

*eSubmitted via www.regulations.gov*

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

**Re: 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:

Equality Now would like to take this opportunity to express our strong opposition to the Notice of Proposed Rulemaking (“NPRM”) on Title IX, issued by the Department of Education on November 29, 2018. Equality Now is an international human rights organization that works towards ending violence and discrimination against women and girls, both domestically and abroad. We are very concerned with several sections of the proposed rules which would decrease protections for adolescent girls. Statistics indicate that nearly 1 in 5 girls between the ages of 14 and 17 have been victims of sexual assault or attempted sexual assault.<sup>1</sup> While it is not clear how many of these assaults were perpetrated by fellow students or in school, there were at least 17,000 official reports of sexual assaults of K-12 students by their peers between 2011 and 2015.<sup>2</sup> In a survey of 1,965 middle and high school students, it was found that between 2010-11, 56% of girls experienced sexual harassment in school.<sup>3</sup> The proposed changes would also violate the United States’ obligations under international law, including the International Covenant on Civil and Political Rights, which prohibits discrimination on the basis of sex, and its commitments under the 2030 Agenda for Sustainable Development (the Sustainable Development Goals), which calls for inclusive, equitable and quality education as well as gender equality and the empowerment of women and girls.<sup>4</sup> We therefore urge the Department of Education to reverse course and dedicate its efforts to advancing policies that ensure equal access to education for all students, including by preventing and addressing sexual harassment.

Our opposition and proposed alternatives to certain specific sections in the proposed rules are set out below:

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<sup>1</sup> U.S. Dep’t of Justice, *Children’s Exposure to Violence: A Comprehensive National Survey 2* (Oct. 2009). Available at <https://www.ncjrs.gov/pdffiles1/ojdp/227744.pdf>.

<sup>2</sup> Robin McDowell et al., *Hidden Horror of school sex assaults revealed by AP*, Associated Press, May 1, 2017. Available at <https://www.ap.org/explore/schoolhouse-sex-assault/hidden-horror-of-school-sex-assaults-revealed-by-ap.html>.

<sup>3</sup> Catherine Hill and Holly Kearn, *Crossing the Line Sexual Harassment at School*, AAUW, 2 (2011). Available at <https://www.aauw.org/files/2013/02/Crossing-the-Line-Sexual-Harassment-at-School.pdf>.

<sup>4</sup> For more information on how these proposed regulations would impact the United States’ international obligations, please see Equality Now’s recent submission to the UN Human Rights Committee at: [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fics%2fUSA%2f33427&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fics%2fUSA%2f33427&Lang=en)

## 1. Sections 106.30 & 106.45(b)(3) - Definition of Sexual Harassment

We are concerned with the proposed definition of sexual harassment, which limits the scope of sexual harassment to behavior that is “unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity” or sexual assault.<sup>5</sup> This definition is very narrow, and many forms of sexual harassment that take place in schools potentially would not rise to that level of severity. In addition, under Sec. 106.45(b)(3), if a Title IX complaint was determined to not meet the definition of sexual harassment, the recipient is required to “terminate its grievance process with regard to that conduct.”<sup>6</sup> Although the NPRM states a recipient has the discretionary power to respond to such cases informally,<sup>7</sup> it seems likely that recipients would choose not to respond to many students’ valid claims of sexual harassment until they reach the point of creating a hostile environment that has severely affected a student’s education.

Although the Department of Education has specified that the purpose behind the proposed rules is to bring the regulations in line with the standards used by the courts in cases of private litigation, it is important to remember that, as noted in the 2001 Revised Sexual Harassment Guidelines issued by the Office of Civil Rights (OCR), “the liability standards established in those cases are limited to private actions for monetary damages,” and were designed to impose a higher bar than for general Title IX claims, which were administrative in nature and concerned with voluntary corrective actions by the recipient.<sup>8</sup> In *Gebser*, the court acknowledged the Department of Education’s ability to “promulgate and enforce requirements” for Title IX that can differ than those required for plaintiffs seeking monetary damages.<sup>9</sup>

In contrast to the definition advanced in private Title IX litigation<sup>10</sup> and the proposed regulations, previous Title IX guidance has used broader language to define sexual harassment. The 2011 guidance defined sexual harassment as “unwelcome conduct of a sexual nature, which can include unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature.”<sup>11</sup> Although under previous guidance recipients were required to respond to cases of sexual harassment that created a hostile environment (i.e. conduct that is “sufficiently serious that it interferes with or limits a student’s ability to participate in or benefit from the school’s program”<sup>12</sup>), there was no requirement that they dismiss complaints if it was determined that the sexual harassment was not severe enough to create a hostile environment. On the contrary, the 2001 guidance notes that once a recipient has notice of sexual harassment, “it should take immediate and appropriate steps to investigate or otherwise determine what

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<sup>5</sup> 83 Fed. Reg. 61462, 61466 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106) [hereinafter NPRM].

<sup>6</sup> *Id.* at 61474.

<sup>7</sup> *Id.* at 61475.

<sup>8</sup> Office for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, U.S. Dep’t Educ. ii (Jan. 2001), <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [hereinafter *Guidance 2001*]

<sup>9</sup> *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998).

<sup>10</sup> *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 652 (1999) (“in the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education”)

<sup>11</sup> *Dear Colleague*, U.S. Dep’t of Education, 6 (Oct. 26, 2010) [hereinafter *Dear Colleague 2010*].

<sup>12</sup> *Dear Colleague*, U.S. Dep’t of Education, 3 (Apr. 4, 2011) [hereinafter *Dear Colleague 2011*].

occurred and 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.”<sup>13</sup>

The 2001 Guidance listed several examples that show how harassment can limit or, in some cases, deny a student the ability to access their education. The effects of these ranged from students having trouble maintaining their GPA, to suffering emotional or physical injuries, to being forced to drop out of school.<sup>14</sup> Ideally, however, sexual harassment should be corrected by a school before it gets to that point. For example, if a student was sexually harassed by a teacher, but it had not progressed to the point where it was affecting that student’s studies, any formal complaint made by the student could be required to be dismissed under the proposed regulation, unless such behavior continued to escalate to the point where the student’s ability to access their education was effectively denied. Although a school could choose to informally put in place measures to stop the situation from escalating, they would not be required to do so. Under the previous guidelines, the recipient was expected to put corrective measures in place in order to ensure that such behavior did not advance to the point where it impaired a student’s ability to access their education.

We are concerned that limiting the definition of sexual harassment to cases that effectively deny a student access to their education will lead to schools ignoring the valid complaints of students who are being sexually harassed, like the example above. In a survey of 1,965 elementary and secondary school students, it was found that 48% of students experienced sexual harassment between 2010-11.<sup>15</sup> Although most students reported that the sexual harassment had a negative effect on them, only a small percentage said that it “significantly affected their education,” with 12% reporting staying home from school and 4% ultimately changing schools.<sup>16</sup> The proposed guidance would only protect a small percentage of students, and declare a school not to be responsible for the others, unless or until it advanced to the point of severely affecting their education. Therefore, we urge you to revert to the definition of sexual harassment as used in the previous guidance.

