Jan. 30, 2019

Submitted via www.regulations.gov

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

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

Dear Mr. Marcus,

Title IX of the Education Amendments of 1972 states, quite simply and elegantly, 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.A. § 1681(a). The Department of Education is tasked with promulgating regulations that will further this statute's mandate of non-discrimination. And yet, the Department itself says in its proposed regulations that "[t]he Department does not believe it is reasonable to assume that these proposed regulations will have a quantifiable effect on the underlying rate of sexual harassment occurring in the education programs or activities of recipients." This statement is alarming, demonstrative of the pervasive problems throughout these proposed regulations, and simply wrong.

The Department seems to have lost the forest for the trees, forgetting the simple fact that Title IX is a civil rights statute. Rather than proposing regulations that focus on ensuring that everyone who experiences sexual harassment or assault can nonetheless access their education, as the statute demands, the Department has instead flipped the focus onto the people who **prevent** educational access. The people who prevent Title IX from being successful have, in effect, become the beneficiaries of the regulations themselves. These proposed regulations do not reflect the appropriate role for the Department of Education, and the cumulative impact of this rearranged focus is to turn Title IX into a haphazard grievance system that does not effectuate its underlying mission of combatting sex discrimination. The Department's role is to **enforce** Title IX. The Department must do so fairly, and certainly can and should include thoughtful safeguards for all parties involved. But the primary role of the Department should be enforcement, rather than an abdication of the position that through enforcing Title IX, educational institutions can and must reduce the rates of sexual violence in their midst. We hope that the Department will take these comments seriously and reconsider using the proposed regulations to create liability shields for schools and perpetrators of sexual violence. Instead, the

Department's regulations must focus on ensuring that survivors of sexual harassment and assault can access their education.

Organizational Interest

The Education Law Center is the only non-profit, legal assistance program in New Jersey that specializes in education law and provides free legal representation to income-eligible parents, guardians and caregivers of students in disputes involving pre-K-12 public education. As part of our mission, ELC works hard to ensure that all students can attend safe and supportive schools, including schools that are free from sexual harassment and sexual violence. Because of the unique expertise ELC brings to pre-K-12 issues from decades of working both in New Jersey and across the country on behalf of those students, these comments will focus primarily on the Department's request for information on "whether there are parts of the proposed rule that will be unworkable at the elementary and secondary school level" and "whether there are other unique aspects of addressing sexual harassment at the elementary and secondary school level that the Department should consider, such as systemic differences between institutions of higher education and elementary and secondary schools."

PROPOSED SECTIONS 106.30 & 106.44(a)

The Department's proposed definitions of key terms and legal standards fall well short of the statutory mandate to ensure that no person be excluded from, denied the benefits of, or subject to discrimination within an educational program or activity receiving federal funds. The definitions are particularly problematic when applied to younger students, who cannot be the ones to bear the burden of a school's lack of communication or action regarding sexual harassment and assault. As set forth below, ELC primarily objects to four aspects of the proposed regulatory definitions as violative of Title IX and administrative law principles: (1) the reliance on an unduly exclusionary actual knowledge standard; (2) the proposal of a "clearly unreasonable" standard for recipient responses to allegations of sexual misconduct; (3) the mandatory dismissal of otherwise violative behavior based on the physical location of the conduct; and (4) the redefining of sexual harassment in a manner that not only allows, but requires funding recipients to ignore significant harassing conduct.

(1) The actual knowledge standard proposed by the Department is too stringent and will have a particularly negative impact on younger students

Though the focus of the proposed regulations is often on higher education students, students as young as three years old are also covered by Title IX. Younger students are **much** less likely to have the same levels of agency and understanding regarding their rights; some cannot even read, let alone comprehend the difference between different adults' job titles. Others might not know the egregiousness of what's happened to them or have difficult identifying the source of their trauma. Elementary students may only know a few adults in the building at all—let alone knowing more than one adult who they trust enough to confide in, especially if their

abuser is another school employee. Any compassionate regulation designed to ensure educational access for all covered students must include consideration of the lack of information and/or agency that some students will inevitably have in the aftermath of being harassed or assaulted. This is particularly true for elementary and secondary education students.

The Department criticizes a "constructive knowledge" standard as putting the institution at risk for behavior that it was unaware of, claiming that actual knowledge standard "ensures that a recipient is liable only for its own misconduct." This justification is insufficient on two fronts. First and foremost, the funding recipient's "knowledge" is defined far too narrowly by excluding the vast majority of school employees, and by correspondingly not including many of the people young students are most likely to confide in. Second, the Department's regulations actually narrow the scope of what constitutes "misconduct," creating a circular justification for limited liability that circumscribes school responsibility contrary to the text and purpose of Title IX.

