations for reform.

Based upon interviews and questionnaires with experts, college professional staff, and students, as well as a review of recent research, policy reports, and college policies, this report documents the gaps and weaknesses in college services and outreach to students with disabilities who have experienced sexual assault. Recommendations include strategies to strengthen compliance with federal disability laws and to build capacity to meet the needs of students with disabilities.

*Students with disabilities may also be accused of sexual violence, as well as being victims of such violence, and may require accommodations during Title IX hearings, judicial procedures, suspensions, and other procedures and actions on campus.*

Due to limited research on how colleges are serving students with disabilities across the nation, the study focuses on the provision of accommodations to students with physical and sensory disabilities. These students have the longest history of service provision in higher education, and a significant proportion of students with these types of disabilities are registered with campus disability services offices.[23] Furthermore, many of the accommodations these students require can be measured in pragmatic and objective terms (e.g., whether sign language interpreters are available, reading matter is accessible to screen readers, or training courses are in physically accessible buildings). This narrowed scope limits findings because students with invisible disabilities, especially mental health disabilities, are a growing population at college campuses,[24] and these students are often underserved.[25] However, given the dearth of data on the topic, a starting point was chosen for this report to begin illuminating the difficulties colleges face in complying with federal laws and meeting the needs of sexual assault survivors with disabilities. Further research on this issue can use the findings

in this report as a jumping off point to investigate the specific needs of students with cognitive or mental health disabilities when accessing services for sexual assault prevention or support.

Students with disabilities may also be accused of sexual violence, as well as being victims of such violence, and may require accommodations during Title IX hearings, judicial procedures, suspensions, and other procedures and actions on campus. While this is an important topic for further study, people with disabilities are far more likely to be victims of violence than instigators of it, and they are more likely to suffer physical and mental illnesses because of violence. In addition, students may experience mental health disabilities after an incident of sexual assault. The National Council on Disability (NCD) has addressed the difficulties colleges face when effectively supporting students with mental health disabilities in a recent report.[26] This report maintains a narrower focus, prioritizing work with survivors and prevention efforts.

**Research Questions**

This study was guided by the following questions:

1. What is the current landscape of college policies and programs regarding sexual assault prevention and response?
2. Do colleges comply with the ADA and Section 504 of the Rehabilitation Act by ensuring that assault services are physically and programmatically accessible to students with physical and sensory disabilities?
3. Do colleges comply with the ADA and Section 504 of the Rehabilitation Act by providing reasonable accommodations so students with disabilities can access and utilize support services if they have experienced sexual assault?
4. Are interpreters or other disability-related supports readily available to students who are Deaf or hard of hearing when making reports to campus law enforcement?
5. Do colleges maintain relationships with trauma and mental health providers in the community that provide similarly accessible services?
6. What gaps, weaknesses, and discriminatory policies exist in campus sexual assault services?
7. What are the current most promising and best practices and emerging trends (e.g., healthy sexual relationship training for incoming freshmen, bystander awareness training to teach students to step in to stop sexual assault, climate surveys, and changes in college disciplinary board rules)?
8. Are disability student organizations connected to sexual assault survivor groups on campus? Are campus disability services and resource offices connected to mental health services to ensure students with disabilities are getting the ongoing services they need after an assault (e.g., therapy)?

9. Have college staff and faculty received training to provide support for students with disabilities who have experienced sexual assault?
10. Has campus law enforcement received disability awareness training in taking reports from victims/witnesses with disabilities?
11. Are the policies of colleges compliant with the Family Educational Rights and Privacy Act, the Clery Act, and Title IX?
12. What are the federal and state legislative responses to campus sexual violence?
13. What policy and system reforms are needed in postsecondary educational settings?

# Chapter 3: Methods

## College Staff and Expert Interviews

To understand how colleges prevent sexual violence, support student sexual assault survivors with disabilities, and address the challenges that can emerge when providing accessible services, 30- to 60-minute telephone interviews were conducted with 9 experts and 27 higher education professionals from December 2016 through July 2017. Experts included researchers or advocates examining sexual assault or violence against people with disabilities and college sexual assault prevention and compliance consultants. College professionals were chosen because they worked with sexual assault or disability services and could speak to college policies and procedures. Roles of professionals targeted for interviews included student program administrators who provide disability services and accommodations, ADA/504 coordinators, administrators or staff in sexual assault service centers, and Title IX coordinators or investigators. Four disabled student program administrators also participated in Title IX investigations or conducted processes, and one Title IX coordinator also served as an ADA/504 coordinator. Professionals represented 6 two-year community colleges, 6 four-year private universities, 11 four-year public colleges, and one regional center for a public state institution. Fourteen states and the District of Columbia were represented across seven of the 10 federal regions (Table 1).[27] Interviews were transcribed and audio recordings were immediately deleted after the study was completed. To protect the confidentiality of the participants, names of interviewees, organizations, and colleges are not mentioned in this report.

## Questionnaires

Open-ended online questionnaires were administered through SurveyGizmo to college staff and students to supplement findings from college professionals and staff interviewees. These questionnaires were administered from April 2017 through June 2017. College staff members were also able to indicate interest in participating in an interview or focus group to further elaborate on their survey responses. The college professional staff questionnaires were distributed through three listservs for the Association on Higher Education and Disability, Title IX coordinators, and the Disabled Student Programs and Services of the California Community College Chancellor's Office. NCD received 100 responses from college professional staff. The student questionnaire was distributed through social media and listservs for students with disabilities, such as the Disability, Rights, Education, Activism, and Mentoring group through the National Center for College Students

**Table 1: College Representation Among Interviewee Participants**

| Federal Region | Number of Colleges in Each Region |
|---|---|
| *Region 1:* Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont | 4 |
| *Region 2:* New Jersey, New York | 0 |
| *Region 3:* Delaware; Maryland; Pennsylvania; Virginia; Washington, DC; West Virginia | 4 |
| *Region 4:* Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, Puerto Rico, U.S. Virgin Islands | 0 |
| *Region 5:* Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin | 8 |
| *Region 6:* Arkansas, Louisiana, New Mexico, Oklahoma, Texas | 2 |
| *Region 7:* Iowa, Kansas, Missouri, Nebraska | 1 |
| *Region 8:* Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming | 0 |
| *Region 9:* Arizona, California, Hawaii, Nevada | 6 |
| *Region 10:* Alaska, Idaho, Oregon, Washington | 1 |

with Disabilities. NCD received 34 responses from students.

## Literature and Policy Review

Research findings and current trends from scientific research, policy reports, white papers, and articles supplemented the interview and questionnaire findings.

## Limitations

Claims regarding existing college services for students with disabilities and compliance with federal disability laws are self-reports from college professionals and staff. Self-reports may not reflect the actual policies and practices at college campuses. However, researchers interviewed staff members who were most knowledgeable about the policies and practices and indicated the level of certainty of staff responses. Researchers gave college staff the interview questions prior to the scheduled interview. If unfamiliar with certain college policies or procedures, staff researched the information or recommended additional staff to include in the interview to accurately answer the questions. In addition, only barriers or challenges mentioned by three or more college professionals and/or students were reported, to indicate a trend across colleges. The validity of self-reported data was also strengthened by using existing research, policy, and media reports when possible, to elaborate on the prevalence of the finding.

# Chapter 4: Overview of Federal Disability and Sexual Assault Laws

## Disability-Related Laws

Section 504 of the Rehabilitation Act of 1973[28] and the ADA[29] of 1990 are civil rights laws that protect people with disabilities from discrimination.

Section 504 prohibits any program receiving federal financial assistance from discriminating against a person because of his or her disability. Section 504 applies to institutions of higher education that receive direct or indirect federal financial assistance,[30] including institutions that receive no other federal financial assistance other than federal student financial aid.

Section 504 states that, "No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, research, occupational training, housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education aid, benefits, or services to which this subpart applies."[31] Section 504 covers qualified students with disabilities[32] who have a physical or mental disability that substantially limits one or more major life activities; or have a record of such a disability; or are regarded as having such a disability.[33]

Institutions of higher education covered by Section 504 must provide effective auxiliary aids to students with disabilities (e.g., sign-language interpreters, captioning services, assistive listening devices, assistive listening systems, telecommunications devices).[34] If an aid is necessary for an appropriate (nonpersonal) use, the institution must make it available, unless provision of the aid would cause undue burden. A student with a disability may not be required to pay any of the costs of the aid or service, and an institution may not limit what it spends for such aids or services or refuse to provide them because other providers of these services exist. Institutions cannot condition the provision of such aids on the availability of funds.[35]

Title II of the ADA prohibits state and local governments from discriminating on the basis of disability and, like Section 504, applies to public colleges, universities, and graduate and professional schools. Title II applies to such institutions whether or not they receive federal financial assistance, and the requirements regarding the provision of auxiliary aids and services under Section 504 are generally included under Title II.

Title III of the ADA prohibits discrimination on the basis of disability in "places of public accommodation," which includes colleges and

universities.[36] Titles II and III require that new facilities are fully accessible to people with disabilities. Title II emphasizes that colleges are not required to make structural changes to existing facilities that were built prior to enactment of federal accessibility requirements, where other methods are effective in achieving compliance; for example, colleges may make modifications to programs or relocate them to make them accessible.[37] Similarly, if buildings have been constructed before 1977, Section 504 allows campuses to relocate programs or services to achieve accessibility.

Another foundational law is Section 508 of the Rehabilitation Act[38] as amended by the Workforce Investment Act of 1998[39] (P.L.105-220), which requires federal agencies and other entities receiving federal funds to make their electronic and information technology accessible to people with disabilities. The standard applies to desktop and laptop computers, websites, and other Internet resources, videotapes and multimedia products, software, telecommunication products, and other electronic and information technology. While Section 508 does not apply to colleges, many campuses use Section 508 and Web Accessibility Initiative guidelines to determine definitions of accessibility for electronic and information technology.

The requirements to provide needed auxiliary aids and have accessible facilities under Section 504 and Titles II and III of the ADA are important protections for students with disabilities who experience sexual assault. For example, after surviving a sexual assault, students who are wheelchair users or have limited mobility need physical access to victims' services and other campus offices, and students who are Deaf or hard of hearing need interpreters or other auxiliary aids to communicate after such a trauma.

*The VAWA amendments added gender identity and national origin to the categories of bias that institutions must reflect within their statistics.*

### The Clery Act, Violence Against Women Act, and Campus Sexual Violence Elimination Act

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act), a consumer protection law passed in 1990, requires all colleges and universities that receive federal funding to share information about crime on or around campus and their efforts to improve campus safety.[40] This information is published in campus annual security reports (ASRs). Throughout the past 25 years, the Clery Act has been amended various times to increase reporting and college responses specific to sexual violence. Most recently, it was amended by the Violence Against Women Reauthorization Act of 2013 (VAWA),[41] which imposed new obligations on colleges and universities under its Campus Sexual Violence Act ("SaVE Act") provision, Section 304.

The Clery Act outlines how information about crime must be reported. Colleges are required to make information publicly accessible through ASRs that provide data regarding incidents of sexual assault, dating violence, domestic violence, stalking, and hate crimes occurring on campus, any building off campus that is owned or controlled by a student organization or by the

college that is used in support of educational purposes, and public property within the campus area that is adjacent to the institution (such as sidewalks, streets, or parking facilities). The VAWA amendments added gender identity and national origin to the categories of bias that institutions must reflect within their statistics. Under the Clery Act, colleges must disseminate timely warnings and notification of crimes. College compliance with the Family Educational Rights and Privacy Act (FERPA) does not prevent the institution from providing timely warnings about crimes. Under FERPA, in an emergency, crime information can be released without consent and the information is not protected. However, victims' individual information must be kept confidential.

The Clery Act also requires colleges to describe their policies regarding procedures to follow after an incident of sexual assault, dating violence, domestic violence, or stalking. It requires colleges to identify their policies on how students report crimes and provides rights to both parties (the accused and the accuser) in the campus disciplinary process. It also identifies the rights and options available to survivors, including changes to academic transportation and living or work situations as well as assistance in notifying local law enforcement. The Campus SaVE Act amended the Clery Act and further elaborated procedures for victims and standards of investigation, such as requiring colleges to create policies addressing victims' confidentiality and training of officials to ensure hearings are conducted in a way that protects victims. Regarding law enforcement, the Campus SaVE Act requires institutions to have a policy statement that describes the jurisdiction of security personnel and identifies any agreements that are in place for the investigation of alleged criminal offenses (such as written memoranda of understanding [MOU] with local law enforcement).

Lastly, the Clery Act requires education and prevention. The Campus SaVE Act mandates that colleges provide prevention and awareness programs regarding sexual misconduct that educate students on consent definitions, promote positive and healthy behaviors, and encourage safe bystander intervention. Campuses are to provide education programs to students and employees when first enrolled or hired and on an ongoing basis.

*As of September 22, 2017, colleges can adopt various standards of proof in sexual assault cases, from the lowest standard of proof (preponderance of evidence) to a higher standard of proof (clear and convincing evidence).*

### Title IX

Title IX of the Education Amendments of 1972 is a federal civil rights law that prohibits discrimination on the basis of sex in any education program or activity that receives federal funding.[42] Under Title IX, discrimination on the basis of sex can include sexual harassment, rape, and sexual assault.[43] A college or university that receives federal funds may be held legally responsible when it knows about and ignores sexual harassment or assault in its programs or activities. As of September 22, 2017, colleges can adopt various standards of proof in sexual

assault cases, from the lowest standard of proof (preponderance of evidence) to a higher standard of proof (clear and convincing evidence).[44] Colleges are also required to appoint a Title IX coordinator who ensures that schools are in compliance with the law and oversees investigations and the disciplinary process.

Like the Clery Act, Title IX requires colleges to adopt and publish grievance procedures that outline the complaint, investigation, and disciplinary process. These processes must be prompt (but no specific time frame is indicated), equitable, and allow for impartial investigation.[45] Title IX, like the Clery Act, also requires college employers that address sexual assault to have proper training and to train the campus community in its policies and procedures regarding sexual assault.

## Chapter 5: Accessibility of College Sexual Assault Programs and Services

Colleges are responding in multiple ways to prevent and respond to sexual assault incidents in adherence to federal laws. Colleges provide educational and training programs to prevent sexual assault, post and disseminate information on sexual assault to encourage reporting, provide multiple sexual assault reporting options, and offer trauma or victim advocate services, mental health counseling, and/or support groups. Colleges also conduct investigations for instances of sexual assault to comply with Title IX.

Whether all these programs and services are accessible to students with disabilities is questionable. NCD found that many colleges are not fully complying with the ADA or Section 504 and not making web materials accessible, and this noncompliance can prevent students with disabilities from accessing sexual assault programs, services, and information. Even if students with disabilities can access these services, they may experience a delay while they wait to receive disability accommodations that will ensure full participation.

This chapter addresses research questions examining college policies and practices related to sexual assault and whether colleges are in compliance with federal disability laws. Questions are addressed as a cohesive set because responses to questions by college professional staff overlapped.

1. What is the current landscape of college policies and programs regarding sexual assault prevention and response?
2. Do colleges comply with the ADA and Section 504 of the Rehabilitation Act by ensuring that assault services are physically and programmatically accessible to students with physical and sensory disabilities?
3. Do colleges comply with the ADA and Section 504 of the Rehabilitation Act by providing reasonable accommodations so students with disabilities can access and utilize support services if they have experienced sexual assault?
4. Are interpreters or other disability-related supports readily available to students who are Deaf or hard of hearing when making reports to campus law enforcement?
5. Do colleges maintain relationships with trauma and mental health providers in the community that provide similarly accessible services?
6. What gaps, weaknesses, and discriminatory policies exist in campus sexual assault services?

## Accessibility of Education Programs and Information Related to Sexual Assault

Colleges are implementing a variety of education and prevention programs on their campuses and making information related to sexual assault readily available to students. Educational programs help develop students understanding of consent and healthy sexual relationships and support the prevention of alcohol abuse.[46] Colleges use a range of online education prevention programs to reach all first-year students and other targeted populations, while complying with federal mandates for sexual assault prevention training. Colleges also organize in-person educational events facilitated by experts and peer educators throughout the year.[47] Research suggests that education is the most effective method for preventing sexual assaults[48] and increases students' awareness of reporting options and supports. Students are more likely to report and access supports for sexual assault if they know the college policies, how to report the assault and access services, and that they have confidential reporting options.[49] Improving awareness of college policies and procedures among students with disabilities can be a promising strategy to support them, because students with disabilities (similar to current trends for the undergraduate population at large) report not knowing about available resources and that they are more likely not to report abuse.[50] The next section discusses whether colleges make online and in-person educational programs and educational information related to sexual assault services accessible to students with disabilities.

*Students are more likely to report and access supports for sexual assault if they know the college policies, how to report the assault and access services, and that they have confidential reporting options.*

### *Accessibility of Online Prevention Training Programs*

College campuses often use predeveloped online prevention programs that address various aspects of effective prevention, such as alcohol abuse, consent and rape myths, and bystander education.[51] Twenty-seven percent of interviewees and 24 percent of questionnaire responses indicated that some or all online prevention training programs were accessible to students with disabilities. For example, professionals reported that online videos were captioned or students were provided transcripts. One professional explained that staff members from the office of services for students with disabilities were included in the selection of online programs, and therefore, they should be accessible to students.

However, 5 (19 percent) college professional staff said in interviews, and 12 college professional staff (12 percent) indicated in their questionnaire responses that all or some of their online education programs were not accessible. Two interviewees and two questionnaire responses indicated that they were unsure that these training courses were accessible. Staff lamented that videos *should* be captioned and two staff members explained that they were in the process of making the programs

accessible. Two college staff members explained that programs purchased by their college were inaccessible, but they worked extensively with the online program provider to make these programs accessible. One ADA/504 coordinator explained, "[The online program] was not fully accessible, and we have worked very hard with the company to provide them feedback regarding what is accessible and what is not. We let them know what the accessibility challenges are. They've complied with most of it." An administrator for disability services explained that staff members evaluated their college's online program to ensure it was "accessible to many needs" because students are penalized for not watching the video.

### *Accessibility of In-Person Education or Prevention Programs*

When asked about the accessibility of in-person education programs or events for students who are Deaf or hard of hearing or have visual impairments, 7 interviewees (26 percent) and 14 questionnaire respondents (14 percent) explained that students could request accommodations for these events in advance and information about this process is given to students. A review of college disability services websites yielded similar results. Of the 27 colleges with staff participating in interviews, 11 of these colleges posted policies on their websites informing students about the advance time needed to arrange accommodations for activities for nonclassroom requests. Request periods for the 10 colleges ranged from 24 hours to 14 days. The one college with a 24-hour request period noted that accommodations could be arranged for tutoring, review sessions, or meetings with instructors. Other colleges did not list a time period.

*Of the 27 colleges with staff participating in interviews, 11 of these colleges posted policies on their websites informing students about the advance time needed to arrange accommodations for activities for nonclassroom requests. Request periods for the 10 colleges ranged from 24 hours to 14 days.*

Interviewees also mentioned that information about how to request accommodations are reportedly posted on event fliers or notices, and students contacted whomever oversees the event to request accommodations. For example, one questionnaire respondent wrote that all event and program flyers stated, "For accommodations or information, please contact [email address]." Most but not all college staff and students reported minimal issues for students with physical disabilities to access sexual assault training and resources.

While most college staff members indicated that they are complying with federal law regarding reasonable accommodations, seven staff members acknowledged challenges at their campuses with providing accommodations during in-person training. One college staff respondent to the questionnaire stated, "There is no formal process for accommodations in place for the in-person training." Another staff member mentioned not being able to provide interpreters during in-person training, while a third staff member commented about the challenge of securing interpreters in a "timely" manner.

Responses from four students concurred with responses from college professionals' reports on inaccessibility. When asked if educational programs at their schools were accessible to students with disabilities, one student explained, "I would like to say yes for the most part, but the events that I have been to have often been in areas that are too hard to get to with a wheelchair, or no interpreters for [students]." Another student reported, "There were no interpreters in the freshman seminar, and the classroom wasn't wheelchair accessible."

Two college staff members reported that students often do not know the process for requesting accommodations, and two students agreed with this assessment. One of these students stated in the questionnaire that asking for accommodations was a "complicated" process. A disability services administrator acknowledged that this process places the "onus" on the student to request the accommodation in advance, which is standard procedure on most campuses. One student commented that asking for accommodations in advance makes students feel like an "inconvenience." Another student commented that schedules for events were not provided early enough to request accommodations. Because the policy requires students to ask for accommodations in advance, students must be knowledgeable about events, understand the procedures for requesting services, and know that services will not be provided unless requested. This speaks to the importance of colleges ensuring that they provide information on the accommodations process to incoming students and all students in a widespread and repetitive manner, posting the information on college websites and administrative offices as well as disseminating the information through instructors and staff.

*[T]wo disability services administrators reported that online forms to report sexual assault or conduct intake for counseling are not screen reader accessible.*

### *Accessibility of Sexual Assault Information, Policies, and Reporting Options*

When asked whether sexual assault information was accessible to students with visual impairments using a computerized screen reader to access text and images, staff from five colleges replied in the negative. Staff at one college reported that campus professionals have limited awareness of accessibility standards for websites and online information at the campus. For example, two disability services administrators reported that online forms to report sexual assault or conduct intake for counseling are not screen reader accessible. One Title IX coordinator explained how most materials at the coordinator's college, including websites, were not accessible to students with visual impairments. Another staff member mentioned that his or her college is beginning to review the Title IX website for readability and challenges with accessibility. This college's Title IX website includes all information related to accessing sexual assault services, such as policy language, reporting options, and resources for students to access as well as how to contact various staff, including the Title IX coordinator.

One disability services administrator was certain the Title IX website was accessible because staff from technology services regularly "spot check" the college websites for screen reader accessibility.

Website accessibility, not solely those websites related to sexual assault information, continues to be a challenge on college campuses across the nation. Complaints to the Office of Civil Rights regarding web accessibility for student with disabilities are growing every year.[52] In 2017, disability rights advocates have filed lawsuits against approximately 30 colleges whose websites fail to meet accessibility standards for students with disabilities, including students who are Deaf or hard of hearing or who have visual impairments.[53] In a 2015 audit, 27 out of 58 web pages selected for review in the California community colleges' online enrollment system were found to have distinct violations of the California accessibility standards.[54] Three common violations were found across multiple websites. Critical violations were those that made content completely inaccessible to users, and significant violations resulted in serious barriers, making some but not all the content accessible. This audit found that the 27 web pages had 26 critical violations and 64 serious violations.

*In 2017, disability rights advocates have filed lawsuits against approximately 30 colleges whose websites fail to meet accessibility standards for students with disabilities, including students who are Deaf or hard of hearing or who have visual impairments.*

### *Accessibility of Printed Sexual Assault Materials*

Many of our interviewees commented on the lack of printed sexual assault information, such as reporting procedures or counseling resource options, for students with visual impairments. College staff from six colleges reported that materials were not available in braille or large print, and college staff members from seven colleges indicated that their colleges do not provide this accommodation in relation to sexual assault services. Specifically, one Title IX coordinator explained that accessible materials about sexual assault reporting procedures were not available. Another Title IX coordinator explained that neither the Title IX brochure nor materials about off-campus and on-campus resources for sexual assault were available in various formats. Two staff members explained that their college would only provide such materials when it was requested. One Title IX coordinator explained, "We don't have things proactively in place for that . . . We would be reactive versus proactive." One 504/ADA coordinator elaborated that access to information remained the biggest access challenge at their college: "There is no ease of accessing information. The places where we fall into things where we're not compliant and potentially discriminatory are

*Another Title IX coordinator explained that neither the Title IX brochure nor materials about off-campus and on-campus resources for sexual assault were available in various formats.*

mostly around the accessibility of information being provided."

When asked about accessibility of print information for students with visual disabilities, three college staff members reported that their college is attempting to adhere to the concept of universal design to make sure that all materials are accessible to all students. The Center for Universal Design defines *universal design* as "the design of products and environments to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design."[55] For example, one college staff member reported that their counseling center provides both paper and online intake forms (although neither of these formats guarantees accessibility for people with visual or print-related disabilities).

## Access to Sexual Assault Trauma or Support Services

In response to students who have experienced sexual assault, colleges are providing support and trauma services, such as making confidential sources available to students who may not want to report an assault immediately, victim advocates (including peer advocates) who guide students through accessing immediate resources after an incident, mental health counseling, and support groups. Students are also given various options to report sexual assault if they choose. But again, access to these services for students with disabilities at all colleges is questionable. College professionals and students report that buildings housing these services can be inaccessible. Furthermore, disability-related supports, such as interpreters, may not be available immediately for students who need them. This section reports issues with physical access and explains challenges with providing disability-related supports in a timely manner. It also explains how colleges lack policies and procedures for personnel responding to crisis situations.

### *Physical Access to Sexual Assault Services*

As reported previously in the section explaining physical access to in-person training, most college staff and students note that buildings at their colleges are physically accessible. But four staff members and three students reported challenges with physically accessing sexual assault services. A Title IX coordinator remarked on the culture on campus to make buildings accessible. This person explained that because the college does not have a lot of students with physical disabilities, the "argument" made by others is that a lot of students "don't need those

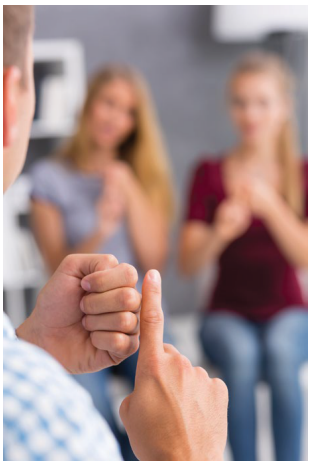
services." These barriers can prevent students from receiving services if they have experienced sexual assault. For example, a sexual assault counselor at a college mentioned that the student counseling center does not have an automatic door opener for a student with physical disabilities. Further, this counselor explained that some counseling center rooms "are too small" for someone in a wheelchair or someone using an assisted-walking device. A college staff member responded in the questionnaire that while the Women's Center was "as accessible as it can be," access issues remain because students with mobility issues can only enter through the back door. Another sexual assault services administrator acknowledged similar access difficulties to the victim services building, and that wheelchair users would not be able to access the wheelchair lift located on the bottom floor because the floor was only accessible via stairs. This coordinator also acknowledged that the location of the building on the edge of campus acted as an access barrier for all students, including students with physical disabilities or mobility issues. One student reported similar access challenges. This student explained that not only is the sexual assault resource center located on the third floor in the student health office, that office is far from "other parts of campus," making the office "so difficult to get to, and far from counselling, so difficult for those with mobility disabilities."

One sexual assault services administrator described an additional challenge posed by the college's lack of focus on accessibility issues for students with disabilities when accessing trauma services—the process of transporting a student with a physical disability for immediate medical attention after a sexual assault. Although the campus has a shuttle used to transport students who use wheelchairs, the shuttle is not accessible in crisis situations. The only option to transport a student using a wheelchair would be an ambulance. The staff member bemoaned how transporting a student in an ambulance would add another layer of trauma to the survivor. Because the college would need to use an ambulance and not regular transport, the coordinator hypothesized that the student may receive substandard trauma care, because in that community, emergency medical services would be required to bring the student to the local hospital instead of a hospital specializing in treating survivors of assault, as preferred by the victim services center.

*Another sexual assault services administrator acknowledged similar access difficulties to the victim services building, and that wheelchair users would not be able to access the wheelchair lift located on the bottom floor because the floor was only accessible via stairs.*

### *Lack of Immediate Auxiliary Aids or Disability-Related Supports When Accessing Sexual Assault Supports*

In interviews, college professionals gave varied responses about the availability of American Sign Language (ASL) interpreters or other auxiliary aides for Deaf or hard of hearing students seeking crisis support, such as reporting sexual assault to a Title IX coordinator, confidential source, or campus security and accessing trauma or counseling services.



Staff members from eight colleges explained that their colleges had some type of communication support immediately available for students, especially for those students who do not know ASL, or that they could access an ASL interpreter within a day. Five colleges reported having assistive technology available to communicate with students if ASL interpreters were not available. Two colleges reported having Communication Access Real-Time Translation (CART) systems that would provide real-time captioning for communication, two colleges had UbiDuo keyboarding systems where people could type to each other, and one college had both an UbiDuo and an FM system that provides portable amplification of sounds. One Title IX coordinator explained the varied resources at hand if a Deaf or hard of hearing student was assaulted and needed immediate assistance: "We do have staff that can sign and in emergencies could access them. We do have a gatekeeper at student services who would use UbiDuo to get them situated immediately. We subscribe to other services . . . immediate video relay. If I needed something right away, we could dial into the relay. It's imperfect and I prefer to have trained interpreters but would have alternatives if that occurred." One disability services director explained that a sexual assault helpline was accessible if a student had access to a TTY (a typewriter that can be used to make phone calls via a relay service) if the counseling services office was closed. This assumes, however, that a student has access to telecommunication equipment.

On the other hand, professionals from nine college campuses indicated that ASL interpreters were not "readily available" and a request would involve unknown wait times. The White House Task Force to Protect Students from Sexual Assault's key components of sexual assault crisis intervention and victim services suggests that advocacy services should be available 24 hours a day for immediate response, but whether colleges could adhere to this guideline was doubtful. When asked how colleges would respond if a student with disabilities or a Deaf or hard of hearing student wanted to make a report or access services, one disability services director said that, in general, "accommodations are not immediately available—it depends on what's needed. There are no interpreters on campus. They must be arranged. It really depends." One counselor mentioned that if a Deaf or hard of hearing student came to the center requesting services, the staff would be

"scrambling" to figure out how to serve the student. No specific procedures were written about access for a Deaf or hard of hearing survivor of sexual assault. Instead, the counselor mentioned having to consult a supervisor and calling the disability services office on campus. This staff member concluded that a Deaf or hard of hearing student would have to wait much longer to be served than a student who was not Deaf or hard of hearing. At another college, one sexual assault services administrator believed no interpreters were available for therapy and students would need to see community providers. This staff member provided no response about how the sexual assault services center would accommodate a Deaf or hard of hearing student.

*One counselor mentioned that if a Deaf or hard of hearing student came to the center requesting services, the staff would be "scrambling" to figure out how to serve the student. No specific procedures were written about access for a Deaf or hard of hearing survivor of sexual assault.*

In contrast, three disability services administrators reported having interpreters on staff that could be used immediately in a crisis, such as accessing counseling services or reporting sexual assault. Two administrators suggested they would "pull" the staff interpreter from a current assignment in the case of a situation that needed immediate support, such as responding to a sexual assault incident. One administrator reported having done this before in crisis situations. A third administrator reported, however, that if no staff interpreters nor CART services were available, then the wait time for an interpreter would be unclear: "There would be no guarantee we would do it as fast as we could." Instead, staff would resort to writing notes back and forth on a "pad of paper" with the student, if the student could write.[56] This staff member acknowledged the unsuitability of this approach but had used it before in emergencies and considered it valid in the case of supporting a survivor of sexual assault. However, such ad hoc communication support strategies are not recommended by Deaf or hard of hearing advocates. This is especially true if the student's first language is ASL, because interactions would occur in the student's non-native language, which can lead to confusion and frustration.[57]

*Instead, staff would resort to writing notes back and forth on a "pad of paper" with the student . . . This staff member acknowledged the unsuitability of this approach but had used it before in emergencies and considered it valid in the case of . . . sexual assault.*

Staff at four colleges also acknowledged the problematic nature of not having immediate disability-related supports in place for students, especially when relying on on-campus staff, because many incidents happen on nights or on weekends. One staff member explained, "If

[students] need accommodations immediately, or after hours, or [they are] reporting to police directly, that would be challenging." One sexual assault services administrator elaborated on this challenge: "I think especially when it comes to ASL interpreters . . . How are we going to access them? I think traditionally, in theory, that if health services is open, we will contact them and they have a [interpreting] service we can use. They have a provider with interpreters for the [Deaf or hard of hearing population]. But the reality is that they are not open 24/7 and we get things during the time when they are not open." A student elaborated on an experience with securing supports after business hours, saying, "It is not my job to figure out how to schedule an interpreter outside of the normal hours; it is yours."

Even if interpreters are available, they may not have the language skills or preparation to interpret for survivors of sexual assault, especially in disciplinary proceedings, in a way that minimizes trauma and considers survivors' safety. Interpreters who interpret for academic classes or remote interpreters may not be familiar with supporting survivors' needs. In addition, using interpreters personally known to the student can compromise the confidentiality and objectivity of the interpreter.[58] The Vera Center on Victimization and Safety names a lack of qualified interpreters as an additional communication access barrier faced by Deaf or hard of hearing survivors, in addition to the barriers named previously, and recommends that interpreters are trained in "vocabulary specific to domestic and sexual violence, trauma and communication, ethics, safety planning, and self-care" to support Deaf or hard of hearing survivors.[59] Without this training, Vera Center on Victimization and Safety suggests supports may not be tailored to survivors' needs and that "imprecise" communication can harm the accuracy of reports used in legal proceedings.[60] The New York Office of the Prevention of Domestic Violence recommends survivor groups recruit and train Trauma-Informed Qualified Interpreters who could be shared across communities to provide effective communication for Deaf or hard of hearing survivors.[61] One expert researching the prevalence of sexual assault among Deaf or hard of hearing students commented in interviews that interpreters who support Deaf or hard of hearing survivors should be familiar with the necessary language or procedures related to sexual assault services processes. This expert recommended that certified interpreters familiar with the legal process and language be available to interpret for sexual assault cases, similar to how federal courts and some state courts require these interpreters to have specialized training.[62]

*The Vera Center on Victimization and Safety names a lack of qualified interpreters as an additional communication access barrier faced by Deaf or hard of hearing survivors . . .*

### *Lack of Policies and Procedures Detailing Responses in Crisis Situations*

Professionals recognized that much of their inability to immediately provide disability-related supports was due to the lack of explicit procedures. Interviewees from 14 colleges (52 percent) reported that their colleges had no policies or procedures in place to support

survivors of sexual assault who may need immediate disability-related accommodations. Instead, their responses would be determined "on the fly." While the questionnaires did not ask specifically about crisis procedures, four questionnaire responses noted the lack of policies and procedures. One disability services administrator commented, "We haven't discussed accommodations for those who have experienced assault." Seventeen other questionnaire respondents indicated that the procedure for providing accommodations for sexual assault services was for students to disclose their disabilities or accommodation need to the Title IX office (which would then contact the disability services office) or the student would contact the disability services office directly. No responses indicated flexible accommodation processes with a variety of options during the sexual assault reporting and follow-up process.

Only three interviewees (11 percent) responded with specificity about their procedures on providing disability supports during a crisis. One Title IX investigator said, "We have a contact person at interpreting services. I haven't needed them that fast yet. I haven't had to test it, but we have an agreement for that to happen. [There is an] awareness of who to call and how to access." Another disability services administrator mentioned that the disability manual had a policy specific for crisis situations but that this was not a college-wide policy.

The rest of the interviewee responses about procedures were hypothetical or adapted from other crisis situations when supports were needed immediately. These interviewees used uncertain language such as "what we would probably do" or "I assume that" when asked how the college would respond if a Deaf or hard of hearing student or student with visual impairments was assaulted and required immediate support. One Title IX coordinator explained that because the "situation has never come up," his or her college lacks appropriate accommodations or policies that outline how to respond.

*Professionals recognized that much of their inability to immediately provide disability-related supports was due to the lack of explicit procedures.*

Interviewees transparently stated that their college lacked policies and procedures and acknowledged that these policies should be created. One sexual assault services director explained, "How do we ensure that students can get these accommodations, which are critical but are also engaged in supports for themselves as well? Some of these things we don't have in place but it would be ideal." A Title IX coordinator mentioned that although the college website states that students can request accommodations, it was insufficient to meaningfully support survivors with disabilities.

*Another disability services administrator explained the potential challenge if a student with a visual impairment was participating in this process, because there is an unchallenged assumption that claimants and witnesses must be able to see . . .*

This coordinator explained that the college's current policy is "way below standard here. We have tag lines that say that if you are a person who needs accommodations it says who to contact. It's not very proactive." One sexual assault services administrator mentioned that upon receiving the interview questions for this research project, it was clear that the college needed to "put some things in motion to realistically address the needs of students [with disabilities]" despite recognizing publicly on the college website that students with disabilities are a population requiring more attention. This staff member had only recognized the importance of students with disabilities in writing but had not thought about how to translate the language of the website into action steps.

During phone interviews, two disability services administrators said they recognized current gaps in their colleges' policy language on the website. While explaining a specific procedure for requesting interpreters in crisis situations, one administrator recognized that crisis procedures were not mentioned on the college website, even though the college is able to secure interpreters within 24 hours (in contrast to the normal one-week notice needed for other requests). Another administrator reviewed the sexual assault policy page and noticed a lack of language pertaining to students requesting accommodations. The administrator acknowledged this misstep, saying, "I just looked at our new sexual assault policy again, and there are tons of resources, but nothing that says, 'if you wish to have accommodations' (which is my bad), for students or staff. Nothing here about the need for accommodations, which is **not** okay."

Five students also commented on the lack of transparency and awareness about the accommodation process, as well as the inclusivity of college support services. Four of these students made the challenges known in their recommendations. One student mentioned, "Put info on what can be done for survivors. Share information on exactly what [disability services] can/would do for survivors [with disabilities] (on the website for example)." Another student suggested, "Advertise, clarify that access needs will be met, offer material in alternate formats/interpreters/buddies/etc." One student elaborated on a sentiment explained earlier in this chapter about the burden students may feel when requesting accommodations and wrote, "Provide examples of accommodations instead of making it seem like a weird edge case."

*[O]nly 1 of the 27 colleges in which staff were interviewed mentioned on their websites that information about sexual assault reporting or resources was provided in alternate formats. No policies for accommodations in crisis situations were posted.*

A search for accommodation policies in crisis situations and contact information for disability services on Title IX or sexual assault resources websites of 27 of the colleges that participated in phone interviews yielded similar findings. First, only 1 of the 27 colleges in which staff were interviewed mentioned on their websites that information about sexual assault reporting or resources was provided in alternate formats. No policies for accommodations in crisis situations were posted. As mentioned in the

section on "Accessibility of In-Person Education or Prevention Programs," only 10 of the colleges posted the request period for students to request accommodations in advance for nonclassroom accommodations. The average wait time was 5.5 days. Furthermore, only two colleges mentioned disability resources as a support on their sexual assault services or Title IX websites. One of these colleges mentioned this in in a downloadable PDF brochure, which may or may not be accessible by screen readers.

### *Recognition of the Lack of Policies and Procedures*

Many respondents mentioned that participation in the NCD data collection process raised awareness of their colleges' lack of policies and procedures related to sexual assault services and thus inattention to serving students with disabilities. With their new awareness, they could begin identifying policies or procedures to put in place. For example, one sexual assault counselor explained during an interview, "We need to revise the policy and procedures manual. It would depend on the type of accommodation needed and the need to involve the access center and the challenges with confidentiality. There is nothing that is written. There is nothing that is written in the procedure." Another sexual assault services coordinator reported that participating in the interview made the coordinator more "conscientious" about the lack of procedures at the college for students with disabilities.

In interview and questionnaire responses, college staff members mentioned potential changes or modifications to their campus practices, based upon their increased awareness during participation in this study. One counseling center staff member explained that they would revise the policy and procedures manual to include provision of disability accommodations, based on existing barriers that were unearthed during the interview. One Title IX coordinator mentioned various steps that would follow:

> I think first, look within sexual assault policy, [to include] a piece about disability services being offered. It needs to be brought up before. Put [an explanation] in email about those services. [We need to] talk with disability services and let them know about the email, and put together a protocol or memorandum of understanding with disability services, and working with disability services to help draft an accommodations letter for any student receiving accommodations through Title IX, and doing some training with all of campus or first those people who have direct interactions with those working directly with those students.

## Accommodations Provided During the Conduct Process and Communication with Law Enforcement

Compliance with Title IX laws require colleges to investigate sexual assault or misconduct incidents. Eight interviewees reported that if students with disabilities go through these processes as claimants, the campus disability services office would work with the coordinator of the conduct process to provide the necessary accommodations to students. Five of these interviewees explained that if law enforcement or campus security were involved during the investigation phase, they would be able to provide needed accommodations if students disclosed their disability status to the Title IX coordinator at the start of this process. The Title IX coordinator

would then request appropriate accommodations. However, no Title IX coordinator or disability services administrator mentioned that students would know how to request disability accommodations while also disclosing a disability during this process. Typically, students should not need to disclose their disabilities to anyone outside of disability services when requesting accommodations, because a diagnosis is protected health information under the Health Insurance Portability and Accountability Act. All interviewees indicated that disability services or an ADA coordinator would be called once a student disclosed a disability or need for accommodations. For example, one disability services administrator explained, "While we don't have anything formal in place, our staff who are deans who coordinate the process would be contacting us and asking if they have accommodation needs." However, this director had only participated in one process where both the victim and perpetrator had physical disabilities and could not speak to what would occur with a student who was Deaf or hard of hearing, but the director assumed that accommodations would be made. Another disability services administrator explained, "Every time a student with a disability identifies, Title IX thinks [the person has a disability], I get called to consult."

Five disability services administrators reported in interviews that students were being given the appropriate accommodations at their colleges because staff participated in conduct management teams (Communication, Action, Response, Evaluation [CARE] teams) or students' needs were addressed through collaboration between a diverse group of campus staff, including campus law enforcement. According to the National Behavioral Intervention Team Association, a CARE team is "a multidisciplinary group whose purpose is meeting regularly . . . track[ing] 'red flags' over time, detecting patterns, trends, and disturbances in individual or group behavior." The teams are a "proactive way to address the growing need in the college and university community for a centralized, coordinated, caring, developmental intervention for those in need, prior to crisis."[63] One disability services administrator explained the process of collaboration between the disability services department and the student conduct office by saying, "The conduct manager serves on the CARE team. Any time one of my students goes through the [disciplinary] process, we consult on what that student might need. There is a letter that goes out to students—[it] indicates getting in touch with student conduct [department] or [disability services] if they need accommodations, and [students] can reach out during any time during the process for accommodations."

Another staff member explained how the CARE team collaborates to support students who are going through this process to ensure the team accommodates their needs and does not traumatize them:

> The director of disability services sits on our case management team for Title IX issues, so when names [of students] arrive, he could know . . . the student's name, any additional challenges that the student might have presented. Our behavioral intervention manger sits in, as well. We would have a holistic view of a student's needs before they get interviewed.

This staff member explained how these collaborative relationships came into play when supporting a student who had witnessed an

incident of sexual assault and another traumatic incident after experiencing registering for disability services due to a prior incident of sexual assault. Because the team knew the student's prior experiences, it was able to tailor its support. The staff member explained that the CARE team "knew [the student] was going to need more supports above what just happened. We did some real triage to make sure [the student] didn't have to interact with new individuals."

One interviewee reported how the conduct process can be problematic if the student has an invisible disability and has not made this known to the disability services office. If a student does not identify a medical or mental health condition as a disability or is not aware of the process for requesting accommodations during the conduct process, then the student may not receive equitable treatment. Only one staff member described a standard practice of proactively informing students about their right to request accommodations during the conduct process. At this college, the student conduct letter specifically mentions how to request accommodations, although the letter presumes students understand the campus definition of "disability" and have documented their disabilities with the disability services office. An adapted version of that statement follows:

> You may choose to have a non-attorney support person attend any of the meetings. Please notify the college if you plan to have a support person attend; if you are a limited-English-speaking or hearing-impaired individual you may request an interpreter and it will be provided. You may also request

other disability-related accommodations. We will work with the Disability Resource Center to guarantee equal access in this process. Please contact the college immediately if an interpreter or other accommodation is needed.