### *Proposed Alternative*

The proposed rules should define sexual harassment as “unwelcome conduct of a sexual nature, which can include unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature,” as it was under the 2011 guidance. In addition, the requirement for recipients to dismiss claims that have not yet reached the point of creating a hostile environment should be removed.

## **2. Sec. 106.30 - The Definition of “Actual Knowledge”**

Section 106.44 of the proposed regulations states that “a recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States must

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<sup>13</sup> *Guidance 2001*, *supra* note 4, at 15.

<sup>14</sup> *Id.* at 6.

<sup>15</sup> Catherine Hill and Holly Kearnl, *Crossing the Line Sexual Harassment at School*, American Association of University women, 2 (2011). Available at <https://www.aauw.org/files/2013/02/Crossing-the-Line-Sexual-Harassment-at-School.pdf>

<sup>16</sup> *Id.* at 22.

respond in a manner that is not deliberately indifferent.”<sup>17</sup> Actual knowledge is defined in Section 106.30 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.”

We are concerned with the definition of actual knowledge proposed in the new regulations, which lacks clarity about who students should report sexual harassment to in order to ensure that the school has “actual knowledge” of the harassment. In particular, there is a lack of clarity on a) the standards to determine if a person is an official with “the authority to institute corrective measures”; and b) the scope of the authority of teachers of elementary and secondary schools.

*a. Notice to any official of the recipient who has the authority to institute corrective measures on behalf of the recipient.*

Under the new regulations, in order for a recipient to have actual knowledge of sexual harassment it would need to be reported to “any official of the recipient who has the authority to institute corrective measures on behalf of the recipient.”<sup>18</sup> Based on this definition, it seems likely that there would be a limited pool of people who would qualify as such an official, therefore making it less likely that recipients will be found to have “actual knowledge” of sexual harassment and decreasing protections for students. It also makes it more difficult for a student to determine who would qualify as an appropriate official to report incidences of sexual harassment to.

As noted in the Notice of Proposed Rulemaking, private actions under Title IX have typically required an “appropriate person” to receive notice for the recipient to be deemed to have actual knowledge.<sup>19</sup> However, the courts have not explicitly defined who an appropriate person is. In *Gebser*, the court found that it couldn’t allow for recovery of damages based on a teacher sexually harassing a student without “actual notice to a school district official,”<sup>20</sup> and that an appropriate person is “at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination.”<sup>21</sup> In *Broward Cty.*, the court noted that the identity of an appropriate person is “necessarily a fact-based inquiry because officials’ roles vary among school districts.”<sup>22</sup> Some courts have found that, in certain circumstances, notice of harassment to a principal can satisfy the requirement for actual knowledge.<sup>23</sup> Others have even gone so far as to decide that, under limited circumstances, teachers can qualify as appropriate persons.<sup>24</sup> What can be

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<sup>17</sup> NPRM, *supra* note 1, at 61497.

<sup>18</sup> NPRM, *supra* note 1, at 61497.

<sup>19</sup> *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

<sup>20</sup> *Id.* at 285.

<sup>21</sup> *Id.* at 290.

<sup>22</sup> *Doe v. Sch. Bd. of Broward Cty., Fla.*, 604 F.3d 1248, 1256–57 (11th Cir. 2010)

(quoting *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1247 (10th Cir. 1999)).

<sup>23</sup> *Id.*; *J.F.K. v. Troup Cty. Sch. Dist.*, 678 F.3d 1254, 1260 (11th Cir. 2012); *Hill v. Cundiff*, 797 F.3d 948, 971 (11th Cir. 2015); *Warren ex rel. Good v. Reading Sch. Dist.*, 278 F.3d 163, 171 (3d Cir. 2002); *Plamp v. Mitchell Sch. Dist. No. 17-2*, 565 F.3d 450, 457 (8th Cir. 2009).

<sup>24</sup> *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1248 (10th Cir. 1999) (“It is possible that these teachers would also meet the definition of ‘appropriate persons’ for the purposes of Title IX liability if they exercised control over the harasser and the context in which the harassment occurred.”); *Hawkins v. Sarasota Cty.*

surmised based on these cases is that the officials referred to by the new regulations are neither explicitly defined nor numerous.

Although there are many reasons why students choose not to report sexual harassment, one of the reasons survivors rarely report cases of sexual violence is because of a lack of knowledge of reporting procedures.<sup>25</sup> When it is unclear who would be an appropriate person for a student to report to [without a court-led, fact-specific inquiry], it seems likely that students would be deterred from coming forward with valid claims of sexual harassment. Therefore, in order to help students navigate the process of reporting cases of sexual harassment, we would recommend that the Department of Education include a description of the specific positions that would qualify as an official of the recipient who has the authority to institute corrective measures on behalf of the recipient.

As an alternative, we suggest that the Department retain the previous guidance on this issue, which denoted that there were multiple ways a recipient could be found to have notice of harassment, and specified that one of those was “if a responsible employee” knew or reasonably should have known of the sexual harassment.<sup>26</sup> Their definition of a responsible employee included “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.”<sup>27</sup> This guidance is a common sense approach and would better serve students by allowing them to report to someone they “reasonably believed” had the authority to address cases of sexual harassment, be they a school district official, principal, or member of the faculty.

*b. Notice to teachers of elementary and secondary school students.*

Under Section 160.30, actual knowledge can involve “notice of sexual harassment or allegations of sexual harassment to [...] a teacher in the elementary and secondary context with regard to student-on-student harassment.”<sup>28</sup> While we applaud the Department of Education’s efforts to make reporting easier for elementary and secondary students, we remain concerned that a recipient is only deemed to have actual knowledge in one situation: student-on-student harassment. This regulation will likely lead to confusion about the proper reporting procedures for sexual harassment.

There are two situations where this rule is likely to confuse elementary and secondary school students. One would be a case where a student was harassed by another student, and turned to a non-teaching member of the faculty to address the issue, like a guidance counselor. The second example would be a situation where a student was sexually harassed by a teacher and reported that harassment to a different teacher. In both situations, the student would likely be under the impression that this was a person who would render the

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*Sch. Bd.*, 322 F.3d 1279, 1286 (11th Cir. 2003); *J.S., III by & through J.S. Jr. v. Houston Cty. Bd. of Educ.*, 877 F.3d 979, 989 (11th Cir. 2017).

<sup>25</sup> Kathryn J. Holland and Lilia M. Cortina, “*It happens to girls all the time*”: Examining sexual assault survivors’ reasons for not using campus supports, 59 *American Journal of Community Psychology*, 50, 55 (2017).