(a) The proposed regulations allow too few school officials to qualify for notice purposes

The Department proposes limiting "actual knowledge" to:

> 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. The proposed definition of "actual knowledge" also states that imputation of knowledge based solely on respondeat superior or constructive notice is insufficient to constitute actual knowledge, that the standard is not met when the only official of the recipient with actual knowledge is also the respondent, and that the mere ability or obligation to report sexual harassment does not qualify an employee, even if that employee is an official, as one who has authority to institute corrective measures on behalf of the recipient.

By limiting what qualifies as institutional knowledge to the knowledge of a few officials within the educational institution, the Department exonerates the funding recipient in situations in which they have failed to live up to their core responsibility to ensure access to the educational program. If the school has insufficient channels of communication and the administration has created a culture in which a school nurse can learn of sexual abuse but does not feel comfortable reporting to a vice principal or feels like it is unnecessary, that kind of gross mis-management should not result in a lack of liability. The statute guarantees access for the student;[1] it is the student who has the civil right and whose access must drive the way the school creates reporting systems and responds to information. The funding recipient thus needs to structure itself in a way that ensures that its students are best served and that no one falls through the cracks. The

[1] We use "student" as a convenient short-hand for "participant," though of course acknowledge that Title IX encompasses other participants, as well.

proposed regulations do not incentivize schools to do this; rather, they exonerate schools that do not do this, leaving students whose right to education under Title IX has been violated a casualty of legal technicalities. This will be especially felt by our most vulnerable students, whose age, disability, or fear of their abuser or harasser limits their ability to report.

While this ostensibly is done in order to give clarity to school districts and protect them from undue liability, school districts themselves disavow this definition as contrary to their values and ignorant to the practical nature of reporting. The School Superintendents Association ("AASA") note[2] that this proposed definition is their greatest concern with the proposed regulations, stating that it would be "an unconscionable attack on the safety of students and our obligations to ensure their safety in school."[3] The Department's claim that this is a contractual issue of notice is insufficient to justify it. School districts have already been on notice for decades that they must address sexual assault and harassment in their midst, and many have taken laudable steps to do just that. Because of those efforts, this proposed change would require school districts to re-train personnel, rather than simplifying the issue by removing some employees from the legal framework, as the Department suggests—and "[t]here 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."[4] School districts know that they can and must protect students in more situations than the few covered under the proposed regulations, which do not serve students, employees, or the districts themselves well.

To define actual knowledge in this way, in which so few school officials qualify as institutional knowledge on behalf of the funding recipient, is to put the burden on five and six year old children to differentiate between a teacher and a teacher's aide, or to figure out how to reach out to a principal or administrative official when they may not even know who that is, let alone feel comfortable confiding in that stranger about deeply traumatic events. Particularly senseless is the proposed limitation of "notice" to include teachers only in student-on-student harassment cases. The Department does not offer a justification for including teachers only in student-on-student cases, and the distinction does not stand up to basic scrutiny. Indeed, when a school official is the perpetrator of sexual harassment or assault, children are even **less likely** to know who might be a safe person to report to. If their options are arbitrarily minimized by this proposed regulation, children who are preyed on by adults will receive less protection than children who are harassed by their classmates, an incongruity that is unfair to the students and makes little legal sense.

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[2] The School Superintendents Association comment [hereinafter AASA comment] was distributed online on January 22, 2019 and is available at http://aasa.org/uploadedFiles/AASA_Blog(1)/AASA%20Title%20IX%20Comments%20Final.pdf.

[3] AASA comment, *supra* note 2, at 2.

[4] AASA comment, *supra* note 2, at 2.

(b) Constructive knowledge standards encourage reporting, communication, and protect more students

In addition to the practical barriers such a stringent actual knowledge standard presents for victims of harassment or assault, this proposed standard misses an opportunity to proactively encourage funding recipients to come up with better initiatives to unearth sex-based discrimination in their midst. The funding recipient's "knowledge" is not some unchangeable, coincidental state of being—it is directly impacted by the policies set forth by the school, which in turn respond to the Department's regulations. Constructive knowledge standards are not designed to catch schools in a game of "gotcha!" They are designed to influence schools to more centralized reporting procedures, to prevent a scenario in which some school officials are aware of harmful conduct, but never report it or act on it. They encourage schools to cultivate school climates in which collaborative work to combat sexual harassment is the expectation, and each member of the school community buys into that mission. A constructive knowledge standard encourages schools to have better reporting practices, act as a unified institution, and tackle problems head-on instead of allowing them to fester via inattention. Crucially, constructive knowledge standards are not unfair—they merely reposition the burden on the correct institutional actor. It is the funding recipient that must guarantee access for the student under Title IX. A constructive knowledge standard, especially for pre-K-12 students, would be more effective in ensuring that every school strove to create policies that would most faithfully effectuate Title IX, and be much less likely than an actual knowledge standard to allow our youngest and most vulnerable students to be uniquely at risk due to administrative inaction, miscommunication, or inattention.