Three interviewees commented on the challenges that students with disabilities would face in the conduct process, specifically students with autism or students with visual impairments. One interviewee explained that in one situation, a conduct process went "better than they could have expected" because the dean of students knew the student with autism. The disability services administrator explained the potential challenges that can arise if a student cannot understand subtle or complex questions asked of them during this process, or how behaviors could be misinterpreted by others and affect the outcome of the investigation, noting, "As the investigators, [they] are looking for that pattern and was this person preyed upon? It's because [the decision] is based on a preponderance of evidence."[64]

Another disability services administrator explained the potential challenge if a student with a visual impairment was participating in this process, because there is an unchallenged assumption that claimants and witnesses must be able to see: "Our trainers and investigators are trying to figure out what happened. But if you can't see what happened, how do they know to ask questions that aren't visual to get the info you need? And I think that is the critical piece, and looking at these different populations to get to the information you need. And then relying on witnesses. If no witnesses, then you can get in a tricky position." However, none of the staff interviewed had provided accommodations for a person with visual impairments and could not speak to how this process would unfold during a conduct process. As with other scenarios, staff could only guess what might occur in hypothetical situations when no procedures or policies were in place to provide guidance.

### Access to Accessible Services Outside of Campus

Staff members from seven colleges reported that their colleges maintain relationships with off-campus sexual assault providers. Of those seven, only two staff members were certain that the providers could offer accessible services to Deaf or hard of hearing students, with one staff member explaining that the community provider would experience a "lag" in securing an interpreter. Other college professional staff members were unsure about the accessibility of these services to students with disabilities. Maintaining relationships with community-based providers is critical because students may be wary of stigma and may not want to access services on campus.[65] In addition, campus mental health services can be at capacity and students may not be able to receive services in a timely manner, if at all.[66] One staff member did not know if local services were accessible, while acknowledging that many students received sexual assault services from a local community provider because of the lack of assault services on campus. One Title IX coordinator believed that the community providers are not "equipped" to deal with a student with visual impairments, but that the provider can provide supports to Deaf or hard of hearing students.[67] These responses by college professional staff suggest that creating relationships with community providers, especially providers with accessible services, is an afterthought.

## Chapter 6: "You've given me a lot to think about:" Existing Gaps in Services and Promising Practices

Responses by college professional staff in interviews and questionnaires indicate that colleges do not have policies and procedures in place for situations in which victims of assault have a disability—in particular students who are Deaf or hard of hearing. Students with disabilities remain on the periphery and are not addressed regarding sexual assault prevention, outreach, and services. In many cases, staff members are confident they could address any situation that may arise, but their confidence is based on numerous assumptions about on-campus and off-campus providers as well as assumptions about students' shared definitions of disability and ability to articulate disability-related needs, prior knowledge of campus procedures and legalities, and ability to calmly and rationally self-advocate while participating in a traumatic crisis and its aftermath. Chapter 5 addressed two major gaps: the lack of college compliance with federal disability laws and the lack of policies or procedures that outline how staff are to respond when serving students with disabilities. With a heightened awareness from participation in the NCD study, many staff members identified new procedures or language to include in their sexual assault policies and additional ways to make programs or information accessible to students with disabilities.

*Students with disabilities remain on the periphery and are not addressed regarding sexual assault prevention, outreach, and services.*

This chapter explains additional gaps in colleges' programming and policies, focusing on educational programs and college staff members' understanding of disability. This chapter addresses collaboration between campus programs to ensure access for students with disabilities, how data collection and reporting marginalizes students with disabilities, and these students' experiences with campus violence and sexual assault. This chapter also identifies some promising practices that may be replicated or scaled up nationally and also addresses the following research questions:

- What gaps, weaknesses, and discriminatory policies exist in campus sexual assault services?
- What are the current most promising and best practices and emerging trends (e.g., healthy sexual relationship training for incoming freshmen, bystander awareness training to teach students to step in to stop

sexual assault, climate surveys, and changes in college disciplinary board rules)?

- Are disability student organizations connected to sexual assault survivor groups on campus? Are campus disability services and resource offices connected to mental health services to ensure students with disabilities are getting the ongoing services they need after an assault (e.g., therapy)?
- Have college staff and faculty received training to provide support for students with disabilities who have experienced sexual assault?
- Has campus law enforcement received disability awareness training in taking reports from victims/witnesses with disabilities?

### Interactions Between Sexual Assault Support Services Offices and Disability Services

Lack of policies or procedures to address the needs of students with disabilities may be due to what some college staff consider the "siloing" of disability services and sexual assault services offices, such as the Title IX office. Seven college staff members and one student mentioned the separation of these campus services when explaining why their colleges may not be considering students with disabilities in sexual assault services. For example, one staff member of a disability services office explained the effects of this separation on college practice: "There is no training to the staff at the women's center, no discernment of disability as one of the [students'] identities. There is not much contact between our office and the sexual assault people and protocols." One student explained that their college could "improve" the sexual assault supports for students with disabilities and recommended that the college "significantly improve communication between the Title IX Coordinator/staff and Disability Services."

*". . . [T]here's a complete disconnect between sexual assault and disability services. Within disability services, they have an understanding that they are only there to provide accommodations for classroom learning. They don't talk to each other . . ."*

A college professional explained, in questionnaire responses, how interactions between these groups may not occur because it is not part of the college culture: "As the disability service provider, we have worked with student services and other units (e.g., counseling and the health center) to provide suggestions, etc. However, this is done when we reach out. It is not something they automatically consider." Another college professional mirrored these sentiments: "The problem that I'm seeing is that there's a complete disconnect between sexual assault and disability services. Within disability services, they have an understanding that they are only there to provide accommodations for classroom learning. They don't talk to each other and also understand themselves in limited ways and capacities. To my knowledge, [they] don't have procedures or policies for it."

In contrast, some colleges report that intentional interactions happen between Title IX

and ADA/disability services and mental health services, and because of this, they are better able to serve students with disabilities when and if a sexual assault incident occurs. For some college professionals, these intentional interactions occur in CARE teams that were explained in detail in Chapter 5 under the section titled "Accommodations Provided During the Conduct Process and Communication with Law Enforcement." A greater awareness of students' needs may come about because these teams bring together staff from these offices, campus law enforcement, and mental health service providers to support students. These teams provide connections where college professionals could ensure that students receive needed counseling or supports. One Title IX coordinator mentioned that whether or not disability services is involved, the Title IX process ensures that students who are on "either side of the complaint" are receiving mental health services either on campus or from off-campus providers. CARE teams with disability services professionals may have a heightened awareness, however, that students receiving mental health services off campus are aware of their rights to disability accommodations on campus, including services for academic courses.

These teams can also create relationships between the disability services office and Title IX, which can be utilized in future incidents. One Title IX coordinator elaborated, "We have a partnership with the office of disability services, and we are both housed within the office of the dean of students. Coming out of that, we have a level of trust. And having led the behavioral intervention team, I know that many students with disabilities tend to be a higher percentage of complainants/victims/survivors (however they identify). [Student disability] ranges from psych, medical, physical, and other impairments. Seeing other disability services connected in that way, I had access." Another disability director sits on a CARE team with the conduct officer and reported that they "collaborate closely." Although they have not had a Title IX "incident" yet with a student with a disability, the two collaborate on other conduct issues and providing the appropriate accommodations to students. For example, a disability services director explained, "The conduct manager serves on [the] CARE team. Anytime [a student with a disability] goes through the process, we consult on what that student might need . . . I sent [the conduct officer] something for how to keep in mind disability services when thinking through sanctions and timing for those."

Other staff members who report closer connections between sexual assault and disability services serve on conduct boards or collaborate as Title IX investigators and therefore are part of the Title IX process. Five of those who served in disability services roles at their colleges also participated in Title IX or student conduct process. When explaining promising college practices, college staff mentioned these tighter collaborations. Two colleges also mentioned that their disability staff is trained as sexual assault advocates. Sexual assault advocates provide confidential guidance and support to students who have experienced sexual assault and assist with filing reports and obtaining medical or trauma care.

Unfortunately, college staff did not report collaboration between organizations for students with disabilities (i.e., ASL clubs, disability cultural centers) and survivor groups. Professionals from 11 colleges reported that they did not have

on-campus support groups for students due to a lack of enough students to form the groups. Only staff from nine colleges reported having campus sexual assault support groups. One respondent reporting on support groups explained that the connection with disability services was more of an awareness as opposed to actual collaboration around support group programming.

### Lack of Disability Training Among Staff and Faculty

Lack of policies and procedures for students with disabilities may be due to the lack of staff understanding of disability. College staff from 12 colleges reported in interviews that the counselors, sexual assault advocates, faculty, or other staff that may interact with students after an incident of sexual assault are not trained in disability issues, or they have only a limited understanding given what would be necessary when supporting students with disabilities in a crisis. Seven questionnaire respondents reported that disability training was not provided to staff that support survivors (i.e., wellness center staff, counselors) on their campus. Only four staff indicated in the questionnaires that peer advocates were trained in understanding disability, and five college staff reported being unsure about the level of training. Considering the prevalence of colleges using peer educators to support prevention efforts, a recent report highlighted the dearth of training peer educators receive in general.[68] If most peer educators surveyed only receive up to 10 hours of training, then whether disability is included in that training is up for question.[69] Only staff from two colleges reported that the disability services department partnered with sexual assault service providers to offer disability-related training. One disability services administrator reported being "very comfortable" sending students with disabilities to receive counseling services due to this partnership. The other college's disability services office provided training to sexual assault advocates but not to staff at the counseling center who may provide more long-term counseling to survivors.

*[T]he counselors, sexual assault advocates, faculty, or other staff that may interact with students after an incident of sexual assault are not trained in disability issues, or they have only a limited understanding . . . when supporting students with disabilities in a crisis.*

Disability training was not provided on most campuses, or disability training was focused on compliance with the ADA and Section 504 and the process for requesting disability accommodations and services. One Title IX coordinator said disability gets "swept under the rug." A sexual assault services coordinator concurred, reporting that the only disability training that crisis center advocates received was probably during their credentialing programs. This staff member recommended that the college provide a disability training similar to the two-hour training that staff received about supporting lesbian, gay, bisexual, transgender, and queer (LGBTQ) students. Another disability services administrator reported that their college needed to shift the campus culture to be more aware of disability, which will come with more education and training across the board, to faculty, staff, and students.[70] In commenting on the lack of

disability training provided to staff, the disability services administrator said, "I'd like a copy of this [questionnaire from the research study] so that I can bring up the training issue for the campus."

When interviewees reported that college sexual assault services staff received training about disability, the training primarily focused on how to refer students to the disability services office and accommodations, instead of information about disability itself. The unique needs of students with disabilities, an understanding of different types of disabilities and how individuals may experience them, how students may define *disability*, or framing disability as an identity beyond a diagnosis were not necessarily part of training courses. A disability services administrator explained how their college needed to do more because training focused on "disability compliance." Another interviewee concurred and explained that counselors or staff members think about disability as centered on the "diagnosis" and accommodations as opposed to "ongoing adjustments" to support a student. This interviewee elaborated, "Their [counselors'] awareness about these [disability] issues would just be writing up documentation. There's a need for awareness in terms of the ongoing impact on our students and how that might interact with other issues regarding why students have come to counseling in the first place." Such training courses are recommended by college staff.[71] Similarly, an expert that works with survivors with disabilities explained that such training courses should include topics beyond providing accommodations that discuss disability in broader ways, especially how trauma may affect students with disabilities:

> [The training should develop] an understanding and having a good grounding in trauma-informed practices, interactions informed by what has happened not only physically but also neurobiologically. Using more basic speech to interact [with a student] if the student has a cognitive disability. . . . Our focus is working with someone not only to explore rights to due process but also looking at their healing process—understanding the impacts of them coming forward or having a sexual assault, and that if they live in a mandatory reporting state, [the process] will influence a lot of other people. It can be very disruptive. [Within the process] of investigation and deciding to report, survivors' need for support and healing gets lost in the whirlwind of all the other activities. We need to not lose sight that [students with disabilities] have the same needs of healing and connection and support around the healing as any other students.

Another expert who conducts research on abuse among people with disabilities elaborated on the need for support providers to understand trauma and trauma-informed practices, since many students with disabilities have experienced trauma before arriving at college. This expert explained, "In terms of how students are impacted by violence, the research seems to be that we are talking about people that [sexual assault] is not their first traumatic event. What does this mean, a layer of trauma that is on top of previous experiences?"

Colleges and sexual assault services providers seem to have a nascent recognition of the need for training courses on disability related to sexual

assault prevention and support practices. In interviews, college professional staff mentioned two training courses that were provided to college staff focused on understanding disability and sexual assault. One interviewee described a community college system seeking specialized training to understand the needs of students with disabilities and how to support them if they were survivors of sexual assault. This two-day training was provided by a sexual assault services director and a sexual assault support provider specializing in disability. The 2017 Campus Sexual Violence Prevention Summit hosted by the Minnesota Department of Health also included a presentation titled "People with Disabilities on Your Campus Are Victims/Survivors of Sexual Violence Too: Engaging in Inclusive Prevention and Response, Awareness, and Understanding." Reportedly, this summit focused on supporting diverse populations and included presentations reflecting the racial and gender diversity on college campuses. However, both these presenters adapted research on adults with disabilities and sexual abuse and were not reporting research or data on college students. As stated previously in this report, no research exists to inform specific prevention and support practices on a college campus.

### *Disability Training for Law Enforcement*

College professionals report that law enforcement receives more specific training regarding working with students with disabilities than other staff. Seven college staff interviewees and five questionnaire respondents reported that campus law enforcement are trained in disability. Two disability services directors reported their personal involvement in training law enforcement about this topic. The interviewees elaborated, however, that training may not be inclusive of all types of disabilities. Two interviewees said the training focused on either mental health disabilities or autism. One disability services director elaborated on the nature of the presentation: "Our on-campus and county police departments have all gone through a sensitivity training for students with disabilities, specifically intellectual disabilities. Like how body language looks, that sort of thing. All that would interact with students on our campus have had that training." One interviewee suggested that due to training, law enforcement could be more competent interacting with a Deaf or hard of hearing student, but not someone who was deaf-blind or someone who had a physical disability because the training did not focus on those disabilities or disability in a broader sense.

Six disability service directors reported close relationships with campus law enforcement and suggested that, despite the lack of specific disability training for law enforcement, law enforcement would be open to receiving advice and support on how to interact with a student with a disability. One disability services administrator referred to a specific instance in which a student with autism was charged with stalking, and campus police "worked closely" with the disability office "to understand [the student's] communication style and behavior to understand if [the student] was really a threat."

## Awareness of the Prevalence of Sexual Assault and Students with Disabilities

Another reason colleges may not have prioritized students with disabilities in their sexual assault policies is the lack of awareness of the higher

risk of assault that students with disabilities face. One college staff member regretted the lack of focus on students with disabilities prior to participating in the study: "Sorry to admit that this subset of students had not really been a focus on sexual assault awareness, but it is now on my radar." Another staff member suggested that concern about students with disabilities has not been "raised as an issue." This is problematic because students with disabilities are likely to underreport incidents of sexual assault,[72] and lack of reporting does not mean that students with disabilities are not experiencing assault at their campuses. Yet this lack of awareness is not surprising when even national advocacy organizations such as Center for Changing Campus Culture,[73] the Campus Prevention Network, and It's on Us[74] do not include college students with disabilities as groups at higher risk for sexual assault.

*"Sorry to admit that this subset of students had not really been a focus on sexual assault awareness, but it is now on my radar."*

While many college staff members indicated that focusing on sexual assault services and students with disabilities is not on their radar, college staff members from 13 colleges reported that they are conducting climate surveys on sexual assault, which can be a first step to gain greater awareness about the prevalence of sexual assault among different demographics. Climate surveys are becoming a more common practice after the White House Task Force, in their 2014 report, recommended that colleges institute these surveys to assess the magnitude of sexual assault at their college and campus attitudes on sexual assault. Colleges can tailor existing climate surveys that have been developed over the past few years or develop their own,[75] and college administrators can use the guidance of the U.S. Department of Justice Office of Violence Against Women to develop and use climate surveys.[76] The National Center for College Students with Disabilities also recommends that colleges use campus climate surveys to understand the needs of college students with disabilities in general.[77] The Association of American Universities found that when campuses administered surveys, they used the results to inform programming and student support services.[78] If colleges are aware of the statistics around students with disabilities, they may be more likely to increase support and services for students.

*. . . [E]ven national advocacy organizations such as Center for Changing Campus Culture, the Campus Prevention Network, and It's on Us do not include college students with disabilities as groups at higher risk for sexual assault.*

However, not all climate surveys automatically include students with disabilities or aggregate findings using disability as a demographic. A disability services administrator at a college reported that the college's first campus climate survey did not ask students to identify by disability. The college plans to administer a new survey that will include this demographic for further examination, including specific questions

about level of support, such as "whether [students with disabilities] are registered or not and level of support [students with disabilities] are receiving." The administrator hopes that conducting this revised survey will give the college a sense of the gaps regarding sexual assault services.

One ADA/504 coordinator explained that the campus institutional research office worked with the Title IX office to tailor a survey and that it was not "off the shelf." Including questions about disability may help campuses understand the scope of under-reporting, because after including these questions on a survey, that campus found that 21 percent of students with disabilities on campus reported experiencing nonconsensual touching or nonconsensual intercourse. The coordinator explained the implications of the survey on the college's sexual assault programming as "being able to go in and look at what education we're going to do generically, but we have to look at subpopulations: Greek life, men, disability, etc. We have these breakdowns in our climate survey. Educational practices at some level need to be tailored to hit people where they live."

*A failure to develop clear sexual assault policies and procedures to serve students with disabilities is a distinct weakness in higher education, and it is discriminatory under the ADA and Section 504 of the Rehabilitation Act.*

### Students with Disabilities Are Not Addressed in Sexual Assault Educational Programs

A failure to develop clear sexual assault policies and procedures to serve students with disabilities is a distinct weakness in higher education, and it is discriminatory under the ADA and Section 504 of the Rehabilitation Act. The lack of access to educational and outreach programming for students with disabilities reflects another problem in services. Thirty-one college staff members and four students reported that programs at their colleges did not specifically address students with disabilities. Only three staff members reported educational programs specific to students with disabilities.

The National Center for Injury Prevention and Control at the Centers for Disease Control and Prevention set forth guidelines in their report titled *Sexual Violence on Campus: Strategies for Prevention*. This report suggests that college orientation and training should be tailored to different populations, including students with disabilities.[79] Two prevention research experts who provide technical assistance to colleges suggested that prevention programs are only effective when they are developed specifically to a target audience, including groups representing specific types of geographic and demographic diversity. For example, the experts explained that programs developed at a college in one region of the United States may not translate well to a college at a different region with a more diverse student population, where students dress differently or perhaps use different terminology or language. These experts elaborated that to make training courses accessible to students with disabilities, campuses need to move beyond a focus on accommodations, such as captioning or interpretation, and include

situations or scenarios specific to students with disabilities. For example, they are developing an educational messaging campaign that includes a scenario with a woman with a physical disability who is in an abusive relationship with a male partner. They also recommend such scenarios be included in bystander programs to increase awareness among students without disabilities. The researchers elaborated on the importance of including students with disabilities:

> We did a series of focus groups five years ago for social marketing bystander intervention images to identify a student with a disability who is a victim of intimate partner violence. One of the challenges for developing prevention to develop awareness and skills around victimization of students with disabilities [is that] we have a very narrow view of what a disability is. There are multiple layers that need to be unpacked when you say disability—you are not just referring to someone in a wheelchair or someone who is visually impaired, and then you've got to unpack the uneasiness that many people in general have in approaching people with disabilities and offering assistance. They think, "Is this my role? Do they feel singled out?"

One disability services administrator explained that the effectiveness of generic educational programs may not resonate with students with disabilities because scenarios or examples do not include situations that students with disabilities may face more often, such as intimate partner violence. This director worked with a survivor with a disability who expressed confusion about how a situation reflected nonconsensual interaction.

The three colleges that reported providing tailored programming described the training as reflecting some of the principles noted earlier. One disability services director provided students with disabilities a disability-only space to discuss and ask questions about consent and assault so that students would feel comfortable asking questions that they may not feel comfortable asking in broader spaces with peers without disabilities. Another disability services director focused specifically on talking with students with autism to explain "appropriate behavior" and to help them understand how others might perceive specific behaviors. One questionnaire respondent elaborated that educational programs were tailored specifically to address the diversity of the college, which included students with disabilities, and that the college is "intentional about providing education and outreach that is intersectional," assuming students may have multiple emerging and established identities that interact in complex ways.

Questionnaire responses from five students elevate the importance of developing prevention programs that are inclusive of students with disabilities. One student reported, "They don't talk about students with disabilities in the context of sexual assault." Another student commented that the assumption at their college is that "[students with disabilities] don't get raped." A different student elaborated on this theme and included a suggestion for campuses to "improve sex education for [students with disabilities] that is relevant to us. Use examples of real-life [people with disabilities]. Talk about the specific ways that a [person with a disability] might be targeted for sexual assault and abuse. Sometimes not just one assault, but people can be hurt again and again by the same person." A fourth student

highlighted the intersectionality of identities, such as students with disabilities who are LGBTQ or people of color, and how their college's support and services providers lack this perspective.

One expert in sexual assault prevention who works with colleges explained that the disability community is not considered part of cultural competency training and does not fall under the definition of "diversity" groups. This expert suggested that colleges are successful with including the transgendered community and racial and ethnic groups, but not students with disabilities. One Title IX coordinator echoed similar sentiments when describing the focus of the student task force on sexual assault. When asked whether the task force considered students with disabilities, the director explained, "not directly," but the group talked about "inclusivity." The coordinator further elaborated that the group has discussed "racial inclusivity" and "transgendered or other LGBT" groups as well as "parents, nontraditional, young, [and those] trying to find partner companions." Another interviewee who is also on a campus sexual assault working group reported that students with disabilities have not been a focus of the working group's efforts.

*One expert in sexual assault prevention who works with colleges explained that the disability community is not considered part of cultural competency training and does not fall under the definition of "diversity" groups.*

These findings mirror nationwide trends. Rider-Milkovich found that only 10 percent ($n$ = 68) of colleges implementing prevention programs are tailoring these to students with disabilities. In contrast, 33 percent of colleges are tailoring programs to international students, and 26.5 percent tailor educational programs to LGBTQ students.[80]

One reason for the lack of targeted educational programming at colleges may be due to the lack of research and best practices on effective prevention programs for students with disabilities. Experts in sexual assault prevention research interviewed for this study (who also provide technical assistance to colleges) report that the development of targeted programs for students with disabilities is "totally uncharted territory." Consistent with the findings in this report, they noted that most colleges where they have worked are not identifying students with disabilities as a population at risk and therefore are not developing programs to address these students' needs. The researchers caution that programs should not assume uniformity of experiences within the broad category of "disability" either.

*Experts in sexual assault prevention research interviewed for this study . . . report that the development of targeted programs for students with disabilities is "totally uncharted territory."*

While three colleges reported tailoring training courses to students with disabilities, 24 college professionals reported that they had not even considered creating programs and services to address students with disabilities. One sexual assault coordinator commented, "You've given

me a lot to think about." Another explained, "As far as students with disabilities are concerned, it's a critical point, and I am so glad we are having this conversation." These staff members commented on an individual or campus-wide lack of awareness about the importance of addressing students with disabilities when developing sexual assault programming and services. For example, one staff member explained, "I'm not sure it's on our radar to have programming specific to students with disabilities, so awareness would be one factor." One sexual assault advocate who works closely with colleges noted,

> So I think that we as a movement and in general are not even really asking this question and it's really horrible. I think we need to. I think that [people with disabilities have] not been at the forefront of the campus movement to end sexual violence and those folks are more vulnerable to sexual assault and less likely to be able to access the systems and resources that we have made available.

### Promising Practices for Colleges Adapted from Community Providers

Because of the lack of research on how college campuses can effectively support students with disabilities, practices from community providers can be used to guide college campus practices. The California Coalition of Sexual Assault explains numerous considerations when supporting survivors who have various disabilities, such as learning disabilities or physical disabilities.[81] The Vera Institute of Justice provides programmatic guidelines explaining how community sexual assault providers can make their services accessible both physically and programmatically for survivors with disabilities, such as ensuring sexual assault services have a budget for accessibility, making buildings and materials physically accessible, making policies and programs inclusive of people with disabilities, representing people with disabilities in their materials and information, collaborating with disability organizations and providers in the community, and providing training on violence against people with disabilities.[82] These guidelines can be used by sexual assault providers at college campuses as they develop inclusive and accessible programs and services.

In addition to providing guidelines to sexual assault providers to make sexual assault services inclusive of students with disabilities, the Vera Institute of Justice includes guidelines for disability organizations to make their staff and group more aware of people with disabilities who have experienced sexual assault. Disability services offices can adapt these programmatic guidelines to better equip their staff to service survivors with disabilities.[83] Adapted practices include sponsoring training for staff about sexual assault policies and procedures, training other college professionals about disability and responding to sexual assault, providing clear and accessible materials at the office that outline students' rights and reporting procedures, encouraging participation of office staff and students with disabilities in campus-wide conversations about sexual assault, and supporting the development of partnerships with community providers.

Further, while no college reported specific guidelines to be used in creating effective Title IX services or programs for students with disabilities, other groups are beginning to fill this gap. Janet Elie Faulkner, an attorney, outlined

several recommendations for Title IX proceedings in a blog entry from March 2017.[84] These mirror several recommendations or ideas from students and professionals in the NCD research:

- List the disability services office as an available resource
- Link to disability services in Title IX FAQs
- Offer assistance in complaint filing instructions to qualified disabled students
- Adopt language from the school's general student conduct procedure stating that accommodations may be available in a Title IX grievance setting

As noted previously, however, a more universally designed approach may be appropriate. While inclusive of people with disabilities, these recommendations still rely on students' understanding of what a "disability" is, identifying as a student with a disability, being registered at disability services, being able to disclose a disability using that terminology, and knowing how to request accommodations. Putting these additional burdens on sexual assault survivors may be unreasonable. Furthermore, some "accommodations" (e.g., help filling out forms, copies of printed materials in digital format so they can be downloaded again later) may be helpful for students without disabilities, as well. Consideration of what students with disabilities may need could potentially lead to more compassionate and accessible services for all students.

# Chapter 7: Sexual Assault Policy Compliance and Responses

Colleges must also comply with federal sexual assault laws when developing inclusive sexual assault policies and programming. Further, the Federal Government and individual states continue to devise new legislation to combat sexual assault on college campuses that can further colleges' supports for students with disabilities. This chapter addresses the research questions related to policy compliance and response. Because many groups and advocates are currently working on addressing compliance to federal policies on sexual assault and making recommendations to improve services and compliance at the state and federal level, the broad themes will be reviewed and how students with disabilities are considered will be explored. This chapter addresses the following research questions:

- Are college policies compliant with the Family Educational Rights and Privacy Act, the Clery Act, and Title IX?
- What are the federal and state legislative responses to campus sexual violence?

*Several existing reports or audits suggest that campuses are struggling with Clery Act compliance. Missing policy statements or procedures are the main violation reported across the audits.*

## Compliance with the Clery Act

Several existing reports or audits suggest that campuses are struggling with Clery Act compliance. Missing policy statements or procedures are the main violation reported across the audits. For example, a review of 105 college websites in Ohio found that only 66 percent of colleges posted their sexual assault policies online.[85] None of the six California colleges under review (two community colleges and four 4-year colleges) disclosed all campus policies in the 2014 ASR. In those reports, VAWA policy statements were the most frequently incomplete or missing documents. Similarly, a 2013 audit of State University of New York (SUNY) colleges found that 19 of the 29 colleges published ASRs with missing and/or incomplete policy and procedure statements. A review of six California colleges found that all six colleges were out of compliance with the Clery Act. As noted in Chapter 5, policy statements need to be available to all students, clearly outlining the campus response to sexual assault and encouraging awareness of the procedures for reporting sexual assaults. And as noted

by interviewees, policy statements should be accessible to students with disabilities, including any online statements.

Colleges violate the Clery Act when they do not report accurate crime statistics. However, the Clery Act does not require that the crimes be identified as crimes against students with disabilities. Five of the six California colleges reported inaccurate crime statistics in 2013. Thirteen of the 29 SUNY colleges also improperly reported crime statistics.[86] A 2014 audit of 10 Minnesota colleges found that they violated many aspects of the Clery Act. Six institutions did not properly identify "Clery Geography," all colleges failed to obtain complete crime data from law enforcement agencies, half did not maintain and allow access to crime or fire logs, four did not address new requirements related to VAWA legislation, nine ASRs were missing policy statements, and seven did not provide sufficient information about the availability of the report to students and employees.[87] The U.S. Department of Education levies fines on campuses that violate any aspect of the Clery Act.[88]

### Compliance with Title IX

Numerous colleges were found in violation of Title IX between 2011 and September 2017, according to the previous guidance on how sexual violence and harassment are covered under Title IX.[89] In January 2017, the U.S. Department of Justice released a list of 304 colleges and universities that were under investigation for violating Title IX by incorrectly handling sexual misconduct or assault issues.[90] For example, the Office of Civil Rights found Harvard Law School in violation of Title IX because of the college's failure to appropriately respond to two students who made complaints about sexual assault.[91] Princeton University was also found in violation of Title IX because of failure to provide prompt responses to sexual assault.[92]

*In January 2017, the U.S. Department of Justice released a list of 304 colleges and universities that were under investigation for violating Title IX by incorrectly handling sexual misconduct or assault issues.*

An audit conducted in 2014 of four California colleges and universities did not examine violations due to the investigation process but did investigate other violations of Title IX law. This audit found that all four colleges were not complying with Title IX.[93] Specifically, these colleges did not ensure that faculty and staff (including coaches and resident advisors) were trained to respond and report on incidents of sexual harassment or sexual assault. While these four campuses seemed to comply with the prevention and education component of Title IX, the audit found inconsistencies. Students were supposed to receive information about reporting procedures and services as incoming students, but the audit found that content of the education did not align with updated policies. Similarly, reporting policies and resources were made available to students in brochures and listed online. However, a student survey conducted through the auditing process found that students were still unaware of the policies and resources available. Of the 208 students surveyed, 22 percent indicated that they were not aware of resources on campus if they experienced sexual assault.[94] Of these students, 35 percent ($n$ = 208) reported experiencing 85 incidents of sexual assault or harassment by a person of the campus

community, but only filed Title IX complaints for 13 percent of these incidents.

This examination did not disaggregate the data on different demographics of students to examine whether different groups, such as students with disabilities, and the degree of understanding of policies and procedures differed. However, these audit findings suggest that even when colleges provide education programs, those programs may not be effectively educating students about the resources and process available at their colleges. The findings indicate that colleges should tailor informational campaigns and education programs using research about effective prevention and supports, and make sure they are accessible to all, including students with disabilities.

*During legislative sessions from 2013 to 2015, 23 states introduced or enacted legislation concerning campus sexual violence.*

## State Legislative Responses to Sexual Assault

Various states have responded to campus sexual violence by adding specific policies in tandem with federal laws. None of these laws specifically address students with disabilities, but some may have implications for how students with disabilities fare on college campuses. More specifically, states' responses to campus sexual assaults center on four policy areas: defining affirmative consent (i.e., "yes means yes"), describing the role of law enforcement, noting violations of student conduct on student transcripts, and addressing the role of counsel in the legal process.[95] During legislative sessions from 2013 to 2015, 23 states introduced or enacted legislation concerning campus sexual violence.[96] Of the 16 states that introduced policies around affirmative consent, policies were enacted in 4 states: California, Hawaii, Illinois, and New York. California and New York have the highest state standards for consent, in which consent not only has to be given voluntarily and freely but also consciously. These consent laws outline four specific circumstances under which consent cannot be given, and people incapacitated by mental health disabilities are included as such a circumstance. This was the only place where disability was mentioned, and the effects of this wording on the sexual behavior of college students with mental health disabilities are unknown at this time.

*Whether local law enforcement is trained in disability may matter in how students experience these interactions and the extent to which students trust law enforcement.*

Other laws may impact the experiences of students with disabilities in the sexual assault process. For example, four state policies focus on the role of law enforcement in sexual assault proceedings, such as informing survivors of their right to report to local law enforcement, entering in MOUs with law enforcement or requiring that law enforcement is informed, and/or giving rights to survivors to decide whether to refer to law enforcement. Whether local law enforcement is trained in disability may matter in how students experience these interactions and the extent to which students trust law enforcement.

California laws enact additional policies that require colleges to take specific actions to prevent sexual assault, not solely directing how colleges respond. California state universities are required to provide orientation programs that educate students and prevent sexual assault.[97] California state laws also require colleges to adopt "victim-centered" protocols when addressing sexual violence that go beyond federal laws.[98] Victim-centered protocols are those that elevate safety and concern for the victim and ensure compassionate delivery of services.[99] This approach differs from most state responses, which one researcher believes do not "reflect the needs of survivors of sexual violence or the best interests of survivors of sexual violence."[100] Two interviewees mentioned that California is one of the exemplars of state policy in regard to sexual assault consent and related policies, and other colleges are attempting to model their policies after California. However, none of these campuses have specifically addressed the needs of people with disabilities in regard to services or due process.

In 2016, two other states also introduced and passed specific policies on college supports. Illinois passed a bill that mandates not only that colleges develop clear sexual assault policies but also that colleges provide confidential advisors that can guide survivors through the process of reporting and seeking assistance. Another promising law that may prevent sexual assault was passed in Maryland. This law requires colleges to conduct climate surveys on sexual assault. As mentioned in Chapter 6, conducting climate surveys seems to be a promising practice. However, disability should be included as a demographic characteristic in these climate surveys for college campuses to understand the increased risk for students with disabilities.

*In January 2017, the White House Task Force to Protect Students from Sexual Assault recommended six areas for college administrators to consider when preventing and addressing sexual misconduct on their campuses.*

### Federal Legislative Response to Sexual Assault

Since amending the Clery Act with the Campus SaVE Act in 2013, the Federal Government has not passed any additional legislation or amendments to direct campus sexual assault responses, but has made recommendations to colleges about prevention and supports. In January 2017, the White House Task Force to Protect Students from Sexual Assault recommended six areas for college administrators to consider when preventing and addressing sexual misconduct on their campuses: 1. Coordinated Campus and Community Response; 2. Prevention and Education; 3. Policy Development and Implementation; 4. Reporting Options, Advocacy, and Support Services; 5. Climate Surveys, Performance Measurement, and Evaluation; 6. Transparency. Only a few of these areas mention students with disabilities.

Congress is currently considering one bill that addresses campus sexual assault. Senators reintroduced the bipartisan Campus Accountability and Safety Act[101] Senate Bill 856 in April 2017,[102] which mirrors policies already passed at the state level, such as mandating

confidential advisors for students and campus climate surveys. As of August 2017, the bill has been in the Committee on Health, Education, Labor and Pensions from April 5, 2017.[103] This Bill has the potential to increase supports to survivors with disabilities if passed. This report makes several recommendations to that end and encourages passage of the Bill with the suggested language.

State laws, as well as federal laws and recommendations, are addressing various prevention and support strategies highlighted as best practices in current research and advocacy organizations, such as increasing confidential reporting options and encouraging educational programs. However, states' responses to sexual assault are still limited in their approach to actively prevent sexual assault. In addition, students with disabilities are not addressed in state laws and are tangentially addressed in federal recommendations. Taking a victim- or survivor-centered approach is a first step to address the needs of students with disabilities because this elevates the needs of the students first. However, first responders and other college staff have limited awareness of the disability and the specific needs of students with disabilities who have encountered sexual assault. Therefore, policies or recommendations that outline resources for students, such as availability of legal counsel or creating MOUs with local rape crisis centers, should also consider the support and training needed to ensure students with disabilities are equitably served. People with disabilities and/or disability advocacy organizations should be included in the application of these policies at colleges to ensure that programs are accessible and the language addresses the needs of people with disabilities.

*Taking a victim- or survivor-centered approach is a first step to address the needs of students with disabilities because this elevates the needs of the students first.*

**Recommendations from the White House Task Force to Protect Students from Sexual Assault (January 2017)**

1. The task force recommends that campuses use a framework that outlines coordinated campus and community responses to sexual assault, designate a fully accessible Title IX coordinator, include relevant stakeholders in these efforts, establish a task force to monitor the campus approach, support student groups that engage in education prevention programs, and establish MOUs with community providers, such as rape crisis centers. This section does not mention students with disabilities.
2. The task force recommends that campuses provide education programs to students that consider the needs of diverse populations, including students with disabilities; reinforce positive behaviors and messages throughout the campus; make information

about resources widely available to all students (including web accessibility); provide annual training courses to all staff at the college on sexual misconduct policies; offer training courses on how to respond when friends or family members disclose an incident of sexual assault; implement awareness campaigns and development; and implement a campus-wide communication plan addressed to all stakeholders about the college's sexual assault programs.

3. The task force recommends that colleges develop a comprehensive grievance policy that defines the process for investigation and resolutions, defines remedies and sanctions, and keeps complainants and respondents abreast of the process in a timely manner. No mention of ensuring accommodations for students with disabilities is made in this section.
4. The task force recommends that colleges encourage reporting, including making options clear and accessible; consider implementing an online reporting system; designate full-time victim advocates; provide or refer students to a range of support services; institute or have relationships with hospitals that have a sexual assault nurse examiner; and ensure that services and accommodations are responsive to diverse populations, including students with disabilities.
5. The task force recommends that colleges administer sexual misconduct climate surveys and maintain accurate statistics on sexual misconduct incidents, communicate findings from the climate survey, evaluate the college's practices using a third-party evaluator, revise and adapt campus policy and procedures, and understand survivors' experiences participating in the grievance process. No mention is made of demographics or including students with disabilities.
6. The task force calls for colleges to maintain accessible websites with college and community sexual assault supports, publish evaluations on the college's policies and practices, comply with ADA by ensuring policies and procedures are available in multiple formats with easy accessibility, and provide information on the policies and practices and publish data relevant to sexual misconduct on the college's website, including the ASR that is required by Clery.

# Chapter 8: Policy and Practice Recommendations

This report highlights that federally funded research on sexual assault on college campuses has ignored students with disabilities while examining other demographics such as race/ethnicity, sexual orientation, and gender identity. It also finds that colleges are struggling to provide accessible and inclusive sexual assault programming and services to students with disabilities. Students with disabilities are not on the radar of many colleges' sexual assault services and programs, and inclusion of training on sexual assault services is not on the radar of many disability services offices. Many college staff members seem unaware of the gaps or disconnects in services and reported that this study illuminated those problems simply by asking questions they had never asked. Staff seem to be making assumptions about how their college would respond when a student with a disability attempts to access sexual assault services, instead of operating from a place of certainty. Cobbling together attempts at the last minute to provide accessible services may delay students from receiving critical services in a timely manner. Further, by not considering students with disabilities more centrally in sexual assault prevention programming, colleges are ignoring a key student population that may be more at risk. The policy and practice recommendations that follow capitalize on existing laws and recommendations by including disability, considering universal design, and incorporating recommendations to ensure federal compliance as a minimum for all programming.

This chapter addresses the final research question for this report through its listings of research findings and policy recommendations:

- What policy and system reforms are needed in postsecondary educational settings?

## Findings

### *Federal*

- Federal-level research studies on sexual assault on college campuses, funded by the Department of Justice's Office on Violence Against Women and the National Institute of Justice, have not included disability as a demographic as they have race/nationality, and sexual orientation. This includes the Justice Department's 2016 Campus Climate Survey Validation Study—funded by the Office of Violence Against Women and conducted by the Bureau of Justice Statistics, which did not include disability as a demographic, missing the opportunity to gather data on the prevalence of sexual assault on students with disabilities.
- The 2014 White House Task Force report, *Not Alone*, did not include disability as a demographic in its sample campus climate

survey, setting the tone for colleges and researchers to omit disability in campus climate studies as well.

### *Colleges*

- Colleges lack policies and procedures to ensure disability-related supports are readily available to students to communicate with sexual assault first responders. This includes informing students that disability-related accommodations are available and providing appropriate contact information for students or staff to request accommodations.
- College sexual assault prevention and education programs are not fully accessible to students with disabilities. Online training courses may not be captioned, and in-person training courses may be held in college buildings that are not physically accessible to students.
- College websites and printed information about sexual assault resources and information are not accessible to students with visual impairments and students with print-based disabilities (e.g., dyslexia). Some websites and online forms are not screen reader accessible, and do not adhere to guidelines of web accessibility (i.e., not accessible to people with limited vision or blindness).
- Campus assault prevention and education programs are not inclusive of students with disabilities, and college staff lack awareness that such programs should be accessible to students with disabilities, and staff are not trained in disability accommodations.

## Recommendations

### *Congress*

1. Congress should amend the Clery Act as follows:
   a. Require colleges to collect the number of all reported sexual assaults on students with disabilities (not just when the assaults are hate crimes) and include this information in their annual security report.
   b. Require colleges to include a description of the disability-related accommodations available to students with disabilities who have experienced sexual assault in their description of the procedures that they will follow once an incident of domestic violence, dating violence, sexual assault, or stalking occurs.
   c. Require colleges to include a statement regarding the disability-related accommodations that will be made available to students with disabilities during the reporting and disciplinary process, such as auxiliary communication aids or interpreters, and how to request those accommodations.
   d. Require memoranda of understanding (MOUs) between colleges and local law enforcement to include protocols for communicating with students who are Deaf.
   e. Require college websites to include information on services and accommodations for victims of sexual assault with disabilities, including who to contact to request accommodations.

2. Congress should pass the Campus Accountability and Safety Act (S. 856) with the following additions:
   a. Require grant applicants under proposed Section 8, part BB, to describe how they will serve students with disabilities in their description of how underserved populations on campus will be served.
   b. Add a survey question to proposed Section 19 on whether the victim had a disability at the time of the assault, and what type of disability.
   c. Require colleges to provide information on how to request disability-related reasonable accommodations in their Written Notice of Institutional Disciplinary Process.
3. Congress should require that research funded by the Office on Violence Against Women on campus sexual assault include students with disabilities to gather data on the problem as it pertains to students with disabilities, and to develop strategies for preventing and reducing the risk of sexual assault and effectively responding to victims with disabilities.

### *Department of Education*

1. The ED should develop and publish a technical assistance document or training for colleges on the rights of students with disabilities to have necessary accommodations in the process of reporting assault, utilizing sexual assault support services, and in the institutional disciplinary process. This training should include information on various types of disability-related accommodations, including captioning services and sign-language interpreter services.

### *ED Office for Civil Rights (OCR)*

1. OCR should
   a. Inform colleges that they must provide required Title IX information in accessible formats to students with disabilities, specifically information on their rights under Title IX, the contact information for the Title IX coordinator, how to file a complaint alleging a violation of Title IX, and how to request disability-related accommodations.
   b. Encourage colleges to reach out to students with disabilities about sexual assault educational programs, available support services, and available disability-related accommodations available to access them.
   c. Encourage colleges to provide disability-awareness training for campus security first responders.
   d. Encourage colleges to include information on how to request disability-related accommodations on their Title IX web pages.
   e. Encourage colleges to make outreach and educational materials regarding sexual assault services available in accessible formats, and through various outlets accessible to students.

### *The National Center on Safe and Supportive Learning Environments (NCSSLE)*

1. NCSSLE should include information on disability, including communicating with victims with disabilities who are Deaf or hard of hearing, in its trauma-informed training programs.