<sup>26</sup> *Guidance 2001*, *supra* note 4, at 13.

<sup>27</sup> *Id.*

<sup>28</sup> NPRM, *supra* note 1, at 61496.

school responsible for addressing the behavior. However, the current guidance does not state that notification to such an official would impart the recipient with actual knowledge.

Although students who wish to report student-on-student harassment to another faculty member besides a teacher, or who wish to report sexual harassment by one teacher to another teacher might be covered by this regulation under the provision that allows them to report to an official with “the authority to institute corrective measures on behalf of the recipient,” as noted above, the identity of these officials is not well-defined. As posited in the Notice of Proposed Rulemaking, there is always the possibility that students could report their sexual harassment to the recipient’s Title IX Coordinator, thus providing the recipient with a clearly designated reporting option.<sup>29</sup> However, this presents a unique problem for students in elementary and secondary schools, where the recipient is only required to appoint one Title IX Coordinator for an entire district.<sup>30</sup> This means that students are much less likely to have developed a relationship with their Title IX Coordinator and to feel comfortable reaching out to them with concerns about being sexually harassed. Therefore, we recommend expanding the scope of teachers under the proposed rule, and to consider adding other members of faculty to the definition of actual knowledge.

#### *Proposed Alternative*

The proposed rules should be amended so that they provide a list of job titles or clear standards for the determination of an official with “the authority to institute corrective measures on behalf of the recipient.” As an alternative to defining such a person, adopt the previous guidances’ definition of a “responsible person” to determine the recipient had notice of the sexual harassment.

The proposed rules should also be modified to increase the scope of the definition of actual knowledge so that elementary and secondary students can report to another teacher in cases involving teacher-on-student sexual harassment. In addition to teachers, guidance counselors and other relevant faculty should be added as officials who elementary and secondary school students can report sexual harassment to under Section 106.30

### **3. Section 106.44(a) - Deliberately Indifferent**

#### *a. The use of the deliberate indifference standard is not legally required*

Proposed section 106.44(a) states that a recipient with *actual knowledge* of sexual harassment in an education program or activity of the recipient against a person in the United States must respond in a manner that is not *deliberately indifferent*. Proposed section 106.44(a) would also state that a recipient is deliberately indifferent only if its response to sexual harassment is *clearly unreasonable in light of the known circumstances*.

Although this standard has been articulated by the Supreme Court in cases involving claims for monetary damages for Title IX violations, these cases specifically note that the requirement only applies for award of

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<sup>29</sup> *Id.* at 61467.

<sup>30</sup> 34 C.F.R. Sec. 106.8(a) (2018).

monetary damages and that a different standard may be used for administrative enforcement.<sup>31</sup> The Supreme Court has specifically noted the power of federal agencies to “promulgate and enforce requirements that effectuate [Title IX’s] nondiscrimination mandate,” even in circumstances that would not give rise to a claim for money damages.<sup>32</sup> As such, the OCR has the authority to refrain from using the deliberate indifference standard. In fact, the proposed rules depart significantly from established practice and guidance from the OCR since 2001, which have taken the position that constructive notice (not actual) triggered a school’s duty to respond, and held schools accountable under a reasonableness standard as opposed to the deliberate indifference standard.<sup>33</sup>

*b. The deliberate indifference standard thwarts the very purpose of Title IX*

The proposed standard would make it extremely difficult to hold schools accountable, since it grants too much leeway to individual schools. The proposed rules provide a safe harbor provision to schools whereby schools would not be considered “deliberately indifferent” (i) where there is a formal complaint, if it follows the investigation procedures in § 106.45, regardless of the school’s final decision; (ii) where there are multiple reports against the same respondent, if the Title IX coordinator files a formal complaint and follows the procedures in § 106.45, regardless of the school’s final decision; or (iii) in all other cases, if the school is not “clearly unreasonable”. This means that as long as schools undertake the procedural process in accordance with the minimal requirements provided in section 106.45, which apart from the requirement to treat the complainant and respondent equally, does not provide any protective measures for the complainant, a school would not be considered deliberately indifferent irrespective of the school’s final decision. This standard under Title IX which is meant to provide equality in access to education to children and young adults, is unfathomably lower than the standard used to protect adult employees from workplace harassment under Title VII, which requires employers to exercise reasonable care to prevent and promptly correct any harassing behavior.<sup>34</sup>

An analysis of federal case-law applying the deliberate indifference standard under Title IX shows that the standard is very easy for schools to satisfy, while in fact doing very little to address sexual abuse.<sup>35</sup> Under this standard, in some circuits even heedless incompetence or cover-ups by schools has been excused. For instance, in one case, a school was not found to be deliberately indifferent even though it gave a teacher only a one week paid suspension for sexually propositioning a student in a closet while blocking the exit.<sup>36</sup> The deliberate indifference standard gives far too wide a latitude to schools. It usually only requires the school to do *something* following the actual knowledge to meet this standard, even if the action taken by the school is completely ineffective and further abuse by the same perpetrator takes place, no real remedy is provided to the student, and no preventive change is implemented regarding the perpetrator or the

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<sup>31</sup> *Davis v. Monroe County* 526 U.S. 629 (1999); *Gebser v. Lago Vista Independent School District* 524 US 274 (1998).

<sup>32</sup> *Gebser v. Lago Vista Independent School District* 524 US 274 (1998); See also *Guidance 2001*, *supra* note 4, at 3.

<sup>33</sup> *Id.*

<sup>34</sup> See *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Burlington Industries, Inc. v. Ellerth* 524 U.S. 742 (1998).

<sup>35</sup> Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 *Yale L.J.* 2038 (2016).

<sup>36</sup> *Wylar v. Connecticut State University System*, 100 F. Supp. 3d 182, 195 (D. Conn. 2015).

school's procedures.<sup>37</sup> Regarding the requirement that the school's response be "clearly unreasonable" especially in student-on-student harassment cases, "[t]his 'high standard' precludes a finding of deliberate indifference in all but limited circumstances."<sup>38</sup>

One First Circuit decision demonstrates how easy it is for schools to escape liability under this standard. In this case, oral sex was forced upon a disabled boy student by another boy. The school was informed of this incident, and took no action other than initially separating the two students, though they put them back in the same class after a year. The same student then had sex with the disabled boy in the school bathroom. The survivor, who was in the seventh grade, was hospitalized and attempted suicide. The First Circuit found that putting the two students back in the same class despite their actual knowledge of the prior incident did not constitute deliberate indifference by the school.<sup>39</sup>

Title IX guarantees an "equal access to education", which is essentially an *outcome* standard, which requires that at student's access to education should not be affected by sexual harassment and assault. The deliberate indifference standard however does nothing to promote sex equality as it is designed to protect schools rather than ensure equal access to education for students.<sup>40</sup> Extending the use of the deliberate indifference test to administrative enforcement actually "thwarts the purpose of Title IX".<sup>41</sup>

Under the proposed rules, schools would just need to tick certain procedural boxes and comply "on paper" to avoid accountability. The compliance of schools to this standard, which "is measured in unreasonableness of procedural steps rather than in substantive equality outcomes, produces an incentive for schools to go through the motions with an eye primarily to looking as if action is being taken, rather than to redressing the injury, stopping the abuse, or addressing the climate in the environment that produced and permitted it."<sup>42</sup>

*c. The deliberate indifference standard is unsuited to administrative enforcement*

The OCR has never required schools to compensate individual victims.<sup>43</sup> Thus, the deliberate indifference standard laid out in *Gebser*, which specifically sought to protect schools attempting good-faith compliance with Title IX from facing high monetary liability<sup>44</sup>, is not appropriate in cases of administrative enforcement. As recognized by the OCR in its 2001 guidance following the *Gebser* ruling,

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<sup>37</sup> See Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 *Yale L.J.* 2038 (2016) which discusses numerous circuit court cases and analyses the implementation of the deliberate indifference standard.