Summary

The proposed regulations effectively punish children for choosing to confide in the wrong person. They arbitrarily exclude school counselors, nurses, teacher's aides, and other commonly trusted adults from the list of people who can constitute institutional knowledge, and simultaneously excuse the funding recipient for failing to respond to reports of sexual violence because of negligent or insufficient internal communication channels. Perhaps most galling is the asymmetrical exclusion of teachers from cases that do not involve student-on-student harassment, leaving children sexually harassed or assaulted by a school employee with more barriers to recourse than students who were teased by a classmate. School superintendents[5] and principals[6] reject these low expectations and expect the Department to fulfill its duty to guarantee

[5] AASA comment, *supra* note 2, at 2.

[6] The National Association of Secondary School Principals [hereinafter NASSP comment] say that "[i]n many instances, schools would not be responsible for addressing sexual harassment, even when school employees knew about the harassment. Oftentimes, victims may refuse to report assault because they believe no action will be taken even if they report it. This proposed rule could lead to even more nonreporting from victims, which could lead to prolonged harassment and suffering." Their comment is available here:

that funding recipients ensure the safety and welfare of their students. The burden should not be on young children who are sexually harassed or assaulted to figure out who the right person to report to is; their bravery in coming forward at all should trigger the school's statutory responsibility.

(2) The deliberate indifference standard allows for too much recipient misconduct to go unchecked

In defining when they would hold a school responsible for violating Title IX, the Department posits a "deliberate indifference standard" that would ask whether a school's response was "clearly unreasonable in light of the known circumstances." This standard would leave a significant amount of sex-based discrimination unaddressed and is an inappropriate standard for administrative enforcement. This standard is especially troublesome when considering the nature of Title IX, as the Department notes several times in its proposed regulations, as a contract. The terms are simple; recipients cannot allow sex-based discrimination to prevent access to education. The Department is abdicating the responsibility to enforce Title IX by allowing for conduct that is offensive and does in actuality prevent access to nonetheless go unchecked in an enforcement action because of such a lax standard of review.

The Department refers often to Supreme Court precedent when defining terms and settling on definitions, including in this instance. While the Supreme Court offers wise counsel in many situations, their decisions must be properly contextualized in order to evaluate if adopting them wholesale in other situations would be appropriate. Here, there are clear reasons for not doing so. Crucially, the Supreme Court's standard for deliberate indifference was set for a very particular context; it is for **private lawsuits** that seek **monetary damages** in the midst of a larger dispute over whether there should be a private right of action under Title IX at all. The context here is far different; it involves the Department attempting to use administrative processes to ensure compliance with the letter and spirit of Title IX, rather than asking whether the behavior of a funding recipient was so egregiously afar from responsible practice that monetary damages should be awarded. Indeed, in the very Supreme Court case setting forth this standard, the Court notes that the bedrock of its decision is setting a standard that captures only cases marked by enough intentionality and egregiousness to justify the particular remedy of monetary damages—explicitly recognized as a subset of the larger category of behavior that violates Title IX. *See 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."). The Supreme Court's own words indicate that this standard would be underinclusive if used in administrative enforcement.

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https://www.nassp.org/wordpress/wp-content/uploads/2019/01/NASSP_Title_IX_Comments_-_1.17.19_V2.pdf.

The Department further justifies this standard by claiming to not want to "second guess" institutional decisions. But there are a variety of standards available to the Department that would not entail "second guessing" decisions while still holding schools accountable for clear violations. This is common in a litany of situations in which a reviewing body provides some form of deference—the standard need not be whether the recipient made the best decision and utilized perfect procedures. Instead, it can entail some deference to decision-making while still adopting appropriate expectations for recipients to enforce Title IX. In the past, the Department judged recipients' behavior according to a simple reasonability standard.[7] The Department has failed to explain why it feels the need to abandon this standard, which does provide a level of deference to funding recipients, to instead attempt to parse the difference between actions that are violative of Title IX, but fall somewhere in the nebulous space between unreasonable and "clearly unreasonable." The word "clearly" seems to exist merely to provide another layer of protection for funding recipients, shielding them from responsibility when they have acted unreasonably in mishandling a complaint, but have yet to act so egregiously as to offend the even laxer standard of whether it was "clearly unreasonable."

The Department's attempted justification for this new standard is one of several areas in which they proposed a radical change from previous regulations without citing the evidence that has led them to believe that the new position is both superior and necessary. It is insufficiently nebulous to claim, without evidence or documentation, that school districts and administrators lacked flexibility and should not be second guessed when **those same institutional actors oppose these changes**.[8] As the Supreme Court has noted,

> the revocation of an extant regulation is substantially different than a failure to act. Revocation constitutes a reversal of the agency's former views as to the proper course. A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to." *Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807–808, 93 S.Ct. 2367, 2374–2375, 37 L.Ed.2d 350 (1973). Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41–42 (1983). The Department's justifications for this change, and others, are brief, conclusory, and

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[7] 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], *available at* https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html.