### *The Bureau of Justice Statistics (BJS)*

1. BJS should include students with disabilities as a demographic when conducting research on sexual assault on college campuses.

### *The Center for Campus Public Safety (CCPS)*

1. CCPS should include information on disability, including communicating with victims with disabilities who are Deaf or hard of hearing, in their trauma-informed training programs for school officials and campus and local law enforcement.

### *The Office on Violence Against Women (OVW)*

1. OVW should include information on disability, including communicating with victims with disabilities who are Deaf or hard of hearing, in its trauma-informed training programs for school officials and campus and local law enforcement.
2. OVW should require all colleges that submit proposals under the *Grants to Reduce Sexual Assault, Domestic Violence, Dating Violence, and Stalking on Campus Program* to
    a. Require grantees that provide outreach and educational materials regarding sexual assault services to students, to provide them in accessible formats and inform the college community that these are available.
    b. When OVW funds research on sexual assault on college campuses, require researchers to include students with disabilities as a demographic. For example, allow students to identify if they have a disability in surveys/questionnaires, etc.

### *Colleges*

To ensure access to sexual assault supports and services, colleges should:

1. Include students with disabilities as a demographic in campus climate surveys on sexual assault.
2. Create crisis policies and procedures on how to provide sexual assault services to students with sensory disabilities, especially Deaf or hard of hearing students, so that students receive services within 24 hours.
3. Guarantee that sexual assault first responders and support providers have access to emergency interpreter services or other communication methods (i.e., Communication Access Real-Time Translation) so that students can communicate with staff immediately.
4. Ensure that sexual assault information (i.e., fliers, posters, websites) are accessible to students with visual disabilities, learning disabilities, and cognitive deficits.
5. Ensure that students can access sexual assault reporting or connect with crisis counseling or other supports through various modes of communication (i.e., online, text messages, or phone).

6. Create formal agreements with community-based providers with the expertise to support survivors with disabilities.
7. Include information about disability and accommodations on the Title IX web page and related information.
8. Include contact information in Title IX policies and related materials for anyone to request disability services and accommodations.

To address the unique needs of survivors of sexual assault with disabilities, colleges should:

1. Develop and implement sexual assault prevention and support service training with messaging campaigns that are inclusive and welcoming to students with disabilities on college campuses.
2. Provide disability-related and trauma-informed practice training to prevention and first responder staff (i.e., advocates, crisis counselors, peer advocates, sexual assault nurse examiners) and campus security so that they understand how to effectively prevent and support students with disabilities after an incident of sexual assault.
3. Establish and maintain active collaborative relationships between Title IX, sexual assault services, counseling and health services, and disability services.
4. College Disability Service Center staff should be actively involved in college sexual assault prevention and support efforts and trained on Title IX procedures.
5. If colleges are using White House Task Force guidelines to enhance services and programs, ensure that disability services, organizations for student with disabilities, and academic fields related to disability (e.g., disability studies, Deaf studies, and American Sign Language programs) are included in discussions and the development of recommendations.

## Endnotes

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30 34 C.F.R.§ 104.3 (k)(2)(i).

31 34 C.F.R. § 104.43 (a).

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SAFETY ADVISORS FOR
EDUCATIONAL CAMPUSES, LLC
*April 2, 2019*

Hon. Lamar Alexander, Chairman
Hon. Patty Murray, Ranking Member
*U.S. Senate Committee on Health, Education, Labor, and Pensions,*
*428 Senate Dirksen Office Building,*
*Washington, DC.*

DEAR CHAIRMAN ALEXANDER, RANKING MEMBER MURRAY, AND HONORABLE MEMBERS OF THE COMMITTEE:

Safety Advisors for Educational Campuses, LLC is a social entrepreneurship organization devoted to safer learning environments with over 100 years of combined experience addressing gender based violence in higher education. We greatly appreciate the Committee's interest in and commitment to addressing this issue by holding today's hearing.

This has long been and remains one of the foremost safety challenges for the field. While we have made significant progress in better addressing this challenge over the last decade, this has brought new challenges as institutional responses expand, and much work remains to be done. We are grateful for this opportunity to offer our input on the federal government's role.

Currently the federal government addresses campus sexual assault as a civil-rights issue under Title IX of the Education Amendments of 1972 (Title IX) and as a consumer-information and protection issue under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act), a subsection of the Higher Education Act of 1965 (HEA). Combined these laws provide a critical framework for higher education to combat sex based harms.

As the Committee hears various concerns we hope that your focus will be on building upon this existing framework in a manner that enhances prevention initiatives, protects victims, ensures robust equal procedural safeguards for both complainants and respondents in disciplinary proceedings, and does not create overly burdensome procedures that turn "classrooms into courtrooms". Our shared goal should be to empower higher education to create safer learning environments not put hurdles in their way.

**The Scope of Campus Sexual Assault**

For decades numerous studies, including those produced by the U.S. Department of Justice (DOJ) have indicated that between 1/5 and 1/4 female undergraduates will experience a completed or attempted sexual assault during their time in college. In 2016, the DOJ's Campus Climate Survey Validation Study Final Technical Report found, for example, that across nine institutions, an average of 25.1 percent of female undergraduates had experienced a sexual assault during their academic career. A finding, however, that has not been the subject of significant discussion was that the prevalence rate varied widely across these institutions. The highest prevalence rate among the institutions was 50.8 percent, and the lowest was 13.2 percent This indicates that the adoption of campus level climate surveys is essential to a better understanding of the unique challenges faced by individual institutions, and the type of prevention initiatives that would best serve each.

Since it was first enacted in 1990, the Clery Act has been the primary source of campus crime data. Relying on this data, however, significantly understates the scope of the challenge of sexual assault because it is limited both to incidents occurring on property directly associated with the institution and when there is an official report. The 2016 study, consistent with prior data, found that "about one-third of rape incidents . . . took place on campus" and that only "12.5 percent of rape incidents were reported by the victim" to officials.

The DOJ found this meant that 2,380 completed rapes against students in their sample of nine institutions during the 2014–2015 academic year corresponded to only 40 reports under Clery. Whether or not actually occurring directly on campus or officially reported, these incidents impact a campus, and having the complete picture is essential to those entrusted with preventing and responding to sexual violence.

**Disciplinary Proceedings**

While comprehensive data isn't available, our experience over the last decade is that institutions of higher education have stepped-up disciplinary enforcement in-

volving sex based harms. This comes about as a result of the U.S. Department of Education's 2011 Title IX Dear Colleague Letter which was withdrawn in 2017, the Violence Against Women Reauthorization Act of 2013's expansion of the Clery Act's sexual violence requirements (which dated back to 1992), and subsequent public attention focused on these issues including by student activists. Many institutions have embraced a culture of accountability focused on combating sexual violence reflecting a significant cultural change.

Challenges to some types of proceedings adopted as part of this process have been raised both in private litigation and a Title IX Notice of Proposed Rulemaking (NPRM) issued by the U.S. Department of Education (ED) on November 29, 2018. We, along with numerous other organizations and individuals, have raised serious concerns about the legality of the NPRM, including that it may raise critical separation of powers issues. We have detailed these concerns in our comments to ED which we have also provided a copy of to the Committee for reference.

We also have serious policy concerns that the proposals of the NPRM would reverse the progress that has been made over the last decade in combating sexual violence. The proposals go beyond what is needed to accomplish the stated goal of finding the truth rather they appear to be geared towards narrowing the scope of incidents dealt with by institutions and deterring reporting.

They also ignore the provisions which already exist within the Clery Act that offer equal procedural safeguards for both the accused and accuser in disciplinary proceedings involving sexual assault, dating violence, domestic violence, and stalking as well as significant flexibility for institutions in implementing these protections. Not only can policies that protect the interests of the accused be implemented without negatively impacting the interests of the accuser, Congress has already done so. These provisions were also designed to complement rather than subvert the civil rights protections afforded to sex discrimination victims under Title IX.

Clery already mandates much of what is being asked for by civil liberties advocates including explicit procedural safeguards. Proceedings must afford a "prompt, fair, and impartial process from the initial investigation to the final result". They must be conducted "by officials who, at a minimum, receive annual training on the issues related to dating violence, domestic violence, sexual assault, and stalking and on how to conduct an investigation and hearing process". Officials must "not have a conflict of interest or bias for or against the accuser or the accused".

Clery in seeking a balanced approach also enumerates specific rights for both "the accuser and the accused" including:

- The same opportunities to have others present.
- The opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice who may be an attorney.
- Simultaneous notification, in writing of the result of the proceeding; options, if any, to appeal; any changes to the result; and when such results become final.
- Timely and equal access to any information that will be used during informal and formal disciplinary meetings and hearings.

ED has determined that these protections apply in disciplinary proceedings whether the underlying conduct occurred on or off campus. In The Handbook for Campus Safety and Security Reporting, 2016 Edition on pages 8–2 and 8–3, they state to institutions "your statement must address . . . the procedures your institution will follow when one of these crimes is reported to your institution, whether the offense occurred on or off campus." (Emphasis Added) They further state, on page 8–16, that this applies to incidents occurring "on or off your institution's Clery Act geography". This is in contrast to the NPRM which would limit an institution's response to "conduct within its education program or activity". Also, a signed complaint is not necessary to initiate action under Clery as would be required by the NPRM.

**Live Cross Examination**

We are especially concerned about the proposal for live cross examination by either the parties or aligned advisors. The efficacy of cross examination as a tool for determining truth is unique to its context. In criminal and civil court, cross examination is conducted by legally trained

individuals, operating within the framework of the rules of evidence, overseen by a judge, with the knowledge that any violations of the rules of evidence or harass-

ment of witnesses could result in either discipline or loss of their job by the American Bar Association.

In contrast, within school proceedings there are no training requirements, process requirements, evidentiary framework, oversight body, or even a guarantee that an individual with the smallest bit of formal legal training will be in the room. The reasons that cross examination is helpful in the court system are absent in the institutional process, and the only way to rectify this is to continue to turn classrooms into courtrooms, something that is unnecessary to achieve the goal of challenging the testimony of any witnesses involved in a campus proceeding.

Cross examination conducted in actual court rooms is conducted by trained individuals and overseen by a judge, and therefore questions are essentially vetted through a process of qualification and oversight from a disciplinary perspective that lawyers are subject to which prohibits harassment of witnesses. In the school context, requiring that each party provide a panel with their list of questions to be asked of witnesses to assure there is no harassing or purposefully intimidating questions is appropriate, as there are no other safeguards in place to protect witnesses and both parties from intentional misuse of the cross examination process.

**Conclusion**

Again we appreciate the Committee's commitment to addressing campus sexual assault, and the opportunity to offer our insights. If we can be of any assistance or help answer any questions you may have please don't hesitate to ask.

Sincerely,

S. DANIEL CARTER
*President*

TAYLOR PARKER
*Title IX Associate*

NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

January 30, 2019

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

Submitted via www.regulations.gov

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

Dear Mr. Marcus:

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

The National Women's Law Center ("the Center") is a nonprofit organization that has worked since 1972 to combat sex discrimination and expand opportunities for women and girls in every facet of their lives, including education. Founded the same year as Title IX of the Education Amendments of 1972 was enacted, the Center has participated in all major Title IX cases before the Supreme Court as counsel[1] or amici. The Center is committed to eradicating all forms of sex discrimination in school, specifically including discrimination against pregnant and parenting students, LGBTQ students, and students who are vulnerable to multiple forms of discrimination, such as girls of color and girls with disabilities. This work includes a deep commitment to eradicating sexual harassment (including sexual violence) as a barrier to educational success. We equip students with the tools to advocate for their own Title IX rights at school, assist policymakers in enforcing Title IX and strengthening protections against sexual harassment and other forms of sex discrimination, and litigate on behalf of students whose schools fail to adequately address their reports of sexual harassment in violation of Title IX.

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

[1] *E.g.*, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005); *Davis v. Monroe Cnty Bd. of Educ.*, 526 U.S. 629 (1999).
[2] Compl. at ¶ 1, *Doe v. Sch. Bd. of Miami-Dade Cnty.*, No. 1:19-cv-20204 (S.D. Fla. Jan. 15, 2019).
[3] *Id.* at ¶¶ 2, 49-51.
[4] *Id*. at ¶¶ 2-3.

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

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

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

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

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[5] *Id.* at ¶ 3.
[6] *Goodwin v. Pennridge Sch. Distr.*, 309 F. Supp. 3d 367, 371 (E.D. Pa. 2018); *see also* Pl.'s Mot. for Summ. J. at 1, *Goodwin v. Pennridge Sch. Dist.*, No. 17-cv-3570-TR (E.D. Pa. Jan. 14, 2019).
[7] *Goodwin*, 309 F. Supp. 3d at 372; Pl.'s Mot. for Summ. J. at 1, *Goodwin*, No. 17-cv-3570-TR.
[8] *Goodwin*, 309 F. Supp. 3d at 372; Pl.'s Mot. for Summ. J. at 1, *Goodwin*, No. 17-cv-3570-TR.
[9] *Goodwin*, 309 F. Supp. 3d at 372, 374; Pl.'s Mot. for Summ. J. at 1, *Goodwin*, No. 17-cv-3570-TR.
[10] *Goodwin*, 309 F. Supp. 3d at 373; Pl.'s Mot. for Summ. J. at 5, 9, *Goodwin*, No. 17-cv-3570-TR.
[11] Dep't of Educ., *Secretary DeVos Prepared Remarks on Title IX Enforcement* (Sept. 7, 2017) [hereinafter *DeVos Prepared Remarks*], *available at* https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement.
[12] Erica L. Green & Sheryl Gay Stolberg, *Campus Rape Policies Get a New Look as the Accused Get DeVos's Ear*, N.Y. TIMES (July 12, 2017), https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html.

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

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

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

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

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

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

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

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

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

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

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[16] Am. Ass'n of Univ. Women (AAUW), *Crossing the Line: Sexual Harassment at School* 2 (2011) [hereinafter *Crossing the Line*], https://www.aauw.org/files/2013/02/Crossing-the-Line-Sexual-Harassment-at-School.pdf.
[17] Nat'l Women's Law Ctr., *Let Her Learn: Stopping School Pushout for: Girls Who Have Suffered Harassment and Sexual Violence* 1 (Apr. 2017) [hereinafter *Let Her Learn: Sexual Harassment and Violence*], *available at* https://nwlc.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence/.
[18] AAUW, *Drawing the Line: Sexual Harassment on Campus*17, 19 (2005) [hereinafter *Drawing the Line*], https://history.aauw.org/files/2013/01/DTLFinal.pdf (noting differences in the types of sexual harassment and reactions to it).
[19] *E.g.*, AAU, *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, 13-14 (Sept. 2015) [hereinafter *AAU Campus Climate Survey*], https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU_Campus_Climate_Survey_12_14_15.pdf.
[20] *Let Her Learn: Sexual Harassment and Violence*, *supra* note 17, at 3.
[21] Nat'l Women's Law Ctr., *Let Her Learn: Stopping School Pushout for Girls Who Are Pregnant or Parenting* 12 (2017) [hereinafter *Let Her Learn: Pregnant or Parenting Students*], *available at* https://nwlc.org/resources/stopping-school-pushout-for-girls-who-are-pregnant-or-parenting/.
[22] GLSEN, *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* 26 (2018) [hereinafter 2017 National School Climate Survey], *available at* https://www.glsen.org/article/2017-national-school-climate-survey-1.

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

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

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

Reporting sexual harassment can be hard for most victims, and the proposed rules would further discourage students from coming forward to ask their schools for help. Already, only 12 percent of college survivors who experience sexual assault,[31] and only 7.7 percent of college students who experience sexual harassment, report to their schools or the police.[32] Only 2 percent of girls ages 14 to 18[33] report sexual assault or harassment. Students often choose not to report for fear of reprisal, because they believe their abuse was not important enough,[34] because they are "embarrassed, ashamed or that it would be too emotionally difficult,"[35] because they think the no one would do anything to help,[36] and because they fear that reporting would make the situation even worse.[37] Common rape myths, such as those perpetuated in statements made by officials in this Administration, that a victim could have prevented their assault if they had only acted differently, wore something else, or did not consume alcohol, only exacerbate underreporting.

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[23] *AAU Campus Climate Survey*, *supra* note 19 at 13-14.
[24] Nat'l Women's Law Ctr., *Let Her Learn: Stopping School Pushout for: Girls With Disabilities* 7 (2017) [hereinafter *Let Her Learn: Girls with Disabilities*], *available at* https://nwlc.org/resources/stopping-school-pushout-for-girls-with-disabilities.
[25] Rochelle Sharpe, *How Much Does Living Off-Campus Cost? Who Knows?*, N.Y. TIMES (Aug. 5, 2016), https://www.nytimes.com/2016/08/07/education/edlife/how-much-does-living-off-campus-cost-who-knows.html (87 percent).
[26] United Educators, *Facts From United Educators' Report - Confronting Campus Sexual Assault: An Examination of Higher Education Claims* (2015), https://www.ue.org/sexual_assault_claims_study.
[27] Jennifer J. Freyd, *The UO Sexual Violence and Institutional Betrayal Surveys: 2014, 2015, and 2015-2016* (Oct. 16, 2014), *available at* https://www.uwire.com/2014/10/16/sexual-assault-more-prevalent-in-fraternities-and-sororities-study-finds (finding that 48.1 percent of females and 23.6 percent of males in Fraternity and Sorority Life (FSL) have experienced non-consensual sexual contact, compared with 33.1 percent of females and 7.9 percent of males not in FSL).
[28] *E.g.*, Audrey Chu, *I Dropped Out of College Because I Couldn't Bear to See My Rapist on Campus*, VICE (Sept. 26, 2017), https://broadly.vice.com/en_us/article/qvjzpd/i-dropped-out-of-college-because-i-couldnt-bear-to-see-my-rapist-on-campus.
[29] *E.g.*, Alexandra Brodsky, *How much does sexual assault cost college students every year?*, WASH. POST (Nov. 18, 2014), https://www.washingtonpost.com/posteverything/wp/2014/11/18/how-much-does-sexual-assault-cost-students-every-year.
[30] Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18(2) J.C. STUDENT RETENTION: RES., THEORY & PRAC. 234, 244 (2015), *available at* https://doi.org/10.1177/1521025115584750.
[31] *Poll: One in 5 women say they have been sexually assaulted in college*, WASH. POST (June 12, 2015) [hereinafter Washington Post Poll], https://www.washingtonpost.com/graphics/local/sexual-assault-poll.
[32] *AAU Campus Climate Survey*, supra note 19 at 35.
[33] *Let Her Learn: Sexual Harassment and Violence*, *supra* note 17 at 2.
[34] *AAU Campus Climate Survey*, *supra* note 19 at 36.
[35] *Id.*
[36] RAINN, *Campus Sexual Violence: Statistics*, https://www.rainn.org/statistics/campus-sexual-violence.
[37] 2017 National School Climate Survey, *supra* note 22, at 27.

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

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

Unfortunately, students who reasonably choose not to turn to the police often face hostility from their schools when they try to report. Reliance on common rape myths that blame individuals for the assault and other harassment they experience[40] can lead schools to minimize and discount sexual harassment reports. An inaccurate perception that false accusations of sexual assault are common[41]—despite the fact that men and boys are far more likely to be victims of sexual assault than to be falsely accused of it[42]—can also lead schools to dismiss reports of assault and assume that complainants are being less than truthful. Indeed, many students who report sexual assault and other forms of sexual harassment to their school face discipline as the result of speaking up, for engaging in so-called "consensual" sexual activity[43] or premarital sex,[44] for defending themselves against their harassers,[45] or for merely talking about their assault with other students in violation of a "gag order" or nondisclosure agreement imposed by their school.[46] The Center regularly receives requests for legal assistance from student survivors across the country who have been disciplined by their schools after reporting sexual assault.[47]

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

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

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

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

[42] *E.g.*, Tyler Kingkade, *Males Are More Likely To Suffer Sexual Assault Than To Be Falsely Accused Of It*, HUFFINGTON POST (Dec. 8, 2014) [last updated Oct. 16, 2015], https://www.huffingtonpost.com/2014/12/08/false-rape-accusations_n_6290380.html.

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

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

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

[46] *See, e.g.*, Tyler Kingkade, *When Colleges Threaten To Punish Students Who Report Sexual Violence*, HUFFINGTON POST (Sept. 9, 2015), https://www.huffingtonpost.com/entry/sexual-assault-victims-punishment_us_55ada33de4b0caf721b3b61c.

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

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

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

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

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

[48] Nat'l Women's Law Ctr., *Let Her Learn: A Toolkit To Stop School Pushout for Girls of Color* 1 (2016) [hereinafter *Let Her Learn: Girls of Color*], *available at* https://nwlc.org/resources/let-her-learn-a-toolkit-to-stop-school-push-out-for-girls-of-color.

[49] *E.g.*, Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARVARD J.L. & GENDER 16, 24-29 (forthcoming), *available at* https://ssrn.com/abstract=3168909.

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

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

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

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

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

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

less likely to be believed because of stereotypes about people with disabilities being less credible[56] and because they may have greater difficulty describing or communicating about the harassment they experienced, particularly if they have a cognitive or developmental disability.[57]

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

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

For the better part of two decades, the Department has used one consistent standard to determine if a school violated Title IX by failing to adequately address sexual assault or other forms of sexual harassment. The Department's 2001 Guidance, which went through public notice-and-comment and has been enforced in both Democratic and Republican administrations,[58] defines sexual harassment as "unwelcome conduct of a sexual nature."[59] The 2001 Guidance requires schools to address student-on-student harassment if *any employee* "knew, or in the exercise of reasonable care should have known" about the harassment. In the context of employee-on-student harassment, the 2001 Guidance requires schools to address harassment "whether or not the [school] has 'notice' of the harassment."[60] Under the 2001 Guidance, the Department would consider schools that failed to "take immediate and effective corrective action" to be in violation of Title IX.[61] These standards have appropriately guided the Department's Office of Civil Rights' (OCR) enforcement activities for almost twenty years, effectuating Title IX's nondiscrimination mandate by requiring schools to quickly and effectively respond to serious instances of harassment and fulfilling OCR's purpose of ensuring equal access to educational opportunities and enforcing students' civil rights.

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

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

[58] These standards have been reaffirmed time and time again, in 2006 by the Bush Administration, in 2010, 2011, and 2014 in guidance documents issued by the Obama Administration, and even in the 2017 guidance document issued by the current Administration. U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter: Sexual Harassment* (Jan. 25, 2006) [hereinafter 2006 Guidance], https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html; U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter: Harassment and Bullying* (Oct. 26, 2010) [hereinafter 2010 Guidance], https://ww2ed.gov/about/offices/ list/ocr/letters/colleague-201104.pdf; U.S. Dep't of Educ. Office of Civil Rights, *Dear Colleague Letter: Sexual Violence* at 4, 6, 9, &16 (Apr. 4, 2011) [hereinafter 2011 Guidance], https://ww2ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf; U.S. Dep't of Educ. Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* 1-2 (Apr. 29, 2014) [hereinafter 2014 Guidance], https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf; U.S. Dep't of Educ. Office for Civil Rights, *Questions and Answers on Campus Sexual Misconduct* (Sept. 2017) [hereinafter 2017 Guidance], https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf.

[59] U.S. Dep't of Educ., Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001) [hereinafter 2001 Guidance], https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.

[60] *Id.*

[61] *Id.*

This standard appropriately differs from the higher bar erected by the Supreme Court in the particular and narrow context of a Title IX sexual harassment lawsuit seeking monetary damages from a school. To recover monetary damages, a plaintiff must show that the school was deliberately indifferent to known sexual harassment that was severe and pervasive and deprived a student of equal access to educational opportunities and benefits.[62] But in establishing that standard, the Court recognized that it was *specific* to private suits seeking monetary damages, not to administrative enforcement. It explicitly noted that the standard it announced did not affect agency action: the Department was still permitted to administratively enforce rules addressing a broader range of conduct to fulfill Congress's direction to effectuate Title IX's nondiscrimination mandate.[63] It drew a distinction between "defin[ing] the scope of behavior that Title IX proscribes" and identifying the narrower circumstances in which a school's failure to respond to harassment supports a claim for monetary damages.[64] And it recognized that the liability standard for money damages does not limit the agency's authority to "promulgate and enforce requirements that effectuate [a] statute's nondiscrimination mandate."[65] The 2001 Guidance likewise addressed the difference between suits for money damages and Department enforcement, concluding that it was inappropriate for the Department to limit its enforcement activities to the narrower damages standard and that the Department would continue to enforce the broad protections provided under Title IX. Indeed, in the current proposed regulations, the Department acknowledges that it is "not required to adopt the liability standards applied by the Supreme Court in private suits for money damages."[66] Yet, despite knowing that adopting such a standard creates higher burdens for students who are sexually harassed to get help from their schools, the Department nevertheless insists on importing those standards without adequate justification.

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

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

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[62] *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 290 (1998) (detailing standard for employee-on-student harassment); *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999) (detailing standard for student-on-student harassment).
[63] *Gebser*, 524 U.S. at 291-92 (citing 20 U.S.C. § 1682).
[64] *Davis*, 526 U.S. at 639.
[65] *Gebser*, 524 U.S. at 292 (citing 20 U.S.C. § 1682).
[66] 83 Fed. Reg. at 61468, 61469.
[67] *Davis*, 526 U.S. at 631.
[68] Proposed § 106.30.
[69] *See Gebser*, 524 U.S. at 290. The Department further misstates the law by claiming that the proposed rules adopt the "*Gebser/Davis* standard" of notice. *See* 83 Fed. Reg. at 61467. The Court in *Davis* did not require a plaintiff alleging student-on-student harassment to prove actual knowledge by an appropriate person with the "authority to institute corrective measures." *See e.g.*, Brian Bardwell, *No One Is an Inappropriate Person: The Mistaken Application of Gebser's "Appropriate Person" Test to Title IX Peer-Harassment Cases*, 68 Case W. Res. L. Rev. 1343, 1347-48. Moreover, nine circuit courts do not require plaintiffs to prove actual knowledge by an "appropriate person" in any of their peer-harassment cases that cite Davis. *See*, *e.g.*, *L. L. v.*

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

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

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

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

[70] *Gebser*, 524 U.S. at 288-89.

[71] 83 Fed. Reg. at 61480.

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

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

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

Under Title VII, the federal law that addresses workplace harassment, a school is potentially liable for harassment of an employee if the harassment is "sufficiently severe *or* pervasive to *alter* the conditions of the victim's employment."[74] If the employee is harassed by a coworker or other third party, the school is liable if (1) it "knew or should have known of the misconduct" and (2) failed to take immediate and appropriate corrective action.[75] If the employee is harassed by a supervisor, the school is automatically liable if the harassment resulted in a tangible employment action such as firing or demotion, and otherwise unless the school can prove that the employee unreasonably failed to take advantage of opportunities offered by the school to address harassment.[76] Schools are liable for harassment of employees under Title VII if the harassment occurs in a work-related context outside of the regular place of work[77] or outside of work but results in an impact on the work environment.[78] However, under the proposed Title IX rules, a school would only be held responsible for harassment against a student if it is (1) deliberately indifferent to (2) sexual harassment that is so severe, pervasive, *and* objectively offensive that it *denied* the student equal access to the school's program or activity; (3) the harassment occurred within the school's program or activity; and (4) a school employee with "the authority to institute corrective measures" had "actual knowledge" of the harassment. In other words, under the proposed rules, schools would be held to a far lesser standard in addressing the harassment of students—including the sexual harassment and abuse of children under its care—than in addressing harassment of adult employees.

Moreover, in contrast to the Title VII approach, which recognizes employer responsibility for harassment enabled by supervisory authority, and in contrast to the 2001 Guidance, the proposed rule does not recognize any higher obligation by schools to address harassment of students by school employees who are exercising authority over students. The 2001 Guidance imposed liability when an employee "is acting (or . . . reasonably appears to be acting) in the context of carrying out these responsibilities over students" and engages in sexual harassment, without regard to whether school officials had notice of this behavior.[79] By jettisoning this standard, the Department would free schools

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[74] *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (emphasis added).
[75] *Meritor Savings Bank v. Vinson*, 477 US 57, 63 (1986) (internal quotations and brackets omitted); Equal Employment Opportunity Commission, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 18, 1999) [hereinafter EEOC Guidance] (An employer is automatically liable for harassment by "a supervisor with immediate (or successively higher) authority over the employee."), https://www.eeoc.gov/policy/docs/harassment.html.
[76] *Meritor,* 477 US at 63.
[77] *Nichols v. Tri-Nat'l Logistics, Inc.*, 809 F.3d 981, 985-86 (8th Cir. 2016) (holding that district court erred in analyzing hostile work environment claim by plaintiff, a truck driver, by excluding alleged sexual harassment of plaintiff by her driving partner during mandatory rest period); *Lapka v. Chertoff*, 517 F.3d 974, 983 (7th Cir. 2008) (concluding that Title VII covered sexual harassment during course of employer-mandated training, where training facility was controlled by a third party); *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 967 (9th Cir. 2002) (concluding that potential client's rape of female manager at business meeting outside her workplace was sufficient to establish hostile work environment since having out-of-office meetings with potential clients was job requirement); *Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128, 135 (2d Cir. 2001) (concluding that "work environment" included short layover for flight attendants in foreign country where employer provided block of hotel rooms and ground transportation).
[78] *Lapka*, 517 F.3d at 983 (explaining that, to be actionable, harassment need only have consequences in the workplace); *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 409-10 (1st Cir. 2002) (stating that harasser's intimidating conduct outside workplace helped show why complainant feared him and why his presence around her at work created a hostile work environment); *Duggins v. Steak 'N Shake, Inc.*, 3 F. App'x 302, 311 (6th Cir. 2001) (stating that employee may reasonably perceive her work environment as hostile if forced to work for someone who harassed her outside the workplace).
[79] 2001 Guidance, *supra* note 59. ("if an employee who is acting (or who reasonably appears to be acting) in the context of carrying out these responsibilities over students engages in sexual harassment – generally this means harassment that is carried out during an employee's performance of his or her responsibilities in relation to students, including teaching, counseling,

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

The drastic differences between Title VII and the proposed rules would mean that in many instances schools are *prohibited* from taking the same steps to protect children in schools that they are *required* to take to protect adults in the workplace, as set out further below.[80] And when they are not affirmatively prohibited from taking action, the proposed rules still create a more demanding standard for children in schools than for adults in the workplace to get help in ending sexual harassment.

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

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

The Department does not provide a persuasive justification to change the definition of sexual harassment from that in the 2001 Guidance, which defines sexual harassment as "unwelcome conduct of a sexual nature."[81] The current definition rightly charges schools with responding to harassment before it escalates to a point that students suffer severe harm. But under the Department's proposed, narrower definition of harassment, students would be forced to endure repeated and escalating levels of abuse, from a student or teacher, before their schools would be permitted to take steps to investigate and stop the harassment. As the School Superintendents Association (AASA) states, the proposed definition would "move [schools] in the opposite direction of what … the federal government should be encouraging school personnel to do today."[82] Similarly, the National Association of Secondary School Principals (NASSP) opposes the proposed definition because it "completely ignores the fact that students excel at a

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supervising, advising, and transporting students – and the harassment denies or limits a student's ability to participate in or benefit from a school program on the basis of sex, the recipient is responsible for the discriminatory conduct").

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

[81] *Id*.

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

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

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

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

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

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[83] Letter from Nat'l Ass'n of Secondary School Principals (NASSP) to Ass't Sec'y Kenneth L. Marcus at 2 (Jan. 18, 2019) [hereinafter NASSP Letter], https://www.nassp.org/wordpress/wp-content/uploads/2019/01/NASSP_Title_IX_Comments_-_1.17.19_V2.pdf..
[84] *Hawkins v. Sarasota Cty. Sch. Bd.*, 322 F.3d 1279, 1289 (11th Cir. 2003).
[85] *Id.*
[86] *Davis*, 526 U.S. at 631 (emphasis added).

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

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

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

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

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[87] Kathryn J. Holland & Lilia M. Cortina, *"It Happens to Girls All the Time": Examining Sexual Assault Survivors' Reasons for Not Using Campus Supports"*, 59 AM. J. COMMUNITY PSYCHOL. 50, 61 (2017), *available at* https://doi.org/10.1002/ajcp.12126.
[88] *See* 20 U.S.C. § 1092(f)(6)(iii); 20 U.S.C § 1092(f)(6)(iv)); 34 C.F.R. § 668.46(a)).
[89] *See e.g.*, *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002) (applying "severe or pervasive" standard to racial discrimination hostile work environment claim).
[90] *See Joanna L. Grossman & Deborah L. Brake, A Sharp Backward Turn: Department of Education Proposes to Protect Schools, Not Students, in Cases of Sexual Violence*, VERDICT (Nov. 29, 2018), *available at* https://verdict.justia.com/2018/11/29/a-sharp-backward-turn-department-of-education-proposes-to-protect-schools-not-students-in-cases-of-sexual-violence.

The Department's repeated attempts to justify its proposed definition by citing "academic freedom and free speech"[91] are unpersuasive. Harassment is not protected speech when it creates a "hostile environment"[92] that limits a student's ability to participate in or benefit from a school program or activity.[93] The Supreme Court made clear nearly a half century ago in *Tinker v. Des Moines* that school officials can regulate student speech if they reasonably forecast "substantial disruption of or material interference with school activities" or if the speech involves "invasion of the rights of others."[94] There is no conflict between Title IX's regulation of sexually harassing speech in schools and the First Amendment.

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

Under proposed §§ 106.44(a) and 106.30, schools would only be responsible for addressing sexual harassment when one of a small subset of school employees actually knew about the harassment. Schools would not be required to address sexual harassment unless there was "actual knowledge" of the harassment by (i) a Title IX coordinator, (ii) an elementary or secondary school teacher (but only for student-on-student harassment, *not* employee-on-student harassment); or (iii) an official who has "the authority to institute corrective measures."[95] This is a dramatic change, as the Department has long required schools to address *student-on-student* sexual harassment if almost any school employee[96] either knows about it or should reasonably have known about it.[97] This standard takes into account the reality that many students disclose sexual abuse to employees who do not have the authority to institute corrective measures, both because students seeking help turn to whatever adult they trust the most, regardless of that adult's official role, and because students are likely not informed about which employees have authority to address the harassment. The 2001 Guidance also requires schools to address all employee-on-student sexual harassment, "whether or not the [school] has 'notice' of the harassment."[98] The 2001 Guidance recognized the particular harms of students being preyed on by adults in positions of authority, and students' vulnerability to pressure from adults to remain silent, and accordingly acknowledged schools' heightened responsibilities to address harassment by their employees.

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

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[91] 83 Fed. Reg. at 61464, 61484. *See also* proposed § 106.6(d)(1), which states that nothing in Title IX requires a school to "[r]estrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution."
[92] See Grossman & Brake, *supra* note 90 ("There is no legitimate First Amendment or academic freedom protection afforded to unwelcome sexual conduct that creates a hostile educational environment.").
[93] 2001 Guidance, *supra* note 59.
[94] 393 U.S. 503, 513, 514 (1969).
[95] Proposed § 106.30.
[96] This duty applies to "any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility." 2001 Guidance, *supra* note 59 at 13.
[97] *Id* at 14.
[98] *Id.* at 10.

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

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

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

Sexual assault is very difficult to talk about. Proposed §§ 106.44(a) and 106.30 would mean even when students find the courage to talk to the adult school employees they trust, schools would frequently have no obligation to respond. For example, if the proposed rules had been in place, colleges like Michigan State and Penn State would have had no responsibility to stop Larry Nassar and Jerry Sandusky—even though their victims reported their experiences to at least 14 school employees over a 20-year period—including athletic trainers, coaches, counselors, and therapists[102]—because those employees are not considered to be school officials who have the "authority to institute corrective measures." These proposed provisions would absolve some of the worst Title IX offenders of legal liability. It is therefore unsurprising that the AASA objects to these proposed rules as "an unconscionable attack" on student safety,[103] and that NASSP fears they will "lead to even more nonreporting from victims, which could lead to prolonged harassment and suffering."[104]

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

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[99] *See* proposed § 106.30 (83 Fed. Reg. at 61496) (for elementary and secondary schools, limiting notice to "a teacher in the elementary and secondary context with regard to student-on-student harassment).
[100] *See id*.
[101] Magnolia Consulting, *Characteristics of School Employee Sexual Misconduct: What We Know from a 2014 Sample* (Feb. 2018), https://magnoliaconsulting.org/news/2018/02/characteristics-school-employee-sexual-misconduct.
[102] Julie Mack & Emily Lawler, *MSU doctor's alleged victims talked for 20 years. Was anyone listening?*, MLIVE (Feb. 8, 2017), https://www.mlive.com/news/index.ssf/page/msu_doctor_alleged_sexual_assault.html.
[103] AASA Letter, *supra* note 15, at 2-3.
[104] NASSP Letter, *supra* note 83, at 1.
[105] 83 Fed. Reg. at 61497.

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

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

Proposed §§ 106.30 and 106.45(b)(3) would *require* schools to dismiss all complaints of off-campus or online sexual harassment that happen outside of a school-sponsored program—even if the student is forced to see their harasser at school every day and the harassment directly impacts their education as a result. To understand why Title IX requires schools to respond to out-of-school harassment, one only need look at the Department's own recent decision to cut off partial funding to the Chicago Public Schools for failing to address two reports of out-of-school sexual assault, which the Department described as "serious and pervasive violations under Title IX."[108] In one case, a tenth-grade student was forced to perform oral sex in an abandoned building by a group of 13 boys, eight of whom she recognized from school. In the other case, another tenth-grade student was given alcohol and sexually abused by a teacher in his car. If the proposed rules become final, school districts would be required to dismiss complaints of similarly egregious behavior simply because they occurred off-campus outside a school program, even if they result in a hostile educational environment.

The proposed rules conflict with Title IX's statutory language, which does not depend on where the *underlying conduct* occurred but instead prohibits discrimination that "exclude[s a person] from participation in, . . . denie[s a person] the benefits of, or . . . subject[s a person] to discrimination under any education program or activity . . . ."[109] For almost two decades, the Department's guidance documents have agreed that schools are responsible for addressing sexual harassment if it is "sufficiently serious to deny or limit a student's ability to participate in or benefit from the education program,"[110] regardless of where it occurs.[111] No student who experiences out-of-school harassment should be forced to wait until they are sexually harassed again on school grounds or during a school activity in order to receive help from their school. Nor has the Supreme Court ever suggested that a school must ignore harassment that occurs off school grounds under Title IX. In *Gebser*, for example, the harassment at issue included multiple instances in which a teacher had sexual intercourse with a middle school student, though "never on school property."[112] In considering whether the school had actual notice of the "sexual relationship"

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

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

[108] *See* David Jackson et al., *Federal officials withhold grant money from Chicago Public Schools, citing failure to protect students from sexual abuse*, CHICAGO TRIBUNE (Sept. 28, 2018), https://www.chicagotribune.com/news/local/breaking/ct-met-cps-civil-rights-20180925-story.html.

[109] 20 U.S.C. § 1681(a).

[110] 2001 Guidance, *supra* note 59.

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

[112] *Gebser*, 524 U.S. at 278.

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

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

Similar harm would accrue to students at institutions of higher education. According to a 2014 U.S. Department of Justice report, 95 percent of sexual assaults of female students ages 18-24 occur outside of school.[116] In a leaked version of the proposed rules, the Department itself cited a study finding that 41 percent of college sexual assaults occur off campus.[117] But under the proposed rules, if a college or graduate student is sexually assaulted by a classmate in off-campus housing, their university would be required to dismiss their complaint—even though almost nine in ten college students live off campus.[118] If a student is assaulted off-campus by a professor, his college would be required to ignore his complaints—even if he would be required to continue attending the professor's class. Although the preamble briefly mentions one case where a Kansas State college fraternity was considered an "education program or activity" for the purposes of Title IX, the Department fails to explain conclusively whether all fraternities and sororities are covered by Title IX.[119] Many schools may therefore interpret the proposed rules to prevent them from addressing any sexual harassment that occurs in fraternities, sororities, and other social clubs not recognized by the school (*e.g.*, the Harvard final clubs[120])—a particularly troubling outcome given that students are more likely to be sexually assaulted if they belong to a fraternity or sorority.[121]

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[113] *Id.* at 291.
[114] Magnolia Consulting, *supra* note 101.
[115] Nat'l Council on Disability, *The Segregation of Students with Disabilities* 18-19 (Feb. 2018), https://ncd.gov/sites/default/files/NCD_Segregation-SWD_508.pdf.
[116] U.S. Dep't of Justice, Bureau of Justice Statistics, *Rape and Sexual Assault Victimization Among College-Age Females, 1995–2013* at 6 (Dec. 2014), https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf.
[117] Letter from Anne C. Agnew to Paula Stannard et al., *HHS Review: Department of Education Regulation – Noon September 10*, U.S. DEP'T OF HEALTH & HUMAN SERVS. 79 n.21 (Sept. 5, 2018), https://atixa.org/wordpress/wp-content/uploads/2018/09/Draft-OCR-regulations-September-2018.pdf.
[118] Sharpe, *How Much Does Living Off-Campus Cost?*, *supra* note 25.
[119] 83 Fed. Reg. at 61468.
[120] *E.g.*, Harvard University, *Unrecognized Single-Gender Social Organizations*, (Dec. 5, 2017), https://www.harvard.edu/president/news/2017/unrecognized-single-gender-social-organizations.
[121] Freyd, *supra* note 27.

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

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

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

Representatives of school leaders like the AASA[125] and NASSP[126] oppose mandatory dismissal of complaints alleging out-of-school harassment. They recognize that out-of-school conduct "often spill[s] over into the school day and school environment" and this is why it is already "common practice" for school districts across the country to "discipline students for off-campus conduct[,] whether it's the use of drugs or alcohol at a house party, cyberbullying, hazing, physical assault, etc."[127] By forcing schools to dismiss complaints of out-of-school sexual harassment, the proposed rules would "unduly tie the hands of school leaders who believe every child deserves a safe and healthy learning environment."[128] It would also require schools to single out complaints of sexual harassment by treating them differently from other types of student misconduct that occur off-campus, perpetuating the pernicious notion that sexual harassment is somehow less significant than other types of misconduct and making schools vulnerable to litigation by students claiming unfairness or discrimination in their school's policies treating harassment based on sex differently from other forms of misconduct.

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

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

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[122] 83 Fed. Reg. at 61468.
[123] Statista, *Community colleges in the United States - Statistics & Facts*, https://www.statista.com/topics/3468/community-colleges-in-the-united-states; National Center for Education Statistics, *Fast Facts*, https://nces.ed.gov/fastfacts/display.asp?id=372 (about 17.0 million students enrolled in undergraduate programs in fall 2018).
[124] David A. Tomar, *Trade Schools on the Rise*, THE BEST SCHOOLS (last visited Jan. 20, 2019), https://thebestschools.org/magazine/trade-schools-rise-ashes-college-degree (an estimated 16 million students were enrolled in vocational schools in 2014).
[125] AASA Letter, *supra* note 15, at 5-6.
[126] NASSP Letter, *supra* note 83, at 1.
[127] AASA Letter, *supra* note 15, at 5-6.
[128] *Id.* at 5.