<sup>38</sup> *Doe v. Bd. of Educ. of Prince George's Cty.*, 982 F. Supp. 2d 641, 654 (D. Md. 2013).

<sup>39</sup> *Porto v. Town of Tewksbury*, 488 F.3d 67, 70 (1st Cir. 2007).

<sup>40</sup> Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 *Yale L.J.* 2038 (2016).

<sup>41</sup> *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 293 (1998) (Stevens, J., dissenting).

<sup>42</sup> Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 *Yale L.J.* 2038 (2016).

<sup>43</sup> Dana Bolger, *Gender Violence Costs: Schools' Financial Obligations Under Title IX*, 125 *Yale L.J.* 2106, 2123 (2016).

<sup>44</sup> *Gebser v. Lago Vista Independent School District* 524 US 274 (1998); See also A.J. Bolan, *Deliberate Indifference: Why Universities Must Do More to Protect Students from Sexual Assault*, 86(3) *The George Washington Law Review* 804 (2018).

“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.”<sup>45</sup>

### *Proposed Alternatives*

The due diligence standard used under international human rights law<sup>46</sup>, including in relation to violence against women<sup>47</sup> is an appropriate standard to be used in such cases. This standard would require schools to prevent, protect, and investigate cases of violence against students by intervening against sexual abuse at all levels—meaning effective investigation, responsive process, and effective remedies. Crucially, due diligence would require that known instances of sexual harassment, or those of which a school should have been aware, actually be remedied and prevented from recurring.<sup>48</sup>

Alternatively, the appropriate standard would be the standard which has been used by the OCR for decades now, and is in fact close to the due diligence standard recommended under international human rights law. In its 2001 Guidance, OCR clarified that a recipient’s failure to respond promptly and effectively to end severe, persistent, or pervasive harassment, which it knew or should have known about, and to prevent its recurrence, could violate Title IX for purposes of administrative enforcement. Unlike often under the deliberate indifference standard, OCR requires that, upon receiving actual or constructive notice of harassment, the school “should take immediate and appropriate steps to investigate or otherwise determine what occurred,” and that every investigation “must be prompt, thorough, and impartial.” It requires the school take “prompt and effective action calculated to end the harassment,” eliminate any hostile environment and its effects, and prevent the harassment from recurring.<sup>49</sup>

#### **4. 106.45(b)(1)(iv) - The Presumption that the Respondent is Not Responsible For the Alleged Conduct**

The proposed rules require school grievance procedures to include a “presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.” Such a presumption is problematic because it will lead to investigations that start with a bias towards the perpetrator and tilts weight of the investigation and

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<sup>45</sup> *Guidance 2001*, *supra* note 4, at 3.

<sup>46</sup> U.N. Human Rights Committee, General Comment No. 31, ¶ 8, U.N. Doc. CCPR/C/21/Rev. 1/Add. 13 (May 26, 2004).

<sup>47</sup> *Lenahan (Gonzales) v. United States*, Case 12.626, Inter-American Committee on Human Rights, Report No. 80/11 (2011)

<sup>48</sup> Catharine A. MacKinnon, In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education, 125 *Yale L.J.* 2038 (2016)

<sup>49</sup> *Guidance 2001*, *supra* note 4, at 3.

grievance proceedings in favor of the perpetrator. It also perpetuates the stereotype that women and girls are likely to lie about sexual assault and harassment. In fact, 1 in 2 girls in grades 7-12 (56%) experience sexual harassment in school<sup>50</sup>, and 1 in 5 girls ages 14-18 (21%) experience sexual violence.<sup>51</sup> Pertinently, only 2-8% of reported cases of sexual assault are false.<sup>52</sup>

Courts have found no violation of due process and have rejected arguments that respondents were not accorded the presumption of innocence in cases where there was no burden of proof and the preponderance of evidence standard was used.<sup>53</sup> Title IX requires that adjudication processes must be “prompt and equitable”.<sup>54</sup> A presumption of innocence would advantage the respondent only, which would not be equitable. Further, in practice, this may inhibit schools from providing supportive measures to the complainant or taking other actions to prevent further sexual harassment, since they are required to presume that the respondent was not responsible for the alleged conduct. Especially considering that there are no longer prescribed timelines for completing the grievance process, it is crucial for schools to provide supportive measures and take action to prevent further harassment while the grievance processes are pending. No presumption should be made either way, and schools should engage in an investigative process to determine the truth rather than favor the accused going into it.

#### *Proposed alternative*

Grievance procedures should mandate that no assumptions should be made about the credibility of either the complainant or the respondent until a determination is made at the conclusion of the grievance process.

### **5. 106.45(b)(1)(v) - Timeframe for Grievance Procedures**

#### *a. Schools should be given a clear timeframe for conducting grievance procedures*

The proposed rules require a “reasonably prompt timeframe for conclusion of the grievance process,” but does not explicitly give OCR the ability to evaluate whether the proceeding was timely. It does not indicate any timeframe within which procedures are typically required to be completed, which means that students who report cases of sexual harassment may be forced to wait for months, or even more than a year for a resolution of their complaint. A lack of defined timeframe and the vagueness of the current procedures leads to uncertainty and confusion for both complainants and schools as to what would constitute a “prompt” investigation.<sup>55</sup> Lack of guidance on what constitutes a “reasonably prompt timeframe” will mean in reality that there are no effective safeguards on the process. It would also allow schools to delay the completion of

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<sup>50</sup> American Association of University Women, *Crossing the Line: Sexual Harassment at School 11* (2011), available at <https://www.aauw.org/research/crossing-the-line>.

<sup>51</sup> National Women’s Law Center, *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence 3* (2017), available at <https://nwl.org/resources/stopping-school-pushout-for-girls-who-have-sufferedharassment-and-sexual-violence>.