[8] See AASA comment, *supra* note 2 and NASSP comment, *supra* note 6.

without substantial evidence in crucial places. The Department fails to explain which "stakeholders" were consulted and why their views on any change were persuasive. This is particularly troublesome when the only named stakeholders in the Department's written justification,[9] the purported beneficiaries of the proposed standard, oppose the proposal. ELC opposes this proposed definition because it would allow funding recipients to leave conduct contrary to Title IX unaddressed, is unpersuasive in its attempt to lift policy justifications for private suits for monetary damages into the administrative context, is opposed by the very people it purports to benefit, and departs from previous Department regulations with insufficient justification.

(3) The Department's exclusion of conduct occurring outside of the education program or activity runs counter to the purpose of Title IX and the clear text of the statute

The Department explains that its proposed definitions for prohibited conduct includes mandatory dismissal of cases in which the underlying conduct occurs outside of a school activity. They say that "[p]roposed § 106.44(a) also reflects the statutory provision that a recipient is only responsible for responding to conduct that occurs within its "education program or activity." *See* 20 U.S.C. § 1681(a) (prohibiting a recipient from subjecting persons in the United States to discrimination "under any education program or activity")."

This proposed definition is simply contrary to statutory language, which does not depend on where the underlying conduct occurred. Instead, Title IX prohibits that anyone "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity." 20 U.S.C.A. § 1681(a). The plain textual reading of this sentence indicates that each of the three clauses ends in a preposition, which then each are to be read as preceding the final phrase "any education program or activity." The Department's attempt to subtly change the context by selectively quoting only the last preposition is unpersuasive when one considers the whole sentence. The prohibition does indeed protect people from being "subjected to discrimination under any education program or activity." But it also forbids being "excluded from participation in . . . any education program or activity" or being "denied the benefits of . . . any education program or activity." The Department's definitions rely on utilizing the preposition "under" with all three clauses insofar as it claims that the underlying conduct complained of must occur within the education program or activity. This is an implausible limitation of the statutory text, and it relies on a simple and clear grammatical mistake. The text is clear, and the Department's interpretation is unambiguously incorrect. And "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

[9] The Department names "teachers and local school leaders" because of their "unique knowledge" of local contexts for discipline purposes.

This proposed policy of excluding conduct that occurs outside of the physical confines of an educational program would leave vast swaths of behavior that violated Title IX unaddressed.[10] Especially for younger children, artificially differentiating between activities occurring online or off-campus and within the school itself makes little sense. A child who is being sexually harassed after school hours by another student will, understandably, be affected by those experiences while attending school. They cannot dissociate their on and off-campus selves, choosing to ignore that their harasser or abuser sits next to them in class. If a teacher meets a student outside of school hours and propositions them for sex, that teacher-student relationship does not suddenly disappear just because the physical location of the meeting is off-campus, nor does the fact that the teacher is "off the clock" mean that the behavior won't prevent the affected student from accessing his or her education. Only 7% of sexual assaults occur on school property, yet students assaulted elsewhere clearly bring that trauma to school with them.[11] Funding recipients must ensure that those students are supported and that their assault does not derail their education.

Further, in recent years the expansion of technology has drastically changed the bullying and harassment landscape. As more and more harassment moves online, younger students simultaneously grow up with ever-increasing access to smartphones, texting, social media, and other applications. This technology means that there simply are many more forms of off-campus communication than experienced by previous generations—and that communication is often unsupervised and anonymous, and sometimes can even be deadly.[12] It is our experience at ELC that many young students say things online that they might not in person—and the easy availability of anonymity on the Internet can provide an unfortunate cloak for groups to bully and harass vulnerable peers. For example, geographically-bound applications such as "Yik Yak" often center around schools and have been a platform for sexual and racial harassment in recent years. Even though content posted there may not exist in the traditional physical space of the classroom, schools, districts, and colleges nationwide quickly realized that they had a responsibility to address its effects because of the hostile environment it created for many of

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[10] Though the Department enumerates several factors for determining whether something occurs under the program or activity, it seems quite clear that the physical location of the alleged conduct will be the primary factor. As noted by the Department, "[i]n determining whether a sexual harassment incident occurred within a recipient's program or activity, courts have examined factors such as whether the conduct occurred in a location or in a context where the recipient owned the premises; exercised oversight, supervision, or discipline; or funded, sponsored, promoted, or endorsed the event or circumstance."