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

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

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

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

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[129] 2001 Guidance, *supra* note 59.
[130] Letter from 903 Mental Health Professionals and Trauma Specialists to Ass't Sec'y Kenneth L. Marcus at 3 (Jan. 30, 2019) [hereinafter Mental Health Professionals Letter], https://nwlc.org/wp-content/uploads/2019/01/Title-IX-Comment-from-Mental-Health-Professionals.pdf.
[131] *See* proposed § 106.44(b)(2) ("If the Title IX Coordinator files a formal complaint in response to the reports, and the recipient follows procedures (including implementing any appropriate remedy as required) consistent with proposed § 106.45 in response to the formal complaint, the recipient's response to the reports is not deliberately indifferent.").
[132] NASSP Letter, *supra* note 83, at 2.
[133] *See* proposed § 106.44(b)(5), 83 Fed. Reg. at 61471 (explaining that proposed § 106.44(b)(5) is meant to clarify that OCR will not "conduct a de novo review of the recipient's investigation and determination of responsibility for a particular respondent").

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

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

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

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

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

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

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

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

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[134] Proposed § 106.45(b)(7)(ii) (recordkeeping of actions, including supportive measures, as a result of reports or formal complaints).
[135] *Davis*, 526 U.S. at 631 (emphasis added).

would still be able to deny the student the "supportive measures" they need to stay in school. In particular, the proposed rules allow schools to deny a student's request for effective "supportive measures" on the grounds that the requested measures are "disciplinary," "punitive," or "unreasonably burden[] the other party." For example, a school might feel constrained from transferring a respondent to another class or dorm because it may "unreasonably burden" him, thereby forcing a harassment victim to change all of her own classes and housing assignments in order to avoid her harasser. In addition, schools may interpret this proposed rule to prohibit issuing a *one-way* no-contact order against an assailant and require a survivor to agree to a *mutual* no-contact order, which implies that the survivor is at least partially responsible for her own assault. However, such a rule would be contrary to decades of expert consensus that *mutual* no-contact orders are harmful to victims, because abusers often manipulate their victims into violating the mutual order,[136] and would allow perpetrators to turn what was intended to be a protective measure for the student survivor into a punitive measure against the survivor. The proposed rule would also be a departure from longstanding practice under the 2001 Guidance, which instructed schools to "direct[] *the harasser to have no further contact with the harassed student*" but not vice-versa.[137] And groups such as the Association for Student Conduct Administration (ASCA) agree that "[e]ffective interim measures, including … *actions restricting the accused*, should be offered and used while cases are being resolved, as well as without a formal complaint."[138]

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

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

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

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

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[136] *E.g.*, Joan Zorza, *What Is Wrong with Mutual Orders of Protection?* 4(5) DOMESTIC VIOLENCE REP. 67 (1999), *available at* https://www.civicresearchinstitute.com/online/article.php?pid=18&iid=1005.
[137] 2001 Guidance, *supra* note 59, at 16.
[138] Ass'n for Student Conduct Admin., *ASCA 2014 White Paper: Student Conduct Administration & Title IX: Gold Standard Practices for Resolution of Allegations of Sexual Misconduct on College Campuses* 2 (2014) [hereinafter ASCA 2014 White Paper], https://www.theasca.org/Files/Publications/ASCA%202014%20White%20Paper.pdf.
[139] The Department does not justify its requirement that a formal complaint be signed.

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

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

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

The Department repeatedly cites the purported need to increase protections of respondents' "due process rights" to justify weakening Title IX protections for complainants, such as proposing § 106.6(d)(2), which specifies that nothing in the rules would require a school to deprive a person of their due process rights. But the current Title IX regulations already provide more rigorous due process protections than are required under the Constitution. The Supreme Court has held that students facing short-term suspensions from public schools[141] require only "some kind of" "oral or written notice" and "some kind of hearing."[142] The Court has explicitly said that a 10-day suspension does not require "the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident."[143] Furthermore, the Department's 2001 Guidance already instructs schools to protect the "due process rights of the accused."[144] Adding proposed § 106.6(d)(2) provides no new or necessary protections and inappropriately pits Title IX's civil rights mandate against the Constitution when no such conflict exists.[145] As Liberty University notes:

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

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

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[140] 34 C.F.R. § 106.8(b).
[141] Constitutional due process requirements do not apply to private institutions.
[142] *Goss v. Lopez*, 419 U.S. 565, 566, 579 (1975).
[143] *Id.* at 583. *See also Gomes v. Univ. of Maine Sys.*, 365 F. Supp. 2d 6, 23 (D. Me. 2005); *B.S. v. Bd. of Sch. Trs.*, 255 F. Supp. 2d 891, 899 (N.D. Ind. 2003); *Coplin v. Conejo Valley Unified Sch. Dist.*, 903 F. Supp. 1377, 1383 (C.D. Cal. 1995); *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 247 (D. Vt. 1994).
[144] 2001 Guidance, *supra* note 59 at 22.
[145] The odd phrasing of the proposed rules also suggests that the Department may be seeking to extend Due Process Clause obligations to private entities covered by Title IX, but of course any such imposition of Constitutional obligations on private actors is well beyond the Department's power.
[146] Letter from Liberty University to Sec'y Elisabeth DeVos at 2 (Jan. 24, 2019) [hereinafter Liberty University Letter], http://www.liberty.edu/media/1617/2019/jan/Title-IX-Public-Comments.pdf.

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

We note that some have welcomed the proposed rule changes by erroneously claiming that the proposed rules would protect Black men and boys from being unfairly disciplined for false allegations; these arguments have effectively erased the experiences of Black women and girls, who are not only more likely than white women and girls to be sexual harassed,[148] but are also often ignored, blamed,[149] pressured to stay silent,[150] suspended by their schools,[151] and/or pushed into the criminal justice system[152] (i.e., the "sexual abuse-to-prison pipeline").[153] There is no data to substantiate the claim that Black men and boys are disproportionately disciplined by schools for sexual misconduct; in fact, the Department's own elementary and secondary school data shows that 0.3 percent of Black boys and 0.2 percent of white boys are disciplined for *sexual harassment,* a minor difference compared to the wide disparity between the proportion of Black boys (18 percent) and white boys (6 percent) who are disciplined for *any type of student misconduct*.[154] While we continue to strongly advocate against discriminatory discipline practices and policies in schools, we note that any claim that these proposed rules are motivated by such concern is sharply undercut by the fact this administration rescinded—without adequate justification—the Department's 2014 Guidance addressing unfair discipline of students of color in December 2018,[155] during the public comment period for the proposed Title IX rules.

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

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[147] Erin E. Buzuvis, *Title IX and Procedural Fairness: Why Disciplined-Student Litigation Does Not Undermine the Role of Title IX in Campus Sexual Assault*, 78 MONTANA L. REV. 71, 72 (2017), https://scholarship.law.umt.edu/cgi/viewcontent.cgi?article=2416&context=mlr.
[148] *Unlocking Opportunity*, *supra* note 45, at 24-25.
[149] *E.g.*, Cantalupo, *supra* note 49, at 1, 16, 24, 29.
[150] Lauren Rosenblatt, *Why it's harder for African American women to report campus sexual assaults, even at mostly black schools*, LOS ANGELES TIMES (Aug. 28, 2017), https://www.latimes.com/politics/la-na-pol-black-women-sexual-assault-20170828-story.html.
[151] *See supra* notes 43-46 and accompanying text.
[152] Nia Evans, *Too Many Black Survivors Get Jail Time, Not Justice*, NAT'L WOMEN'S LAW CTR. (Dec. 14, 2018), https://nwlc.org/blog/too-many-black-survivors-get-jail-time-not-justice.
[153] Human Rights Project for Girls, Georgetown Law Ctr. on Poverty and Inequality, and Ms. Found. for Women, *The Sexual Abuse to Prison Pipeline: The Girls' Story* (2015), https://rights4girls.org/wp-content/uploads/r4g/2015/02/2015_COP_sexual-abuse_layout_web-1.pdf.
[154] U.S. Gov't Accountability Office, *K-12 Education: Discipline Disparities for Black Students, Boys, and Students with Disabilities* (Mar. 2018), https://www.gao.gov/assets/700/690828.pdf.
[155] Dep't of Justice & Dep't of Educ., *Dear Colleague Letter* (Dec 21, 2018), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201812.pdf.
[156] Tara N. Richards, *No Evidence of "Weaponized Title IX" Here: An Empirical Assessment of Sexual Misconduct Reporting, Case Processing, and Outcomes*, L. & HUMAN BEHAVIOR (2018), *available at* http://dx.doi.org/10.1037/lhb0000316.
[157] *Id.*

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

Under proposed § 106.45(b)(1)(iv), schools would be required to presume that the reported harassment did not occur, which would ensure partiality to the respondent. This presumption would also exacerbate the rape myth upon which many of the proposed rules are based—namely, the myth that women and girls often lie about sexual assault.[158] The presumption of innocence is a criminal law principle, inappropriately imported into this context.[159] Criminal defendants are presumed innocent until proven guilty because their very liberty is at stake: criminal defendants go to prison if they are found guilty. There is no such principle in civil proceedings generally or civil rights proceedings specifically, and Title IX is a civil rights law that ensures that sexual harassment is never the end to anyone's education. As NASSP notes, this proposed rule would result in schools being "required[ ]to deny harassment victims of due process."[160]

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

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

This presumption conflicts with the current Title IX rules[166] and other proposed rules,[167] which require that schools provide "equitable" resolution of complaints. A presumption in favor of one party

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[158] Indeed, the data shows that men and boys are far more likely to be victims of sexual assault than to be falsely accused of it. *See, e.g.,* Kingkade, *supra* note 42.
[159] *See also* the Department's reference to "inculpatory and exculpatory evidence" (proposed § 106.45(b)(1)(ii)), the Department's assertion that "guilt [should] not [be] predetermined" (83 Fed. Reg. at 61464), and Secretary DeVos's discussion of the "presumption of innocence" (Elisabeth DeVos, *Betsy DeVos: It's time we balance the scales of justice in our schools*, WASH. POST (Nov. 20, 2018), https://www.washingtonpost.com/opinions/betsey-devos-its-time-we-balance-the-scales-of-justice-in-our-schools/2018/11/20/8dc59348-ecd6-11e8-9236-bb94154151d2_story.html.
[160] NASSP Letter, *supra* note 83, at 2.
[161] *See* Michael C. Dorf, *What Does a Presumption of Non-Responsibility Mean in a Civil Context*, DORF ON LAW (Nov. 28, 2018), https://dorfonlaw.org/2018/11/what-does-presumption-of-non.html.
[162] *See, e.g.*, Kingkade, *supra* note 46.
[163] *E.g.*, Cantalupo, *supra* note 49 at 1, 16, 24, 29; *Let Her Learn: Girls of Color*, *supra* note 48 at 1.
[164] Chambers & Erausquin, *The Promise of Intersectional Stigma to Understand the Complexities of Adolescent Pregnancy and Motherhood*, JOURNAL OF CHILD ADOLESCENT BEHAVIOR (2015), https://www.omicsonline.org/open-access/the-promise-of-intersectional-stigma-to-understand-the-complexities-ofadolescent-pregnancy-and-motherhood-2375-4494-1000249.pdf.
[165] *See e.g.*, David Pinsof, et al., *The Effect of the Promiscuity Stereotype on Opposition to Gay Rights* (2017), *available at* https://doi.org/10.1371/journal.pone.0178534.
[166] 34 C.F.R. § 106.8(b).
[167] Proposed §§ 106.8(c) and 106.45(b).

against the other is not equitable. This proposed presumption is also in significant tension with proposed § 106.45(b)(1)(ii), which states that "credibility determinations may not be based on a person's status as a complainant" or "respondent."

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

Proposed § 106.45(b)(3)(vii) requires colleges and graduate schools to conduct a "live hearing," and requires parties and witnesses to submit to cross-examination by the other party's "advisor of choice"— often an attorney who is prepared to grill a survivor about the traumatic details of an assault, or possibly an angry parent or a close friend of the respondent, or a teacher, coach, or other adult in a position of authority over the complainant or witness. Proposed § 106.45(b)(3)(vi) would allow elementary and secondary schools to use this process, even when children, who are likely to be easily intimidated under hostile questioning by an adult, are complainants and witnesses.[168] The adversarial and contentious nature of cross-examination would further traumatize those who seek help through Title IX to address assault and other forms of harassment—especially where the named harasser is a professor, dean, teacher, or other school employee. Being asked detailed, personal, and humiliating questions often rooted in gender stereotypes and rape myths that tend to blame victims for the assault they experienced[169] would understandably discourage many students—parties and witnesses—from participating in a Title IX grievance process, chilling those who have experienced or witnessed harassment from coming forward.[170] The requirement that schools must provide each party "an advisor aligned with that party to conduct cross-examination" would not account for the existence of multiple complainants and/or multiple respondents, who may not have mutually aligned interests and whose interests may not be served by a single advisor conducting cross-examination on their collective behalf. Nor would the proposed rules entitle the individual who experienced harassment to the procedural protections that witnesses have during cross-examination in the criminal court proceedings that apparently inspired this requirement. Schools would not be required to apply general rules of evidence or trial procedure;[171] would not be required to make an attorney representing the interest of the complainant available to object to improper questions; and would not be required to make a judge available to rule on objections. The live cross-examination requirement would also lead to sharp inequities, due especially to the "huge asymmetry" that would arise when respondents are able to afford attorneys and complainants cannot.[172] According to the president of Association of Title IX Administrators (ATIXA), the live cross-examination provision

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

[169] Zydervelt, S., Zajac, R., Kaladelfos, A. and Westera, N., *Lawyers' Strategies for Cross-Examining Rape Complainants: Have we Moved Beyond the 1950s?*, BRITISH JOURNAL OF CRIMINOLOGY, 57(3), 551-569 (2016).

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

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

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

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

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

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[173] *Id.*

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

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

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

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

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

The proposed rule's flat prohibition on reliance on testimony that is not subject to cross-examination[179] would force survivors to a "Hobson's choice" between being revictimized by their assailant's advisor or having their testimony completely disregarded, and would prohibit schools from simply "factoring in the victim's level of participation in [its] assessment of witness credibility."[180] It would also make no allowance for the unavailability of a witness and would not allow any reliance at all on previous statements, regardless of whether those statements have other indicia of reliability, such as being made under oath or against a party's own interest. This would require schools to disregard relevant evidence in a variety of situations in a manner that could pose harms to both parties and would hinder the school's ability to ensure that their findings concerning responsibility are not erroneous.

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

The proposed rules also ignore the reality that many survivors of sexual assault develop anxiety, depression, PTSD, or other mental illnesses as a result of their assault. Survivors with PTSD, as well as survivors with other disabilities, have the right to request accommodations under Section 504[184] and the Americans with Disabilities Act (ADA),[185] and elementary and secondary students have accommodation rights under the Individuals with Disabilities in Education Act (IDEA).[186] These disability accommodations include the right to answer questions in writing or through a neutral school employee instead of being subjected to live cross-examination by their assailant's advisor. By denying institutions

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[179] *See* proposed § 106.45(b)(3)(vii) ("If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility.").
[180] Liberty University Letter, *supra* note 146, at 5.
[181] *Goss*, 419 U.S. at 583. *See also Coplin*, 903 F. Supp. at 1383; *Fellheimer*, 869 F. Supp. at 247.
[182] The Department cites to one case, *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018) to support its proposed cross-examination requirement. However, *Baum* is anomalous. *See e.g., Dixon*, 294 F.2d at 158, *cert. denied* 368 U.S. 930 (1961) (expulsion does not require a *full-dress judicial hearing, with the right to cross-examine witnesses."*); *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993) (holding no due process violation in expulsion of college student without providing him right to cross-examination); *Winnick v. Manning*, 460 F.2d 545, 549 (2d Cir. 1972) ("The right to cross-examine witnesses generally has not been considered an essential requirement of due process in school disciplinary proceedings.); *Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 16 (1st Cir. 1988) (a public institution need not conduct a hearing which involves the right to confront or cross-examine witnesses). *See also A Sharp Backward Turn*, *supra* note 92 (*Baum* "is anomalous.").
[183] 83 Fed. Reg. at 61476.
[184] 29 U.S.C. § 794; 34 C.F.R. pt. 104.
[185] 42 U.S.C. § § 12131-12134; 28 C.F.R. pt. 35.
[186] 20 U.S.C. §§ 1400-1419; 34 C.F.R. pt. 300. *See also* U.S. Dep't of Educ., Office for Civil Rights, *Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools* (2014) [hereinafter Disability Guidance], https://www2.ed.gov/about/offices/list/ocr/docs/dcl-faqs-effective-communication-201411.pdf.

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

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

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

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

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[187] 83 Fed. Reg. at 61466, 61468, 61469, 61470, 61472, 61474 n.6, 61477.
[188] *E.g.*, Liberty University Letter, *supra* note 146, at 4.
[189] AASA Letter, *supra* note 15, at 4.
[190] ATIXA, *ATIXA Position Statement on Cross-Examining: The Urge to Transform College Conduct Proceedings into Courtrooms* 1 (Oct. 5, 2018), *available at* https://atixa.org/wordpress/wp-content/uploads/2018/10/ATIXA-Position-Statement_Cross-Examination-final.pdf.
[191] *ASCA 2014 White Paper*, *supra* note 138 at 2 (2014).

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

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

Proposed § 106.45(b)(6) would allow schools to use "any informal resolution process, such as mediation" to resolve a complaint of sexual harassment, including sexual assault, as long as the school obtains the students' "voluntary, written consent." Mediation is a strategy often used in schools to resolve peer conflict, where both sides must take responsibility for their actions and come to a compromise. However, mediation is never appropriate for resolving sexual assault, even on a voluntary basis, because of the power differential between assailants and victims, the potential for re-traumatization, and the implication that survivors somehow share "partial" responsibility for their own assault.

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

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

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[192] Am. Bar Ass'n, *ABA Criminal Justice Section Task Force On College Due Process Rights and Victim Protections: Recommendations for Colleges and Universities in Resolving Allegations of Campus Sexual Misconduct* 8-10 (June 2017).
[193] AICUM Letter, *supra* note 15.
[194] AAU Letter, *supra* note 15.
[195] Mental Health Professionals Letter, *supra* note 130.
[196] *E.g.*, Grace Watkins, *Sexual Assault Survivor to Betsy DeVos: Mediation Is Not a Viable Resolution*, TIME (Oct. 2, 2017), http://time.com/4957837/campus-sexual-assault-mediation.

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

For all of these reasons, the Department recognized in its 2001 Guidance that even "voluntary" consent to mediation is never appropriate to resolve cases of sexual assault. Experts also agree that mediation is inappropriate for resolving sexual violence. For example, the National Association of Student Personnel Administrators (NASPA), representing student affairs administrators in higher education, stated in 2018 that it was concerned about students being "pressured into informal resolution against their will."[198] Likewise, both the AASA[199] and NASSP[200] oppose the use of mediation in a manner that would preclude a party from pursuing formal procedures in school Title IX proceedings. Mental health experts also oppose mediation for sexual assault because it would "perpetuate sexist prejudices that blame the victim" and "can only result in further humiliation of the victim."[201]

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

The Department's longstanding interpretation of Title IX requires that schools use a "preponderance of the evidence" standard—which means "more likely than not"—to decide whether sexual harassment occurred.[202] Proposed § 106.45(b)(4)(i) departs from that practice, and establishes a system where schools could elect to use the more demanding "clear and convincing evidence" standard in sexual harassment matters, while allowing all other student or employee misconduct investigations to be governed by the preponderance of the evidence standard, even if they carry the same maximum

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

[198] Nat'l Ass'n of Student Personnel Administrators (NASPA), *NASPA Priorities for Title IX: Sexual Violence Prevention & Response* 1-2 [hereinafter *NASPA Title IX Priorities*], *available at* https://www.naspa.org/images/uploads/main/NASPA_Priorities_re_Title_IX_Sexual_Assault_FINAL.pdf.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

For this reason, Title IX experts and school leaders alike support the preponderance standard, which is used to address harassment complaints at over 80 percent of colleges.[220] The National Center for Higher Education Risk Management (NCHERM) Group, whose white paper *Due Process and the Sex Police* was cited by the Department,[221] has promulgated materials that require schools to use the preponderance standard, because "[w]e believe higher education can acquit fairness without higher standards of proof."[222] The white paper by four Harvard professors that is cited by the Department[223] recognizes that schools should use the preponderance standard if "other requirements for equal fairness are met."[224] ATIXA takes the position that

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[213] *Santosky v. Kramer*, 455 U.S. 745, 758 (1982).
[214] *Addington*, 441 U.S. at 432.
[215] *Woodby v. INS*, 385 U.S. 276, 286 (1966).
[216] *Chaunt v. United States*, 364 U.S. 350, 353 (1960); *Schneiderman v. United States*, 320 U.S. 118, 125 (1943).
[217] *In re Winship*, 397 U.S. 358, 367-68 (1970).
[218] Despite overwhelming Supreme Court and other case law in support of the preponderance standard, the Department cites just two state court cases and one federal court district court case to argue for the clear and convincing standard. 83 Fed. Reg. at 61477. The Department claims that expulsion is similar to loss of a professional license and that held that the clear and convincing standard is required in cases where a person may lose their professional license *Id*. However, even assuming expulsion is analogous to loss of a professional license, which is certainly debatable as it is usually far easier to enroll in a new school than to enter a new profession, this is a weak argument, as there are numerous state and federal cases that have held that the preponderance standard is the correct standard to apply when a person is at risk of losing their professional license. *See, e.g., In re Barach*, 540 F.3d 82, 85 (1st Cir. 2008); *Granek v. Texas State Bd. of Med. Examiners*, 172 S.W. 3d 761, 777 (Tex. Ct. App. 2005). As an example, the Department cites to *Nguyen v. Washington State Dep't of Health*, 144 Wash.2d 516 (Wash. 2001), *cert. denied* 535 U.S. 904 (2002) for the contention that courts "often" employ a clear and convincing evidence standard to civil administrative proceedings. In that case, the court required clear and convincing evidence in a case where a physician's license was revoked after allegations of sexual misconduct. But that case is an anomaly; a study commissioned by the U.S. Department of Health and Human Services found that two-thirds of the states use the preponderance of the evidence standard in physician misconduct cases. *See* Randall R. Bovbjerg et al., *State Discipline of Physicians* 14-15 (2006), https://aspe.hhs.gov/sites/default/files/pdf/74616/stdiscp.pdf. *See also* Kidder, William, *(En)forcing a Foolish Consistency?: A Critique and Comparative Analysis of the Trump Administration's Proposed Standard of Evidence Regulation for Campus Title IX Proceedings* (January 27, 2019), *available at* http://ssrn.com/abstract=3323982 (providing an in depth comparative analysis of the many instances in which the preponderance standard is used instead of the clear and convincing evidence standard).
[219] The Department's bizarre claim that the preponderance standard is the "lowest possible standard of evidence" (83 Fed. Reg. at 61464) is simply wrong as a matter of law. Courts routinely apply lower standard of proof in traffic stops ("reasonable suspicion") and conducting searches ("probable cause"). *Terry v. Ohio*, 392 U.S. 1 (1968) (traffic stops); U.S. Const. amend. IV (searches).
[220] Heather M. Karjane, et al., *Campus Sexual Assault: How America's Institutions of Higher Education Respond* 120 (Oct. 2002), https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf.
[221] 83 Fed. Reg. at 61464 n.2.
[222] The NCHERM Group, *Due Process and the Sex Police* 2, 17-18 (Apr. 2017), *available at* https://www.ncherm.org/wp-content/uploads/2017/04/TNG-Whitepaper-Final-Electronic-Version.pdf.
[223] 83 Fed. Reg. at 61464 n.2.
[224] Elizabeth Bartholet, Nancy Gertner, Janet Halley & Jeannie Suk Gersen, *Fairness For All Students Under Title IX* 5 (Aug. 21, 2017), https://dash.harvard.edu/bitstream/handle/1/33789434/Fairness%20for%20All%20Students.pdf.

> any standard higher than preponderance advantages those accused of sexual violence (mostly men) over those alleging sexual violence (mostly women). It makes it harder for women to prove they have been harmed by men. The whole point of Title IX is to create a level playing field for men and women in education, and the preponderance standard does exactly that. *No other evidentiary standard is equitable*.[225]

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

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

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

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

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[225] ATIXA, *ATIXA Position Statement: Why Colleges Are in the Business of Addressing Sexual Violence* 4 (Feb. 17, 2017), *available at* https://atixa.org/wordpress/wp-content/uploads/2017/02/2017February-Final-ATIXA-Position-Statement-on-Colleges-Addressing-Sexual-Violence.pdf.
[226] *ASCA 2014 White Paper, supra* note 138.
[227] ACSA, *The Preponderance of Evidence Standard: Use In Higher Education Campus Conduct Processes*, https://www.theasca.org/files/The%20Preponderance%20of%20Evidence%20Standard.pdf.
[228] 83 Fed. Reg. at 61477.
[229] *Id.*
[230] Proposed § 106.45(b)(4)(i).
[231] *See* Grossman & Brake, *supra* note 90 ("It is a one-way ratchet.").
[232] NASSP Letter, *supra* note 83, at 2.

> Allowing campuses to single out sexual assault incidents as requiring a higher burden of proof than other campus adjudication processes make it – by definition – harder for one party in a complaint than the other to reach the standard of proof. Rather than leveling the field for survivors and respondents, setting a standard higher than preponderance of the evidence tilts proceedings to unfairly benefit respondents.[233]

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

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

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

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

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[233] *NASPA Title IX Priorities*, *supra* note 198 at 1-2.
[234] *See* Grossman & Brake, *supra* note 90 (clear and convincing evidence is "the standard the [American Association of University Professors] has urged on colleges and universities for faculty discipline and which some unionized institutions have incorporated in collective bargaining agreements with institutions").
[235] Although the Department claims that it wants to give schools "flexibility" in choosing their standard of proof,[235] Proposed § 106.45(b)(4)(i) would effectively force schools to use "clear and convincing evidence" for student sexual harassment investigations if "clear and convincing evidence" is used by that school in *employee* sexual harassment investigations. Given that most schools already use the preponderance standard in student Title IX proceedings, many of them would be forced to change their procedures—hardly the "flexibility" that the Department claims it wishes to provide.
[236] *See* 34 C.F.R. § 106.51 ("A recipient shall not enter into a contractual or other relationship which directly *or indirectly* has the effect of subjecting employees or students to discrimination….).
[237] 83 Fed. Reg. at 61477.
[238] For example, 34 percent of college students who are sexually assaulted drop out of school. Mengo & Black, *supra* note 30, at 234, 244.

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

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

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

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

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

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

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[239] *See* Fed. R. Evid. 401, 402.
[240] *See* Fed. R. Evid. 403.
[241] 2014 Guidance, *supra* note 58, at 31.
[242] 83 Fed. Reg. at 61476.
[243] Fed. R. Evid. 412(b)(1)(B).

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

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

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

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

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

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[244] Fed. R. Evid. 412(b)(2).
[245] 2014 Guidance, *supra* note 58, at 31; 2011 Guidance, *supra* note 58, at 12.
[246] 2001 Guidance, *supra* note 59, at 21. *See also* 2014 Guidance, *supra* note 58, at 27-28; 2011 Guidance, *supra* note 58, at 10.
[247] *See supra* notes 184-186 and accompanying text.
[248] Taylor S. Parker, *The Less Told Story: The Intersection of Title IX and Disability* at 14-16, *at* https://www.stetson.edu/law/academics/highered/home/media/Title%20IX%20and%20Disability%20Taylor%20S%20Parker.pdf.

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

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

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

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

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

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[249] *Id*. at 2.
[250] National Council on Disability, *Not on the Radar: Sexual Assault of College Students with Disabilities* 33-58 (Jan. 30, 2018), *available at* https://ncd.gov/publications/2018/not-radar-sexual-assault-college-students-disabilities.
[251] 42 U.S.C. § 2000d to d-7; U.S. Dep't of Educ., Office for Civil Rights, *Dear Colleague Letter: English Learner Students and Limited English Proficient Parents* 37-38 (2015) [hereinafter Language Guidance], https://www2.ed.gov/about/offices/list/ocr/letters/ colleague-el-201501.pdf.
[252] NASSP Letter, *supra* note 104, at 2.
[253] ATIXA, *ATIXA Position Statement on the Proposed Legislation Entitled: Promoting Real Opportunity, Success, And Prosperity Through Education Reform (PROSPER) Act (Higher Education Act Reauthorization)* (Jan. 18, 2018), https://atixa.org/wordpress/wp-content/uploads/2015/03/ATIXA-POSITION-STATEMENT-ON-PROSPER-ACT-Final.pdf.
[254] DeVos, *supra* note 159.

Experts and school leaders alike support equal appeal rights. The American Bar Association recommends that the grounds for appeal include "a sanction disproportionate to the findings in the case (that is, too lenient or too severe)."[255] ATIXA announced in October 2018 that it supports equal rights to appeal for both parties, "[d]espite indications that OCR will propose regulations that permit inequitable appeals."[256] Even the white paper by four Harvard professors that is cited by the Department[257] recognizes that schools should allow "[e]ach party (respondent and complainant) [to] request an impartial appeal."[258] NASSP notes that by requiring schools to give unequal appeal rights with respect to sanctions, the proposed rule would "deny harassment victims . . . due process."[259]

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

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

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

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

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[255] Am. Bar Ass'n, *supra* note 192, at 5.
[256] ATIXA, *ATIXA Position Statement on Equitable Appeals Best Practices* 1 (Oct. 5, 2018), *available at* https://atixa.org/wordpress/wp-content/uploads/2018/10/2018-ATIXA-Position-Statement-Appeals.pdf.
[257] 83 Fed. Reg. at 61464 n.2.
[258] Bartholet, et al., *supra* note 224.
[259] NASSP Letter, *supra* note 83, at 2.
[260] 83 Fed. Reg. at 61479.
[261] 526 U.S. at 648.
[262] 819 F.3d 834, 848 (6th Cir. 2016).
[263] *Davis*, 526 U.S. at 648; *Stiles ex rel. D.S.* v. *Grainger Co., Tenn.,* 819 F.3d 834, 848 (6th Cir. 2016).
[264] *Sances v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 167-68 (5th Cir. 2011) (emphasis added).
[265] 20 U.S.C. § 1232g(b)(1) (generally forbidding disclosure from a student's "education record," which includes written information about the complaint, investigation, and outcome of a disciplinary proceeding, without consent of the student).

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

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

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

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

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

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

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[266] 2017 Guidance, *supra* note 58 at 6; 2014 Guidance, *supra* note 58 at 36-37; 2011 Guidance, *supra* note 58, at 13-14; 2001 Guidance, *supra* note 59, at vii; 1997 Guidance, 62 Fed. Reg. at 12034, 12038, 12051. *See also* 20 U.S.C. 1232g(b)(6)(C)(i).
[267] 2014 Guidance, *supra* note 58, at 36.
[268] Nat'l Women's Law Ctr., *Breaking Down Barriers* at 91 n.354 (2015), https://nwlc.org/wp-content/uploads/2015/08/BDB07_Ch6.pdf.
[269] *Id*. at 92 n.355-57.
[270] Parker Waichman LLP, *Statutes of Limitations – A Legal Guide*, http://www.statutes-of-limitations.com/search?statutes_next_page=1&state_id=Choose%20Jurisdiction&case_type_id=-7&year_limit=Year%20Limit&x=60&y=14.
[271] Jake New, *Justice Delayed*, INSIDE HIGHER ED (May 6, 2015), https://www.insidehighered.com/news/2015/05/06/ocr-letter-says-completed-title-ix-investigations-2014-lasted-more-4-years.
[272] 34 C.F.R. § 106.71 (incorporating 34 C.F.R. § 100.7, the Title VI regulation prohibiting "intimidatory or retaliatory acts").

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

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

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

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[273] Grossman & Brake, *supra* note 90 (criticizing the Department's attempt to "traffic in a false equivalence that is supported by neither law nor logic").
[274] Proposed § 106.45(a).
[275] 83 Fed. Reg. at 61462, 61465, 61472 (three times), 61473, 61477, 61484, 61489 (twice), 61490.
[276] Proposed § 106.30.
[277] Proposed § 106.45(b)(3).
[278] Proposed § 106.30.
[279] Proposed § 106.44(a).
[280] Grossman & Brake, *supra* note 90 ("If it is sex discrimination against the accused student to subject him to an unfair process, but only sex discrimination against the complainant if her complaint is met with deliberate indifference, then siding with respondents is the less perilous path toward Title IX compliance.").

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

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

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

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

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

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

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[281] 20 U.S.C. § 1681(a).
[282] 83 Fed. Reg. at 61480.
[283] *Id.* at 61466.
[284] *Id.* at 61480.
[285] *Id.* at 61489.

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

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

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

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

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

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

[286] 83 Fed. Reg. at 61482.
[287] *Id.* at 61481.
[288] *Id.* at 61482.

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

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

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

The current rules allow religious schools to claim religious exemptions from particular Title IX requirements by notifying the Department in writing and identifying which Title IX provisions conflict with their religious beliefs. The proposed rules remove that requirement and permit schools to opt out of Title IX without notice or warning to the Department or students. This would allow schools to conceal their intent to discriminate, exposing students to harm, especially women and girls, LGBTQ students, pregnant or parenting students (including those who are unmarried), and students who access or attempt to access birth control or abortion.[290] Transgender students are especially at risk because this proposed change threatens to compound the harms created by (i) the Department's decision in February 2017 to rescind Title IX guidance on the rights of transgender students; (ii) the Department's decision in February 2018 to stop investigating civil rights complaints from transgender students regarding access to sex-segregated facilities; and (iii) HHS's leaked proposal in October 2018 for the Department and other federal agencies to define "sex" to exclude transgender, non-binary, and intersex students. It allows schools to assert post facto religious justifications for discrimination in violation of Title IX, to the detriment of students.

Further, the Department's proposed rule permitting religious schools to covertly opt out of Title IX requirements directly conflict with the current[291] and proposed[292] rules' requirements that each covered educational institution "notify" all applicants, students, employees, and unions "that it *does not* discriminate on the basis of sex." By requiring a school to tell students that it does not discriminate while simultaneously allowing it to opt out of anti-discrimination provisions whenever it chooses, the Department is creating a system that enables schools to actively mislead students. This bait-and-switch practice demonstrates that the Department is more interested in protecting schools from liability when they discriminate than in protecting students from discrimination.

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[289] *Id.*
[290] *See* Jeremy W. Peters et al., *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. TIMES (Feb. 22, 2017), https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html; Moriah Balingit, *Education Department no Longer Investigating Transgender Bathroom Complaints*, WASH. POST (Feb. 12, 2018), https://www.washingtonpost.com/news/education/wp/2018/02/12/education-department-will-no-longer-investigate-transgender-bathroom-complaints; Erica. L. Green et al., *'Transgender' Could Be Defined Out of Existence Under Trump Administration*, N.Y. TIMES (Oct. 21, 2018), https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html.
[291] 34 C.F.R. § 106.9(a).
[292] Proposed § 106.8(b)(1).

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

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

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

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

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

[294] *See* Michael C. Dorf, *The Department of Education's Title IX Power Grab*, VERDICT (Nov. 28, 2018), https://verdict.justia.com/2018/11/28/the-department-of-educations-title-ix-power-grab.

[295] 34 C.F.R. § 106.51(a).

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

[297] Proposed § 106.6(f).

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

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

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

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[298] Proposed § 106.30.

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

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

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

[301] 28 C.F.R. § 1604.11(a).

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

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

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

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

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

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

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

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

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

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

[308] *See* proposed § 106.44(a).

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

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

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

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

Although the Department acknowledges that Title IX and the Clery Act's "jurisdictional schemes … may overlap in certain situations,"[314] it fails to explain how institutions of higher education should resolve the conflicts between two different sets of rules when addressing sexual harassment. These different sets of rules would likely create widespread confusion for schools.

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

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

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[309] 20 U.S.C. § 1092(f)(8)(C).
[310] 20 U.S.C. § 1092(f)(6)(iii); 20 U.S.C § 1092(f)(6)(iv)); 34 C.F.R. § 668.46(a)).
[311] 20 U.S.C. § 1092(f)(8)(B)(vii); 34 C.F.R. § 668.46(b)(11)(v).
[312] U.S. Dep't of Educ.; Violence Against Women Act; Final Rule, 79 Fed. Reg. at 62752, 62778 (Oct. 20, 2014) (codified at 36 C.F.R. Pt. 668), https://www.gpo.gov/fdsys/pkg/FR-2014-10-20/pdf/2014-24284.pdf.
[313] 20 U.S.C. § 1092(f)(8)(b)(iv)(I)(aa).
[314] 83 Fed. Reg. at 61468.

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

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

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

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[315] Memorandum from the President for the Heads of Executive Agencies re: Preemption (May 20, 2009).
[316] *See e.g.*, California (Cal. Educ. Code § 67386, Cal. Educ. Code § 66290.1); Connecticut (Conn. Gen. Stat. Ann. § 10a-55m); Hawaii (Haw. Rev. Stat. Ann. § 304A-120), Illinois (110 Ill. Comp. Stat. Ann. 155); Maryland (Md. Code Ann., Educ. § 11-601); New Jersey (N.J. Stat. Ann. § 18A:61E-2); New York (N.Y. Educ. Law §§ 6439-49); Oregon (Or. Rev. Stat. Ann. § 350.255, Or. Rev. Stat. Ann. § 342.704); Texas (Tex. Educ. Code Ann. § 51.9363); and Virginia (Va. Code Ann. § 23.1-806).
[317] Letter from State Legislators to Ass't Sec'y Kenneth L. Marcus at 2 (Jan. 25, 2019), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/01/State-Legislator-Comment-Letter-1.25.pdf.
[318] Letter from Members of New York State Legislature to Sec'y DeVos (Jan. 28, 2019), *available at* https://www.nystateofpolitics.com/2019/01/rozic-organizes-push-against-title-ix-changes/.
[319] Comment from Council of District of Columbia to Sec'y Elisabeth DeVos (Jan. 30, 2019), submitted via regulations.gov.
[320] Cal. Educ. Code § 48918(h) ("A decision of the governing board of the school district to expel shall be supported by substantial evidence showing that the pupil committed any of the acts enumerated in Section 48900," including "an allegation of committing or attempting to commit a sexual assault … or to commit a sexual battery"); Kan. Stat. Ann. § 72-6116(a)(8) (student suspension of more than 10 days must be "based on substantial evidence"); *Bd. of Educ. of City Sch. Dist. of City of New York v. Mills*, 741 N.Y.S.2d 589, 591 (App. Div. 2002) (explaining that in New York the "substantial and competent" evidence standard for student suspension proceedings is "imposed by statute," citing State Administrative Procedure Act § 306[1]); Minn. Stat. Ann. § 122A.40(14) ("substantial and competent evidence" before teacher may be terminated); Miss. St. § 37-9-1 ("The standard of proof in all [student] disciplinary proceedings shall be substantial evidence.").

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

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

These are only a few examples. No doubt an exhaustive search of the statutes and regulations of every State, tribe, and locality would produce more. Yet the Department does not appear to have undertaken any such search. Executive Order 13132 anticipated precisely the problem of potential contradictory regulatory obligations by requiring the Department to consult with elected[324] (not non-elected)[325] state and local officials "early in the process of developing the proposed regulation," and to publish a federalism summary impact statement. Executive Order 13175 imposes the same early consultation and impact statement requirements for preemption of Tribal laws.[326] The burden to obtain the relevant information is the Department's.

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

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

[321] *Mills*, 741 N.Y.S.2d at 591 ("the Court of Appeals has defined substantial evidence as 'less than a preponderance of the evidence …'" but "we are unconvinced that use of the competent and substantial evidence standard risks an erroneous deprivation of the student's liberty and property interests"); Christine Ver Ploeg, *Terminating Public School Teachers for Cause Under Minnesota Law*, 31 WM. MITCHELL L. REV. 303, 313 (2004) ("substantial and competent evidence" standard is "typically viewed as less burdensome than the 'preponderance' standard").
[322] Cal. Educ. Code § 67386(3) (requiring all institutions of higher education that accept state financial assistance to provide that "the standard used in determining whether the elements of the complaint against the accused have been demonstrated is the preponderance of the evidence").
[323] Kan. Stat. Ann. § 72-6116(a)(5) (student potentially subject to suspension of more than 10 days must be granted right "to present the pupil's own witnesses in person or their testimony by affidavit").
[324] Executive Order 13132, §§ 1(d), 6(a), 6(c)(1)-(2).
[325] Office of Management and Budget, *Guidance for Implementing E.O. 13132,* M-00-02, at 4 (Response to Question 8) (Oct. 28, 1999).
[326] Executive Order 13175, § 5(c); Department of Education's Consultation Plan, Part IV.A.1.d.
[327] Executive Order 12988 § 3(b)(2)(A).
[328] Executive Order 13132 § (4)(c).

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

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

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

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

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[329] 83 Fed. Reg. at 61463, 61484.
[330] *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008).
[331] *See Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 199, 201-202 (D.C. Cir. 2007)
[332] *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1121 (D.C. Cir. 1984).
[333] 83 Fed. Reg. at 61485.
[334] *Id.* at 61487.
[335] *Id.* at 61485-89.
[336] *Id.* at 61490-93.
[337] *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 56-57 (D.C. Cir. 2015); *see also id.* ("agencies do not have free rein to use inaccurate data"); *New Orleans v. SEC*, 969 F.2d 1163, 1167 (D.C. Cir. 1992) ("an agency's reliance on a report or study without ascertaining the accuracy of the data contained in the study or the methodology used to collect the data is arbitrary" (quotation marks omitted)).
[338] U.S. Dep't of Educ., *Information Quality Guidelines* (effective Oct. 1, 2002), https://www2.ed.gov/policy/gen/guid/infoqualguide.html.
[339] 83 Fed. Reg. at 61485.

the CRDC contain errors,[340] and, most relevant to the proposed rules, that many school districts consistently and inaccurately report that they receive zero complaints of sexual harassment from students or that no complaints of harassment result in student discipline.[341] Similarly, approximately 90 percent of colleges consistently report in their annual Clery statistics that they received zero reports of rape on their campuses[342]—part of a broader and alarming pattern of underreporting and misreporting of sexual assault that has been well-documented for more than a decade[343] and that is consistent with the Department's own enforcement findings.[344] Yet the Department failed to identify any of these weaknesses in accuracy and reliability of the CRDC and Clery data, a clear violation of both the APA and the Department's own IQA guidelines.

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

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

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

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

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

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

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

students of equal access to educational opportunities, claiming, "if everything is harassment, then nothing is."[346] While heading the Department's Office for Civil Rights and just a few months before the 2011 and 2014 guidance documents were rescinded, former Acting Assistant Secretary Candice Jackson, reinforced the myth of false accusations, claiming that "90 percent" of her office's Title IX investigations were the result of "drunk[en]" sexual encounters and regret[347] and requiring her staff to read excerpts from a book that baselessly labeled college campuses as "a secret cornucopia of accusation."[348]

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

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

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[346] *Id.*
[347] Green & Stolberg, *supra* note 12.
[348] Democracy Forward, *Advocacy Groups Advance Legal Fight Against Secretary DeVos's Unconstitution Rollback of Survivor Protections* (Jan. 14, 2019), https://democracyforward.org/updates/advocacy-groups-advance-legal-fight-against-secretary-devoss-unconstitutional-rollback-of-survivor-protections.
[349] Neomi Rao, *Shades of Gray*, YALE HERALD (Oct. 14, 1994), https://assets.documentcloud.org/documents/5684266/01-Shades-of-Gray-Neomi-Rao.pdf.
[350] Neomi Rao, *"The Feminist Dilemma"*, *supra* note 13.
[351] Neomi Rao, *Submission, Silence, Mediocrity*, YALE FREE PRESS (Nov. 1993), https://www.documentcloud.org/documents/5684271-Rao-Submission-Silence-Mediocracy.html.
[352] Derek Hawkins, *Billy Bush says there were 8 witnesses to Trump's 'Access Hollywood' comments*, WASH. POST (Dec. 4, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/12/03/he-said-it-billy-bush-reiterates-that-trumps-access-hollywood-tape-is-real.
[353] Ben Jacobs, *Trump Uses Gettysburg Address to Threaten to Sue Sex Assault Accusers,* THE GUARDIAN (Oct. 22, 2016), https://www.theguardian.com/us-news/2016/oct/22/donald-trump-gettysburg-contract-with-america-sue-accusers-hillary-clinton.
[354] John Wagner, *All of the Women Who Have Accused Trump of Sexual Harassment Are Lying, the White House Says*, WASH. POST (Oct. 27, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/10/27/all-of-the-women-who-have-accused-trump-of-sexual-harassment-are-lying-the-white-house-says.
[355] Donald Trump (@realDonaldTrump), TWITTER (Feb. 10, 2018), https://twitter.com/realDonaldTrump/status/962348831789797381.