<sup>52</sup> Lisak, D., Gardinier, L., Nicksa, S. C., & Cote, A. M. (2010). False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases. *Violence Against Women*, 16(12), 1318-1334. doi:10.1177/1077801210387747.

<sup>53</sup> *John Doe v. University of Cincinnati*, <https://kcjohnson.files.wordpress.com/2013/08/cincinnati-entry-on-mtd.pdf>

<sup>54</sup> 40 Fed. Reg. 24128 (June 4, 1975) (codified at 45 CFR pt. 86).

<sup>55</sup> Grayson Sand Walker, *The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault*, 45 *Harvard Civil Rights-Civil Liberties Law Review* 95 (2010).

the grievance process till the accused student has graduated, rendering any potential remedies ineffective. Even with the 60 day timeframe recommended under past OCR guidance, schools often took longer to complete their grievance processes - one university admitted that the process took 4 months on average to complete.<sup>56</sup> Lack of any defined timeframe is likely to result in schools failing to provide prompt relief to complainants.

*b. Concurrent law enforcement activity is not a sufficient ground to extend procedures*

The proposed rules allow for multiple extensions/delays to the timeframe, including concurrent law enforcement activity, and do not specify a length of time that would generally be considered reasonable. There is a risk that such regulations would lead to indefinite delays in the grievance procedure. As recognized by earlier OCR guidance, the Title IX grievance process and criminal investigations can run parallel and are not dependent on each other.<sup>57</sup> If a specific exception is provided for concurrent law enforcement activity, schools could misuse this provision to justify long delays in the process merely because a criminal complaint has also been filed. The vague wording of the proposed rules moreover, does not clarify that schools cannot wait for the conclusion of the police investigation or for charges to continue the Title IX grievance process, leaving the room open for long delays by the school administration. This would be especially harmful to K-12 students, because most school employees are legally required by state laws to report child sexual abuse to the police—which means there will often be an ongoing criminal investigation.

Prompt conclusion of grievance procedures is especially important in Title IX cases where the survivor is often forced to share small campuses, classes or even dormitories with their alleged assailant, leading to re-traumatization, inability to concentrate on their education and numerous other issues. Delays in these grievance processes to accommodate criminal investigations which may sometimes take years, could force survivors to drop out of school, and it leaves other students on campus at risk of repeated assault by the accused individual.

The different remedies available in the criminal justice system and the Title IX grievance process are both required by survivors. However, allowing schools to delay their processes due to concurrent law enforcement activity could in effect deter students from reporting their sexual assaults to the police, in situations where there is no mandatory referral. Rates of criminal reporting of sexual assault are already very low - only about 1 in 4 sexual assaults are reported to the police.<sup>58</sup> If the students believe that their school might use law enforcement as a reason for making slow progress on addressing an allegation, this could create a disincentive for students to involve the police at all.

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<sup>56</sup><https://news.harvard.edu/gazette/story/2017/12/harvard-releases-annual-report-by-title-ix-office-and-office-for-dispute-resolution/>

<sup>57</sup> *Dear Colleague 2011*, *supra* note 8, at 12.

<sup>58</sup> RAINN, Criminal Justice System: Statistics, available online at <https://rainn.org/statistics/criminal-justice-system>

## *Proposed Alternative*

We therefore propose language similar to that used in the *Dear Colleague Letter* guidance, which stipulated that the OCR had the ability to evaluate whether a school's grievance procedures were timely and noted that the length of a typical procedure was 60 days.<sup>59</sup>

Concurrent law enforcement activity should not be permitted to delay the grievance process. At the very least, the rules must specify that even if any delay is allowed in limited circumstances such as if the police has uncovered evidence that will be revealed shortly, such delay should be very brief - early guidance by the DoE has suggested a limit of 3-10 days for such delay. As specified by policies in certain universities,<sup>60</sup> the proposed rules should also specifically clarify that any delay necessitated by a criminal investigation would not impair the school's ability to provide supportive measures to the complainant or to protect the community.

### **6. Section 106.45(b)(3) - Education program or activity requirement**

Section 106.44(a) states that "a recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States must respond in a manner that is not deliberately indifferent." Although the notice of proposed rulemaking states that a recipient would still be allowed to initiate a grievance proceeding for conduct that occurs outside a recipient's education program or activity, under Section 106.45(b)(3), "if the conduct alleged by the complainant [...] did not occur within the recipient's program or activity, the recipient must terminate its grievance process with regard to that conduct." This means that under the new regulations, sexual harassment grievance procedures are limited to *incidents that occurred* in the education programs or activities of the recipient, and schools would be required to ignore many claims of sexual harassment that occurred off-campus. We are concerned that this rule is quite narrow and would lead to the exclusion of many cases of off-campus sexual harassment which create a hostile environment on-campus.

Previous guidance has differed greatly from that advanced here, and has required recipients to take into account incidents of sexual harassment which initially occurred off campus if they led to a hostile environment on campus. After all, as noted in the 2011 Guidance, there are many cases where students "experience the continuing effects of off-campus sexual harassment in the educational setting."<sup>61</sup> As per those guidelines, if a student files a complaint with the school, the school must investigate and "should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus."<sup>62</sup> Such guidance was seen as applying to a variety of issues, including off-campus rape and sexual assault.

In adopting Section 106.45(b)(3), the proposed rules are, again, seeking to bring themselves in line with the standards used in private Title IX actions seeking monetary damages. The Supreme Court has held that the

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<sup>59</sup> *Dear Colleague 2011*, *supra* note 8, at 12.

<sup>60</sup> Fisk University, Title IX Sexual Misconduct Policy, available online at <https://www.fisk.edu/assets/files/if/updated-titleix01220623-3.pdf>

<sup>61</sup> *Dear Colleague 2011*, *supra* note 8, at 4.

<sup>62</sup> *Id.*

recipient is only liable for monetary damages in “circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs,” such as incidents that occur on school grounds.<sup>63</sup> Although the NPRM has acknowledged that some incidences of sexual harassment that occur off-campus can be included under this new rule, especially in cases where the school has some control of the location or event where the incident occurred,<sup>64</sup> under the new guidance, there are many forms of sexual harassment that take place off-campus but create a hostile environment on-campus that would not be covered.

The difference between the previous guidelines and the proposed rules can be seen when we look at cases of sexual harassment and bullying of students either online or through texts. As established in *Davis* and the proposed guidelines, in order to be liable the recipient must be found to have exercised control over the context in which the harassment occurred.<sup>65</sup> In *Gordon*, the sixth circuit held that a recipient was not liable for harassing comments made by fellow students on a plaintiff’s Facebook page because he “offer[ed] no evidence that students ‘liked’ the offending Facebook posts during school hours, and he fails to explain how [the recipient] retained control over its students’ off-campus internet use.”<sup>66</sup> Therefore, if a middle or high school student were to be cyberbullied by their fellow students online, outside of campus and school hours, under *Davis* and the proposed guidelines, the school would likely not be allowed to consider whether these incidents led to a hostile environment on-campus in a Title IX grievance procedure. In contrast, under previous guidance, a school would “consider the effects” of the online bullying in their determination of whether there was a hostile environment on campus.