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

[12] *See, e.g.*, Ray Sanchez, Natisha Lance & Eric Levenson, *Woman sentenced to 15 months in texting suicide case*, CNN (Aug. 3, 2017), https://www.cnn.com/2017/08/03/us/michelle-carter-texting-suicide-sentencing/index.html (documenting recent high-profile case of a criminal conviction for involuntary manslaughter when a high-school student encouraged her boyfriend to commit suicide via text messages and phone calls).

their students.[13] The proposed Title IX regulations could, unreasonably and contrary to the text of the statute, exclude behavior such as threatening feminists and advocates for women's rights with death and rape from the purview of Title IX.[14]

Compounding the issue, the Department mandates dismissal of cases that do not fall under their mistaken interpretation of the statute.[15] Mandatory dismissal of cases is a blunt instrument that hamstrings local officials. It is especially problematic when it includes mandatory dismissal of cases that Title IX coordinators not only *should* handle, but *must* handle under the statutory text and Supreme Court precedent. Essentially, this proposed regulation is so far afield that it actually **requires funding recipients to violate Title IX** if they abide by the proposed regulations and dismiss cases that rightfully fall under the statutory mandate, but are excluded by the proposed regulations. This atextual proposal must be modified to include behavior that is contrary to the statutory mandate, which includes events occurring off-campus that nonetheless create a hostile environment on-campus.

(4) The new definition of sexual harassment is simply inappropriate and leaves harassed students without legal recourse

Proposed section 106.30 seeks to drastically change the definition of sexual harassment from its historical definition of "unwelcome conduct of a sexual nature"[16] to one that limits harassment to quid pro quo requests for sexual favors and "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." This proposed definition, like the proposed definition of deliberate indifference, is based on the unexamined decision by the Department to simply copy-and-paste Supreme Court doctrine intended for private lawsuits for monetary damages into the administrative context. Because this proposed definition would leave students who suffered serious harassment with no recourse under Title IX, the Department must revert to a more appropriate regulation, such as its historical and well-accepted definition of "unwelcome conduct of a sexual nature."[17]

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[13] *See, e.g.*, Naheed Rajwani & Stacy St. Clair, *Yik Yak app disabled in Chicago amid principals' worries*, CHICAGO TRIBUNE (Mar. 7, 2014), https://www.chicagotribune.com/suburbs/winnetka/ct-xpm-2014-03-07-ct-yik-yak-schools-met-0307-20140306-story.html.

[14] *Cf. Feminist Majority Found. v. Hurley*, No. 17-2220, 2018 WL 6625847, at *8 (4th Cir. Dec. 19, 2018) (holding that harassment via applications such as Yik Yak could be covered under Title IX because "[b]eyond the University's technical capacity to control the means by which the harassing and threatening messages were transmitted, the Complaint demonstrates that UMW could have exercised control in other ways that might have corrected the hostile environment.").

[15] *See* proposed section 106.45(b)(3).

[16] *See* 2001 Guidance, supra note 7, at 2.

[17] *See* 2001 Guidance, supra note 7, at 2.

In justifying its extensive use of standards that guide federal courts, the Department notes that it "believes that students and institutions would benefit from the clarity of an essentially uniform standard." But, again, the Department seems to have not consulted with the relevant stakeholders, as the *institutions themselves* note that an essentially uniform standard is undesirable. The AASA projects that if students cannot receive different recourse from the Department than they could in federal courts, "then presumably students will find civil litigation to be the better avenue 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."[18] This is especially likely given that the Department's proposed regulations include an absolute prohibition on monetary damages,[19] which can be available in a civil suit. Because of this, school districts both *want* to address sexual harassment before it becomes so severe, pervasive, and objectively offensive that it would expose them to liability for money damages *and* believe that the Department's proposed definition limiting their ability to do so will lead to increased and substantial litigation costs.

In addition to placing school districts in an untenable position, the proposed definition simply defies common-sense in its underinclusivity. Unduly restricting the conduct subject to Title IX scrutiny to such a narrow category of behavior will unnecessarily force people to suffer ever-increasing acts of harassment before it can be addressed and send a message of non-support to victims. As noted by the AASA, "[u]nder the Department's proposed, narrower definition of harassment, students would be forced to endure repeated and escalating levels of abuse, from a student or teacher, before their schools would be required to investigate and stop the harassment."[20] The problem actually goes further than that—when combined with the mandatory dismissal clause in proposed section 106.45(b)(3), schools would not only not be required to investigate or stop harassment. They would be **forbidden** from doing so.

This definition also runs counter to Title VII's prohibition on sexual harassment, which currently encompasses more conduct than the proposed Title IX definition.[21] This means that adults and children in the same building would be subject to differing standards as to when sexual harassment must—and even can—be addressed. It is confusing to employees and unfair to students to give students less protection from sexual harassment than the adult employees receive in the exact same building. Minor children, who are impressionable and have less power and

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[18] AASA comment, *supra* note 2, at 2.
[19] "Specifically, we state that OCR shall not deem necessary the payment of money damages to remedy violations under part 106 (proposed section 106.3(a))."
[20] AASA comment, *supra* note 2, at 4.
[21] Under Title VII, "[f]or 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.'" *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (citing *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)) (emphasis added).

autonomy than adults, absolutely cannot be asked to endure more sexual harassment than their adult counterparts before a funding recipient is permitted to address it.