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

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

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

Sexual assault inflicts enormous costs on survivors. A single rape can cost a survivor between $87,000 and $240,776.[359] Survivors are also three times more likely to suffer from depression, six times more likely to have PTSD, 13 times more likely to abuse alcohol, 26 times more likely to abuse drugs, and four times more likely to contemplate suicide.[360] The lifetime costs of intimate partner violence, which can constitute sexual harassment in educational settings, including related health problems, lost productivity, and criminal justice costs, can total $103,767 for women and $23,414 for men.[361] The Centers for Disease Control and Prevention estimates that the lifetime cost of rape is $122,461 per survivor, resulting in an annual national economic burden of $263 billion and a population economic burden of nearly $3.1 trillion over survivors' lifetimes.[362] More than half of this cost is due to loss of workplace productivity, and the rest due to medical costs, criminal justice fees, and property loss and damage.[363] About one-third of the cost is borne by taxpayers.[364] None of these costs, nor the significant costs to those suffering sexual harassment short of sexual assault, are mentioned in the rulemaking docket.

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

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[356] *See* Grossman & Brake, *supra* note 90 ("Costs are not saved, but shifted.").
[357] *See* Grossman & Brake, *supra* note 90 ("[t]he Department of Education is not a neutral beancounter.").
[358] 83 Fed. Reg. at 61485.
[359] White House Council on Women and Girls, *Rape and Sexual Assault: A Renewed Call to Action* 15 (Jan. 2014), https://www.knowyourix.org/wp-content/uploads/2017/01/sexual_assault_report_1-21-14.pdf.
[360] Feminist Majority Foundation, *Fast facts - Sexual violence on campus* (2018), http://feministcampus.org/wp-content/uploads/2018/11/Fast-Facts.pdf.
[361] Inst. for Women's Policy Research, *Dreams Deferred: A Survey on the Impact of Intimate Partner Violence on Survivors' Education, Careers, and Economic Security* 8 (2018), https://iwpr.org/wp-content/uploads/2018/10/C474_IWPR-Report-Dreams-Deferred.pdf.
[362] Cora Peterson et al., *Lifetime Economic Burden of Rape Among U.S. Adults*, 52(6) AM. J. PREV. MED. 691, 698, (2017), *available at* https://stacks.cdc.gov/view/cdc/45804/cdc_45804_DS1.pdf.
[363] *Id.* at 691.
[364] *Id.* at 691.

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

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

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

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

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

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[365] 83 Fed. Reg. at 61487.
[366] 83 Fed. Reg. at 61485.
[367] *Id.* at 61485.
[368] *Id.* at 61485 n.18.
[369] *Id.* at 61485.
[370] U.S. Dep't of Educ., Office for Civil Rights, *List of districts that have open Title IX sexual violence investigations at the elementary/secondary level* (Sept. 6, 2017), https://mediaassets.scrippsnationalnews.com/cms/dcbureau/SchoolSexAssaults/elementarysecondary.pdf.
[371] Associated Press, *624 sex assault complaints at Chicago schools this semester* (Nov. 29, 2018), https://apnews.com/ad8c79d567ff461a946423735 79bd588.
[372] 83 Fed. Reg. at 61485.

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

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

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

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

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

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[373] *Id.* at 61485 n.17.
[374] U.S. Senate Comm. on Homeland Sec. & Governmental Affairs, U.S. Senate Subcomm. on Fin. & Contracting Oversight, *Sexual Violence on Campus: How too many institutions of higher education are failing to protect students* 9 (July 9, 2014), https://www.mccaskill.senate.gov/SurveyReportwithAppendix.pdf.
[375] 83 Fed. Reg. at 61486.
[376] AASA Letter, *supra* note 15, at 2.
[377] United Educators, *supra* note 26.
[378] United Educators, *The High Cost of Student-Victim Sexual Assault Claims and What Institutions Can Do* 3 (2017), https://static1.squarespace.com/static/53e530a1e4b021a99e4dc012/t/590501f74402431ac4900596/1493500411575/FN-+RE-+2017.04-+High+Cost+of+Student-Victim+SA+Claims.pdf.

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

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

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

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

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

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

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[379] AASA Letter, *supra* note 15, at 2.
[380] 83 Fed. Reg. at 61488.
[381] AAU Letter, *supra* note 15, at 4.
[382] AASA Letter, *supra* note 15, at 4.
[383] Jason M. Lindo et al., *Any Press is Good Press? The Unanticipated Effects of Title IX Investigations on University Outcomes*, NAT'L BUREAU OF ECON. RES. 12-13 (July 2018), *available at* http://www.nber.org/papers/w24852.

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

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

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

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

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

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

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

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

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[384] 83 Fed. Reg. at 61483.
[385] 20 U.S.C. § 1089(c)(1).
[386] *See*, *e.g.*, 20 U.S.C. §§ 1090(b) (governing regulations "promulgated pursuant to this subchapter"), 1090(e)(6) ("regulations prescribed under this subchapter"), 1091(e) ("regulations issued under this subchapter"), 1094(c)(1) & (c)(3)(B)(i)(I) (prescribed).
[387] 83 Fed. Reg. at 61483.
[388] Both quotations in this paragraph are from H.R. Rep. 102-447, 76-77, 1992 U.S.C.C.A.N. 334, 409-410. In the second quotation, emphasis was added.
[389] Executive Order 12250 §§ 1-202, 1-402.
[390] 28 C.F.R. § 0.51(a).

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

Further, close coordination with the Department of Justice is crucial with regard to Title IX and sexual harassment in particular. For example, the Solicitor General of the United States previously informed the Supreme Court that it was the view of the United States that the deliberate indifference standard identified in *Gebser* did not apply to a federal agency enforcing Title IX administratively[392] and the Department of Justice has stated the same conclusion in its Title IX Legal Manual.[393] As a further example, in the Title IX context, Department of Justice has also encouraged agencies to seek damages for victims of discrimination in agency enforcement proceedings, in contrast to the prohibition on assessment of damages in the proposed rule.[394] The Department of Justice should necessarily be involved in any reversal of these and other positions by the proposed rule.

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

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

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

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

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[391] *See*. 7 C.F.R. § 15a.110(b) (proposed § 106.3(a) is inconsistent with USDA rule on remedial action); 7 C.F.R. §§ 15a.135, 15a.140 (proposed § 106.8 is inconsistent with USDA rules on designation of responsible employee and adoption of grievance procedures); 7 C.F.R. § 15a.205 (proposed § 106.12(b) is inconsistent with USDA rule on religious exemptions).
[392] U.S. *Amicus* Brief, *Davis v. Monroe County Bd. of Educ.*, No. 97-843, at 19-25 (Nov. 1998).
[393] Dep't of Justice, *Title IX Legal Manual*, https://www.justice.gov/crt/title-ix ("Importantly, for purposes of administrative enforcement of Title IX and as a condition of receipt of federal financial assistance—as well as in private actions for injunctive relief—if a recipient is aware, or should be aware, of sexual harassment, it must take reasonable steps to eliminate the harassment, prevent its recurrence and, where appropriate, remedy the effects.").
[394] *Id.* ("[A]gencies are encouraged to identify and seek the full complement of relief for complainants and identified victims, where appropriate, as part of voluntary settlements, including, where appropriate, not only the obvious remedy of back pay for certain employment discrimination cases, but also compensatory damages for violations in a nonemployment context.").
[395] 5 U.S.C. § 601 et al.
[396] *See* 83 Fed. Reg. at 61490-493.
[397] 5 U.S.C. § 603(a).

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

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

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

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

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

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

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

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[398] Letter from Small Bus. Admin. to Sec'y Elisabeth DeVos (Aug. 30, 2018), *available at* https://www.sba.gov/advocacy/8-30-18-comments-general-provisions-federal-perkins-loan-program-federal-family-education.
[399] Executive Order 13272 § 3(c).
[400] 5 U.S.C. § 604(a)(3).
[401] 83 Fed. Reg. at 61463-464.
[402] *See* Office of Legal Counsel, U.S. Dep't of Justice, *Applicability of Section 504 of the Rehabilitation Act to Tribally Controlled Schools*, 28 Opinions of Office of Legal Counsel 276 (Nov. 16, 2004); U.S. Dep't of Educ., Office for Civil Rights, *Office for Civil Rights Jurisdiction Over Tribally Controlled Schools and Colleges* and accompanying *Questions and Answers Regarding Tribally Controlled Schools and Colleges* (Feb. 14, 2014).
[403] U.S. Dep't of Educ., Office for Civil Rights, *Questions and Answers Regarding Tribally Controlled Schools and Colleges* (Response to Question 1) (Feb. 14, 2014).
[404] *Let Her Learn: Sexual Harassment and Violence*, *supra* note 17, at 3.
[405] Executive Order 13175 § 5(c)(2); Dep't of Educ.'s Consultation Plan, Part IV.A.1.d.

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

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

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

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

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

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

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[406] 5 U.S.C. § 603(b)(3).
[407] 83 Fed. Reg. at 61490.
[408] *Id*. at 61491.
[409] *Cf*. 5 U.S.C. § 605(b).
[410] U.S. Small Bus. Admin., Office of Advocacy, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* 20 n.70, 23-24 (Aug. 2017).
[411] *See supra* note 15.
[412] 5 U.S.C. § 609(a).

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

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

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

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

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

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

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

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

[413] *See*, *e.g.*, 2001 Guidance, *supra* note 58.
[414] Letter from Kenneth L. Marcus, Assistant Secretary re: Appeal of OCR Case No. 02-11-2157 (Rutgers University) (Aug. 27, 2018).

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

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

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

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

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

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

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

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

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[415] *See*, *e.g.*, *U.S. Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 600 n.4 (1986); *Grove City Coll. v. Bell*, 465 U.S. 555, 566 (1984) (Title IX was patterned after Title VI).
[416] 83 Fed. Reg. at 61466 (actual knowledge), 61468 (deliberate indifference).
[417] Nat'l Science Found., *NSF Announces New Measures to Protect Research Community From Harassment* (Sept. 19, 2018), https://www.nsf.gov/od/odi/harassment.jsp.
[418] 5 U.S.C. § 603(b)(5).
[419] Executive Order 12866 § 1(b)(10).

a definitive statement from administration officials as to whether public comments, or requests for agency action were being accepted and considered by agency officials during the shutdown. It was unclear whether the main conduits for online public participation in rulemaking, regulations.gov and federalregister.gov, were operating during that time due to a lapse in appropriations. When visiting federalregister.gov, visitors have been confronted with a message stating that the site is not being "supported." On January 16, 2019, regulations.gov was shut down completely[420]—with no notice or warning—leaving members of the public with no option to submit their comments electronically.[421] While assurances were given that the website would become operational within 24 hours, members of the public continued to be left with the distinct impression that neither site was operational or being updated, and there was significant confusion about whether both sites remained available for accepting public comments throughout the government shutdown. Such widespread confusion inevitably discouraged the public from submitting comments.

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

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

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

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

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[420] The regulations.gov landing page displayed a message stating that the site "is not operational due to a lapse in funding, and will remain unavailable for the duration of the government shutdown."
[421] The Title IX rules specify that the Department of Education will not accept comments by email or fax. While regulations.gov was down, the only options were to mail in comments or hand-deliver them.
[422] Federal Register, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance* (last visited Jan. 27, 2019), https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal.
[423] Regulations.gov, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance* (last visited Jan. 27, 2019), https://www.regulations.gov/document?D=ED-2018-OCR-0064-0001.
[424] U.S. Dep't of Educ., *Evaluation of Existing Regulations*, 82 Fed. Reg. at 28431 (June 22, 2017) https://www.regulations.gov/contentStreamer?documentId=ED-2017-OS-0074-0001&contentType=pdf.
[425] Tiffany Buffkin et al., *Widely Welcomed and Supported by the Public: A Report on the Title IX-Related Comments in the U.S. Department of Education's Executive Order 13777 Comment Call*, CAL. L. REV. ONLINE 2 (forthcoming) (Sept. 25, 2018) [last revised Dec. 31, 2018), available at https://ssrn.com/abstract=3255205.
[426] *Id.* at 27-28 (48,903 people signed petitions and statements supporting Title IX and the 2011 Guidance); Caitlin Emma, *Exclusive: Education reform groups team up to make bigger mark*, POLITICO (Sept. 6, 2017),

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

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

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

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

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

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

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

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

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

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

[433] *Id.* at 1

[434] *Id.* at 2.

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

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

## XII. Directed Questions

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

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

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

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

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

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

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[435] Mental Health Professionals Letter, *supra* note 130.
[436] *See* Dana Bolger, *Betsy DeVos's New Harassment Rules Protect Schools, Not Students*, N.Y. TIMES (Nov. 27, 2018), https://www.nytimes.com/2018/11/27/opinion/betsy-devos-title-ix-schools-students.html.

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

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

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

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

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

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

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

Proposed § 106.45(b)(1)(iii) is also inadequate because it would not require trainings to be trauma-informed. Scientific, trauma-informed approaches are critical to sexual assault investigations. For example, in order to ensure that investigations are reliable in ascertaining what actually occurred between the parties in a complaint, investigators should be knowledgeable about common survivor responses to sexual assault, such as tonic immobility, an involuntary paralysis common among survivors during their assaults[437] that has been recognized by psychiatrists[438] and legal scholars[439] in numerous peer-reviewed publications. Judges, too, have recognized the importance of trauma-informed training in properly adjudicating sexual assault cases. In fact, the National Judicial Education Program (NJEP), a project sponsored by the U.S. Department of Justice, produced a training manual written for judges by a nationwide survey of judges on what they wish they had known before they had adjudicated a sexual assault case.[440] These judges agreed that many survivor responses that "appear counterintuitive to those not knowledgeable about sexual assault" are in fact quite common among survivors,[441] including tonic immobility, collapsed immobility, dissociation, delayed reporting, post-assault contact with the assailant, imperfect retrieval of memories, and a flat affect while testifying.[442]

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

### E. Q5: Parties with disabilities

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

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

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

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

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

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

[442] *Id.* at 6-9.

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

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## QUESTIONS AND ANSWERS

### RESPONSE BY PATRICIA HAMILL TO QUESTIONS OF SENATOR ALEXANDER, SENATOR WARREN, SENATOR ROSEN, AND SENATOR SANDERS

#### SENATOR ALEXANDER

*Question 1.* In your representation of accused students, how have you seen campus disciplinary proceedings impact their access to education? What negative effects do these proceedings, regardless of outcomes have on the future employment opportunities for these students?

I would like to start by stating that I am heartened by the fact that most, if not all, of the Senators and witnesses at the hearing affirmed the need for fair and transparent procedures for resolving Title IX complaints.[1] As I set forth in my written testimony, basic principles such as the need for adequate notice and fair, thorough and impartial investigations and decisions are well established in our nation's jurisprudence. The procedural concerns discussed at the hearing focused on whether fair procedures should include live hearings and direct cross-examination, which I address further in some of my answers below.[2]

Answer 1. As this Committee knows, Title IX provides that "[n]o 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." 20 U.S.C. § 1681(a). At the hearing, Senators and witnesses emphasized that Title IX protects students' equal access to education, and that sexual harassment or assault can affect a complainant's access to educational programs and activities. I completely agree. And I emphasize that the right to equal access to education means equal access for both complainants and respondents, regardless of gender. Students who are accused of sexual harassment or assault may be completely excluded from and denied the benefits of their school's educational programs and activities, whether or not they are found responsible.

First, if accused students are found responsible, they may be suspended or expelled from their school and lose the degree they worked and paid for, sometimes very late in their college careers. They may lose scholarships or the ability to participate in military or other programs that have made their educations possible. They likely will be unable to transfer to a comparable school to complete an undergraduate degree. And if they are able to transfer, they may lose credits or have to repeat a term or year.[3] Their reputations, educational prospects, and career or professional prospects may be permanently damaged due to gaps in their education, the stigma of being found responsible for sexual harassment or assault, and, in many cases, permanent notations in their academic records or on their transcripts.[4] It is critical to provide a process fair to both parties before such a consequential decision is made, to minimize the possibility that a student wrongfully accused is found responsible. And it is also critical to provide a path to rehabilitation in cases where an institution's finding of responsibility might have merit. I believe schools should be able to expunge a student's records after a designated period of time, and that there should be a time frame after which respondents are no longer required to report an adverse disciplinary ruling on an application for admission to another school. I note the broad support for "ban the box" laws in the criminal context, which require employers to consider a job candidate's qualifications first, without the stigma of a criminal conviction or arrest record. And the Common Application

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[1] Patricia Hamill is a partner at the Philadelphia law firm Conrad O'Brien, P.C., and Chair of the firm's nationwide Title IX, Due Process and Campus Discipline practice. She represents college students and academic professionals in disciplinary proceedings and related litigation. Patricia is a frequent speaker on Title IX litigation and related issues to audiences including Title IX coordinators, advocacy groups, and attorneys. Patricia is also a commercial litigator who represents clients in white-collar and internal investigations, and is a member of the firm's three-person Executive Committee.

[2] My focus here is on colleges and universities and their students.

[3] For instance, a student expelled after completing junior year ordinarily cannot simply complete his senior year elsewhere and be awarded a degree from the second institution. Most schools require students to earn a certain number of credits at their institution before awarding a degree. That usually means a student must complete two full years, so a student expelled after his junior year will usually have to repeat that year – assuming he is admitted somewhere else. Also, when a school suspends a student, it typically will not honor courses the student has taken elsewhere during the period of suspension.

[4] Some states and some school policies require notations on transcripts indicating a finding of responsibility for sexual harassment or assault. Some such notations are permanent, particularly in the case of expulsion, and some may be removed after a suspension is served. See, e.g., Va. Code § 23–9.2:15; N.Y. Education Law Art. 129–B.

has removed its question on criminal history – though it continues to include a question on disciplinary history.

Second, an accused student who is ultimately exonerated may also be excluded from and denied the benefits of the school's educational programs and activities. In my experience, this happens frequently due to interim actions schools take while a disciplinary proceeding is pending. The exclusion/denial is obvious if a school suspends or removes a respondent from campus before a final decision is made. The Department's proposed Title IX regulations address this problem, stating that emergency removal is appropriate only if the school "undertakes an individualized safety and risk analysis, determines that an immediate threat to the health or safety of students or employees justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal." Proposed 34 C.F.R. § 106.44(c). I support those protections, and have proposed in addition that emergency removal be allowed only if it is the least restrictive alternative. Moreover, comparable protections should be in place for other interim actions schools routinely take. "No contact orders," though often appropriate and necessary, should be tailored in such a way that they do not prevent either student from participating in educational programs or activities while the proceeding is pending. The routine practice of putting a "disciplinary hold" on accused students' transcripts or, for students with cases pending at graduation, withholding their degrees, denies accused students the benefits of their education in some of the same ways as a finding of responsibility. For example, a student who cannot get a clean official transcript or whose degree is withheld may, while waiting for the final outcome, lose a job, a scholarship, the ability to participate in a military program, etc., and may be unable to apply for jobs or graduate programs. The damage that occurs while those interim sanctions are in place cannot be undone. Unless a particular student poses an "immediate threat," there is simply no justification for denying him the benefits of his education while his responsibility has yet to be adjudicated.

Third, even apart from the school's official actions, the mere fact of an accusation and a disciplinary proceeding involving alleged sexual harassment or assault can interfere with an accused student's ability to pursue his education. A student who is accused is distressed and is often ostracized. In this age of the Internet and social media, the damage to an accused student's educational and career prospects can persist regardless of the outcome of the disciplinary proceeding. While I understand that is not entirely in a school's control, schools can and should mitigate the impact by adopting fair procedures; administering them fairly; avoiding any suggestion that an accusation is credible simply because it was made; educating both employees and students on what a fair process entails; and taking prompt and effective action when harassment or retaliation occurs. The current stigma associated with even a wrongful allegation of sexual assault is so intense that the vast majority of judges who have handled lawsuits in this area have allowed the accused student to file pleadings as "John Doe."

A number of people who responded to the Department's request for comments on its proposed Title IX regulations shared personal stories illustrating the devastating impact of accusations of sexual harassment or assault, interim sanctions, findings of responsibility, and final sanctions.[5] These stories are consistent with what I have

[5] See, for example, Comments of Anonymous parent, *https://www.regulations.gov/document?D=ED*–2018–OCR–0064–9000 (describing student's experience and sharing specific recommendations based on that experience: the student was found responsible without a hearing and expelled, his parents learned about the situation when they received a call that he was suicidal and in the hospital, and they sued and won. "Many of us have daughters, some women have experienced sexual assault themselves and we strongly agree that victims need protection. However, it should never come at the expense of an innocent accused student. The goal should be to find the truth and provide a fair process given the high stakes for both students. Both victims and falsely accused students experience profound trauma"); Comments of Anonymous parent, *https://www.regulations.gov/document?D=ED*–2018–OCR–0064–7160 (sharing perspective from having had a daughter who was sexually assaulted and a son accused of sexual assault while in college. "We all, as a family, appreciate the hesitancy of victims to come forward, and we certainly want those guilty of sexual crimes to be prosecuted. However, to deny basic and established constitutional rights to the accused becomes a slippery slope and begs the question of which other situations should be considered for the repeal of one's constitutional rights?"); Comments of Craig Stanfill, *https://www.regulations.gov/document?D=ED*–2018–OCR–0064–10624 (student who was accused a few months before graduation and exonerated over a year later lost two years of his professional life because of the withholding of his degree and inability to apply for graduate school or find a permanent job); Comments of Mark Shaw, *https://www.regulations.gov/document?D=ED*–2018–OCR–0064–10413 (student was exonerated eight months after complaint was made, but was damaged by the campus restrictions imposed during that period); Comments of Anonymous student, *https://www.regulations.gov/document?D=ED*–2018–OCR–0064–9043.

observed firsthand. I urge the Committee to consider these stories, and to remember that complainants and respondents are people – young people – who deserve a fair and impartial resolution based on the facts of their individual cases.

*Question 2.* Are campus disciplinary proceedings distinguishable from workplace disciplinary actions? If so, why?

Answer 2. I believe this question stems from the fact that some have suggested that workplace disciplinary proceedings use single investigator models without hearings and cross-examination, and that the same model is therefore appropriate for student proceedings. As I explain below, such generalizations ignore the substantial variation in workplace protections and do not justify efforts to deny important procedural protections in the campus setting. Indeed, many schools offer their employees greater rights and protections than the Department of Education's proposed regulations would provide. In addition, courts are increasingly recognizing the need for fundamental protections in student disciplinary proceedings. Both historical and practical considerations support those protections.

First, employers handle disciplinary proceedings in a wide variety of ways and workers are subject to a wide variety of procedures and protections. Some employees are at will. Some are protected by statutes, regulations, handbooks (which may or may not be contractually binding), contracts or collective bargaining agreements, with provisions that differ for different employers, and sometimes also for different employees at the same company. The broad generalizations about "workplace models" are not based on evidence and do not support efforts to deny accused students fair processes in campus proceedings.

Second, the rights and protections many colleges and universities give their employees are greater than the rights and protections that would be guaranteed by the Department of Education's proposed regulations. Indeed, in comments to the proposed regulations, many schools protested the proposal that universities apply the same standard of evidence in student Title IX proceedings as they use in employee proceedings. The Association of Independent Colleges and Universities of Massachusetts (AICUM), for example, argued that student disciplinary cases are "fundamentally different" from employee proceedings. "Campus conduct proceedings involving faculty and other employees are governed by existing state laws, collective bargaining agreements, faculty by-laws, and/or other constraints, which institutions often have no power unilaterally to change."[6]

I am not arguing here that students should necessarily have every right enjoyed by faculty or by employees governed by a collective bargaining agreement. I am simply pointing to the protections colleges and universities give their employees – particularly academic employees – to illustrate that it is inappropriate to advocate for limiting accused students' rights in disciplinary proceedings by suggesting that there is some uniform "workplace model" involving decisions made by a single investigator, with no live hearings and no opportunity to confront the other party or witnesses.

The University of Washington provides just one example of a workplace model involving substantial procedural protections – including separation of investigative and adjudicative functions, steps to ensure impartial decisionmakers, steps to ensure all relevant evidence is gathered and shared with the parties, right to a hearing, and right to cross-examination. Administrative Policy Statement 46.3, "Resolution of Complaints Against University Employees," describes how the university handles complaints against university employees, including complaints involving alleged sexual harassment or sexual violence. As an initial matter, complaints may be addressed through local investigation and resolution or through the University Complaint Investigation and Resolution Office (UCIRO) process. In the UCIRO process, an investigator "acts as a neutral, objective fact-finder" and produces "a summary of the allegations investigated and the facts determined." "As warranted, UCIRO will refer the result to the appropriate administrative head to determine whether corrective actions should be taken involving the individual whose behavior is the subject of the complaint in accordance with the individual's employment pro-

[6] Comments of AICUM, at 13, *http://aicum.org/wp-content/uploads/2019/01/AICUM-public-comments-on-Notice-of-Proposed-Rulemaking-%E2%80%9CNPRM%E2%80%9D-amending-regulations-implementing-Title-IX-of-the-Education-Amendments-of-1972*–Title-IX%E2%80%9D–Docket-ID–ED–2018–OCR–0064.pdf; see also Comments of Association of Governing Boards of Universities and Colleges, *https://www.regulations.gov/document?D=ED*–2018–OCR–0064–7550 (stating that requiring consistency across all proceedings would impact "myriad campus matters, constituencies and processes," including "collective bargaining agreements, institutional governance decisions, as well as state-law-regulated and non-Title IX disciplinary policies and procedures").

gram." Id., *http://www.washington.edu/admin/rules/policies/APS/46.03.html (emphasis added).*

Complaints against faculty are governed by the Faculty Code, which sets forth "the adjudicative procedures to be used in resolving disputes involving faculty members that cannot be resolved by informal means." Ch. 28, *http://www.washington.edu/admin/rules/policies/FCG/FCCH28.html.* The chapter starts by strongly encouraging the use of informal dispute resolution. Id. If the UCIRO files "a written report that claims reasonable causes exist to adjudicate charges" against a faculty member, the first step is a determination of reasonable cause, to be made by the provost with the assistance of a special committee of three faculty members "who are not involved in the matter being considered" and who will not "subsequently serve on any panel hearing or review any adjudication arising out of or related to the matters set forth in the report." Section 28–32(A).

For "[c]omprehensive adjudication," defined as "the formal hearing process used for all cases except the minor cases that are resolved with brief adjudications," the Code sets forth extensive rights and protections, including the following provisions:

- "In selecting members of a particular hearing panel, the Chair of the Adjudication Panel shall attempt to achieve the highest degree of diversity and impartiality and make every possible effort to select panel members with differing backgrounds that the Chair deems relevant to the issues at hand and the persons involved. This requirement is especially important to observe in cases where unlawful discrimination is alleged. The purposes of this provision are to broaden the perspective of the panel, and increase the panel's ability to understand the motivations of the persons involved." Section 28–32(G).
- "The role of any member of a hearing panel . . . shall be that of an impartial fact finder and judge and shall not be that of an advocate for any of the parties to the adjudication." Section 28–32(H).
- A pre-hearing conference will be held at which "the hearing officer, the panel and the parties shall discuss and agree upon the evidence to be presented and the issues to be addressed at the hearing." Section 28–52(D).
- The hearing officer "shall issue a Prehearing Order . . . which shall set forth the issues to be addressed at the hearing, the factual issues which are uncontroverted, the witnesses to be called and the other evidence to be presented, the extent to which any discretionary rights to participate will be given to nonparty participants, the extent to which depositions, requests for admission and any other form of discovery will be allowed and any other matters the hearing panel shall deem appropriate in setting the procedure to be followed at the hearing." Section 28–52(E).
- "Any faculty member who is a party to a proceeding under this chapter shall have the right to be represented by counsel at all stages in the proceedings." Section 28–52(G).
- "The hearing officer may instruct any person who is a party to the adjudication or an administrative officer or administrative employee of the University to appear and to give testimony under oath or affirmation." A person who refuses to comply is subject to sanctions, including dismissal or the drawing of adverse inferences. Section 28–52(H).
- "The hearing officer may at any time issue any discovery or protective orders that he or she deems appropriate, and such orders shall be enforceable under the provisions of Chapter 34.05 RCW regarding civil enforcement of agency actions." Section 28–52(K).
- "The parties and nonparty participants of right and their advisors and representatives" are entitled to be present at the hearing. Section 28–53(A).
- "The hearing shall either be recorded, audio only or video, or transcribed by a court reporter, as determined by the hearing panel. . . . Copies of the recording or transcript shall be made available to any party or nonparty participant of right at University expense upon request." Section 28–53(B).
- "If the facts in the case or relief requested are in dispute, testimony of witnesses and other evidence relevant to the issues and to the relief requested shall be received if offered. The hearing officer may admit and consider evidence on which reasonably prudent people are accustomed to rely in the conduct of their affairs," and shall "refer to the Washington

Rules of Evidence as non-binding guidelines for evidentiary rulings. All testimony of parties and witnesses shall be given under oath or on affirmation." Section 28–53(C).

- "To the extent necessary for full disclosure of all relevant facts and issues, the hearing officer shall afford to all parties and nonparty participants the opportunity to respond, present evidence and argument, conduct cross-examination and submit rebuttal evidence . . . ." Section 28–53(D).
- "The parties shall have the opportunity to confront all witnesses." Section 28–53(F).

Third, as I explained in my written testimony, campus disciplinary proceedings have been in a spotlight in recent years. Courts are increasingly holding that students accused of sexual harassment or assault are entitled to certain procedural protections, and that how respondents are treated in disciplinary proceedings can constitute gender discrimination. The case law continues to develop regarding the obligations of both public and private institutions. When similar issues about unfair processes and arbitrary results arise in the workplace context, courts, regulators, and others should be just as concerned to ensure fair procedures in the workplace. Indeed, a federal court recently ruled that a tenured professor who alleged he was fired without a hearing and without consideration of exculpatory evidence stated a valid gender discrimination claim. Fogel v. Univ. of the Arts, No. CV 18–5137, 2019 WL 1384577 (E.D. Pa. Mar. 27, 2019).

Fourth, with the above points in mind, there are historical and practical considerations that support requiring robust procedural protections before students are deprived of their educations.

- a. Historical considerations. Title IX applies to federally funded educational institutions, and thus to almost every college and university in the United States. Starting with the Office for Civil Rights' 2011 Dear Colleague Letter, the federal government has used the threat of withdrawal of funding to dictate campus procedures for sexual harassment and assault allegations. The government's pressure has led to massive Title IX bureaucracies at colleges and universities.[7] While individual schools have different policies and procedures, there are common elements (some prescribed by the government and others that are an outgrowth of its mandates) and common themes, including presumptions of guilt, use of a "single investigator" model that involves inherent conflicts of interest and severely limits the respondent's ability to challenge the complainant's account, denial of meaningful cross-examination, erosion of other procedural protections for respondents, and systemic gender discrimination. As noted above and in my written testimony, courts are already responding by holding that schools must avoid discrimination and provide procedural protections, including live hearings and cross-examination. For public institutions, courts have confirmed these protections are mandated by the Constitution's Due Process and Equal Protection clauses. In this context, it is critical that lawmakers, regulators, and schools also take action to undo the harm that has been done. If employers are using unfair procedures to discipline their employees, that is of course an important concern and should be addressed, but it does not change the fact that campus disciplinary procedures need reform now.
- b. General practical considerations. (I say "general" because individual cases and circumstances differ, and overall these considerations are on a spectrum). First, students generally pay tuition for an education at a particular school, including enrollment for a time period and a degree from that school. Given the way the education system works, a student who is sanctioned midway through an academic year or midway through his college career (even if just shortly before graduation) can lose credit for courses he took and paid for, may be unable to graduate from the school that accepted his tuition, and may be unable to transfer to a comparable institution or have his previous coursework accepted. If his transcript contains a notation of the disciplinary finding (as many schools and some states require), or if he has to complete the Common Application, his job

[7] For one example, a 2016 Harvard Crimson article discussed "Harvard's web of 50 Title IX coordinators at each of the 12 schools and units." See Andrew Duehren and Emma Talkoff, Seeking Trust: Navigating Harvard's Sexual Assault Policies, Harvard Crimson (March 10, 2016), *https://www.thecrimson.com/article/2016/3/10/harvard-sexual-assault-policies/*.

and transfer applications may never even be considered. There are good reasons to require a formal process before a student is deprived of the education he paid for and is substantially impeded in seeking other educational opportunities. Second, at many schools, students study, work, live, and socialize in the context of the school community. Many contested student complaints involve sexual encounters between young people who are sexually inexperienced, are engaged in the casual hook-up culture prevalent on campuses, or both. They may have misread or misinterpreted each other's feelings or intent. Often both parties have consumed alcohol or drugs, further diminishing their ability to make clear decisions, communicate effectively, or remember what happened. Disputes often center not on whether particular conduct occurred but whether it was consensual. In such ambiguous and nuanced situations, live hearings and cross-examination are critical both for the parties to explore and test each other's accounts and for the decisionmakers to observe the parties as they testify. Of course these observations may not apply to all schools and all students, and employees may have analogous arguments. But again, whether or not fair procedures are available in the workplace does not change the need to act now to ensure fair procedures on school campuses. And I note that workers have an important legal protection that students do not: Title VII of the Civil Rights Act of 1964 allows legal challenges to employment practices that have a disparate impact on a protected class of individuals (including a particular gender), whether or not the employer intends to discriminate. In contrast, courts have held that a plaintiff bringing a claim under Title IX must plead and ultimately prove "particularized" facts to show that a school was motivated by gender bias.[8] This has allowed schools to argue, and some courts to hold, that they are free to discriminate against respondents and for complainants even though this discrimination overwhelmingly harms men.[9]

Some have argued that the federal government should not be overly prescriptive in this area and that additional protections for students will be too costly. This ignores the realities: the government is already prescriptive, schools already invest huge sums in their Title IX bureaucracies, fair treatment for both complainants and respondents is required both by existing law and by our basic principles of justice, and the system that currently exists does not provide fair processes or fair and reliable outcomes.[10]

*Question 3.* Some have argued that the 6th Circuit Court of Appeals decision, Doe v. Baum, was decided based on the fact that University of Michigan offered live cross-examination in other disciplinary proceedings, but not in proceedings involving sexual assault. However, the holding is not specific to those facts. Do you view Doe v. Baum as unique to its facts, or is the holding broader?

Answer 1. Doe v. Baum, 903 F.3d 575 (6th Cir. 2018), is not unique to its facts. The Court's decision is based on long-standing precedent regarding fair disciplinary processes and stands for three broad propositions. First, due process requires that "if a student is accused of misconduct, the university must hold some sort of hearing before imposing a sanction as serious as expulsion or suspension." Id. at 581. Second, due process requires that "when the university's determination turns on the credibility of the accuser, the accused, or witnesses, that hearing must include an opportunity for cross-examination;" i.e., "if a university is faced with competing narratives about potential misconduct, the administration must facilitate some form of cross-examination in order to satisfy due process." Id. And third, for purposes of a Title IX "erroneous outcome" claim (which can be asserted against either a private or a public school), a plaintiff who alleges "the university did not provide an opportunity for cross-examination even though credibility was at stake in his case . . . has pled facts sufficient to cast some articulable doubt on the accuracy of the disciplinary proceeding's outcome." Id. at 585–86.[11]

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[8] See, e.g., Doe v. Baum, 903 F.3d 575, 585 (6th Cir. 2018).

[9] See my written testimony, p.9 n.26.

[10] Live hearings and cross-examination may not be required or necessary in every case involving alleged sexual misconduct. The Department of Education's proposed regulations represent an effort to reserve formal Title IX proceedings for alleged conduct that could deprive a complainant of educational opportunities, and give schools and parties more flexibility to pursue informal, non-punitive resolutions. And in general, the case law on these issues requires hearings when the potential sanctions are as serious as expulsion or suspension, and cross-examination when the decision turns on credibility. See, e.g., Baum, 903 F.3d at 581.

[11] "A university violates Title IX when it reaches an erroneous outcome in a student's disciplinary proceeding because of the student's sex." Id. Courts have held that "[t]o survive a motion

The Court's reasoning confirms that it intended its ruling to apply broadly. Among other things, it repeated the classic statement that cross-examination is "'the greatest legal engine ever invented for uncovering the truth.'" It also noted that cross-examination is critical both because it allows parties "to identify inconsistencies in the other side's story" and because it "gives the fact-finder an opportunity to assess a witness's demeanor and determine who can be trusted." Id. at 581 (internal citation omitted).

Only after finding "a significant risk that the university erroneously deprived Doe of his protected interests" by denying him cross-examination did the Court note that "[t]his risk is all the more troubling considering the significance of Doe's interests and the minimal burden that the university would bear by allowing cross-examination in Doe's case." Id. at 582. "As it turns out," the Court stated, "the university already provides for a hearing with cross-examination in all misconduct cases other than those involving sexual assault." Id. The Court used this observation to bolster the ruling it had already made, not to limit the applicability of the ruling.

The Court then went on to further emphasize the importance of cross-examination, roundly rejecting the university's argument that Doe was adequately protected by being allowed to review the complainant's statement and identify inconsistencies for the investigator. "Cross-examination is essential in cases like Doe's because it does more than uncover inconsistencies—it 'takes aim at credibility like no other procedural device.' . . . Without the back-and-forth of adversarial questioning, the accused cannot probe the witness's story to test her memory, intelligence, or potential ulterior motives. Nor can the fact-finder observe the witness's demeanor under that questioning. For that reason, written statements cannot substitute for cross-examination. 'It is of great importance in the distribution of justice that witnesses should be examined face to face, that the parties should have the fairest opportunity of cross-examining them in order to bring out the whole truth; there is something in the manner in which a witness delivers his testimony which cannot be committed to paper, and which yet very frequently gives a complexion to his evidence, very different from what it would bear if committed to writing . . . .'" Id. at 582–83 (internal citations omitted).

Developments after Baum Court's ruling confirm its breadth. The University of Michigan filed a petition for rehearing en banc. Other Michigan universities, which did not have the same procedures, filed an amicus brief. The Sixth Circuit denied the petition, saying the original panel had already fully considered the issues it raised and that on consideration by the full court "[n]o judge has requested a vote on the suggestion for rehearing en banc."[12] Universities in the Sixth Circuit are now revising their procedures to comply with the Court's ruling.[13]

*Question 4.* Aside from the 6th Circuit's decision in Doe v. Baum, what are other courts around the country saying on the issues of live hearings, cross-examination, and the single-investigator model in university disciplinary proceedings?

Answer 4. As I stated, the rulings in Doe v. Baum and other cases are solidly based on long-standing precedent requiring that people accused of serious misconduct are entitled to a reasonable opportunity to defend themselves before impartial decisionmakers. This is constitutionally required for public institutions, and courts have applied similar requirements to private institutions based on Title IX, federal regulations, state law, or contractual documents.

One of the earliest, and most powerful, description of those rights in the context of a student disciplined under Title IX was in Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 603 (D. Mass. 2016), where the Court held that a private university did not provide the accused student the "basic fairness" required by state law and the parties' contract. "Here, Brandeis failed to provide a variety of procedural protections to John, many of which, in the criminal context, are the most basic and fundamental components of due process of law." Id. at 603. These "basic and fundamental components" included the right to confront the accuser; to present evidence at a hearing; and to separation of investigation, prosecution, and adjudication functions.

Regarding cross-examination, the Court said:

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to dismiss under the erroneous-outcome theory, a plaintiff must plead facts sufficient to (1) 'cast some articulable doubt' on the accuracy of the disciplinary proceeding's outcome, and (2) demonstrate a 'particularized ... causal connection between the flawed outcome and gender bias.'" Id. at 585.

[12] Doe v. Baum, No. 17–2213 (6th Cir.), Docs. 49, 55, 56.

[13] See Universities confront Title IX policy changes after proposed regulations, federal court rulings (Mar. 31, 2019), *http://www.kentwired.com/latest—updates/article—0d03846c-53de-11e9–*82d5–17570f289133.html.

- Brandeis did not permit John to confront or cross-examine J.C. [the complainant], either directly or through counsel. Presumably, the purpose of that limitation was to spare J.C. the experience of being subject to cross-examination. While protection of victims of sexual assault from unnecessary harassment is a laudable goal, the elimination of such a basic protection for the rights of the accused raises profound concerns.
- In the famous words of John Henry Wigmore, cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth." 3 Wigmore, Evidence § 1367, p. 27 (2d ed. 1923). The ability to cross-examine is most critical when the issue is the credibility of the accuser. . . .
- Here, there were essentially no third-party witnesses to any of the events in question, and there does not appear to have been any contemporary corroborating evidence. The entire investigation thus turned on the credibility of the accuser and the accused. Under the circumstances, the lack of an opportunity for cross-examination may have had a very substantial effect on the fairness of the proceeding.

Id. at 604–05.

Regarding the university's use of a single investigator model, the Court said:

- Under the Special Examiner Process, a single individual was essentially vested with the powers of an investigator, prosecutor, judge, and jury. Furthermore, those decisions were not reviewable except as to certain narrowly defined categories.
- The dangers of combining in a single individual the power to investigate, prosecute, and convict, with little effective power of review, are obvious. No matter how well-intentioned, such a person may have preconceptions and biases, may make mistakes, and may reach premature conclusions. The dangers of such a process can be considerably mitigated if there is effective review by a neutral party, but here that right of review was substantially circumscribed.

Id. at 606.

The Sixth Circuit's decision in Doe v. Univ. of Cincinnati, 872 F.3d 393 (6th Cir. 2017), from which the Baum decision logically flowed, made clear again that the cross-examination requirement is rooted in due process and legal precedent and essential to reliable results, and that "[r]eaching the truth through fair procedures is an interest Doe and UC have in common." Id. at 402 (emphasis added).

- "The Due Process Clause will not shield [a student] from suspensions properly imposed, but it disserves both his interest and the interest of the state if his suspension is in fact unwarranted." Goss [v. Lopez], 419 U.S. [565,] at 579, 95 S. Ct. 729. UC, of course, also has a "well recognized" interest in maintaining a learning environment free of sex-based harassment and discrimination. Bonnell v. Lorenzo, 241 F.3d 800, 822 (6th Cir. 2001). To that end, "ensuring allegations of sexual assault on college campuses are taken seriously is of critical importance, and there is no doubt that universities have an exceedingly difficult task in handling these issues." Brandeis, 177 F.Supp.3d at 602 (citation omitted).
- But if a university's procedures are insufficient to make "issues of credibility and truthfulness ? . . clear to the decision makers," that institution risks removing the wrong students, while overlooking those it should be removing. See Furey v. Temple Univ., 884 F. Supp. 2d 223, 252 (E.D. Pa. 2012). "The concern would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never unfair. Unfortunately, that is not the case, and no one suggests that it is." Goss, 419 U.S. at 579–80, 95 S. Ct. 729. Cross-examination, "the principal means by which the believability of a witness and the truth of his testimony are tested," can reduce the likelihood of a mistaken exclusion and help defendants better identify those who pose a risk of harm to their fellow students.