Cyberbullying and other forms of online sexual harassment are not uncommon, especially in secondary schools. It has been reported that in the 2010-11 school year 30% of students in grades 7-12 experienced sexual harassment by their fellow students online.<sup>67</sup> Of those, 18% reported that it made them not want to go to school, 13% found it hard to study, 17% had trouble sleeping, and 8% stayed home from school.<sup>68</sup> Under the proposed regulations, schools would likely not be able to take such conduct into account, even though it does create a hostile environment at the school by impairing students’ ability access to their education, because the actual harassing activities occurred outside of the traditional educational activity or program.

As noted above, the Department of Education is not bound to align its guidance with the standards established in court rulings on private Title IX cases. In fact, a higher bar was established in those cases, as the plaintiffs were seeking monetary damages. This proposed change would be a negative one for students,

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<sup>63</sup> *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, at 645 (1999).

<sup>64</sup> NPRM, *supra* note 1, at 61468.

<sup>65</sup> *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 at 645 (1999).

<sup>66</sup> *Compare Gordon v. Traverse City Area Pub. Sch.*, 686 F. App’x 315, 324 (6th Cir. 2017); *with Feminist Majority Found. v. Hurley*, No. 17-2220, 2018 WL 6625847, at \*8 (4th Cir. Dec. 19, 2018) (Applying the standard in *Davis*, a university had control over the context of online harassment in part because offending content was posted using the university’s wireless network, during school hours, and the offending content “originated on or within the immediate vicinity” of the campus).

<sup>67</sup> Catherine Hill and Holly Kearl, *Crossing the Line Sexual Harassment at School*, American Association of University Women, 11 (2011). Available at <https://www.aauw.org/files/2013/02/Crossing-the-Line-Sexual-Harassment-at-School.pdf>.

<sup>68</sup> *Id.* at 25.

since cases where a student is sexually assaulted by a fellow student off-campus or experiences online sexual harassment can easily lead to hostile environments on-campus.

### *Proposed Alternative*

The proposed rules should require recipients to take into account cases of student-on-student sexual harassment that initially occurred outside the recipient's education program or activity in their determination of whether a sexually hostile environment exists on-campus.

## **7. Section 106.45(b)(4)(i) Standard of Evidence**

### *a. The Preponderance of Evidence Standard is the appropriate standard to be used in disciplinary proceedings*

The proposed rules allow schools to use the preponderance of evidence standard for determining responsibility only in limited circumstances, if (i) it uses preponderance for all other misconduct that carries “the same maximum disciplinary sanction,” and (ii) it uses preponderance in complaints against employees. Otherwise, the proposed rules require schools to use the more demanding “clear and convincing evidence” standard. This constitutes a change from earlier guidance from the Office of Civil Rights, which has championed the use of the preponderance of the evidence standard in complaints of sexual harassment since 1995.<sup>69</sup> Even prior to 2011 Dear Colleague Letter, surveys in 2002 and 2011 have found that around 80% of institutions applied the preponderance of evidence standard in adjudicating complaints under Title IX.<sup>70</sup>

The proposed rules however would force schools to use “clear and convincing evidence” in student sexual harassment investigations if the “clear and convincing standard” is used in complaints against employees, even if those schools use the preponderance standard for all other types of student misconduct. This is not appropriate as students are not parties to the union's bargaining negotiations. They should not be bound by the outcome of the negotiations between the school and faculty. Further, as the civil rights of the student complainants are at stake, it does not make sense to mandatorily require schools to use the clear and convincing evidence standard merely because this may be a requirement in some teacher union contracts. In any event, for the reasons set out below, the preponderance of evidence standard, and not the clear and convincing evidence standard, is the appropriate standard to be used even in cases where students accuse employees of sexual harassment.

The clear and convincing evidence standard is higher than the previously utilized “preponderance of the evidence standard.” It is more demanding and entirely inappropriate for use in complaints of sexual harassment and assault under Title IX. It tilts investigations in favor of the respondent, and therefore makes

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<sup>69</sup> Association of Title IX Administrators, ATIXA Guide to choosing between Preponderance of Evidence v. Clear and Convincing Evidence, available online at <<https://atixa.org/wordpress/wp-content/uploads/2017/09/ATIXA-Guide-to-Choosing-Between-Preponderance-of-the-Evidence-v.-Clear-and-Convincing-Evidence-9.22.17.pdf>>

<sup>70</sup> Heather M. Karjane; Bonnie S. Fisher ; Francis T. Cullen, Campus Sexual Assault: How America's Institutions of Higher Education respond, October 2002, available online at <<https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf>>; Foundation for Individual Rights in Education (FIRE), Standard of Evidence Survey, August 2011, <https://dfkpg46c119o7.cloudfront.net/pdfs/8d799cc3bcc596e58e0c2998e6b2ce4.pdf>

it easier for the respondent to be cleared of all wrongdoing, as evidence of sexual harassment is often circumstantial, difficult to authenticate, and relies on the testimony of the accused and the accuser. The preponderance of evidence standard is the only standard which values the testimony of the complainant and the respondent equally.

The Sixth Circuit Court of Appeals has found that there was no violation of due process when a University applied the preponderance of evidence standard in adjudicating a complaint under Title IX.<sup>71</sup> The preponderance of evidence is used in numerous instances where a finding of responsibility can have a serious impact on the profession of the respondent, including in cases of disbarment of lawyers<sup>72</sup>. In fact, as the proposed rules admit, the preponderance of evidence standard is used in nearly all cases of civil litigation. The preponderance of evidence standard is the standard of proof used in adjudicating cases of employment discrimination under Title VII, racial discrimination under Title VI, and even claims against universities and school administrations who are alleged to have violated Title IX<sup>73</sup>. It seems preposterous that a higher evidence standard should be applied before a college or school can discipline a student (the maximum penalty that can be applied here is expulsion) as opposed to when an employer can discipline an employee.

The proposed rules posit that the use of the preponderance of evidence standard is not always appropriate in Title IX cases since “Title IX grievance processes lack certain features that promote reliability in civil litigation”. However, the rules fail to take into account that Title IX grievance processes also lack many of the powers that are available to adjudicators in criminal proceedings that use higher standards of proof. The investigating authority in a school or university disciplinary process does not have the authority to issue a subpoena, or compel a witness to attend the proceedings. Hence, a clear and convincing evidence standard would be too demanding for school or college disciplinary proceedings.