In addition to all of the aforementioned structural problems, this proposed definition, when applied to actual situations, excludes conduct that should clearly qualify as sexual harassment under any reasonable definition. For example, in *Hawkins v. Sarasota Cty. Sch. Bd.*, 322 F.3d 1279, 1281 (11th Cir. 2003), these uncontroverted facts were deemed insufficient to meet the severe, pervasive, and objectively offensive standard that the Department now seeks to adopt:

> The three girls testified that not long after he joined the class, John Doe would cross his hands, gesture to his genitals, and tell Jane Doe I, Jane Doe II, and Jane Doe III to "suck it."[2] In the lunchroom, he would hold two fingers up. One of the girls testified that although she did not know what this meant, she was told by other children that it meant "meet me in bed in two seconds."[3] In the lunchroom, he also said that he wanted to "suck [the girls'] breasts till the milk came out,"[4] that he wanted [the girls] to "suck the juice from his penis," and that "he wanted [the girls] to have sex with him." On other occasions, he referred to one or all of the girls as "sexy baby" and stated that "you have a bun, and I have a hot dog, and I want to eat them both." At the playground, he would chase the girls and try (sometimes successfully) to touch them on their chests, and (unsuccessfully) to kiss them. At the bus stop, he also would try to grab Jane Doe III and look up her skirt. He would also jump onto her and rub his body on hers. The girls stated that this conduct took place over a period of several months.

Those girls were eight years old. And yet, the Department's proposed definition leaves those children with no options to assert their rights under Title IX because it unwisely collapses the administrative and civil litigation contexts. It cannot be repeated often enough: it is not appropriate to lift those standards into an entirely different context without applying a critical eye. Just because a court decided that harassment did not rise to the level of monetary damages does not mean that Title IX allows those little girls to be pushed out of school. The Department is tasked with effectuating the statute itself, not the Supreme Court's standards for a private right of action. They must take on that responsibility by utilizing definitions that capture behavior that violates Title IX, not just the small subset of conduct proscribed by the courts in private lawsuits for monetary damages.

Because the proposed definition will leave an extensive amount of sexual harassment unaddressed, the systemic effect that sexual harassment has in harming girls, LGBTQ+ students, and other populations disproportionately harmed by harassment will only be amplified and magnified. By hampering their ability to access their education and, relatedly, to utilize that education to participate in the workforce and society writ large, the proposed definition ironically threatens to perpetuate the exact societal forces that the passage of Title IX was intended to

combat. ELC adamantly opposes the new proposed definition of sexual harassment as underinclusive, contrary to the purpose of Title IX, and a risk to the health and safety of pre-K-12 students nationwide.

PROPOSED SECTION 106.45(b)(1)(v)

The Department proposes that funding recipients abide by "reasonably prompt timeframes" for completion of the grievance process and appeals process. The Department's failure to establish explicit time frames is arbitrary for the simple reasons that clear rules are more enforceable, encourage uniformity across institutions, and create clear expectations for parties, rather than leaving them to wonder what their particular school views as "reasonably prompt." Because the reasonability of a funding recipient's response is the core of the underlying question of whether their procedures constitute a Title IX violation, creating an additional layer of "reasonability" is unnecessarily nebulous. Instead, the Department should define what is reasonable for all parties, including funding recipients, to expect.

Given that the Department already includes provisions ensuring that recipients can extend timeframes for good cause, there is little concern that establishing explicit time expectations will hinder the ability of universities to handle cases of differing complexities in the appropriate manner. Instead, the expectations set will create a floor, beyond which a recipient's response is clearly unreasonable, and encourage recipients to act promptly. Meanwhile, those timeframes will allow those impacted by proceedings, such as complainants and respondents, to set appropriate expectations and have a greater understanding of the length of time it may take for the process to unfold. A person who has been sexually assaulted at the beginning of their last year at an institution should be able to know that an investigation can and will be completed before they leave. Otherwise, the vagueness in the policy might leave complainants unsure of the value in submitting to an emotionally difficult and potentially lengthy process.

While there may be extenuating circumstances for institutions of higher education, elementary and secondary schools should be able to move relatively quickly in the vast majority of Title IX cases. Most have easy, daily access to potential witnesses, exist in a confined geographic area, and regularly conduct disciplinary investigations within a matter of days, if not hours. The greater control they exhibit over students' lives is inherent to the way the schooling model differs between elementary schools and colleges. Of course, because the grievance process here is more formalistic than in some other discipline matters, additional time may be warranted. But thorough investigations need not take exceedingly long periods of time, even when they are more formal. For example, in New Jersey, potential incidents of bullying, harassment, and intimidation are highly regulated, and they are required by statute to conclude as quickly as possible, with a finite deadline within ten days of being reported. N.J. Stat. Ann. § 18A:37-15(b)(6)(a). Meanwhile, previous Title IX documents issued by the Department

encouraged funding recipients to complete investigations and hearings within 60 days.[22] Finite deadlines better effectuate the purpose of Title IX and give certainty to all participants in the process. An explicit timeframe for appeals—if a recipient offers an internal appeals process—should be adopted, as well.