Id.

Other cases addressing the need for hearings and cross-examination in the specific context of campus Title IX proceedings are described below.

In series of recent cases in California state court, the courts have directed both public and private universities to set aside decisions finding male students respon-

sible for sexual misconduct, and have held that when a disciplinary decision turns on credibility, parties and witnesses must be subjected to questioning and cross-examination at a live hearing before a neutral adjudicator who cannot be the same person as the investigator. See, e.g., Doe v. Allee, 30 Cal. App. 5th 1036 (Cal. Ct. App. 2019). In the Allee case, the Court stated that "[f]or practical purposes, common law requirements for a fair disciplinary hearing at a private university mirror the due process protections at public universities," including "'a full opportunity to present [respondent's] defenses.'" Id. at 1061–62. Citing multiple cases, the Court held that when credibility is at stake, the accused must be allowed to cross-examine the accuser and adverse witnesses. It noted that a cross-examiner may "delve into the witness' story to test the witness' perceptions and memory;" may "expose testimonial infirmities such as forgetfulness, confusion, or evasion;" and may "reveal[] possible biases, prejudices, or ulterior motives' that color the witness's testimony." And, the Court noted, the "strategy may also backfire, provoking the kind of confident response that makes the witness appear more believable to the fact finder than [the cross-examiner] intended. . . . Whatever the outcome, 'the greatest legal engine ever invented for the discovery of truth' will do what it is meant to: 'permit[] the [fact finder] that is to decide the [litigant]'s fate to observe the demeanor of the witness in making his statement, thus aiding the [fact finder] in assessing his credibility.'" Id. at 1065–66 (internal citations omitted). The Allee Court also disapproved the university's use of a single investigator to resolve Title IX complaints without a hearing. In the Court's words:

> • As we have explained, in USC's system, no in–person hearing is ever held, nor is one required. Instead, the Title IX investigator interviews witnesses, gathers other evidence, and prepares a written report in which the investigator acts as prosecutor and tribunal, making factual findings, deciding credibility, and imposing discipline. The notion that a single individual, acting in these overlapping and conflicting capacities, is capable of effectively implementing an accused student's right of cross–examination by posing prepared questions to witnesses in the course of the investigation ignores the fundamental nature of cross–examination: adversarial questioning at an in–person hearing at which a neutral fact finder can observe and assess the witness' credibility . . . In light of these concerns, we hold that when a student accused of sexual misconduct faces severe disciplinary sanctions, and the credibility of witnesses (whether the accusing student, other witnesses, or both) is central to the adjudication of the allegation, fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross-examine those witnesses, directly or indirectly, at a hearing in which the witnesses appear in person or by other means (e.g., videoconferencing) before a neutral adjudicator with the power independently to find facts and make credibility assessments. That factfinder cannot be a single individual with the divided and inconsistent roles occupied by the Title IX investigator in the USC system.

Id. at 1068–69.

In Doe v. Regents of Univ. of California, 28 Cal. App. 5th 44 (Cal. Ct. App. 2018), the Court's ruling illustrates that the right to cross-examination is the right to effective cross-examination, and must include access to relevant information and the ability to ask questions relating to the respondent's defense. In that case, the university allowed a detective to testify about a single phrase from a sexual assault response team (SART) report without requiring production of the entire report to the hearing committee or the respondent. "Without access to the complete SART report, [respondent] did not have a fair opportunity to cross-examine the detective and challenge the medical finding in the report. The accused must be permitted to see the evidence against him. Need we say more?" Id. at 57. The university also violated respondent's rights by allowing the complainant to refuse to answer questions relating to his defense. "This deprived John of his right to cross-examine Jane and impeded his ability to present relevant evidence in support of his defense." Id. at 60.

In Norris v. Univ. of Colorado, Boulder, No. 1:18–CV–02243–LTB, 2019 WL 764568 (D. Colo. Feb. 21, 2019), the Court discussed cases holding that "a lack of meaningful cross-examination may contribute to a violation of due process rights of an accused student in a disciplinary hearing regarding sexual assault. . . . So with the credibility of the parties in the investigation at issue . . ., the lack of a full hearing with cross-examination provides evidence supporting a claim for a violation of his due process rights." Id. at *15 (emphasis added).

One of the cases Norris cited for the proposition that cross-examination must be "meaningful" was Gischel v. Univ. of Cincinnati, 302 F. Supp. 3d 961 (S.D. Ohio 2018). In that case, the Court found a viable procedural due process claim based on allegations that a hearing panel refused to ask entire categories of questions plaintiff deemed critical to his defense. This included questions to the complainant regarding her "inconsistent or inaccurate statements about how much she drank, the last events she remembered, and whether she was drugged." Id. at 978–79.

In Oliver v. University of Texas Southwestern Medical School, No. 3:18–CV–1549–B, 2019 WL 536376 (N.D. Tex. Feb. 11, 2019), the Court denied the university's motion to dismiss a student's procedural due process and Title IX claims. "[B]ased on Oliver's allegations, it appears that UTSW did not present any witnesses to the alleged assault for Oliver to effectively cross-examine such as Rowan [the complainant], nor did UTSW present key evidence [including audio files which plaintiff eventually proved the complainant had doctored, and pictures which established that complainant's bruises were from an injury at work, before the parties' alleged encounter]. . . . The Court recognizes that neither the Supreme Court nor the Fifth Circuit has explicitly required any one of these procedures. But taken together, the allegations show Oliver was not afforded sufficient procedural mechanisms in light of the facts and circumstances of this case and what he stood to lose. . . . [T]here was a substantial risk of erroneously depriving Oliver's interests through the procedures used, and the probable value of disclosing that evidence or having Rowan testify is clearly shown." Id. at *11, 13. The Court reached this conclusion without citing the Sixth Circuit cases, basing its decision on "the minimum procedural due-process required in previous cases" decided by the Fifth Circuit and the Supreme Court. Id. at *13. Regarding plaintiff's Title IX claim, the Court held that the "inference of gender bias in the erroneous outcome is further exacerbated by the fact that Oliver was never given access to the incriminating evidence against him nor was Rowan required to testify against him at trial, which significantly limited his ability to mount a viable defense." Id. at *18.

In Doe v. Univ. of Mississippi, No. 3:18–CV–138–DPJ–FKB, 2019 WL 238098 (S.D. Miss. Jan. 16, 2019), the Court denied a university's motion to dismiss a student's due process claim, in part because the student plausibly alleged that allowing him to cross-examine his accuser would have added "some value to the hearing." Id. at *10. The Court cited a 1970 U.S. Supreme Court opinion for the principle that "'[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.'" Id. at *9 (internal citation omitted). The Court also said that, even though the Fifth Circuit has not ruled on the specific issue, it was proper to address the need for cross-examination under the factors set forth in Mathews v. Eldridge, 424 U.S. 319, 332 (1976). Id. at *9. Mathews held that procedural due process "imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." Id. at* 6 (citing Mathews). In the context of school disciplinary proceedings, courts applying Mathews consider three factors: "'(a) the student's interests that will be affected; (b) the risk of an erroneous deprivation of such interests through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (c) the university's interests, including the burden that additional procedures would entail.'" Id. (citing Plummer v. Univ. of Houston, 860 F.3d 767, 773 (5th Cir. 2017). The university argued that requiring cross-examination would significantly burden it, but the Court stated that the Sixth Circuit does not require cross-examination in every case [as I noted above] and cited a Supreme Court case noting the "need for cross-examination 'where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings.'" Id. at *10 (internal citation omitted).

In Doe v. Marymount Univ., 297 F. Supp. 3d 573, 584 (E.D. Va. 2018), the Court denied a motion to dismiss a student's Title IX claim, holding among other thing that allegations that the student "was deprived the opportunity to identify and interview potential witnesses, to gather exculpatory evidence, to meet with the adjudicator in person, and to cross-examine [complainant], . . . taken together, [] warrant concern that [respondent] was denied a full and fair hearing." Id. at 584.

In Powell v. Montana State Univ., No. CV 17–15–BU–SEH, 2018 WL 6728061 (D. Mont. Dec. 21, 2018), the Court denied a university's motion for summary judgment on a student's due process claims, in part because he was denied the right to cross-examine a witness against him. The Court cited the Sixth Circuit's decisions and said they were consistent with Ninth Circuit precedent expressing the view that "a charge resulting in a disciplinary suspension of a student 'may require more formal

procedures' to satisfy components of our system of constitutional due process." Id. at *7 (internal citations omitted).

In Lee v. University of New Mexico, No. 17–1230, Order, at 2–3 (D.N.M. Sept. 20, 2018), available at *https://www.thefire.org/lee-v-university-of-new-mexico/,* the Court – citing only the Fourteenth Amendment itself – denied a motion to dismiss a student's due process claims, holding that "Lee's allegations plausibly support a finding that his sexual misconduct investigation resolved into a problem of credibility such that a formal or evidentiary hearing, to include the cross-examination of witnesses and presentation of evidence in his defense, is essential to basic fairness."

In Doe v. Pennsylvania State Univ., 336 F. Supp. 3d 441 (M.D. Pa. 2018), the Court denied a motion to dismiss a student's due process claims. The university used an "Investigative Model" in which a hearing panel resolved cases based on a paper record compiled by an investigator, with no in-person testimony and no opportunity for cross-examination. In concluding this model raised constitutional concerns, the Court emphasized "PSU's interest in securing accurate resolutions of student complaints like the one at issue here. PSU's educational mission is, of course, frustrated if it allows dangerous students to remain on its campuses. Its mission is equally stymied, however, if PSU ejects innocent students who would otherwise benefit from, and contribute to, its academic environment." Id. at 449 (Court's emphasis).

> • When the panel determined Mr. Doe's responsibility and sanction, it was relying solely on the Investigative Packet and its written responses. Mr. Doe's main objection to this paper-only Investigative Model is that it prohibited him from telling his story directly to the panel, and from challenging Ms. Roe's version of events before that panel. . . . In a case like this, however, where everyone agrees on virtually all salient facts except one—i.e., whether or not Ms. Roe consented to sexual activity with Mr. Doe—there is really only one consideration for the decisionmaker: credibility. After all, there were only two witnesses to the incident, with no other documentary evidence of the sexual encounter itself. As a result, in this Court's view, the Investigative Model's virtual embargo on the panel's ability to assess that credibility raises constitutional concerns. Consequently, while this Court is consistently "mindful of [the Supreme Court's] admonition [that j]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint," Defendants' motion to dismiss Mr. Doe's due process claim for a failure to state a claim upon which relief can be granted will be denied.

Id. at 450–51 (internal citations omitted).

In Doe v. Alger, 175 F. Supp. 3d 646, 661–662 (W.D. Va. 2016), the Court held a male student adequately alleged a procedural due process violation where a university appeal panel reversed a decision that cleared the student of alleged rape, without hearing live testimony despite the credibility issues. In a later opinion, the Court granted summary judgment to the student. 228 F. Supp. 3d 713 (W.D. Va. 2016).

*Question 5.* Are there rules or guidelines institutions should adopt to govern the live questioning of witnesses or parties in campus disciplinary proceedings? If so, do you have specific suggestions on what rules or guidelines institutions should adopt?

Answer 1. Yes. As the Sixth Circuit observed in Baum and Senator Alexander suggested at the hearing, the concern that direct interaction between an accuser and accused will cause trauma does not justify denying cross-examination altogether, but the concern can be mitigated by allowing "the accused student's agent to conduct cross-examination on his behalf. After all, an individual aligned with the accused student can accomplish the benefits of cross-examination—its adversarial nature and the opportunity for follow-up—without subjecting the accuser to the emotional trauma of directly confronting her alleged attacker." Baum, 903 F.3d at 583. Schools can, should, and do adopt measures to ensure respectful treatment of parties and witnesses and prevent irrelevant, unfair, or badgering questions. Schools can also allow a witness or party to be questioned outside the other party's physical presence, e.g., by using a witness screen or allowing questioning via Skype. See id. & n.3. For cross-examination to be meaningful, however, the parties and decisionmakers must be able to observe people as they testify, whether live or through electronic means. Id.

*Question 6.* 6. Do you have any specific suggestions on what guidelines or parameters, if any, should be used when informal resolution methods, such as mediation or restorative justice, are selected as a way to resolve sexual misconduct allegations, including sexual assaults?

Answer 6. Yes. Schools should establish in advance the kinds of informal resolutions they will offer, and should publicize the availability of informal resolution processes. When a complaint is filed, schools should notify both parties clearly and prominently that informal resolution is available, what it would involve, and the consequences of participating in it (including whether a student who opts to participate could later change his or her mind, and whether statements made during an informal resolution could later be used in a formal proceeding if one occurs). It would be appropriate for schools to encourage informal resolution – as the University of Washington does in its procedures for faculty – but they should not pressure parties to participate in an informal process. An informal resolution should proceed only if both parties give voluntary, written consent. Informal resolutions should be facilitated by a person or persons who are trained and skilled in the process, and should be conducted in a way that is fair and respectful to both parties.

*Question 7.* Should institutions be able to implement a statute of limitations to report an allegation of sexual misconduct, including sexual assault?

Answer 7. Yes. I have frequently seen cases in which a complaint is made to a school many months or years after an alleged incident occurred. At that point memories have faded, witnesses may be unavailable, and evidence may have been lost, making a fair and reliable resolution virtually impossible. At the same time, as long as both complainant and respondent attend the school, the school has an interest in addressing alleged sexual harassment or assault, and in some circumstances may have a legal obligation. There are different ways to approach this issue, and I would recommend it be addressed with input from many stakeholders. A few points to consider:

- A school could adopt a time limit with a provision it will consider significant extenuating circumstances that prevented the complaint from being brought within the period.
- Adopting and publicizing a limitations period could encourage complainants to bring their complaints at a time when they can be fairly and reliably resolved – to the benefit of both complainants and respondents. If the time period is reasonable and the school makes clear complaints are taken seriously, that should not pose an undue deterrent to reporting.
- If an alleged act continues to have effects after the limitations period expires, the school could address those effects without opening a disciplinary process. The Department's proposed regulations suggest various forms of non-punitive supportive measures that may be appropriate apart from a formal disciplinary process, finding, or sanction, including "counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures." Proposed 34 CFR § 106.30.
- A school may provide that it will not conduct a disciplinary proceeding if either the complainant or the respondent no longer attends the school; indeed, the school may not have jurisdiction in those circumstances. Regardless, a complainant who is still enrolled could be given supportive measures.

While this was not addressed in Senator Alexander's written questions, the Senator asked me during the hearing whether a respondent's testimony in a Title IX proceeding could be used against him in a criminal proceeding. I answered that it could, and I would like to supplement that answer here. The risk is very real, particularly when students are questioned without legal representation or without proper notice of the accusations against them. A 2015 article describes the case of a University of Wisconsin student whose statement during a Title IX investigation was used to arrest him. "The accused student denied the charges when interviewed by police, [Susan] Riseling [a university administrator and then-campus police chief] said. In his disciplinary hearing, however, he changed his story in an apparent attempt to receive a lesser punishment by admitting he regretted what had occurred. That version of events was 'in direct conflict with what he told police,' Riseling said. Police subpoenaed the Title IX records of the hearing and were able to use that as

evidence against the student. 'It's Title IX, not Miranda,' Riseling said. 'Use what you can.'" Jake New, Making Title IX Work, Inside Higher Ed (July 6, 2015), *https://www.insidehighered.com/news/2015/07/06/college-law-enforcement-administrators-hear-approach-make-title-ix-more-effective.*

If a Title IX proceeding continues while a criminal investigation is pending, a respondent's right to avoid self-incrimination must be protected and no adverse inference should be drawn if the respondent limits his participation or testimony.

SENATOR WARREN

*Question 1.* According to data from the U.S. Department of Justice, only one in five women who are sexually assaulted on campus will actually report the attack to the police.[1] What should Congress do to encourage students to report incidences of harassment and assault?

Answer 1. With respect to the Department of Justice publication referenced in the question, I would like to offer some points of clarification. First, the publication stated that it was based on responses to the National Crime Victimization Survey (for the period 1995–2013), and used the term "victims" to refer to people who reported in the survey that they had been raped or assaulted. Second, it stated that 20 percent of "female victims ages 18 to 24 enrolled part time or full time in a post-secondary institution" reported to police. For this figure, the publication did not address where alleged assaults occurred or whether the alleged assaulter was a fellow student, and specifically did not include reports to "other officials or administrators." Third, based on the survey, the publication set forth a rate of rape or sexual assault of 6.1 per 1000 female college students from 1995 to 2013, with the rate trending significantly downwards, from 9 per 1000 in 1997 to 4.3 per 1000 in 2013. As set forth in my written testimony, policymakers and advocates often claim that one in five women is sexually assaulted in college, and the Department of Justice's figures, generated by an office with substantial experience in producing statistics for questions related to crime and criminal activity, show a much lower rate – though, of course, even one sexual assault is too many. Finally, I note that the publication reported a rate of rape or sexual assault 1.2 times higher for college-aged females not enrolled in a post-secondary school: 7.6 per 1000 from 1995 to 2013. Of course, survey responses and figures do not prove sexual assault occurred. As I stated in my testimony and discuss again below, a finding of sexual harassment or assault in a specific case must depend on the individual facts of that case.

Turning to Senator Warren's question, given the focus of the HELP Committee and the April 2 hearing, I assume the question pertains to whether Congress should act to encourage students to report harassment and assault to their schools.

**First,** in addressing that question, Congress should have a thorough understanding of the measures that are already in place to encourage reporting. Six years have passed since the last year referenced in the Department of Justice's publication, and substantial progress has been made. In my experience, schools are already doing a great deal to encourage students to come forward if they encounter or witness harassment or assault. Based on long-standing federal law, all colleges and universities have a dedicated Title IX office, at least one and often a number of Title IX coordinators, and specific Title IX policies and procedures. These policies and procedures, published to students and employees and generally available on line, explain the options for reporting sexual harassment to the school or to law enforcement and the procedures for making and resolving complaints to the school. Schools offer continual training. They support advocacy groups. They host awareness campaigns such as "Take Back the Night" and "It's On Us." They provide extensive health and support services for students who believe they have experienced sexual harassment or assault, including services students can obtain without reporting to their Title IX offices. In my experience, students in 2019 know they have recourse at their schools, as well as through the criminal (and civil) justice system. Under the current legal framework, students may make their own decisions about whether or not to report an assault to the school and/or police. The Department of Education, in its 2018 Notice of Proposed Rulemaking, reported hearing "from a wide range of stakeholders about the importance of a school taking into account the wishes of the complainant in deciding whether or not a formal investigation and adjudication is

[1] U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics. (2014). Rape and Sexual Victimization Among College-Aged Females, 1995–2013. *https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf.*

warranted."[2] Students' right to decide whether or not to go to the police should also be respected.

**Second,** while the goal of ensuring that any student who is sexually harassed or assaulted feels comfortable in reporting the offense is a commendable one, the central purpose of a grievance procedure should be to ensure reliable results in particular cases. The overall goal must be to ensure that campus disciplinary proceedings are fundamentally fair to both parties; that each individual case is decided based on the facts of that case, objectively and fairly assessed; and that no student (whether complainant or respondent, and regardless of gender) is unjustifiably deprived of access to an education.[3]

To that end, schools should: a) resolve, and publicize their resolve, to take every complaint of sexual harassment or assault seriously; b) resolve, and publicize their resolve, to ensure complaints are handled through a process that is prompt and fundamentally fair to both parties; c) make sure all members of the school community know the school's policies and the protections available to all parties; d) offer appropriate, non-punitive support services to both parties, to increase the likelihood that they can continue their education, whether or not conduct of concern rises to the level of a particular definition of harassment and whether or not a formal complaint is filed; e) offer the parties the option of addressing a complaint through informal resolution processes; f) if a formal proceeding does occur, provide a fundamentally fair process and impartial decisionmakers; and g) educate the school community about the importance of fair procedures in a nation committed to the rule of law and the fact that both parties (as well as the schools themselves) benefit from disciplinary procedures that are fair, prompt, and reliable. Clear options for supportive measures and informal resolutions, with steps to ensure fair procedures and reliable outcomes if a formal grievance procedure takes place and with appropriate education, should encourage students who encounter sexual harassment or assault to report to and seek support from their schools.

*Question 2.* From your perspective, how would each of the following aspects of the Department of Education's proposed rule, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," affect a complainant's likelihood of reporting harassment or assault?

a. The live cross examination requirement;

b. The proposed definition of harassment, which would narrow the scope of what incidences of sexual misconduct schools are required to respond to;

c. The geographic location limitations, which would limit instances where schools may respond to sexual harassment and assault to school grounds, activities, and programs;

d. The clear and convincing standard requirement; and

e. The actual knowledge standard and requirements for filing formal complaints.

I am not aware of empirical data connecting the specifics of campus procedures to reporting patterns, and do not have a basis to answer the question specifically.

That said, I will share my thoughts, based on my experience and observations, on points a and d first, and then points b, c and e.

**First,** regarding points a and d, as discussed above and in my oral and written testimony, measures to ensure fair procedures and reliable outcomes in Title IX grievance procedures benefit both complainants and respondents, and are increasingly being required by the courts. In my written and oral testimony, I explained why live cross-examination is essential to a fair proceeding, and cited cases allowing accused students to sue their schools when they were not given the opportunity to cross-examine their accusers. In my responses to questions for the record from Senator Alexander, I cited additional cases reaching that result, including at least a dozen since early 2018 alone. In my written testimony, I also addressed the importance of the clear and convincing standard, given the severe and life-long con-

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[2] *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, https://www.federalregister.gov/documents/2018/11/29/2018–25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal.*

[3] I emphasize that Title IX's right to equal access to education means equal access for both complainants and respondents, regardless of gender. Students who are accused of sexual harassment or assault are routinely excluded from and denied the benefits of their school's educational programs and activities, whether or not they are found responsible. I explained this at length in response to Questions for the Record from Senator Alexander, which I understand will be included in the record for consideration by all Committee Members.

sequences of sexual harassment or assault charges, the anti-respondent, anti-male bias that pervades Title IX disciplinary proceedings now, and the need to ensure schools reach just results, not simply adopt fairer procedures on paper.

The Department of Education's proposed requirements regarding live hearings and cross-examination and provisions regarding the standard of evidence should also be considered in the context of the regulations as a whole. As set forth in my written testimony, the Department proposes to give schools and parties more flexibility to pursue informal, non-punitive resolutions. Only if a case advances to the formal grievance procedure will a live hearing and cross-examination be required, and the standard of evidence applied. And those cases are particularly likely to involve credibility issues and competing narratives, where cross-examination is essential for determining the truth. When live hearings and cross-examination do take place, the impact on students can be mitigated with measures to ensure respectful treatment of parties and witnesses; prevent irrelevant, unfair, or badgering questions; and keep the parties separated by use of screens or technology.

As California's Second Appellate District Court of Appeal held last year, **both** parties suffer from unfair procedures that deny a full testing of the allegations:

Due process-two preeminent words that are the lifeblood of our Constitution. Not a precise term, but most everyone knows when it is present and when it is not. It is often most conspicuous by its absence. Its primary characteristic is fairness. It is self-evident that a trial, an adjudication, or a hearing that may adversely affect a person's life must be conducted with fairness to all parties. Here, a university held a hearing to determine whether a student violated its student code of conduct. Noticeably absent was even a semblance of due process. **When the accused does not receive a fair hearing, neither does the accuser.**

It is ironic that an institution of higher learning, where American history and government are taught, should stray so far from the principles that underlie our democracy. This case turned on the Committee's determination of the credibility of the witnesses. Credibility cannot be properly decided until the accused is given the opportunity to adequately respond to the accusation. The lack of due process in the hearing here precluded a fair evaluation of the witnesses' credibility. **In this respect, neither Jane nor John received a fair hearing.**

*Doe v. Regents of Univ. of California, 28 Cal. App. 5th 44, 46, 61 (Cal. Ct. App. 2018) (emphasis added).*

If institutions of higher education properly educate their communities about the importance of fundamentally fair proceedings to ensure fair and reliable outcomes, the options for supportive measures and informal resolutions, and the protections available if live hearings do occur, students who experience sexual harassment or assault should be more rather than less willing to report to and seek support from their schools. And if schools' procedures are fairer and more reliable, they will also be less vulnerable to lawsuits. Litigation can extend the life of an allegation for years, and will often require complainants to sit for a deposition and/or provide documents, whether or not they are parties.

**Second,** regarding points b, c, and e, I have no data that would allow me to express an opinion on how these provisions could impact reporting. As I stated in my written testimony, I believe commenters have raised legitimate concerns about the proposed definitions and conditions that give rise to schools' duty to respond, and there is room for discussion and compromise. Counterproposals include, on the one hand, expanded definitions of sexual harassment and the conditions that give rise to a duty to respond, and, on the other, measures to ensure schools do not circumvent key procedural protections by handling cases of serious alleged misconduct outside of the Title IX process. While this is beyond the scope of the issues I was asked to address at the hearing, I encourage lawmakers and the Department to consider the comments and requests for clarification regarding the Department's proposed definitions of sexual harassment and sexual assault (Section 106.30 of the proposed regulations), the "deliberate indifference" standard (Section 106.44(a)); and the standards for what constitutes conduct within a school's "education program or activity" (Section 106.44(a)).

SENATOR ROSEN

*Question 1.* As others have expressed today, I am incredibly concerned with the proposed rollbacks of Title IX protections for sexual assault survivors and how they would jeopardize student safety, particularly students in my home state of Nevada. Among other harmful provisions, the Department of Education's proposed rule only allows schools to investigate a report of sexual harassment if it occurred "within a school's own program or activity." At University of Nevada Las Vegas (UNLV) – a

public university with the highest student enrollment rate in my state – only 6 percent of full-time students reside on campus. UNLV is a commuter campus, so the majority of students experience sexual violence, harassment, or misconduct involving fellow students outside the campus or university-sponsored program or activity. Likewise, in a 2016 survey of sexual conduct and campus safety, 79 percent of University of Nevada Reno students reported that "unwanted sexual conduct affecting students occurs off campus". And this doesn't even account for the many Nevadans who attend other commuter campuses like Truckee Meadows Community College, Nevada State College, and College of Southern Nevada. Changing the rules so schools only have to respond if the incident occurred on campus would have a direct negative impact on survivors of sexual assault and harassment in Nevada. Just because assault or harassment took place off campus, students may be forced to see their harasser on campus every day, and their education can be impacted – potentially resulting in them dropping out of school altogether.

a. Given that Title IX itself does not state that discriminatory conduct must occur during a school activity for there to be a discriminatory environment, how is this proposed change appropriate?

b. Nevada institutions like UNLV have pledged to continue to offer support and resources to survivors of off-campus assaults, even if this rule goes into effect. Unfortunately, not all schools will do the same. How will these changes affect the rate of student reporting of sexual misconduct?

Answer 1. As background for my response, I note that Senator Alexander, in his opening statement at the April 2 hearing, outlined the statutes and binding regulations that govern campus Title IX proceedings. As Senator Alexander also stated, the guidance documents issued during the previous administration, including OCR's 2011 Dear Colleague Letter and the 2014 Questions and Answers on Title IX Sexual Violence, did not undergo formal rulemaking procedures and were not legally binding, though OCR behaved as if they were – and schools responded accordingly. In my written testimony, I described those guidance documents and related actions by the federal government between 2011 and 2016. Doubtless the government's actions were motivated by the legitimate and necessary goal of making sure schools take sexual harassment and assault seriously. However, as set forth in my written testimony, the end result has been that schools have essentially eliminated fundamental fairness and due process protections for respondents – the great majority of whom are male – and have undermined the legitimacy of campus disciplinary proceedings and outcomes. Concerns about these developments have been voiced in public and scholarly commentary, by universities and colleges, in several state legislatures, and in an increasing number of opinions from federal and state courts

In this context – including developing case law and escalating concerns that individual Title IX complaints are not being justly resolved – the Department of Education has modified its position on Title IX enforcement. In September 2017, it withdrew the 2011 Dear Colleague Letter and the 2014 Questions and Answers on Title IX Sexual Violence, and released a new interim Q&A to guide schools on how to investigate and adjudicate sexual misconduct allegations under federal law. In November 2018, it issued a Notice of Proposed Rulemaking including proposed amended Title IX regulations. The basic statutory and regulatory framework that Senator Alexander summarized is still in place, and still requires schools to provide a prompt, fair, and impartial investigation and resolution. Court opinions also provide roadmaps for what that entails.

Answer (a). In response to Senator Rosen's question a, as I stated in my written testimony, I believe commenters have raised legitimate concerns about the proposed definitions and conditions that give rise to schools' duty to respond, including the standards for what constitutes conduct within a school's "education program or activity" (Section 106.44(a) of the proposed regulations). Counterproposals include, on the one hand, expansion of the conditions that give rise to a duty to respond, and, on the other, measures to ensure schools do not circumvent key procedural protections by handling cases of serious alleged misconduct outside of the Title IX process. While this is beyond the scope of the issues I was asked to address at the hearing, I encourage lawmakers and the Department to consider the comments and requests for clarification on that subject. I do note that the Department stated in its Notice of Proposed Rulemaking that "[w]hether conduct occurs within a recipient's education program or activity does not necessarily depend on the geographic location

of an incident (e.g., on a recipient's campus versus off of a recipient's campus)," and cited case law developing standards for making this determination. [4]

Answer (b). With respect to question b, I am not aware of empirical data connecting the specifics of campus procedures to reporting patterns, and do not have a basis to answer the question specifically. In general, however, in my experience, the support services and resources schools offer for students who believe they have experienced sexual harassment or assault are available whether or not a student wishes to file a complaint with the school's Title IX office. I am not aware of any school that has announced it would cease offering support and resources to students who report off-campus assault if the proposed regulations go into effect. Any college or university president who did so would likely face substantial, and deserved, campus criticism. Moreover, while the goal of ensuring that any student who is sexually harassed or assaulted feels comfortable in reporting the offense is a commendable one, the central purpose of a grievance procedure should be to ensure reliable results in particular cases. The overall goal for Title IX grievance procedures must be to ensure that campus disciplinary proceedings are fundamentally fair to both parties; that each individual case is decided based on the facts of that case, objectively and fairly assessed; and that no student – whether complainant or respondent, and regardless of gender – is unjustifiably deprived of access to an education. [5]

SENATOR SANDERS

*Question 1.* As you know, Secretary DeVos rescinded guidance issued by the Obama administration that helped schools understand their responsibility to address campus sexual assault and ensure student safety and rights. Colleges and universities are focused on policies and procedures, the Department of Education ensures schools comply with federal law and it seems students, faculty and visitors to campus are an afterthought. Based on your experience working in the field of criminal law, how should the views, perspectives and experiences of students and various stakeholders taken into account to ensure that everyone feels safer on campus?

Answer 1. I would like to open with some background regarding the previous administration's guidance and where it fit within the statutory and regulatory framework governing campus Title IX proceedings.

As Senator Alexander outlined in his opening statement at the April 2 hearing, federal statutes and legally binding regulations forbid gender discrimination and retaliation at federally funded educational institutions (i.e., most colleges and universities in the United States) and require prompt and equitable disciplinary proceedings. These include Title IX itself, which provides that "[n]o 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," 20 U.S.C. § 1681(a); the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, as amended in 2013, which states that school disciplinary procedures for alleged sexual misconduct must "provide a prompt, fair, and impartial investigation and resolution," 20 U.S.C. § 1092(f)(8)(B)(iv)(I)(aa); binding regulations implementing Title IX, issued by the Department of Education and Department of Justice, which require schools to "adopt and publish grievance procedures providing for prompt and equitable resolution of student . . . complaints alleging any action which would be prohibited" by Title IX and implementing regulations, 34 C.F.R. 106.8(b) and 45 C.F.R. § 86.8(b); and binding regulations implementing the Clery Act, which specify the requirements for "prompt, fair, and impartial" proceedings, including notice, fair investigations, compliance with schools' policies, transparency to both accuser and accused, equal access to evidence, impartial officials, and explanations of "the rationale for the result and the sanctions," 34 C.F.R. § 668.46(k). A guidance document issued by the Office for Civil Rights (OCR) in 2001, after public notice and comment, also outlined the elements of a fair and equitable process; stated that "[a]ccording

[4] *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,* 83 FR at 61468, *https://www.federalregister.gov/documents/2018/11/29/2018*–25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal.

[5] I emphasize that Title IX's right to equal access to education means equal access for both complainants and respondents, regardless of gender. Students who are accused of sexual harassment or assault are routinely excluded from and denied the benefits of their school's educational programs and activities, whether or not they are found responsible. I explained this at length in response to Questions for the Record from Senator Alexander, which I understand will be included in the record for consideration by all Committee Members.

due process to both parties involved, will lead to sound and supportable decisions"; and made clear that Title IX's "due process" requirement applies to both public and private colleges and universities. *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties,* at 2, 20, 22, *https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf).*

As Senator Alexander also stated in his opening, the guidance documents issued during the previous administration, including OCR's 2011 Dear Colleague Letter and the 2014 Questions and Answers on Title IX Sexual Violence, did not undergo formal rulemaking procedures and were not legally binding, though OCR behaved as if they were – and schools responded accordingly. In my written testimony, I described those guidance documents and related actions by the federal government between 2011 and 2016. Doubtless the government's actions were motivated by the legitimate and necessary goal of making sure schools take sexual harassment and assault seriously. However, as set forth in my written testimony, the end result has been that schools have essentially eliminated fundamental fairness and due process protections for respondents – the great majority of whom are male – and have undermined the legitimacy of campus disciplinary proceedings and outcomes. Concerns about these developments have been voiced in public and scholarly commentary, by universities and colleges, in several state legislatures, and in an increasing number of opinions from federal and state courts.

In this context – including developing case law and escalating concerns that individual Title IX complaints are not being justly resolved – the Department of Education has modified its position on Title IX enforcement. In September 2017, it withdrew the 2011 Dear Colleague Letter and the 2014 Questions and Answers on Title IX Sexual Violence, and released a new interim Q&A to guide schools on how to investigate and adjudicate sexual misconduct allegations under federal law. In November 2018, it issued a Notice of Proposed Rulemaking including proposed amended Title IX regulations. The basic statutory and regulatory framework, summarized above, is still in place, and still requires schools to provide a prompt, fair, and impartial investigation and resolution. Court opinions also provide roadmaps for what that entails.

While the goal of ensuring that everyone feels safer on campus is a commendable one, the central purpose of a grievance procedure should be to ensure reliable results in particular cases. The overall goal must be to ensure that campus disciplinary proceedings are fundamentally fair to both parties; that each individual case is decided based on the facts of that case, objectively and fairly assessed; and that no student – whether complainant or respondent, and regardless of gender – is unjustifiably deprived of access to an education.[6] The stakeholders here are not just students and schools, but everyone concerned with the long-term negative effects of government deprivation of civil liberties.

*Question 2.* The Clery Act, amended by the Violence Against Women Act (VAWA), requires colleges and universities across the United States to disclose information about crime on and around their campuses. The law applies to most institutions of higher education because it compels compliance in order to participate in federal student financial aid programs. Again, based on your experience working in the field of criminal law, are schools fully complying with the Clery Act? Is the Department of Education properly enforcing the Clery Act and VAWA?

Answer 2. Respectfully, this question is not within the scope of my experience in representing individual students.

*Question 3.* Colleges and universities seem to be struggling with the repeal of the Obama Title IX rules since they provided much needed guidance for institutions experiencing rising cases of sexual assault and harassment. While Secretary DeVos has proposed new guidelines, they are not in effect and have drawn criticism for favoring the rights of the accused over those of the survivor and for not actually preventing or addressing campus sexual assault. In the meantime, how can colleges and universities strengthen their campus disciplinary process to ensure that all students are safer on and near campus, especially if students feel discouraged from coming forward about sexual assaults and other acts of violence?

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[6] I emphasize that Title IX's right to equal access to education means equal access for both complainants and respondents, regardless of gender. Students who are accused of sexual harassment or assault are routinely excluded from and denied the benefits of their school's educational programs and activities, whether or not they are found responsible. I explained this at length in response to Questions for the Record from Senator Alexander, which I understand will be included in the record for consideration by all Committee Members.

Answer 3. For background relevant to this question, please see my response to Question 1 and my written testimony. As I have noted, the basic statutory and regulatory framework governing Title IX proceedings is still in place, and the courts have provided roadmaps for what is required. While the Department has opened a notice and comment proceeding for its proposed regulations, to ensure all stakeholders are heard before legally binding regulations are issued, it has issued interim guidance for schools on how to investigate and adjudicate allegations under federal law.

Regarding the concern that students "feel discouraged from coming forward," I note that, in my experience, schools are already doing a great deal to encourage students to come forward if they encounter or witness sexual harassment or assault. Based on long-standing federal law, all colleges and universities have a dedicated Title IX office, at least one and often a number of Title IX coordinators, and specific Title IX policies and procedures. These policies and procedures, published to students and employees and generally available on line, explain the options for reporting sexual harassment to the school or to law enforcement and the procedures for making and resolving complaints. Schools offer continual training. They support advocacy groups. They host sexual awareness campaigns such as "Take Back the Night" and "It's On Us." They provide extensive health and support services for students who believe they have experienced sexual harassment or assault, including services students can obtain without reporting to their Title IX offices. In my experience, students in 2019 know that they have recourse at their schools, as well as through the criminal (and civil) justice system. Under the current legal framework, students may make their own decisions about whether or not to report an assault to the school and/or police.

In addition, as I said with respect to the goal of ensuring people feel safe, the goal of encouraging students to come forward about sexual assault is a commendable one, but the central purpose of a grievance procedure should be to ensure reliable results in particular cases. To that end, schools should: a) resolve, and publicize their resolve, to take every complaint of sexual harassment or assault seriously; b) resolve, and publicize their resolve, to ensure complaints are handled through a process that is prompt and fundamentally fair to both parties; c) make sure all members of the school community know the school's policies and the protections available to all parties; d) offer appropriate, non-punitive support services to both parties, to increase the likelihood that they can continue their education, whether or not conduct of concern rises to the level of a particular definition of harassment and whether or not a formal complaint is filed; e) offer the parties the option of addressing a complaint through informal resolution processes; f) if a formal proceeding does occur, provide a fundamentally fair process and impartial decisionmakers; and g) educate the school community about the importance of fair procedures in a nation committed to the rule of law and the fact that both parties (as well as the schools themselves) benefit from disciplinary procedures that are fair, prompt, and reliable. Clear options for supportive measures and informal resolutions, with steps to ensure fair procedures and reliable outcomes if a formal grievance procedure takes place and with appropriate education, should encourage students who encounter sexual harassment or assault to report to and seek support from their schools.

Measures to ensure fair procedures and reliable outcomes in Title IX grievance procedures benefit both complainants and respondents, as well as the schools themselves, and are increasingly being required by the courts. In my written and oral testimony, I explained why live hearings and cross-examination in particular are essential to a fair proceeding, and cited cases allowing accused students to sue their schools when they were not given the opportunity to cross-examine their accusers. In my responses to questions for the record from Senator Alexander, I cited additional cases reaching that result, including at least a dozen since early 2018 alone. In my written testimony, I also addressed the importance of the clear and convincing standard, given the severe and life-long consequences of sexual harassment or assault charges, the anti-respondent, anti-male bias that pervades Title IX disciplinary proceedings now, and the need to ensure schools reach just results, not simply adopt fairer procedures on paper.

The Department of Education's proposed requirements regarding live hearings and cross-examination and provisions regarding the standard of evidence should also be considered in the context of the regulations as a whole. As set forth in my written testimony, the Department proposes to give schools and parties more flexibility to pursue informal, non-punitive resolutions. Only if a case advances to the formal grievance procedure will a live hearing and cross-examination be required, and the standard of evidence applied. And those cases are particularly likely to involve credibility issues and competing narratives, where cross-examination is essen-

tial for determining the truth. When live hearings and cross-examination do take place, the impact on students can be mitigated with measures to ensure respectful treatment of parties and witnesses; prevent irrelevant, unfair, or badgering questions; and keep the parties separated by use of screens or technology.

As California's Second Appellate District Court of Appeal held last year, both parties suffer from unfair procedures that deny a full testing of the allegations:

> Due process-two preeminent words that are the lifeblood of our Constitution. Not a precise term, but most everyone knows when it is present and when it is not. It is often most conspicuous by its absence. Its primary characteristic is fairness. It is self-evident that a trial, an adjudication, or a hearing that may adversely affect a person's life must be conducted with fairness to all parties. Here, a university held a hearing to determine whether a student violated its student code of conduct. Noticeably absent was even a semblance of due process. **When the accused does not receive a fair hearing, neither does the accuser.**
>
> It is ironic that an institution of higher learning, where American history and government are taught, should stray so far from the principles that underlie our democracy. This case turned on the Committee's determination of the credibility of the witnesses. Credibility cannot be properly decided until the accused is given the opportunity to adequately respond to the accusation. The lack of due process in the hearing here precluded a fair evaluation of the witnesses' credibility. **In this respect, neither Jane nor John received a fair hearing.**

*Doe v. Regents of Univ. of California, 28 Cal. App. 5th 44, 46, 61 (Cal. Ct. App. 2018) (emphasis added).*

If institutions of higher education properly educate their communities about the importance of fundamentally fair proceedings to ensure fair and reliable outcomes, the options for supportive measures and informal resolutions, and the protections available if live hearings do occur, students who experience sexual harassment or assault should be more rather than less willing to report to and seek support from their schools. And if schools' procedures are fairer and more reliable, they will also be less vulnerable to lawsuits. Litigation can extend the life of an allegation for years, and will often require complainants to sit for a deposition and/or provide documents, whether or not they are parties.

Finally, I would like to express my concern about the use of the term "survivor" in this context. A campus Title IX disciplinary tribunal hears allegations between a complainant and a respondent, or between an accuser and an accused—not between "the accused [and] the survivor." Deeming the complainant a survivor prejudges the outcome of the case. As the U.S. District Court of Massachusetts held in Doe v. Brandeis University, "Whether someone is a 'victim' is a conclusion to be reached at the end of a fair process, not an assumption to be made at the beginning. Each case must be decided on its own merits, according to its own facts."[7] A fair system – designed not to prejudge the case but to treat both parties with respect and to ensure that the school's goal is to determine the truth of the allegations – remains the best way to ensure safety for all students without denigrating the rights of any.

*Question 4.* What changes to Secretary DeVos' proposed Title IX guidance would you recommend to ensure that the administration does not create a campus sexual assault disciplinary process that favors wealthier students and their families who can afford attorneys and consultants to guide them through the labyrinth of filing a formal complaint with the "appropriate person," notification requirements, live cross examinations, and extensive knowledge of criminal procedure?

Answer 4. As I have stated, fundamentally fair campus proceedings are essential and required by law.[8] In my experience, under the system as it exists now, schools generally make very substantial efforts to ensure that reporting is easy and provide complainants ample support and resources throughout the process, including access to advisors trained in advocating for reported victims of sexual assault. Respondents have commonly not received the same support or resources, and they have been the ones who need money and connections to protect themselves. I have frequently seen cases in which school policies are unclear and internally inconsistent. Sometimes school officials themselves do not understand their own policies and have not given

[7] *Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 573 (D. Mass. 2016).*

[8] It is important to note that Title IX proceedings are not criminal proceedings, though the consequences for respondents can be severe and permanent.

accused students even the most basic protections, such as notice, access to evidence, and impartial decisionmakers. The existing system has been particularly detrimental to poor students, and disproportionately students of color.[9]

Procedures that are fundamentally fair and transparent will make it more rather than less likely that students without economic means will be treated fairly. And the Department's proposals encourage schools to provide support and resources for both parties, regardless of whether a formal complaint is filed and regardless of whether the alleged conduct fits certain regulatory definitions, and give schools and parties more flexibility to pursue informal resolution. These provisions offer a path to resolve matters at lower economic and emotional cost to both parties. I do believe policymakers and schools should give more consideration to how to ensure that both parties have suitable, trained advisors if a formal grievance proceeding takes place and a live hearing with cross-examination is necessary.