As expressed by the Association for Student Conduct Administration, one of the numerous concerned bodies to have issued a statement in favor of the preponderance of evidence standard,

“Considering the serious potential consequences for all parties in these cases, it is clear that preponderance is the appropriate standard by which to reach a decision, since it is the only standard that treats all parties equitably. To use any other standard says to the victim/survivor, “Your word is not worth as much to the institution as the word of accused” or, even worse, that the institution prefers that the accused student remain a member of the campus community over the complainant. Such messages do not contribute to a culture that encourages victims to report sexual assault.”<sup>74</sup>

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<sup>71</sup> *Doe v. Cummins*, 662 F. App’x 437, 449 (6th Cir. 2016).

<sup>72</sup> *Jesus E. Tirrez v. Commissioner for Lawyer Discipline*, <https://law.justia.com/cases/texas/third-court-of-appeals/2018/03-16-00318-cv.html>

<sup>73</sup> *Williams Hart v. Paint Valley Local School District* 400 F.3d 360 (6th Cir. 2005); *Bostic v. Smyrna School District* 418 F.3d 355 (3d Cir. 2005); *Cohen v. Brown University* 991 F.2d 888 (1st Cir. 1993).

<sup>74</sup> *Association for Student Conduct Administration*, *The Preponderance of Evidence Standard: Use in Higher Education Campus Conduct Processes*, available online at <<https://www.theasca.org/files/The%20Preponderance%20of%20Evidence%20Standard.pdf>>

*b. The proposed rules are discriminatory against complainants of sexual harassment*

The proposed rules allow schools to use the preponderance of 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.” The express reason provided for this proposed rule is “to ensure that recipients do not single out respondents in sexual harassment matters for uniquely unfavorable treatment”.

It appears however, that the proposed rules are allowing and encouraging recipients to single out *complainants* in sexual harassment matters for uniquely unfavorable treatment. Under the proposed rules, schools are free to use the preponderance of evidence standard for other code of conduct violations carrying the same maximum disciplinary sanction, but still use the more onerous clear and convincing evidence standard in cases involving sexual harassment only. In fact, schools routinely apply the preponderance of evidence standard for disciplinary proceedings involving criminal or harassing code of conduct violations, including physical assault, burglary, hazing and racial harassment<sup>75</sup>. As noted by a group of prominent law professors in their White Paper on Title IX and the Preponderance of Evidence,

“[t]olerating a different standard from the preponderance standard in cases involving sexual violence or other forms of gender-based harassment would allow schools to provide less legal protection to student victims of sexual harassment than the vast majority of comparable populations involved in civil, civil rights and student disciplinary proceedings, all of which overwhelmingly use the preponderance standard.”<sup>76</sup>

As such, the proposed rules discriminate against complainants of sexual harassment, ensuring that schools can treat them worse than complainants of other code of conduct violations, including victims of other forms of discrimination and criminal acts. The only justification provided for such discrimination is the so-called “heightened stigma” associated with sexual harassment, though it is unclear why such stigma is higher than that associated with racial harassment, physical assault or other criminal behavior. The allowance provided to schools to treat complainants of sexual harassment and assault differently is in reality akin to the traditional gender discriminatory approach to sexualized violence of viewing women and girls as inherently untrustworthy and men and boys as presumptively innocent (this point will be further addressed in section II below) and in need of protection from false allegations.<sup>77</sup> Proposed section 106.45(b)(4)(i) is thus rooted in discriminatory sex stereotypes and rape myths, and discriminates on the basis of sex, which is very thing that Title IX prohibits. It also violates the International Covenant on Civil and Political Rights, under which the United States is obligated to prohibit and eliminate discrimination, including discrimination on the basis of sex.<sup>78</sup>

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<sup>75</sup> Wallingford Board of Education, VOLUNTARY RESOLUTION AGREEMENT, available at <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01131207-b.pdf>.

<sup>76</sup> Title IX and the Preponderance of the Evidence: A White Paper, 2016, available online at <<https://www.feministlawprofessors.com/wp-content/uploads/2016/08/Title-IX-Preponderance-White-Paper-signed-8.7.16.pdf>>

<sup>77</sup> Ibid.

<sup>78</sup> International Covenant on Civil and Political Rights, Articles 2, 26. Available online at <<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>>

## *Proposed Alternatives*

The proposed rules should be modified so that recipients are required to use the preponderance of evidence standard in cases of sexual harassment. At the very least, schools and colleges should not be permitted to use the clear and convincing evidence standard in cases of sexual harassment if the recipient uses a different standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction.

### **8. Section 106.45(b)(6) - Informal Resolution**

The proposed section would allow for informal resolution processes such as mediation to be used as an alternative to the formal process, so long as both parties give their voluntary, written consent. Additionally, it allows schools to “preclude[] the parties from resuming a formal complaint” after they begin the informal process.

We strongly oppose this championing of informal resolution in sexual harassment and abuse cases to the exclusion of a formal complaint. The use of informal resolution for sexual harassment proceedings is problematic given the fact that it all too often has been used as a tool to silence the complainant, and even if students are required to consent to the procedure, they may be pressured into doing so.

The National Advisory Council on Violence Against Women has explicitly noted that mediation is not appropriate when sexual or domestic violence is involved.<sup>79</sup> Mediation often ignores the inherent power imbalance between those who are harmed and those who have harmed. Mediation processes presuppose equality between the parties. However, in cases of sexual harassment and particularly sexual abuse, there are “profound power imbalances” due to the violence, coercion and intimidation that has taken place. Survivors can feel responsible to make the mediation work, even at the expense of their own interests.<sup>80</sup> Since 2000, American Bar Association policy recommends that as a rule, mediation not be used in domestic violence cases.<sup>81</sup> The same or similar dynamics are at play in sexual assault matters.

The United Nations Handbook for Legislation on Sexual Violence Against Women notes that numerous problems arise when mediation is utilized in cases of violence against women. Mediation presumes that both parties have equal bargaining power, reflects an assumption that both parties are equally at fault for violence, and reduces offender accountability.<sup>82</sup>

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<sup>79</sup> National Advisory Council on Violence Against Women, Toolkit To End Violence Against Women, 2001, available online at <<https://www.ncjrs.gov/pdffiles1/206041.pdf>>

<sup>80</sup> Margaret B Drew, It’s Not Complicated: Containing Criminal Law ’ s Influence on the Title IX Process, 6(2) Tennessee Journal of Race, Gender and Social Justice 191 (2017)

<sup>81</sup> American Bar Association Commission on Domestic Violence, Section of Dispute Resolution, Section of Family Law, Steering Committee on the Unmet Legal Needs of Children, Tort and Institutional Practice Section, American Bar Association Resolution 109B at 1 (2000).