The proposed regulations should also be clarified in order to note that extensions granted because there is a concurrent criminal investigation (1) do not excuse the funding recipient's responsibility to investigate the matter, and (2) cannot be used to delay the recipient's justice process beyond that necessary to cooperate with the criminal probe, *e.g.*, the recipient's investigation cannot be delayed in order to wait for the outcome of a criminal investigation. Extensions in this area are not granted in order to abdicate responsibility to other authorities; they should be granted only if there is a bona fide investigative reason for a delay.

PROPOSED SECTION 106.45(b)(3)

The procedures utilized within a formal hearing are crucial to the truth-finding function of any adjudication. While the Department espouses admirable values in support of its efforts to overhaul these processes, many of the proposed regulations are untenable. Through a combination of micromanaging recipients and paying insufficient attention to the unique needs of complainants who have been sexually assaulted or harassed, the Department's proposals create a bureaucracy of rules that will stack the deck against survivors and inhibit well-intentioned schools. This effort to transform Title IX hearings into a quasi-judicial procedural byzantine will shield perpetrators from responsibility while doing little to serve the fundamental purpose of providing due process: determining the truth of the underlying matter. For the reasons set forth below, the proposed regulations must be rejected.

(1) Mandatory dismissals are inappropriate restrictions on Title IX professionals' ability to do their job

The Department must eliminate the provision in proposed section 106.45(b)(3) that mandates dismissal of cases that represent a threat to educational access, but do not match their proposed definition of sexual harassment.[23] Indeed, mandatory dismissal of cases that are not covered by the Department's proposed regulations but still fall under the statutory mandate puts schools in a troubling Catch-22 scenario. Schools would have to violate Title IX in order to comply with the proposed Title IX regulations. That untenable dilemma demonstrates just how afar from the statutory text the Department has found itself in attempting to reshape Title IX adjudications.

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[22] U.S. Dep't of Educ. Office of Civil Rights, *Dear Colleague Letter: Sexual Violence* at 12 (Apr. 4, 2011) [hereinafter 2011 Guidance], *available at* https://www2ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

[23] This is especially important given that the definition of sexual harassment, as detailed elsewhere, is already far too strict and runs contrary to the statutory text.

The thrust of these proposed regulations must be towards guiding schools on how to increase educational access, rather than acting as a liability shield for bad actors. Given the Department's professed desire to provide deference to professional educators in their work, micro-managing the ability of administrators to work proactively in order to prevent Title IX issues from rising to the point of legal liability seems out of place. This provision would be especially troubling in the elementary and secondary education context, in which children would be forced to endure repeated and severe harassment before the school was permitted to lodge a formal complaint or take action against the perpetrator under Title IX. As children are just learning behaviors and the boundaries of acceptable peer interaction at a young age, proactive and preventative work to prevent sexism and demonstrate the unacceptability of sexual harassment is crucial both in curbing the immediate behavior and in preventing children from repeating the behavior after seeing that harassment may go unpunished. When children are at their most impressionable, local efforts to model positive behaviors and combat sexism should not be thwarted by an inflexible and overly prescriptive mandate from the federal government.

(2) There is no absolute right to discuss an ongoing grievance procedure when that speech may entail harassment or retaliation itself

Several provisions, included proposed section 106.45(b)(3)(iii), suggest that the respondent in a grievance procedure has an absolute right to speak about pending cases, short of falling afoul of prohibitions on false testimony. There is no proposed regulation providing any instruction to the parties that retaliation for reporting an act of sexual harassment or sexual assault is prohibited; indeed, the word "retaliation" does not appear in the proposed regulations at all. The proposed regulation suggesting an absolute right to discuss a pending case also fails to take into account the possibility of no-contact orders between the parties, despite that being cited as a valid supportive measure elsewhere in the proposed regulations.[24] Compounding this issue is the detail with which the Department has proposed to regulate the written notice provided by the funding recipient to the parties; despite prescribing exactly what information schools must provide to each party involved, the Department fails to include a no-retaliation instruction under proposed sections 106.45(b)(3)(v) or 106.45(b)(2). The proposed regulations must take into account the common tactics of retaliation that can both threaten the investigation at hand and contribute to a larger atmosphere of intimidation that leads to underreporting. ELC objects to the proposed regulations, as they provide insufficient protections against potential retaliation.