## RESPONSE BY FATIMA GOSS GRAVES TO QUESTIONS OF SENATOR WARREN, SENATOR ROSEN, AND SENATOR SANDERS

### SENATOR WARREN

*Question 1.* According to data from the U.S. Department of Justice, only one in five women who are sexually assaulted on campus will actually report the attack to the police.[1] What should Congress do to encourage students to report incidences of harassment and assault?

Answer 1. Congress should ensure that federal policies and enforcement mechanisms are designed to ensure students feel safe to report sexual harassment and sexual assault, and that campuses will take each report of sexual harassment, including sexual assault, seriously. This includes requiring that schools respond to sexual harassment that they know or reasonably should know about and investigate online and off-campus conduct, and that schools have equitable grievance procedures that will not re-traumatize complainants or deter them from participating in the grievance process.

*Question 2.* From your perspective, how would each of the following aspects of the Department of Education's proposed rule, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," affect a complainant's likelihood of reporting harassment or assault? a. The live cross examination requirement:

Answer 2. The proposed rules ignore the devastating impact of sexual violence and other forms of sexual harassment in schools. Instead of effectuating Title IX's purpose of protecting students and school employees from sexual abuse and other forms of sexual harassment that is, from unlawful sex discrimination they will make it harder for individuals to report abuse, allow (and sometimes require) schools to ignore reports when they are made, and unfairly tilt the investigation process in favor of respondents, to the direct detriment of survivors.

*Question (a)* The live cross examination requirement:

Answer a. Schools are ill-equipped to effectively meet the goals of live cross-examination. In student misconduct proceedings, schools are less likely to be equipped to apply general rules of evidence or trial procedure or apply the procedural protections that witnesses have during cross-examination in criminal or civil court proceedings[2] and ensure that they are not subject to improper questions. Nor is there

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[9] *See* Emily Yoffe, *The Question of Race in Campus Sexual-Assault Cases; Is the system biased against men of color?,* The Atlantic (Sept. 11, 2017), *https://www.theatlantic.com/education/archive/2017/09/the-question-of-race-in-campus-sexual-assault-cases/539361/;* Ben Trachtenberg, *How University Title IX Enforcement and Other Discipline Processes (Probably) Discriminate Against Minority Students,*18 Nevada Law Journal 107 (Fall 2017), *https://papers.ssrn.com/sol3/papers.cfm?abstract—id=3035999* ("increasingly muscular Title IX enforcement—launched with the best of intentions in response to real problems— almost certainly exacerbates yet another systemic barrier to racial justice and equal access to educational opportunities"). Please also see my answers to Senator Alexander's QFRs, where I cite comments filed by students and their families who have suffered harm from unfair campus procedures, including through substantial legal bills.

[1] U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics. (2014). Rape and Sexual Victimization Among College-Aged Females, 1995–2013. *https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf.*

[2] The proposed rules impose only mild restrictions on what it considers "relevant" evidence. See proposed § 106.45(b)(3)(vi) (excluding evidence "of the complainant's sexual behavior or predisposition, unless such evidence about the complainant's sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged" or to prove consent).

a judge available to rule on objections. Live cross-examination will also only deter reporting of sexual assault and re-traumatize many complainants participating in the process. The systems we build on campus to investigate and address student reports of sexual harassment must both enable truth-seeking and avoid perpetuating a hostile environment. Direct cross-examination of a victim by his or her assailant or the assailant's representative in campus misconduct proceeding is likely to result in the latter without uniquely promoting the former. 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 [3] would understandably discourage many students—parties and witnesses—from participating in the grievance process, chilling those who have experienced or witnessed harassment from coming forward. [4] Any live cross-examination requirement would also lead to sharp inequities, due especially to the "huge asymmetry" that would arise when respondents are able to afford attorneys and complainants cannot. [5] According to the president of Association of Title IX Administrators (ATIXA), the live cross-examination provision alone—"even with accommodations like questioning from a separate room—would lead to a 50 percent drop in the reporting of misconduct." [6]

Many advocates of live cross-examination in school grievance procedures, assume that cross-examination will improve the reliability of a decision-maker's determinations of responsibility and allow them to discern "truth." [7] But the reality is much more complicated, particularly in schools, where procedural protections against abusive, misleading, confusing, irrelevant, or inappropriate tactics are largely unavailable. Empirical studies show that adults give significantly more inaccurate responses to questions that involve the features typical of cross-examination, like relying on leading questions, compound or complex questions, rapid-fire questions, closed (i.e., yes or no) questions, questions that jump around from topic to topic, questions with double negatives, and questions containing complex syntax or complex vocabulary. [8] While these common types of questions are likely to confuse adults and result in inaccurate or misleading answers, these problems are compounded and magnified when such questions are targeted at young people and minors. [9] Moreover, there are frequently civil rights investigations, including sexual harassment investigations, held in the workplace settings without live cross-examination, which clearly indicates that cross-examination is not the only means to test the truth.

Most fundamentally, any rule requiring institutions of higher education to conduct live, quasi-criminal trials with live cross-examination to address allegations of sexual harassment, when no such requirement exists for addressing any other form of student or employee misconduct at schools, communicates the message that those alleging sexual assault or other forms of sexual harassment are uniquely unreliable

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[3] 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).

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

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

[6] Id.

[7] See, e.g., 83 Fed. Reg. at 61476. The Department of Education offers no evidence to support its assumption that live -cross examination will improve the reliability of schools' determinations regarding sexual assault; it merely cites a case which relies on John Wigmore's evidence treatise. See id. (citing California v. Green, 399 U.S. 149, 158 (1970) (quoting John H. Wigmore, 5 Evidence sec. 1367, at 29 (3d ed., Little, Brown & Co. 1940))).

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

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

and untrustworthy. Implicit in requiring cross-examination for complaints of sexual harassment, but not for complaints of other types of student misconduct, is an extremely harmful, persistent, deep-rooted, and misogynistic skepticism of sexual assault and other harassment complaints. Sexual assault is already dramatically underreported. This underreporting, which significantly harms schools' ability to create safe and inclusive learning environments, will only be exacerbated if any such reporting forces complainants into traumatic, burdensome, and unnecessary procedures built around the presumption that their allegations are false. This selective requirement of cross-examination harms complainants and educational institutions.

Unsurprisingly, Title IX experts, student conduct experts, institutions of higher education,[10] and mental health experts overwhelmingly oppose live cross-examination. ATIXA, for example, opposes live, adversarial cross-examination, instead recommending that investigators "solicit questions from the parties, and pose those questions the investigators deem appropriate in the investigation interviews."[11] ASCA agrees that schools should "limit[] advisors' participation in student conduct proceedings."[12] The American Bar Association recommends that schools provide "the opportunity for both parties to ask questions through the hearing chair."[13] The Association of Independent Colleges and Universities in Massachusetts (AICUM), representing 55 accredited, nonprofit institutions of higher education, oppose the cross-examination requirement because it would "deter complainants from coming forward, making it more difficult for institutions to meet Title IX's very purpose preventing discrimination and harassment, stopping it when it does occur, and remedying its effects."[14] The Association of American Universities (AAU), representing 60 leading public and private universities, oppose the requirement because it can be "traumatizing and humiliating" and "undermines other educational goals like teaching acceptance of responsibility."[15] And over 900 mental health experts who specialize in trauma state that subjecting a survivor of sexual assault to cross-examination in the school's investigation would "almost guarantee[] to aggravate their symptoms of post-traumatic stress," and "is likely to cause serious to harm victims who complain and to deter even more victims from coming forward."[16]

*Question b.* The proposed definition of harassment, which would narrow the scope of what incidences of sexual misconduct schools are required to respond to;

Answer b. The Department's proposed rules would also require schools to dismiss all complaints of sexual harassment that do not meet its proposed narrow definition.

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[10] Letter from Pepper Hamilton to Sec'y Elisabeth DeVos at 15 (Jan. 30, 2019) [hereinafter Pepper Hamilton Comment], *https://www.pepperlaw.com/resource/35026/22G2,* ("[A]dversarial cross-examination will unnecessarily increase the anxiety of both parties going through the process. For complainants in particular, this may lead them to simply not come forward or utilize the school's process, no matter how meritorious their claims may be. As a result, our campuses will be less safe."); Letter from Georgetown University to Sec'y Elizabeth DeVos as 7 (Jan. 30. 2019), *https://georgetown.app.box.com/s/fwk978e3oai8i5hpq0wqa70cq9iml2re* ("Mandatory cross-examination by advisors will have a chilling effect on reporting and therefore diminish accountability of perpetrators. We already know that the majority of students who experience sexual misconduct never proceed with a formal complaint. There is little doubt that the specter of being cross-examined by a trained criminal defense attorney during a school's grievance procedure would drive down the number of students seeking redress through formal process even further.").

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

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

[13] Am. Bar Ass'n, ABA Criminal Justice Section Task Force On College Due Process Rights and Victim Protections: Recommendations for Colleges and Universities in Resolving Allegations of Campus Sexual Misconduct 8–10 (June 2017) [hereinafter Am. Bar Ass'n Task Force].

[14] Letter from Ass'n of Indep. Colls. and Univs. (AICUM) to Sec'y Elisabeth DeVos (Jan.23, 2019) [hereinafter AICUM Letter], *http://aicum.org/wp-content/uploads/2019/01/AICUM-public-comments-on-Notice-of-Proposed-Rulemaking-%E2%80%9CNPRM%E2%80%9D-amending-regulations-implementing-Title-IX-of-the-Education-Amendments-of-1972–Title-IX%E2%80%9D–Docket-ID–ED–2018–OCR–0064.pdf.*

[15] See Letter from Ass'n of Am. Univs. (AAU) to Brittany Bull (Jan. 24, 2019) [hereinafter AAU Letter], *https://www.aau.edu/sites/default/files/AAU–Files/Key-Issues/Higher-Education-Regulation/AAU–Title-IX–Comments-1–24–19.pdf.*

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

The proposed rules [17] define sexual harassment as (1) "[a]n employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct"; (2) "[u]nwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the [school's] education program or activity"; or (3) "[s]exual assault, as defined in 34 CFR 668.46(a)." The proposed rules mandate dismissal of all complaints of harassment that do not meet this standard. Thus, if a complaint did not allege quid pro quo harassment by an employee or sexual assault, a school would be required to dismiss a student's Title IX complaint if the harassment has not yet advanced to a point that it is actively harming a student's education. A school would be required to dismiss such a complaint even if it involved harassment by a teacher or other school employee. A school would be required to dismiss such a complaint even if the school would typically take action to address behavior that was not based on sex but was similarly harassing, disruptive, or intimidating. The Department's proposed definition is out of line with Title IX purposes and precedent, discourages reporting, unjustifiably creates a higher standard for sexual harassment than other types of harassment and misconduct, and excludes many forms of sexual harassment that interfere with equal access to educational opportunities.

Acting arbitrarily, the Department does not provide a compelling or persuasive justification to change the definition of sexual harassment from that in the 2001 Guidance, which defines sexual harassment as "unwelcome conduct of a sexual nature" [18] The current definition rightly charges schools with responding to harassment before it escalates to a point that students suffer severe harm. But under the Department's proposed, narrower definition of harassment, students would be forced to endure repeated and escalating levels of abuse, from a student or professor, before their schools would be permitted to take steps to investigate and stop the harassment.

The Department's proposed definition is also vague and complicated. Administrators, employees, and students would struggle to understand which complaints meet the standard. These difficulties would be significantly compounded for students with developmental disabilities. Students confronted with this lengthy, complicated definition of sexual harassment would have a hard time understanding whether the harassment they endured meets the Department's narrow standard. How would these students know what allegations and information to put in their formal complaint in order to avoid mandatory dismissal? A student may believe that she suffered harassment that was both severe and pervasive, but does she know whether it was also "objectively offensive" and whether it "effectively denied" her of "equal access" to a "program or activity?"

The Department's proposed definition would discourage students from reporting sexual harassment. Already, the most commonly cited reason for students not reporting sexual harassment is the fear that it is "insufficiently severe" to yield a response. [19] Moreover, if a student is turned away by her school after reporting sexual harassment because it does not meet the proposed narrow definition of sexual harassment, the student is even more unlikely to report a second time when the harassment escalates. Similarly, if a student knows of a friend or classmate who was turned away after reporting sexual harassment, the student is unlikely to make even a first report. By the time a student reports sexual harassment that the school can or must respond to, it may already be too late: because of the impact of the harassment, the student might already be ineligible for an important course for her major, disqualified from applying to a dream graduate program, or derailed from graduating altogether.

Finally, the Department's harassment definition and mandatory dismissal requirement would create inconsistent rules for sexual harassment as compared to other misconduct. Harassment based on race or disability, for example, would continue to be governed by the more inclusive "severe or pervasive" standard for creating a hostile educational environment. [20] And schools could address harassment that was not sexual in nature even if that harassment was not "severe and pervasive" while, at the same time, being required to dismiss complaints of similar con-

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[17] §§ 106.30 and 106.45(b)(3).

[18] Id.

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

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

duct if it is deemed sexual. This would create inconsistent and confusing rules for schools in addressing different forms of harassment. It would send a message that sexual harassment is less deserving of response than other types of harassment and that victims of sexual harassment are inherently less deserving of assistance than victims of other forms of harassment. It would also force students who experience multiple and intersecting forms of harassment to slice and dice their requests for help from their schools in order to maximize the possibility that the school might respond, carefully excluding reference to sexual taunts and only reporting racial slurs by a harasser, for example. [21]

*Question c.* The geographic location limitations, which would limit instances where schools may respond to sexual harassment and assault to school grounds, activities, and programs;

Answer c. The Department's proposed rules would also require schools to dismiss all complaints of off-campus or online sexual harassment that happen outside of a school-sponsored program—even if the student is forced to see their harasser at school every day and the harassment directly impacts their education as a result. The proposed rules conflict with Title IX's statutory language, which does not depend on where the underlying conduct occurred but instead prohibits discrimination that "exclude[s a person] from participation in, . . . denie[s a person] the benefits of, or . . . subject[s a person] to discrimination under any education program or activity . . . ." [22] For almost two decades, the Department's guidance documents have agreed that schools are responsible for addressing sexual harassment if it is "sufficiently serious to deny or limit a student's ability to participate in or benefit from the education program," [23] regardless of where it occurs. [24] No student who experiences out-of-school harassment should be forced to wait until they are sexually harassed again on school grounds or during a school activity in order to receive help from their school. Nor should they be required to sit in class next to their assailant with no recourse.

Sexual harassment and assault also occur both on-campus and in off-campus spaces closely associated with school. Nearly nine in ten college students live off campus. [25] According to a 2014 U.S. Department of Justice report, 95 percent of sexual assaults of female students ages 18–24 occur outside of school. [26] Forty-one percent of college sexual assaults involve off-campus parties [27] and many fraternity and sorority houses are very much a part of the school community but physically located off campus. Students are also far more likely to experience sexual assault if they are in a sorority (nearly one and a half times more likely) or fraternity (nearly three

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[21] 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.*

[22] 20 U.S.C. § 1681(a).

[23] U.S. Dep't of Educ., Office for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (2001) [hereinafter 2001 Guidance], *https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.*

[24] U.S. Dep't of Educ. Office for Civil Rights, Questions and Answers on Campus Sexual Misconduct (Sept. 2017) [hereinafter 2017 Guidance] at 1 n.3, *https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf* ("Schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities"); 2014 Guidance ("a school must process all complaints of sexual violence, regardless of where the conduct occurred"); 2011 Guidance ("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"); U.S. Dep't of Educ. Office for Civil Rights, Dear Colleague Letter: Harassment and Bullying (Oct. 26, 2010) at 2 [hereinafter 2010 Guidance], *https://ww2ed.gov/about/offices/ list/ocr/letters/colleague-201104.pdf* (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).

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

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

[27] United Educators, Facts From United Educators' Report - Confronting Campus Sexual Assault: An Examination of Higher Education Claims (2015), *https://www.ue.org/sexual—assault—claims—study.*

times more likely).[28] But under the proposed rules, if a college or graduate student is sexually assaulted by a classmate in off-campus housing, their university would be required to dismiss their complaint—even though almost nine in ten college students live off campus.[29] The proposed rules would also pose particular risks to students at community colleges and vocational schools. Approximately 5.8 million students attend community college (out of 17.0 million total undergraduate students),[30] and 16 million students attend vocational school.[31] But because very few of these students live on campus, the harassment they experience by faculty or other students is especially likely to occur outside of school, and therefore outside of the protection of the proposed Title IX rules. Finally, proposed § 106.8(d) would create a unique harm to the 10 percent of U.S. undergraduate students who participate in study abroad programs. If any of these students report experiencing sexual harassment during their time abroad, including within their study abroad program, their schools would be required to dismiss their complaints—even if they are forced to see their harasser in the study abroad program every day, and even if they continue to be put into close contact with their harasser when they return to their home campus.

By forcing schools to dismiss complaints of out-of-school sexual harassment, the proposed rules would "unduly tie the hands of school leaders who believe every child deserves a safe and healthy learning environment."[32] It would also require schools to single out complaints of sexual assault and other forms of harassment by treating them differently from other types of student misconduct that occur off-campus, perpetuating the pernicious notion that sexual assault is somehow less significant than other types of misconduct and making schools vulnerable to litigation by students claiming unfairness or discrimination in their school's policies treating harassment based on sex differently from other forms of misconduct.

*Question d.* The clear and convincing standard requirement; and

Answer d. The Department's decision to allow schools to impose a more burdensome standard in sexual harassment matters than in any other investigations of student or employee misconduct appears to rely on the stereotype and false assumption that those who report sexual assault and other forms of sexual harassment (mostly women) are more likely to lie than those who report physical assault, plagiarism, or the wide range of other school disciplinary violations and employee misconduct. When this unwarranted skepticism of sexual assault and other harassment allegations, grounded in gender stereotypes, infects sexual misconduct proceedings, even the preponderance standard "could end up operating as a clear-and-convincing or even a beyond-a-reasonable-doubt standard in practice."[33] Previous Department guidance recognized that, given these pervasive stereotypes, the preponderance standard was required to ensure that the playing field, at least on paper, was as even as possible. The Department now ignores the reality of these harmful stereotypes by imposing a standard of evidence that encourages, rather than dispels, the stereotype that women and girls lie about sexual assault and other harassment, a result that is contrary to Title IX.

The preponderance standard is used for nearly all civil rights cases. Indeed it's a standard applied in nearly all civil cases, including where the conduct at issue could also be the basis for a criminal prosecution.[34] The preponderance standard

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

[29] How Much Does Living Off-Campus Cost?, supra note 26.

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

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

[32] Letter from The School Superintendents Ass'n (AASA) to Sec'y Elisabeth DeVos at 5 Jan. 22, 2019) [hereinafter AASA Letter], *http://aasa.org/uploadedFiles/AASA—Blog(1)/AASA* Title IX Comments Final.pdf

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

[34] To take one famous example, O.J. Simpson was found responsible for wrongful death in civil court under the preponderance standard after he was found not guilty for murder in crimi-

is also used for people facing more severe deprivations than suspension, expulsion or other school discipline, or termination of employment or other workplace discipline, including in proceedings to determine paternity,[35] competency to stand trial,[36] enhancement of prison sentences,[37] and civil commitment of defendants acquitted by the insanity defense.[38] The Supreme Court has only required something higher than the preponderance standard in a narrow handful of civil cases "to protect particularly important individual interests,"[39] where consequences far more severe than suspension, expulsion, or firing are threatened, such as termination of parental rights,[40] civil commitment for mental illness,[41] deportation,[42] denaturalization,[43] and juvenile delinquency with the "possibility of institutional confinement."[44] In all of these cases, incarceration or a permanent loss of a profound liberty interest was a possible outcome—unlike in school sexual harassment proceedings. Moreover, in all of these cases, the government and its vast power and resources was in conflict with an individual—in contrast to school harassment investigations involving two students with roughly equal resources and equal stakes in their education, two employees who are also similarly situated, or a student and employee, where any power imbalance would tend to favor the employee respondent rather than the student complainant.[45] Preponderance is the only standard of proof that treats both sides equally and is consistent with Title IX's requirement that grievance procedures be "equitable."[46]

For this reason, Title IX experts and school leaders alike support the preponderance standard, which is used to address harassment complaints at over 80 percent of colleges.[47] The National Center for Higher Education Risk Management (NCHERM) Group, whose white paper Due Process and the Sex Police was cited by

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nal court under the beyond-a-reasonable-doubt standard. See B. Drummond Ayres, Jr., Jury Decides Simpson Must Pay $25 Million in Punitive Award, N.Y. TIMES (Feb. 11, 1997), *https://www.nytimes.com/1997/02/11/us/jury-decides-simpson-must-pay-25-million-in-punitive-award.html.*

[35] Rivera v. Minnich, 483 U.S. 574, 581 (1987).

[36] Cooper v. Oklahoma, 517 U.S. 348, 368 (1996).

[37] McMillan v. Pennsylvania, 477 U.S. 79, 91–92 (1986).

[38] Jones v. United States, 463 U.S. 354, 368 (1983).

[39] Addington v. Texas, 441 U.S. 418, 424 (1979) (civil commitment).

[40] Santosky v. Kramer, 455 U.S. 745, 758 (1982).

[41] Addington, 441 U.S. at 432.

[42] Woodby v. INS, 385 U.S. 276, 286 (1966).

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

[44] In re Winship, 397 U.S. 358, 367–68 (1970).

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

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

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

the Department,[48] has promulgated materials that require schools to use the preponderance standard, because "[w]e believe higher education can acquit fairness without higher standards of proof."[49] And even the Department admits it is "reasonable" for a school to use the preponderance standard.[50]

By permitting and sometimes mandating the clear and convincing evidence standard in sexual harassment proceedings, the Department treats sexual harassment differently from other types of school disciplinary violations and employee misconduct, uniquely targeting and disfavoring sexual harassment complainants. First, the Department argues that school sexual harassment investigations are different from civil cases, and therefore may appropriately require a more burdensome standard of proof, because many school sexual harassment investigations do not use full courtroom procedures, such as active participation by lawyers, rules of evidence, and full discovery.[51] However, the Department does not exhibit this concern for the lack of full-blown judicial proceedings to address other types of student or employee misconduct, including other examples of student or employee misconduct implicating the civil rights laws enforced by the Department. Schools have not, as a general rule, imposed higher evidentiary standards in other misconduct matters, nor have employers more generally in employee misconduct matters, to compensate for the proceedings' failure to be full-blown judicial trials, and the Department does not explain why such a standard is appropriate in this context alone.

Moreover, although the proposed rules would require schools to use the "clear and convincing" standard for sexual harassment investigations if they use it for any other student or employee misconduct investigations with the same maximum sanction,[52] and would require that it be used in student harassment investigations if it is used in any employee harassment investigations, the proposed rules would not prohibit schools from using the clear and convincing standard in sexual harassment proceedings even if they use a lower proof standard for all other student conduct violations.[53] School leaders agree that requiring different standards for sexual misconduct as opposed to other misconduct is inequitable.

*Question e.* The actual knowledge standard and requirements for filing formal complaints.

Answer e. Under the proposed rules, schools would not be required to address any sexual harassment and assault unless one of a small subset of school employees had "actual knowledge" of it.[54] The proposed rules also unjustifiably limit the set of school employees for whom actual notice of sexual assault or other forms of harassment triggers the school's Title IX duties. For example, under the proposed rules, if a college or graduate student told their professor, residential advisor, or teaching assistant that they had been raped by another student or by a professor or other university employee, the university would have no obligation to help the student.

Under the Department's proposed rules, even when students find the courage to talk to the adult school employees they trust, schools would frequently have no obligation to respond. For example, if the proposed rules had been in place, colleges like Michigan State and Penn State would have had no Title IX responsibility to stop Larry Nassar and Jerry Sandusky—even though their victims reported their experiences to at least 14 school employees over a 20-year period—including athletic trainers, coaches, counselors, and therapists[55]—because those employees are not considered to be school officials who have the "authority to institute corrective measures."[56] These proposed provisions would absolve some of the worst Title IX offenders of legal liability.

The "formal complaint" requirement would also compel complainants to engage in arcane procedural maneuvers in order to enforce a recipient's anti-harassment standards. As a practical matter, moreover, many victims, having already suffered through significant trauma during a first proceeding, might well be reluctant to go through everything a second time.

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[48] 83 Fed. Reg. at 61464 n.2.
[49] The NCHERM Group, Due Process and the Sex Police 2, 17–18 (Apr. 2017), available at *https://www.ncherm.org/wp-content/uploads/2017/04/TNG–Whitepaper-Final-Electronic-Version.pdf.*
[50] 83 Fed. Reg. at 61477.
[51] Id.
[52] Proposed § 106.45(b)(4)(i).
[53] See A Sharp Backward Turn, supra note 83 ("It is a one-way ratchet.").
[54] Proposed §§ 106.30, 106.44.
[55] Julie Mack & Emily Lawler, MSU doctor's alleged victims talked for 20 years. Was anyone listening?, MLIVE (Feb. 8, 2017), *https://www.mlive.com/news/index.ssf/page/msu—doctor—alleged—sexual—assault.html.*
[56] Proposed § 106.30.

SENATOR ROSEN

*Question 1.* As others have expressed today, I am incredibly concerned with the proposed rollbacks of Title IX protections for sexual assault survivors and how they would jeopardize student safety, particularly students in my home state of Nevada. Among other harmful provisions, the Department of Education's proposed rule only allows schools to investigate a report of sexual harassment if it occurred "within a school's own program or activity." At University of Nevada Las Vegas (UNLV) – a public university with the highest student enrollment rate in my state – only 6 percent of full-time students reside on campus. UNLV is a commuter campus, so the majority of students experience sexual violence, harassment, or misconduct involving fellow students outside the campus or university-sponsored program or activity. Likewise, in a 2016 survey of sexual conduct and campus safety, 79 percent of University of Nevada Reno students reported that "unwanted sexual conduct affecting students occurs off campus". And this doesn't even account for the many Nevadans who attend other commuter campuses like Truckee Meadows Community College, Nevada State College, and College of Southern Nevada. Changing the rules so schools only have to respond if the incident occurred on campus would have a direct negative impact on survivors of sexual assault and harassment in Nevada. Just because assault or harassment took place off campus, students may be forced to see their harasser on campus every day, and their education can be impacted – potentially resulting in them dropping out of school altogether.

*Question (a).* Given that Title IX itself does not state that discriminatory conduct must occur during a school activity for there to be a discriminatory environment, how is this proposed change appropriate?

Answer (a). The proposed rules conflict with Title IX's statutory language, which does not prohibit discrimination depending on where the underlying conduct occurred but instead prohibits discrimination that "exclude[s a person] from participation in, . . . denie[s a person] the benefits of, or . . . subject[s a person] to discrimination under any education program or activity . . . ."[57] For almost two decades, the Department's guidance documents have agreed that schools are responsible for addressing sexual harassment if it is "sufficiently serious to deny or limit a student's ability to participate in or benefit from the education program,"[58] regardless of where it occurs.[59] No student who experiences out-of-school harassment from a school employee or another student that impacts their education should be forced to wait until they are sexually harassed again on school grounds or during a school activity in order to receive help from their school. Nor should they be required to sit in class next to their assailant with no recourse. Thus, the proposed change requiring that the harassment occur within an education program or activity in order for a school to conduct an investigation, without regard to how the complainant's education is impacted by the harassment, is in conflict with Title IX's statutory language.

*Question (b).* Nevada institutions like UNLV have pledged to continue to offer support and resources to survivors of off-campus assaults, even if this rule goes into effect. Unfortunately, not all schools will do the same. How will these changes affect the rate of student reporting of sexual misconduct?

Answer (b). The Department's proposed rules would also require schools to dismiss all complaints of off-campus or online sexual harassment that happen outside of a school-sponsored program—even if the student is forced to see their harasser at school every day and the harassment directly impacts their education as a result. The proposed rules conflict with Title IX's statutory language, which does not depend on where the underlying conduct occurred but instead prohibits discrimination that "exclude[s a person] from participation in, . . . denie[s a person] the benefits of, or . . . subject[s a person] to discrimination under any education program or activity . . . ."[60] For almost two decades, the Department's guidance documents have agreed that schools are responsible for addressing sexual harassment if it is "sufficiently serious to deny or limit a student's ability to participate in or benefit from the education program,"[61] regardless of where it occurs.[62] No student who experiences out-of-school harassment should be forced to wait until they are sexually harassed again on school grounds or during a school activity in order to receive help

[57] 20 U.S.C. § 1681(a).
[58] 2001 Guidance, supra note 23.
[59] See supra note 24.
[60] 20 U.S.C. § 1681(a).
[61] 2001 Guidance, supra note 24.
[62] Supra note 25.

from their school. Nor should they be required to sit in class next to their assailant with no recourse.

Sexual harassment and assault also occur both on-campus and in off-campus spaces closely associated with school. Nearly nine in ten college students live off campus.[63] According to a 2014 U.S. Department of Justice report, 95 percent of sexual assaults of female students ages 18–24 occur outside of school.[64] Forty-one percent of college sexual assaults involve off-campus parties[65] and many fraternity and sorority houses are very much a part of the school community but physically located off campus. Students are also far more likely to experience sexual assault if they are in a sorority (nearly one and a half times more likely) or fraternity (nearly three times more likely).[66] But under the proposed rules, if a college or graduate student is sexually assaulted by a classmate in off-campus housing, their university would be required to dismiss their complaint—even though almost nine in ten college students live off campus.[67] The proposed rules would also pose particular risks to students at community colleges and vocational schools. Approximately 5.8 million students attend community college (out of 17.0 million total undergraduate students),[68] and 16 million students attend vocational school.[69] But because very few of these students live on campus, the harassment they experience by faculty or other students is especially likely to occur outside of school, and therefore outside of the protection of the proposed Title IX rules. Finally, proposed § 106.8(d) would create a unique harm to the 10 percent of U.S. undergraduate students who participate in study abroad programs. If any of these students report experiencing sexual harassment during their time abroad, including within their study abroad program, their schools would be required to dismiss their complaints—even if they are forced to see their harasser in the study abroad program every day, and even if they continue to be put into close contact with their harasser when they return to their home campus.

By forcing schools to dismiss complaints of out-of-school sexual harassment, the proposed rules would "unduly tie the hands of school leaders who believe every child deserves a safe and healthy learning environment."[70] It would also require schools to single out complaints of sexual assault and other forms of harassment by treating them differently from other types of student misconduct that occur off-campus, perpetuating the pernicious notion that sexual assault is somehow less significant than other types of misconduct and making schools vulnerable to litigation by students claiming unfairness or discrimination in their school's policies treating harassment based on sex differently from other forms of misconduct.

SENATOR SANDERS

*Question 1.* As you know, Secretary DeVos rescinded guidance issued by the Obama administration that helped schools understand their responsibility to address campus sexual assault and ensure student safety and rights. Colleges and universities are focused on policies and procedures, the Department of Education ensures schools comply with federal law and it seems students, faculty and visitors to campus are an afterthought. Based on your experience working in the field of criminal law, how should the views, perspectives and experiences of students and various stakeholders taken into account to ensure that everyone feels safer on campus?

Answer 1. It is critical that the views of students and other stakeholders are taken into account in any law, regulation, or policy that addresses campus sexual assault. As a longtime civil rights and gender justice lawyer, it's a lesson that I have learned again and again. And, unfortunately, when making changes to Title IX guidance and most recently, proposing changes to its Title IX rules, the Department of Education did not do this. In fact, the Department's proposed rules are so far out of step with the general public's views on sexual harassment, they are decidedly undemocratic. The American public overwhelmingly agrees that strong Title IX protections are necessary to ensure student survivors' equal access to educational opportunities.

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[63] How Much Does Living Off-Campus Cost?, supra note 26.
[64] Supra note 27.
[65] Supra note 28
[66] Supra note 29
[67] How Much Does Living Off-Campus Cost?, supra note 26.
[68] Supra note 31.
[69] Supra note 32.
[70] AASA Letter, supra note 33.

Recently, we commissioned public opinion research to understand voters' policy preferences and attitudes towards issues disproportionately affecting women, and the vast majority of those polled (88 percent) considered "preventing sexual harassment and assault" an important issue for Congress to work on, and preventing sexual harassment and assault was a top priority among votes of nearly every background, including across gender, party, and racial lines.[71] Moreover, public comments submitted to the Department of Education during its deregulation comment period in September 2017, indicates that the majority of the American people support strong Title IX protections, including those in the 2011 Guidance and 2014 Guidance that the Department rescinded in September 2017. Last fall, when the Department asked the public for input on deregulation (i.e., which rules the Department should repeal, replace, or modify),[72] over 12,000 people submitted comments about Title IX, with 99 percent of them supporting Title IX and 96 percent explicitly urged the Department to preserve its 2011 Guidance.[73] They were joined by more than 150,000 other people who signed petitions and statements in support of the Department's 2011 Guidance and 2014 Guidance.[74] However, just one day after the public comment period closed, the Department rescinded both the 2011 Guidance and the 2014 Guidance and issued the 2017 Guidance, when it could not possibly have finished reading and considering all of the comments it had received.[75] The rescission was an anti-democratic move contrary to the APA, which was enacted to hold non-elected agency officials like Secretary DeVos accountable to constituents by requiring agencies to consider public comments during the rulemaking process.

The Department's proposed rules ignore the cultural milestones that have demonstrated the public's interest in eliminating sexual harassment, including sexual assault, from our schools and workplaces. In the past sixteen months, the #MeToo hashtag has used more than 19 million times on Twitter,[76] the Time's Up Legal Defense Fund raised more than $24 million to combat sexual harassment,[77] and state legislators passed more than 100 bills strengthening protections against sexual harassment.[78] In fall 2018, millions of people gathered across the country, online, and on the steps of the Supreme Court in solidarity with Dr. Christine Blasey Ford, Professor Anita Hill, and other survivors who have courageously come forward yet have been denied justice. In the face of this overwhelming support for survivors of sexual violence and those confronting other forms of sexual harassment, the Department's proposed Title IX rules contravene the basic notion that the right to be free from sexual harassment and violence is a human right and the right to not have one's education harmed by sexual harassment is a civil right.

More than 800 law professors, scholars, and experts in relevant fields have signed letters opposing the proposed regulations.[79] Similarly, survivors at Michigan State

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[71] Perry Undem and GBA Strategies, Voters' Priorities for the New Congress (Mar. 14, 2019).

[72] U.S. Dep't of Educ., Evaluation of Existing Regulations, 82 Fed. Reg. at 28431 (June 22, 2017) *https://www.regulations.gov/contentStreamer?documentId=ED–2017–OS–0074–0001&contentType=pdf.*

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

[74] Id. at 27–28 (48,903 people signed petitions and statements supporting Title IX and the 2011 Guidance); Caitlin Emma, Exclusive: Education reform groups team up to make bigger mark, POLITICO (Sept. 6, 2017), *https://www.politico.com/tipsheets/morning-education/2017/09/06/exclusive-education-reform-groups-team-up-to-make-bigger-mark-222139* (more than 105,000 petitions delivered to Department of Education supporting 2011 and 2014 Title IX Guidances).

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

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

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

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

[79] Letter from 201 Law Professors to the Sec'y Elisabeth DeVos and Ass't Sec'y Kenneth L. Marcus (Nov. 8, 2018), *http://goo.gl/72Aj1b;* Letter from 1,185 members of Nat'l Women's Stud-

Continued

University, University of Southern California, and Ohio State University who were sexually abused by Larry Nassar, George Tyndall, and Richard Strauss expressed opposition to the Department's proposed rules.[80] In a letter to Secretary DeVos and Assistant Secretary Marcus, more than 80 of these survivors shared their concern that "[t]he proposed changes will make schools even less safe for survivors and enable more perpetrators to commit sexual assault in schools without consequence."[81] They agreed that if these rules are finalized, "fewer survivors will report their assaults and harassment, schools will be more dangerous, and more survivors will be denied their legal right to equal access to educational opportunities after experiencing sexual assault."[82] More than 900 mental health professionals submitted a comment condemning the proposed rules, claiming that the rule would "cause increased harm to students who report sexual harassment, including sexual assault, . . . [and] discourage students who have been victimized from coming forward," and that they would also "reinforce the shaming and silencing of victims, which has long prevailed in our society, and [] worsen the problem of sex discrimination in education."[83]

Finally, educational institutions have come out strongly in opposition to most the changes proposed to the Title IX rules, particularly around the changed definition of sexual harassment, requirement for live hearings with cross-examination, mandated dismissals of most off-campus and online sexual harassment, and heightened notice requirements.[84]

*Question 2.* The Clery Act, amended by the Violence Against Women Act (VAWA), requires colleges and universities across the United States to disclose information about crime on and around their campuses. The law applies to most institutions of higher education because it compels compliance in order to participate in federal student financial aid programs. Again, based on your experience working in the field of criminal law, are schools fully complying with the Clery Act? Is the Department of Education properly enforcing the Clery Act and VAWA?

Answer 2. While the Clery Act and Title IX both apply to institutions of higher education, a number of the Department's proposed Title IX rules are inconsistent with the Clery Act, which also addresses the obligation of institutions of higher education to respond to sexual assault and other behaviors that may constitute sexual harassment, including dating violence, domestic violence, and stalking. Although I am not a criminal law attorney, I have practiced deeply in the area of Title IX and also served on the Department of Education's negotiated rulemaking committee for the Clery Act regulations. First, the proposed rules prohibiting schools from investigating off-campus and online sexual harassment conflict with Clery's notice and reporting requirements. The Clery Act requires institutions of higher education to notify all students who report sexual assault, stalking, dating violence, and domestic violence of their rights, regardless of "whether the offense occurred on or off campus."[85] The Clery Act also requires institutions of higher education to report all sexual assault, stalking, dating violence, and domestic violence that occur on "Clery geography," which includes all property controlled by a school-recognized student organization (such as an off-campus fraternity); nearby "public property"; and "areas within the patrol jurisdiction of the campus police or the campus security department."[86] The proposed rules would undermine Clery's mandate and create a perverse system in which schools would be required to report instances of sexual assault that occur off-campus to the Department under Clery, yet would also be required by the Department to dismiss these complaints under Title IX instead of investigating them.

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ies Ass'n to Sec'y Elisabeth DeVos and Ass't Sec'y Kenneth L. Marcus, (Nov. 11, 2018), *https://sites.google.com/view/nwsa2018openletter/home.*

[80] Letter from 89 Survivors of Larry Nassar, George Tyndall, and Richard Strauss at Michigan State University, Ohio State University, and University of Southern California to Sec'y Elisabeth DeVos and Ass't Sec'y Kenneth Marcus (Nov. 1, 2018), at 2, *https://www.documentcloud.org/documents/5026380–November-1–Survivor-Letter-to-ED.html;* Letter from Liberty University to Sec'y Elisabeth DeVos (Jan. 24, 2019), *http://www.liberty.edu/media/1617/2019/jan/Title-IX–Public-Comments.pdf;* Letter from Georgetown University to Sec'y Elizabeth DeVos as 7 (Jan. 30. 2019), *https://georgetown.app.box.com/s/fwk978e3oai8i5hpq0wqa70cq9iml2re*

[81] Id. at 1

[82] Id. at 2.

[83] Mental Health Professionals Letter, supra note 16.

[84] See AAU Letter, supra note 15; AICUM Letter, supra note 14 ("[s]uch financial costs and administrative burdens may be overwhelming"); Pepper Hamilton Comment, supra note 10.

[85] 20 U.S.C. § 1092(f)(8)(C).

[86] 20 U.S.C. § 1092(f)(6)(iii); 20 U.S.C § 1092(f)(6)(iv)); 34 C.F.R. § 668.46(a)).

Second, the Department's definition of "supportive measures" is inconsistent with Clery, which requires institutions of higher education to provide "accommodations" and "protective measures" if "reasonably available" to students who report sexual assault, dating violence, domestic violence, and stalking.[87] The Clery Act does not prohibit accommodations or protective measures that are "punitive," "disciplinary," or "unreasonably burden[] the other party." Third, the proposed rules' unequal appeal rights conflict with the preamble to the Department's Clery rules stating that institutions of higher education are required to provide "an equal right to appeal if appeals are available," which would necessarily include the right to appeal a sanction.[88]

Finally, Clery requires that investigations of sexual assault and other sexual harassment be "prompt, fair, and impartial."[89] But the proposed rules' indefinite timeframe for investigations conflicts with Clery's mandate that investigations be prompt. And the many proposed rules discussed above that tilt investigation procedures in favor of the respondent are anything but fair and impartial. Although the Department acknowledges that Title IX and the Clery Act's "jurisdictional schemes . . . may overlap in certain situations,"[90] it fails to explain how institutions of higher education should resolve the conflicts between two different sets of rules when addressing sexual harassment. These different sets of rules would likely create widespread confusion for schools.

Regarding compliance with the Clery Act, schools routinely fail to live up to the Clery requirements that they properly compile and publish statistics for specific Clery crimes that occur within Clery geography, publish and disseminate annual security reports, meet crime awareness requirements, have adequate policy statements, and maintain an accurate and complete daily crime log.[91] And even with these compliance challenges, it has still had an overall positive impact on schools.[92] For example, campuses have been giving more timely warnings of crimes committed on campus, including through mass notification systems, to ensure the safety of the campus community, and more resources have been going towards campus public safety, including addressing sexual violence on campuses.[93] And the February 2019[94] report by the Department of Education detailing how Michigan State University violated the Clery Act for years, including the many failures to investigate abuses by athletic doctor, Larry Nassar and a million dollar fine against the University of Montana in October 2018 for Clery Act violations are two important examples of the potential of Clery enforcement.[95] Unfortunately there are reports that the Trump administration also has taken steps to undermine Clery enforcement, providing form letter responses to Clery complaints with few details on what the school did or how the Department would bring them into compliance.[96] I encourage the Committee to continue to examine the Department's Clery enforcement.

*Question 3.* Colleges and universities seem to be struggling with the repeal of the Obama Title IX rules since they provided much needed guidance for institutions experiencing rising cases of sexual assault and harassment. While Secretary DeVos has proposed new guidelines, they are not in effect and have drawn criticism for favoring the rights of the accused over those of the survivor and for not actually preventing or addressing campus sexual assault. In the meantime, how can colleges

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[87] 20 U.S.C. § 1092(f)(8)(B)(vii); 34 C.F.R. § 668.46(b)(11)(v).

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

[89] 20 U.S.C. § 1092(f)(8)(b)(iv)(I)(aa).

[90] 83 Fed. Reg. at 61468.

[91] Clery Center, National Campus Safety Awareness Month 2017, Department of Education Clery Act Program Reviews: Common Themes, available at *http://ncsam.clerycenter.org/wp-content/uploads/2016/08/DE–Program-Reviews-Common-Themes.pdf.*

[92] S. Daniel Carter, Clery Act Has Prompted Positive Change in Campus Public Safety, CAMPUS SAFETY MAGAZINE (Sept. 6, 2017), available at *https://www.campussafetymagazine.com/university/clery-act-has-prompted-positive-changes-in-campus-public-safety/.*

[93] Id.