<sup>82</sup> United Nations Department on Economic and Social Affairs, Division for the Advancement of Women, *Handbook for Legislation on Sexual Violence Against Women*, 2010, available online at <<http://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf>>

Mediation processes do not require individuals to take responsibility for the harm that they have caused prior to participation in an informal resolution proceeding. As a result, facilitators engaged in a mediation proceeding may engage in conduct implying that survivors and perpetrators are equally at fault for experiences of intimate partner or acquaintance violence. In fact, sexual violence survivors often do not report their sexual assaults because of fear of being disbelieved or their assault not taken seriously.<sup>83</sup> Such harmful mediation processes, especially considering that no guidelines have been set out for conducting such processes, can compound such issues. Due to the lack of clear standards, the quality of mediation proceedings across schools and colleges is likely to widely vary based on whoever is leading the process. This state of affairs is deeply concerning, as mediation’s open structure can make it highly susceptible to abuse.<sup>84</sup>

There is also a high risk that the individual who caused harm will use the informal resolution process to further manipulate and harm the survivor is high. Abusive individuals can manipulate the resolution process and the survivor simultaneously.<sup>85</sup> Mediation processes which require survivors to confront and negotiate with their abusers, which can cause further trauma.

The proposed rules require voluntary, written consent in an effort “to ensure that no party is involuntarily denied the protections that would otherwise be provided by these regulations.” However, in reality, survivors can be pressured into engaging in such processes both by the school and the respondent. Schools have monetary and reputational incentives to downplay claims of violence and harassment. In the past, schools have pressured survivors to participate in informal mediations<sup>86</sup>, which are confidential and rarely result in remedies such as expulsion or suspension of the respondent. Given that these processes require less resources in terms of time, cost and human resources, schools could push students to use such methods without considering the interests of the complainant.

Schools would also be allowed to prevent survivors from ending an informal process and requesting a formal investigation—even if they change their mind and realize that mediation is too traumatizing to continue. This would especially harm K-12 students, students with disabilities, and students at religious schools, who are more likely to be pressured by their schools into “voluntarily” agreeing to an informal process, and who may also be less likely to understand the consequences of waiving their right to change their mind and to request a formal investigation later on.

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<sup>83</sup> Kathryn J. Holland; Lilia M. Cortina, “It Happens to Girls All the Time”: Examining Sexual Assault Survivors’ Reasons for Not Using Campus Supports, 59 *American Journal of Community Psychology* 40 (2017).

<sup>84</sup> Grace Watkins, Sexual Assault Survivor to Betsy DeVos; Mediation is Not a Viable Resolution, *Time Magazine*, 2017, <http://time.com/4957837/campus-sexual-assault-mediation/>

<sup>85</sup> Margaret B Drew, It’s Not Complicated: Containing Criminal Law’s Influence on the Title IX Process, 6(2) *Tennessee Journal of Race, Gender and Social Justice* 191 (2017).

<sup>86</sup> Andrew Kreighbaum, OCR: Colleges can Use Mediation for Sexual Assault, available online at <https://www.insidehighered.com/quicktakes/2017/09/29/ocr-colleges-can-use-mediation-sex-assault>; Erin Gloria Ryan, Betsy DeVos’ new Title IX changes leaves both sides in limbo, available online at <https://www.thedailybeast.com/betsy-devos-new-title-ix-changes-leave-both-sides-in-limbo>; Aimee Levitt, A Resolution to a five-year-old Title IX complaint, available online at <https://www.chicagoreader.com/Bleader/archives/2018/11/27/a-resolution-to-a-five-year-old-title-ix-complaint>.

### *Proposed Alternative*

The proposed rules should abide by long-standing OCR guidance, and prohibit schools from using mediation to resolve cases of sexual harassment that involve sexual assault—“even on a voluntary basis.” The rules should also mandatorily require schools to allow parties to end the informal process and start the formal process at any time.

#### **9. Title 34 C.F.R. Sec. 106.8(b)(1) - Notification to Parents of Elementary and Secondary School Students**

We are concerned about the proposed changes to section 106.9(a)(1) of Title 34 C.F.R. (which would be moved to 106.8(b)(1) under the new regulations), which would not require recipients to notify parents of elementary and secondary school students of a school’s Title IX policy. This change will likely lead to underreporting of cases of sexual harassment.

Under the proposed rules, recipients will be required to provide notice to all “applicants for admission and employment, students, employees, and employee unions and professional organizations” of the recipient’s Title IX policy and told to address all inquiries about Title IX application to the designated coordinator.<sup>87</sup> A regulation like this would undoubtedly help students by serving to increase the likelihood of students understanding when a school was responsible for responding to cases of sexual harassment, and also giving them the tools to report incidents of sexual harassment when they occur.

However, under the previous regulations, recipients were also required to notify the “parents of elementary and secondary school students” of Title IX policies and to address inquiries to the coordinator.<sup>88</sup> The notice of proposed rulemaking states that the purpose of changing this section was to “streamline the list of people whom recipients must notify of its policy.”<sup>89</sup> While it may seem useful to streamline processes in general, we cannot forget the impact that these regulations might have on students, especially younger students.

In a survey of 1,965 middle and high school students, it was found that 48% experienced sexual harassment during the 2010-11 school year.<sup>90</sup> Only 9% of these students told faculty they were sexually harassed.<sup>91</sup> In sharp contrast, 32% of girls and 20% of boys told their family about being sexually harassed.<sup>92</sup> There are many reasons why students choose not to report sexual harassment, although one of the reasons survivors rarely report cases of sexual violence is because of a lack of knowledge of reporting procedures or what services were available.<sup>93</sup> What seems clear from this data is that students are more likely to discuss being sexually harassed with a parent than a Title IX Coordinator or other designated official. If their parents are

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<sup>87</sup> NPRM, *supra* note 1, at 61482.

<sup>88</sup> 34 C.F.R. § 106.9 (2018).

<sup>89</sup> NPRM, *supra* note 1, at 61481.

<sup>90</sup> Catherine Hill and Holly Kearn, *Crossing the Line Sexual Harassment at School*, American Association of University Women, 2 (2011).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 27

<sup>93</sup> Kathryn J. Holland and Lilia M. Cortina, “*It happens to girls all the time*”: Examining sexual assault survivors’ reasons for not using campus supports, 59 *American Journal of Community Psychology*, 50, 55 (2017).

not informed of the existence of a school's Title IX policy or who the coordinator is, they will be deprived of the tools to impart their child with knowledge of their options under Title IX, likely leading to even fewer students filing claims of sexual harassment.

Based on the rationale listed in the notice of proposed rulemaking, there does not seem to be adequate justification for the decision to cease notifying parents of elementary and secondary school children of the school's Title IX policy, especially considering the risk that it will lead to students not understanding their rights under Title IX, or who to ask about said rights. As such, we would strongly recommend the language be added back into the regulations.

*Proposed Alternative*

The parents of elementary and secondary students should be added to the list of required notifications in the proposed rules.

For the reasons detailed above, the Department of Education should immediately amend its current proposal and dedicate its efforts to advancing policies that ensure equal access to education for all students, including students who experience sexual harassment.

Thank you for the opportunity to submit comments on the Proposed Rules. Please do not hesitate to contact us for further information.

Regards,



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