[94] James Paterson, Report: Michigan State violated Clery Act over Nassar, other crime reporting, EDUCATION DIVE (Feb. 4, 2019), available at *https://www.educationdive.com/news/report-michigan-state-violated-clery-act-over-nassar-other-crime-reportin/547486/.*

[95] James Paterson, University of Montana assessed $1M Clery Act fine, EDUCATION DIVE (Oct. 4, 2018), available at *https://www.educationdive.com/news/university-of-montana-assessed-1m-clery-act-fine/538861/.*

[96] Benjamin Wermund, A new tack on Clery complaints for the Trump administration? POLITICO MORNING EDITION (Sept. 15, 2017), available at *https://www.politico.com/tipsheets/morning-education/2017/09/15/a-new-tack-on-clery-complaints-for-the-trump-administration-222304.*

and universities strengthen their campus disciplinary process to ensure that all students are safer on and near campus, especially if students feel discouraged from coming forward about sexual assaults and other acts of violence?

Answer 3. Since the Clery Act and Title IX already require that schools adopt and enforce procedures to address sexual assault that are prompt, equitable, and impartial, reauthorization of the Higher Education Act should support and reaffirm the principles and requirements of both Clery and Title IX, including ensuring that schools address sexual harassment before it causes greater harm to a student's education and create equitable processes that preserve and restore access to education for those who experience sexual harassment, including survivors of sexual violence.

As described in further detail in my written testimony and to responses to questions above, here are steps that schools should take to preserve and restore access to education for students who are sexual assaulted:

1. Schools must take effective and immediate action when responding to sexual assault and other form of harassment that school employees know about or reasonably should know about.
2. Complainants must be afforded non-punitive interim measures to preserve and restore access to educational programs.
3. Investigations must be equitable and not create barriers to participation.
4. Schools should not use live cross-examination as it would deter reporting of campus sexual assault and is unnecessary for reliable school discipline determinations.
5. Campuses must now allow for mediation for resolving complaints of sexual assault.
6. Campuses must not consider irrelevant or prejudicial evidence in investigations.
7. Campuses must provide remedies to preserve or restore access to education.
8. Campuses must have equitable appeal rights.
9. Campuses must prohibit retaliation against parties and witnesses.

*Question 4.* What changes to Secretary DeVos' proposed Title IX guidance would you recommend to ensure that the administration does not create a campus sexual assault disciplinary process that favors wealthier students and their families who can afford attorneys and consultants to guide them through the labyrinth of filing a formal complaint with the "appropriate person," notification requirements, live cross examinations, and extensive knowledge of criminal procedure?

Answer 4. We would recommend that the Department of Education not proceed with the proposed rules. Currently, the Department's 2001 Guidance, which went through public notice-and-comment and has been enforced in both Democratic and Republican administrations,[97] has been relied on by educational institutions to understand and fulfill their Title IX obligations for many years. This guidance rightly charges schools with responding to harassment before it escalates to a point that students suffer severe harm and it does not pose the same issues as in the current proposed Title IX rules that would create severe inequities between students based on wealth and access to resources, like counsel, to guide them through the grievance process. The 2001 Guidance requires schools to address student-on-student harassment if any employee "knew, or in the exercise of reasonable care should have known" about the harassment. In the context of employee-on-student harassment, the 2001 Guidance requires schools to address harassment "whether or not the [school] has 'notice' of the harassment."[98] Under the 2001 Guidance, the Department would consider schools that failed to "take immediate and effective corrective

[97] These standards have been reaffirmed time and time again, in 2006 by the Bush Administration, in 2010, 2011, and 2014 in guidance documents issued by the Obama administration, and even in the 2017 guidance document issued by the current Administration. U.S. Dep't of Educ. Office for Civil Rights, Dear Colleague Letter: Sexual Harassment (Jan. 25, 2006) [hereinafter 2006 Guidance], *https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html;* 2010 Guidance, supra note 24; U.S. Dep't of Educ. Office of Civil Rights, Dear Colleague Letter: Sexual Violence at 4, 6, 9, &16 (Apr. 4, 2011) [hereinafter 2011 Guidance], *https://ww2ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf;* U.S. Dep't of Educ. Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence 1–2 (Apr. 29, 2014) [hereinafter 2014 Guidance], *https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf;* 2017 Guidance, supra note 24.

[98] Id.

action" to be in violation of Title IX.[99] For years, these standards have appropriately guided colleges in understanding their obligations around responding to campus sexual assault. However, under the proposed rules, students would be required to file a formal complaint to initiate an investigation by their school, and students who are unable to afford an attorney to assist them with filing a formal complaint that meets the requirements in the proposed rules would be at a disadvantage.

Moreover, as also indicated by your question, the live cross-examination requirement would lead to sharp inequities, due especially to the "huge asymmetry" that would arise when respondents are able to afford attorneys and complainants cannot.[100] According to the president of Association of Title IX Administrators (ATIXA), the live cross-examination provision alone—"even with accommodations like questioning from a separate room—would lead to a 50 percent drop in the reporting of misconduct."[101] These attorneys are often defense counsel ready to grill a survivor about the traumatic details of an assault.

## RESPONSE BY JEANNIE SUK GERSEN TO QUESTIONS OF SENATOR ALEXANDER, SENATOR WARREN, SENATOR ROSEN, AND SENATOR SANDERS

### SENATOR ALEXANDER

*Question 1.* Are there rules or guidelines institutions should adopt to govern the live questioning of witnesses or parties in campus disciplinary proceedings? If so, do you have specific suggestions on what rules or guidelines institutions should adopt?

Answer 1. Live questioning of witnesses and parties at a hearing is essential to a fair process of adjudication for campus discipline. But schools must guard against enabling hurtful personal confrontation in that context, especially where students are being questioned and may suffer harm to their access to education. Schools are usually not equipped with expertise and resources to properly implement a beneficial courtroom-style cross-examination wherein trained judges and rules of evidence can keep proceedings under control. Schools should therefore not be required to implement cross-examination in their hearings, but they should be required to allow live questioning.

Schools should seek a balance in which live questioning can occur without the harms that may result from unchecked grilling of students by opposing parties. Schools should adopt rules that provide for a party to submit questions for witnesses and for the other party to the presiding adjudicator. This avoids direct personal confrontation, and avoids allowing lawyers for either party to engage in unfiltered questioning of the opposing party. The rules should provide that the adjudicator must proceed to ask all the questions submitted by each party, unless the questions are irrelevant, excluded by a rule of evidence clearly adopted in advance, harassing, or duplicative. The adjudicator should be required state on the record a specific, clear, rule-based reason for refusing to ask any of the questions submitted. It is crucial that a general trauma-based concept, such as a need to "avoid retraumatizing" a party, not be an allowable ground for the adjudicator's refusal to ask a submitted question, because that concept makes a blanket assumption that the party is traumatized, which is circular in a proceeding that sets out to determine whether someone has been harmed. It is effectively assuming the respondent's responsibility for harm and therefore inconsistent with a presumption of innocence.

The rules should also instruct the adjudicator that a party's refusal to answer questions should not automatically result in having the party's statements disregarded. Parties may have good reasons for not answering certain questions, and respondents in particular may be instructed by counsel not to answer questions in order to preserve criminal trial rights. Adjudicators should, however, be allowed to draw a negative inference from refusals to answer questions when that inference appears equitable under the circumstances.

It is also extremely important that in a live questioning procedure, the parties be allowed to bring an advisor who is "on their side." If a party does not have an advisor, the school should provide one.

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[99] Id.

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

[101] Id.

Schools should provide the option of videoconferencing as an available alternative to having the parties in the same room for the live questioning.

If a school permits traditional cross-examination, it should not allow parties to question each other personally. The questioning should be done by attorneys with knowledge of rules of evidence that limit cross-examination to questions of relevance, under the supervision of a presiding adjudicator who has expertise to act as would a judge enforcing those rules in court.

*Question 2.* Do you have any specific suggestions on what guidelines or parameters, if any, should be used when informal resolution methods, such as mediation or restorative justice, are selected as a way to resolve sexual misconduct allegations, including sexual assaults?

Answer 2. Schools should provide mediation or restorative justice as possible alternatives to adjudication of a complaint, in cases where both parties consent and indicate that it is their preferred route. Parties should not be pressured to opt out of formal adjudication. Parties should be accompanied by their advisors to any meetings with the other party, and videoconferencing should be made available as an alternative to face to face meetings.

For mediation, the school should provide a trained neutral mediator to facilitate the process toward a mutually agreed-upon resolution of the matter.

For restorative justice, the school should make clear that the respondent's acceptance of responsibility is a precondition of entering a restorative justice process, and that the goal of the process is to arrive at a consensus on how the respondent can repair the harm. Each of the parties should be permitted to select several members of the community to attend the restorative justice session, which should be guided by a trained facilitator.

The school should provide guidelines indicating a range of acceptable resolutions that can arise out of mediation or restorative justice, such as acknowledgment, apology, changing dormitories and classes, and voluntary leave-taking. If the parties are unable to reach a resolution that is mutually satisfactory, then the complainant should still be permitted to pursue the complaint under the school's formal adjudication process. But the parties should not be allowed to use statements made as part of the mediation or restorative justice process as evidence in a later formal adjudication of the complaint.

Regardless of the availability of mediation or restorative justice, only the school should be empowered to impose discipline, such as probation, suspension, expulsion, or transcript marks. The school should also retain discretion to reject resolution via informal methods in a rare case where it determines that it is necessary to pursue a formal complaint to vindicate the school's interest in protecting the community from danger.

*Question 3.* Should institutions be able to implement a statute of limitations to report an allegation of sexual misconduct, including sexual assault?

Answer 3. Yes. Schools should adopt a reasonable statute of limitations for reporting sexual misconduct including sexual assault. The fairness concerns that inform civil and criminal statutes of limitations strongly apply to school-based adjudication processes. It is important to the legitimacy and fairness of school-based adjudications of complaints that they be based on memories and evidence that have not deteriorated with time. It is also deeply unfair and harmful to the parties undertake any adjudication in which evidence in support of complaints or defenses that may have once been available is no longer available because of a long passage of time.

SENATOR WARREN

*Question 1.* According to data from the U.S. Department of Justice, only one in five women who are sexually assaulted on campus will actually report the attack to the police.[1] What should Congress do to encourage students to report incidences of harassment and assault?

Answer 1. One of the many important reasons for the low rate of reporting to police of sexual assault on campus may be that definitions of "sexual assault" on campus include much conduct that may not be criminal. A divergence between criminal standards and campus standards of conduct is of course to be expected, because unlike criminal law, the purpose of campus sexual misconduct discipline is to address the discriminatory impact of the behavior on access to education. But campus defini-

[1] U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics. (2014). Rape and Sexual Victimization Among College-Aged Females, 1995–2013. *https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf.*

tions may also deter reporting because they are unclear or too expansive for students to take seriously. To help bring rates of campus reporting of sexual assault closer to the actual incidence of conduct that has a concrete discriminatory impact on education and is worthy of discipline, Congress should help give better focus to definitions of sexual assault for campus discipline purposes. Providing a clear, nonambiguous, and appropriate definition of sexual assault that is not overinclusive or underinclusive would do a tremendous amount to encourage reporting in which we can feel more confident. To that end, I would propose the following definition of sexual assault:

Sexual assault is the penetration or touching of another's genitalia, buttocks, anus, breasts, or mouth without consent.

A person acts without consent when, in the context of all the circumstances, the person should reasonably be aware of a substantial risk that the other person is not voluntary and willingly engaging in the conduct at the time of the conduct.

*Question 2.* From your perspective, how would each of the following aspects of the Department of Education's proposed rule, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," affect a complainant's likelihood of reporting harassment or assault?

*Question (a).* The live cross examination requirement;

Answer 2. I believe the concern about the potential effect of live cross-examination on reporting is overblown and misguided. After all, cross-examination would be available to both parties, and each party has much to gain in being able to subjecting the other party to cross-examination. In the criminal and civil justice systems, complainants and plaintiffs know that if they report, they may be subject to cross-examination if the case goes to trial. The fact that this knowledge and the desire to avoid being cross-examined may deter reporting in the legal system does not and should not lead us to deny the value of cross-examination in court proceedings.

Answer (a). However, as I indicated in my answer to Senator Alexander's Question # 1, above, I do not believe traditional cross examination of parties is essential to fairness in a school-based proceeding, which is not a court. That is not because of the effect on reporting, but rather because the potential for parties and their advisors to engage in hurtful confrontation is great where, unlike in a court, there are no experienced judges and lawyers to enforce and comport with rules of evidence and to control such behavior. A live hearing with the opportunity for parties to ask questions of witnesses and parties is essential to fairness and can be accomplished without traditional cross-examination. Perhaps that, too, would depress reporting, but so too may other requirements of due process or even the very prospect of an investigation or adjudication at all. The effect on reporting cannot be a proper determinant of the rules we adopt for the sake of adjudication that is fair to both parties.

*Question (b).* The proposed definition of harassment, which would narrow the scope of what incidences of sexual misconduct schools are required to respond to;

Answer (b). The Proposed Rule's definition of hostile-environment sexual harassment is unwelcome sexual conduct that is "so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity." The "and" in this definition narrows the definition of misconduct to which schools are required to respond to such a degree they could not meaningfully protect equal access to educational opportunity. The proposed definition is inappropriately underinclusive. The "and" should be replaced with an "or."

However, it is also important to avoid expanding the definition of sexual harassment so that it becomes inappropriately overinclusive. A definition based in the one that the Supreme Court provided in Meritor Savings Bank v. Vinson strikes a balance that is neither too underinclusive nor overinclusive. Schools should define sexual harassment as unwelcome sexual conduct that is sufficiently severe or pervasive as to deny or unreasonably limit a person's equal access to educational opportunity.

The definitions of sexual misconduct that a school adopts will directly affect which incidents lead to complainants' reports. But the goal should not be merely increasing the number of reports full stop; the goal should be getting the misconduct definitions right so that the reports that are made are ones that comport with fairness and that allow enforcement is legitimate.

*Question (c).* The geographic location limitations, which would limit instances where schools may respond to sexual harassment and assault to school grounds, activities, and programs;

Answer (c). Limiting a school's response to incidents that occur only on school grounds or in its activities and programs would fail to include incidents that occur off-campus. Given that many students live and interact off-campus, and attend so-

cial events off-campus, sexual misconduct that occurs in those locations would not be subject the school's disciplinary authority. The negative impact on reporting of those incidents is clear. Students who experience sexual misconduct by another member of the school community in an off-campus location could of course still report criminal incidents to the police. But they would unjustifiably be deprived of a key means of addressing a discriminatory situation that may have a severe impact on equal access to education.

*Question (d).* The clear and convincing standard requirement; and

Answer (d). The Department of Education proposes to allow schools to use either the preponderance of the evidence standard or the clear and convincing evidence standard. It does not propose to require the use of clear and convincing evidence. I agree that either standard is consistent with Title IX and that it is permissible for the Department to leave the choice of standard to schools.

But importantly, if a school chooses one standard for sexual misconduct, it should adopt the same standard for non-sexual misconduct such as racial harassment. The Proposed Rule would unfortunately allow schools to use the higher standard for sexual cases while using the lower one for non-sexual ones. That would be discriminatory, and the Rule should instead require symmetry and equalization of the standards for sexual and non-sexual misconduct.

*Question (e).* The actual knowledge standard and requirements for filing formal complaints.

Answer (e). The Department of Education proposes that schools be held responsible for violating Title IX only if they knew of sexual misconduct allegations and were deliberately indifferent to them. This is far too permissive a standard, and it would hold schools responsible only for egregious institutional conduct. Such a low expectation undermines the Title IX's goal of holding schools responsible for adhering to the prohibition of sex discrimination. The proper solution is instead to hold schools to have violated Title IX when they have responded unreasonably – that is when they knew or should have known of sexual misconduct and failed to respond.

*Question 3.* You, along with Professors Nancy Gertner and Janet E. Halley, submitted a 22-page comment letter to the Department of Education regarding its proposed Title IX rule. As part of your legal analysis, you denounced some parts of the rule that limited a school's responsibility to address and respond to incidences of sexual harassment and assault. For example, the Department of Education's proposed rule limits a school's Title IX responsibilities only to conduct committed on a school's campus or at a school-sponsored program or activity. Based on your legal scholarship and research, how does this narrowing of the scope of a school's responsibility undermine Title IX's goal of ensuring equal access to education regardless of sex? How would you suggest this part of the rule be changed?

Answer 3. Limiting a school's Title IX responsibilities to conduct committed on a school's campus or at a school-sponsored program or activity unjustifiably narrows the scope of a school's responsibilities and undermines Title IX's goal of ensuring equal access to education. Many students live and socialize off-campus, and some incidents of sexual misconduct occur off-campus. The geographic location of an incident is not important to determining whether an incident has a discriminatory impact on educational access. What is important is whether the parties share the common environment of a school's program and activities. Because the goal of Title IX is ensuring equal access to education, the impact on the educational experience of an individual due to another's discriminatory conduct, regardless of where that conduct occurred, should be focus of the inquiry. It should not matter whether the discriminatory conduct occurred on campus, off campus, or hundreds of miles away. The Education Department should change its proposal to provide that a school must provide Title IX remedies when a complainant's educational opportunity is concretely impaired by conduct in the school's educational programs and activities, or by the conduct of the school's students, staff, or faculty.

*Question 4.* Under the Department of Education's proposal, schools would only be required to respond to instances of sexual harassment or assault of which they have "actual knowledge." This means that schools would only be responsible for students who report to a Title IX Coordinator or other official with certain authority. To put a finer point on it, if a student reported harassment to anyone else, like a professor, advisor, or even a coach—as was true in the cases of gymnasts at MSU who reported Dr. Larry Nassar—the school would not have responsibility for addressing this sexual assault. In your opinion, does the "actual knowledge" standard adequately hold schools responsible for upholding Title IX?

Answer 4. The proposal of an "actual knowledge" standard attempts to limit schools' responsibility for responding to incidents of which school authorities are ig-

norant and could not address even if they wanted to. The "actual knowledge" standard overshoots the mark, however, and does not adequately hold schools responsible for ensuring equal access to education as required by Title IX. It would be most consistent with school's Title IX obligations to make them responsible for responding reasonably to incidents when they" know or should have known" of the sexual misconduct. In order to lesson ambiguity about the circumstances in which a school "should have known" of sexual misconduct, schools should make clear designations in advance of which school employees are required to report instances of sexual misconduct of which they become aware to the school's Title IX Office. But it is also important that not every instance in which a student confides in any school employee be one that automatically leads to the imposition of responsibility on the school itself. Many students value the ability to speak confidentially with a trusted teacher or mentor with the knowledge that those trusted adults will not be obligated take the decision to report an incident out of the students' hands. Students may seek out such confidential discussions with teachers or mentors precisely to seek help in deciding whether they wish to report an incident. While the proper standard for school's responsibility is "knew or should have known," it is important that the mere fact that a student confided in a professor about an incident not automatically mean that the school knew or should have known of the incident.

Please see also my answer to Senator Warren's Question number 2e.

*Question 5.* In a piece for The New Yorker, you wrote, "[w]hile it's essential for each party to be allowed to put questions to the other party, adversarial cross-examination is perhaps not the best way to do so in the context of a school's disciplinary process, which is not a court."[2] Please explain the drawbacks to requiring live cross-examinations. What are other potential methods schools can use to obtain relevant information regarding an instance of sexual harassment or assault?

Answer 5. Please see my answer to Senator Alexander's Question number 1, above.

SENATOR ROSEN

*Question 1.* As others have expressed today, I am incredibly concerned with the proposed rollbacks of Title IX protections for sexual assault survivors and how they would jeopardize student safety, particularly students in my home state of Nevada. Among other harmful provisions, the Department of Education's proposed rule only allows schools to investigate a report of sexual harassment if it occurred "within a school's own program or activity." At University of Nevada Las Vegas (UNLV) – a public university with the highest student enrollment rate in my state – only 6 percent of full-time students reside on campus. UNLV is a commuter campus, so the majority of students experience sexual violence, harassment, or misconduct involving fellow students outside the campus or university-sponsored program or activity. Likewise, in a 2016 survey of sexual conduct and campus safety, 79 percent of University of Nevada Reno students reported that "unwanted sexual conduct affecting students occurs off campus". And this doesn't even account for the many Nevadans who attend other commuter campuses like Truckee Meadows Community College, Nevada State College, and College of Southern Nevada. Changing the rules so schools only have to respond if the incident occurred on campus would have a direct negative impact on survivors of sexual assault and harassment in Nevada. Just because assault or harassment took place off campus, students may be forced to see their harasser on campus every day, and their education can be impacted – potentially resulting in them dropping out of school altogether.

*Question (a).* Given that Title IX itself does not state that discriminatory conduct must occur during a school activity for there to be a discriminatory environment, how is this proposed change appropriate?

Answer 1. Title IX prohibits the denial of "the benefits of . . . any education program or activity receiving Federal financial assistance," on the basis of sex. It does not state whether discriminatory conduct must occur during a school activity, or can occur outside of a school activity. However, given Title IX's goal to ensure equal access to educational opportunity, it is most reasonable to interpret the statute to require schools to address discriminatory conduct by its students, faculty, and staff that occur both on and off campus, of the conduct has a discriminatory impact on campus. Denial of the benefits of a school's program or activity may occur because of discriminatory conduct outside of the school's program or activity.

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[2] Jeannie Suk Gersen, "Assessing Betsy DeVos's Proposed Rules On Title IX and Sexual Assault," The New Yorker (February 1, 2019), *https://www.newyorker.com/news/our-columnists/assessing-betsy-devos-proposed-rules-on-title-ix-and-sexual-assault.*

Answer (a). Please also see my answer to Senator Warren's Question number 3.

*Question (b).* Nevada institutions like UNLV have pledged to continue to offer support and resources to survivors of off-campus assaults, even if this rule goes into effect. Unfortunately, not all schools will do the same. How will these changes affect the rate of student reporting of sexual misconduct?

Answer (b). Please see my answer to Senator Warren's Question number 2c.

SENATOR SANDERS

*Question 1.* As you know, Secretary DeVos rescinded guidance issued by the Obama administration that helped schools understand their responsibility to address campus sexual assault and ensure student safety and rights. Colleges and universities are focused on policies and procedures, the Department of Education ensures schools comply with federal law and it seems students, faculty and visitors to campus are an afterthought. Based on your experience working in the field of criminal law, how should the views, perspectives and experiences of students and various stakeholders taken into account to ensure that everyone feels safer on campus?

Answer 1. Regular campus climate surveys give students, faculty, and employees of colleges and universities the opportunity make their experiences with sexual misconduct known to the institution. Accurate statistics are important to increasing knowledge about campus sexual assault. In addition to the function of gathering knowledge, the fact that a school conducts a climate survey and is interested in wide participation in the survey communicates to stakeholders that the school is serious about learning of the scope of the problem and working to address it.

In this context, despite the temptation to use climate surveys as vehicles to communicate a certain message, it is also extremely important that climate surveys, to the extent possible, take care not to construct or distort the perception and understanding of the risk being measured. Climate surveys that are intended to truly measure the incidence of sexual misconduct should use clear and descriptive terms that make clear exactly what behavior is being asked about. Lack of clarity, lumping of many different kinds and degrees of behavior into large categories, and conflation, without definition, of various terms such as "sexual assault," "sexual violence," "violation," "nonconsensual," "unwanted," "unwelcome," and many others, make it difficult for surveys to produce knowledge on which we can confidently rely. Inflation or deflation of the scope and prevalence of campus sexual assault is not helpful to ensuring campus safety.

*Question 2.* The Clery Act, amended by the Violence Against Women Act (VAWA), requires colleges and universities across the United States to disclose information about crime on and around their campuses. The law applies to most institutions of higher education because it compels compliance in order to participate in federal student financial aid programs. Again, based on your experience working in the field of criminal law, are schools fully complying with the Clery Act? Is the Department of Education properly enforcing the Clery Act and VAWA?

Answer 2. In my experience, schools are complying with the Clery Act. In some instances, schools are overcomplying, by sending out immediate campus-wide notices disclosing alleged sexual misconduct incidents on campus as they occur, which is unhelpful to the goal, mentioned in Question # 1, of "making everyone feel safer on campus."

I am not currently in a position to know whether the Department of Education is "properly enforcing the Clery Act and VAWA."

*Question 3.* Colleges and universities seem to be struggling with the repeal of the Obama Title IX rules since they provided much needed guidance for institutions experiencing rising cases of sexual assault and harassment. While Secretary DeVos has proposed new guidelines, they are not in effect and have drawn criticism for favoring the rights of the accused over those of the survivor and for not actually preventing or addressing campus sexual assault. In the meantime, how can colleges and universities strengthen their campus disciplinary process to ensure that all students are safer on and near campus, especially if students feel discouraged from coming forward about sexual assaults and other acts of violence?

Answer 3. I am troubled by the notion that ensuring due process for the accused means discouraging students from coming forward about sexual assault. I reject that false choice. It is important to understand that fairness for all parties is compatible with rigorous and legitimate measures to address sexual assault. The Obama Title IX guidance unfortunately did not lead schools to that understanding,

as many of them responded to the guidance by treating the accused unfairly in their efforts to take sexual violence seriously.

I disagree with many aspects of Secretary DeVos's Proposed Rule, but I also agree with many other aspects of it. It is important that the Proposed Rule not simply be rejected out of hand but rather that we do the hard work of evaluating its merits and demerits.[3] See also my answer to Question number 4, below.

*Question 4.* What changes to Secretary DeVos' proposed Title IX guidance would you recommend to ensure that the administration does not create a campus sexual assault disciplinary process that favors wealthier students and their families who can afford attorneys and consultants to guide them through the labyrinth of filing a formal complaint with the "appropriate person," notification requirements, live cross examinations, and extensive knowledge of criminal procedure?

Answer 4. A commitment to basic fairness in a context as serious as ensuring equal access to education may mean that some procedural measures, of this question seems to express disapproval, are in fact essential. I disagree with the assumption embedded in this question that measures intended to ensure fairness of process have the effect of favoring wealthier students. Indeed, procedural due process is particularly important for protecting the educational opportunity of poor students of color who may be disproportionately represented in campus sexual misconduct cases.

I embrace the requirements in Secretary DeVos's Proposed Rule that schools provide advisors for parties who cannot afford one, avoid favoring or disfavoring either party, employ a presumption of innocence, explain the allegations to both parties, give both parties access to the evidence, afford a live hearing before the decision-maker, bear the burdens of proof and of production rather than putting them on either party, and provide written reports explaining decisions and reasoning. I also agree with the Proposed Rule's provision allowing schools to use informal dispute resolution methods when both parties consent.

Changes that I would recommend to the Proposed Rule are as follows:

*Live Questions.* The Proposed Rule requires that schools allow cross-examination at a live hearing. A live hearing is essential to fair process in school-based adjudications, but I believe that cross-examination is not. Parties should be allowed to ask questions of other parties and witnesses in a meaningful way at a live hearing. Instead of cross-examination, is sufficient, perhaps even optimal, to have parties instead submit questions to the presiding decision-maker, who should then ask all questions submitted unless they are irrelevant, excluded by a rule of evidence clearly adopted in advance, harassing, or duplicative. This submitted-questions procedure, if administered fairly, provides ample opportunity for parties to probe each other's and witnesses' credibility and consistency, such that direct cross-examination is not needed.

*Standard of Evidence.* The Proposed Rule allows schools to use either the preponderance of the evidence standard or the clear and convincing evidence standard. While I agree that either standard is consistent with Title IX, the Proposed Rule would allow schools to use the higher standard for sexual cases while using the lower one for non-sexual ones. That is discriminatory. The Proposed Rule should be changed to equalize the standard of evidence for sexual and non-sexual misconduct.

*Off-Campus Misconduct.* The Proposed Rule provides that schools are not obligated to respond to allegations of sexual misconduct that occur outside of their educational programs or activities. This is untenable because many students live and interact off campus, and off-campus misconduct may have a concrete discriminatory impact on educational access.

*Deliberate Indifference Standard.* The Proposed Rule provides that schools are in violation of Title IX only if they know of sexual-misconduct allegations and are deliberately indifferent to them. This is too permissive a standard for schools and is inconsistent with Title IX's mandate. The Rule should be changed to provide that a school is in violation of Title IX if it

[3] See, e.g., Jeannie Suk Gersen, "Assessing Betsy DeVos's Proposed Rules On Title IX and Sexual Assault," The New Yorker (February 1, 2019), *https://www.newyorker.com/news/our-columnists/assessing-betsy-devos-proposed-rules-on-title-ix-and-sexual-assault;* Jeannie Suk Gersen, Nancy Gertner & Janet Halley, Comment on Proposed Title IX Rulemaking, Submitted Jan. 30, 2019, *https://perma.cc/3F9K—PZSB.*

reacted unreasonably—that it knew or should have known of sexual misconduct and failed to address it.

RESPONSE BY DR. JEFF HOWARD TO QUESTIONS OF SENATOR ALEXANDER, SENATOR WARREN, SENATOR ROSEN, AND SENATOR SANDERS

SENATOR ALEXANDER

*Question 1.* In your testimony, you outlined that if a student fails to maintain proper decorum throughout the hearing and questioning process they will receive a contempt of court citation. Could you explain in detail what this citation consists of and what sanctions, if any, result?

Answer 1. The court reads the following statement at the beginning of a hearing: "Statement of contempt. Order will prevail at all times during the hearing. Persons must be recognized by the chair before speaking. This statement should be considered a warning. Any misconduct during the hearing will now result in the assignment of appropriate sanctions to any or all parties involved."

The board handbook offers the following guidance: Contempt - An individual found guilty of contempt may be subject to disciplinary action.

Charges of contempt will be filed against acts which are in violation of the following guidelines. Although this list shall not be taken as exhaustive and the judiciary boards may enlarge upon or modify this list to meet the particular circumstances in any case, the following are possible acts which might result in contempt of the judicial board.

1. Failure to fully comply with the instructions or orders of the courts
2. Failure to fully perform disciplinary measures imposed
3. Conduct which disrupts court proceedings
4. Any act which tends to embarrass, obstruct, or hinder the duty and function of the boards
5. Any act intended to lessen the authority or dignity of the boards
6. Failure to cooperate with institutional officials on behalf of the court
7. Failure to appear before a scheduled meeting of a judicial board

In extraordinary cases where a student's conduct is excessively disruptive of the proceedings, the board by majority vote can declare the student to be in contempt of the judiciary and may then and there impose disciplinary measures. Such action by the board shall be in writing."

Finally, the board could impose sanctions for the contempt charge from those sanctions within their purview for the case in question. Sanctions such as a warning, reprimand, service, education, apology, fines, restrictions, and probation. The board would take into account the situation and circumstances.

Because the board is so up front about contempt and expectations, I am unaware of anything beyond a warning being used over the past decade.

Members of the board may at any time during the hearing question the respondent, complainant, or witnesses.

Four valuable aspects exist in questioning.

First, the specifics of a case should be sought before turning to the philosophical aspects.

Secondly, when several individuals are involved in the case, a specified set of questions should be asked each individual involved as a test of verification of stories.

Thirdly, feedback questions prove useful for the purpose of explicating apparent contradictions. This takes place most generally when someone tries to give answers the way he feels they will appeal most to the sympathies of the board.

Lastly, a board strives to ask as many questions as possible which will elicit a definite "yes" or "no" answer. This provides a solid foundation of concrete evidence for later discussion.

An inherent part of judicial procedure is the board's effort to understand both the student and the situations in which they become involved. If given time to answer well the questions of the board, much can be learned about attitude and personality from the nature of the responses. Under no circumstances should board members communicate back and forth, pass notes, watch the clock, or the like, for the student deserves the same courtesy and attentiveness from the board which it demands of him.

It is a good idea to collect one's thoughts for a few moments between each person questioned. This provides an opportunity to check for possible conflicts or discrepancies of stories and to decide upon areas which may need further investigation.

Conflicts must be resolved. It is impossible to conclude anything on insufficient information. If a situation cannot be clarified through individual questioning, it is permissible to bring those with conflicting stories before the board together. Here, however, the situation generally involves far more than mere misrepresentation; it is an even more serious matter of honor.

In some cases there occurs two personal relationships which are important to investigate: What is the student's relationship with his roommate and with the other students on his floor.

The time element and related specifics are often very pertinent information for the board to consider. What time did things happen? How much time was between events? It is always important to inquire about what went on preceding the specific incident in question, since many times this is revealing to other factors in the case.

It is essential that no accusation or statement or any kind is made which cannot be supported by proof. The board members and the staff advisor must be conscious of this important area of law and qualify their statement in light of the facts.

*Question 2.* Your institution provides for direct questioning between students, or through the Chairperson of the hearing board. Are there specific guidelines given to the Chairperson as to what questions to allow or not allow?

Answer 2. The following is provided in the board handbook:

Technical exclusionary rules of evidence followed in a court of law will not apply, nor will technical legal motions be entertained. Technical legal rules pertaining to the wording of questions, hearsay, and opinion will not be legalistically applied. Reasonable rules of relevancy will guide the board in ruling on the admissibility of evidence.

The respondent, complainant, and witnesses are entitled to refuse to answer questions. In the case of the respondent, of his/her witnesses, refusal to answer will not be taken as indicative of guilt and must be noted without prejudice. In the case of the complainant or his/her witnesses, refusal to answer should not necessarily negate any other part of the testimony.

The Chairperson shall insure that:

Proper decorum prevails. (Failure to exhibit proper behavior will result in a contempt of court citation.)

Questioning shall be for the purpose of gathering information only.

All questions be germane; either party may object to unfair or impertinent questions.

*Question 2.* a. Is there a specific training provided for the Chairperson and other board members?

Annual trainings are held for the entire board. One broad training on the board, duties, etc. and another specific to sexual misconduct, and then ongoing trainings/professional development type in-services throughout the year.

*Question 2.* b. If so, could you provide what is included in this training?

Answer 2. Judicial Board Trainings

Annual Training

Each year every board member is trained on the policies and procedures concerning the ETSU Institutional Disciplinary Policy and the judicial board processes used to address violations.

Each year every board member is trained on the ETSU Student Sexual Misconduct Policy, Title IX as it relates to board responsibilities, investigation processes, and board processes used to address violations. If board members are not available for training, then they are not eligible to hear sexual misconduct cases.

Additional Trainings

Additional specialized training regarding the Preponderance of Evidence standard is offered each semester.

Additional specialized training regarding Title IX updates and legislation is offered each semester.

Additional specialized training regarding police processes is offered once per year, with a goal of offering once per semester. This training is led by an officer with ETSU Public Safety.

Philosophically, we have established the following goals for when board members are ready to hear cases:

1. Each member not only understands, but also can articulate the university philosophy on discipline.

2. Each member is thoroughly familiar with the procedures for handling a case; so there will be no hesitation, no uncertainty, no bickering in the mechanical flow of the meeting.

3. The board members know each other and their advisor well enough to permit a free expression of opinion.

4. The board knows the kind of information it needs to make a wise decision: the facts involved in the misconduct, the motivation of the student involved, his general conduct, his level of maturity, the environment in which he lives, and his purpose in attending the university.

5. The board has some practice in questioning a student so that it can obtain the necessary information without appearing to pry into personal matters, without showing prejudices and without showing hostility.

6. The board understands the importance of its position as a foundation of responsible self-government.

7. The board recognizes it may serve two purposes: determination of guilt and assessment of a corrective disciplinary sanction in an educational manner.

8. The board members themselves feel confident that they are prepared to handle a disciplinary case.

9. The board recognized the confidentiality of its meetings.

10. The board members recognize that no list of procedures and no amount of legalism will prove to be a substitute for common sense, honesty, and good judgment.

11. The board members are generally familiar with due process requirements.

12. The advisor is sure that the board members are ready for a case.

SENATOR WARREN

*Question 1.* According to data from the U.S. Department of Justice, only one in five women who are sexually assaulted on campus will actually report the attack to the police.[1] What should Congress do to encourage students to report incidences of harassment and assault?

Answer 1. Congress should ensure that reporting options are not limited. A student may report to an employee or friend. They will likely report to someone they know or have built a comfort level and/or relationship with. Do not limit institutions from acting on reports made in this manner.

*Question 2.* From your perspective, how would each of the following aspects of the Department of Education's proposed rule, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," affect a complainant's likelihood of reporting harassment or assault?

a. The live cross examination requirement;

Answer 2. Our institution currently permits the parties to question one another. This may occur in one of two hearing types at ETSU, in a judicial board hearing or in an UAPA hearing (defined in state code).

In the judicial board hearing the questions are asked by the complainant and respondent. They may be in the same room or may be screened or in separate rooms participating using technology. The important thing to note is that the question is done in a way that the parties are comfortable. The questions may be directed to the chair of the board but both parties hear the question and the response.

Advisors/lawyers are permitted but may not speak in the hearing.

In the UAPA, lawyers may directly question. It is a much more legalistic process and is offered to the respondent if suspension or expulsion are possible outcome sanctions.

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[1] U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics. (2014). Rape and Sexual Victimization Among College-Aged Females, 1995–2013. *https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf.*

In both cases, the University has made sure the process happens in a fair and equitable manner with all due process rights being observed. One is not necessarily better than the other.

b. The proposed definition of harassment, which would narrow the scope of what incidences of sexual misconduct schools are required to respond to;

I do not think that changing the definition helps institutions address complaints.

c. The geographic location limitations, which would limit instances where schools may respond to sexual harassment and assault to school grounds, activities, and programs;

Limiting geography reduces the institutions' ability to respond and take action on situations that could occur on school trips, spring break, or study abroad. Geography should not be changed.

d. The clear and convincing standard requirement; and

The preponderance of evidence standard is used by my institution for all Code of Conduct processes including sexual harassment. We are in favor of this standard remaining.

e. The actual knowledge standard and requirements for filing formal complaints.

If a student living in a residence hall reports to their Resident Advisor (RA) they assume they are reporting to the school. They may report to the RA because that is who they feel comfortable speaking with. Institutions should be able to address and respond to complaints made to others within the institution and not just the Title IX Coordinator. Clery talks about responsible employees and Campus Security Authorities who has certain reporting obligations. Title IX and Clery should align in this way.

SENATOR ROSEN

*Question 1.* As others have expressed today, I am incredibly concerned with the proposed rollbacks of Title IX protections for sexual assault survivors and how they would jeopardize student safety, particularly students in my home state of Nevada. Among other harmful provisions, the Department of Education's proposed rule only allows schools to investigate a report of sexual harassment if it occurred "within a school's own program or activity." At University of Nevada Las Vegas (UNLV) – a public university with the highest student enrollment rate in my state – only 6 percent of full-time students reside on campus. UNLV is a commuter campus, so the majority of students experience sexual violence, harassment, or misconduct involving fellow students outside the campus or university-sponsored program or activity. Likewise, in a 2016 survey of sexual conduct and campus safety, 79 percent of University of Nevada Reno students reported that "unwanted sexual conduct affecting students occurs off campus". And this doesn't even account for the many Nevadans who attend other commuter campuses like Truckee Meadows Community College, Nevada State College, and College of Southern Nevada. Changing the rules so schools only have to respond if the incident occurred on campus would have a direct negative impact on survivors of sexual assault and harassment in Nevada. Just because assault or harassment took place off campus, students may be forced to see their harasser on campus every day, and their education can be impacted – potentially resulting in them dropping out of school altogether.

*Question (a).* Given that Title IX itself does not state that discriminatory conduct must occur during a school activity for there to be a discriminatory environment, how is this proposed change appropriate?

Answer (a). This change could limit institutions and their ability to respond appropriately to complaints. Commuter students, or student on study abroad, school trips, or break trips should not have their complaints treated any differently just because it occurred off campus grounds.

*Question (b).* Nevada institutions like UNLV have pledged to continue to offer support and resources to survivors of off-campus assaults, even if this rule goes into effect. Unfortunately, not all schools will do the same. How will these changes affect the rate of student reporting of sexual misconduct?

Answer (b). Our institution would continue to support and offer resources to complainants but the change in geography could put limitations on that response. The complaint is made between students and that nexus should allow for complaint response no matter the geography.

SENATOR SANDERS

*Question 1.* As you know, Secretary DeVos rescinded guidance issued by the Obama administration that helped schools understand their responsibility to address campus sexual assault and ensure student safety and rights. Colleges and universities are focused on policies and procedures, the Department of Education ensures schools comply with federal law and it seems students, faculty and visitors to campus are an afterthought. Based on your experience working in the field of criminal law, how should the views, perspectives and experiences of students and various stakeholders taken into account to ensure that everyone feels safer on campus?

Answer 1. Campus processes must be accessible and campus procedures must be fair and equitable to both parties. Institutions have well established Codes of Conduct and hearing processes. These are not courts of law but must afford all parties due process. Transparency is key in assuring that campus constituents understand their rights, their responsibilities, and resources. Those things should be more open and not more restricted.

*Question 2.* The Clery Act, amended by the Violence Against Women Act (VAWA), requires colleges and universities across the United States to disclose information about crime on and around their campuses. The law applies to most institutions of higher education because it compels compliance in order to participate in federal student financial aid programs. Again, based on your experience working in the field of criminal law, are schools fully complying with the Clery Act? Is the Department of Education properly enforcing the Clery Act and VAWA?

Answer 2. Yes, I think school are complying with Clery and VAWA. Having worked in this area I have found the DOE and their Clery Handbook helpful. Institutions must put considerable time and attention to compliance and training.

*Question 3.* Colleges and universities seem to be struggling with the repeal of the Obama Title IX rules since they provided much needed guidance for institutions experiencing rising cases of sexual assault and harassment. While Secretary DeVos has proposed new guidelines, they are not in effect and have drawn criticism for favoring the rights of the accused over those of the survivor and for not actually preventing or addressing campus sexual assault. In the meantime, how can colleges and universities strengthen their campus disciplinary process to ensure that all students are safer on and near campus, especially if students feel discouraged from coming forward about sexual assaults and other acts of violence?

Answer 3. Institutions are faced with an untenable situation, of trying to hit a moving target with the changing rules.

For students to feel they are being hear, then campus processes must be fair and equitable and allow for:

a. filing a complaint with those on campus the student might feel comfortable speaking with

b. School response and support through resources/interim measures, to both parties

c. a fair and unbiased investigation with two trained investigators

d. a fair and unbiased hearing process with the ability to review all related materials, witnesses, and questioning one another

e. the ability to appeal

*Question 4.* What changes to Secretary DeVos' proposed Title IX guidance would you recommend to ensure that the administration does not create a campus sexual assault disciplinary process that favors wealthier students and their families who can afford attorneys and consultants to guide them through the labyrinth of filing a formal complaint with the "appropriate person," notification requirements, live cross examinations, and extensive knowledge of criminal procedure?

Campus student conduct processes are not courts of law. Student, complainants and respondents should be afforded due process rights in any campus process. Advisors/attorneys should serve as an advisor and should not be involved in the campus conduct hearing directly but should advise their advisee/client in the process.

I am supportive of removing the single investigator model and for holding a hearing before imposing a sanction. I am in favor of both the complainant and respondent being allowed to review all materials collected and to be able to question one another and any witnesses/evidence submitted. This can be done in such a way that is respectful and equitable to all parties without it having to be done by an advisor/representative/attorney.

Many institutions, including mine, already allow for such questioning.

The more conditions and parameters placed on Title IX complaints the less institutions will be able to respond. Students should be able to file a complaint with others besides the Title IX Coordinator and students should be able to file complaints that happen off campus.

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[Whereupon, at 12:04 p.m., the meeting was adjourned.]

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