(3) Evidentiary rules must allow for greater discretion by the funding recipient to exclude questions as irrelevant, prejudicial, repetitive, or otherwise inappropriate

[24] "For example, where a mutual no-contact order has been imposed as a supportive measure, the affected complainant and respondent should know to contact the Title IX Coordinator with questions about how to interpret or enforce the no-contact order."

Proposed section 106.45(b)(3)(vi) states that "the decision-maker **must**, after the recipient has incorporated the parties' responses to the investigative report under paragraph (b)(3)(ix) of this section, ask each party and any witnesses **any** relevant questions and follow-up questions."[25] Seemingly, the only exception to an all-inclusive mandate to allow any and all questions[26] is relevance. Yet the Federal Rules of Evidence, and generally accepted practice in state courts and other adjudicative bodies, allow for much otherwise relevant evidence to be excluded. For example, under Federal Rule 403, "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence" are all additional reasons to exclude otherwise relevant questioning. Title IX hearings are not replacements for courts, so they need not imitate federal rules in all aspects. But many of the exceptions, including those attempting to weigh against unduly prejudicial questioning, have particular relevance to proceedings that carry a unique risk for common practices such as victim-blaming and weaponization of rape myths.[27] Indeed, the risk of prejudice against survivors of sexual violence is higher than it is for victims of other crimes—which is recognized by the Federal Rules of Evidence in Rule 412, which provides particular rules for civil and criminal proceedings involving accusations of sexual misconduct. Though the Department has included an exception for a complainant's "sexual behavior or predisposition," there are many other situations in which additional questions may need to be excluded because they are inappropriate for the tribunal. The Department's insistence that the decision-maker has no authority or discretion to exclude **any** question for **any** reason other than relevance or its relationship to sexual behavior runs contrary to common legal practice and could result in harassing, prejudicial, or needlessly cumulative questioning of either party. ELC objects to the proposed regulations because they mandate inappropriate evidentiary practice that will prevent administrators from properly moderating Title IX adjudications.

(4) Cross-examination is rarely, if ever, appropriate for Title IX hearings

Proposed section 106.45(b)(3)(vi) implies that cross-examination could be mandated by a pre-K-12 funding recipient choosing to hold a live hearing,[28] and proposed section

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[25] Emphasis added.

[26] Aside from the exception identified in the provision itself: "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."

[27] *See generally* Sarah Zydervelt, Rachel Zajac, Andy Kaladelfos & Nina Westera, *Lawyers' Strategies for Cross-Examining Rape Complainants: Have we Moved Beyond the 1950s?*, 57 BRITISH JOURNAL OF CRIMINOLOGY 551 (2016).

[28] Because young children are particularly impressionable and susceptible to being pressured, live hearings themselves have questionable value for pre-K-12 students. The Department's

106.45(b)(3)(vii) mandates it for institutions of higher education. Mandating cross-examination in any situation, and making a blanket prohibition on the use of evidence not subject to cross-examination, creates a substantial risk of exacerbating trauma to sexual assault survivors, and has questionable value in terms of producing the truth.[29] Allowing cross-examination may serve a purpose in some cases, but it is difficult to see how mandating it in such a manner implements the statute in any way, rather than serving as an *ultra vires* overregulation that goes beyond the scope of the statute.

Cross-examination can be traumatizing, especially for younger students, and the Department's quotation of John Henry Wigmore that it is the "greatest legal engine ever invented for the discovery of truth" is incomplete without including Wigmore's own caveat; that "[a] lawyer can do anything with cross-examination. . . . He may, it is true, do more than he ought to do; he . . . may make the truth appear like falsehood."[30] Cross-examination is premised on pressure; lawyers apply pressure on witnesses in order to test their testimony for accuracy, completeness, bias, and other relevant qualities. It is widely recognized as a stressful task to be cross-examined, even for people who may regularly find themselves in litigation. But the overbearing nature of cross-examination can have a particular impact on vulnerable children, which is reflected in the laws modifying traditional cross-examination for children in child protection hearings and other areas commonly involving minors.[31] For young, impressionable, and even fearful children, the pressure of cross-examination may not press them towards greater truth-telling, but rather towards appeasement of the aggressor. This is especially troublesome in circumstances in which one party might be able to afford an attorney, while the other cannot.

Heavy use of cross-examination changes the forum from a school-based discipline process to a transposed courtroom. Forcing lay advisors to conduct cross-examination will transform that role from a supportive presence into an adversarial champion. Given the likely

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dedication to aligning Title IX with a common-law, adversarial model as an indispensable method of truth-finding ignores the benefits a more inquisitorial system may have in these situations.

[29] The Department fails to explain, beyond a single quote from John Henry Wigmore, why cross-examination is more likely to find the truth than less confrontational methods of probing and investigating, such as utilizing written questions.

[30] Frank E. Vandervort, *A Search for the Truth or Trial by Ordeal: When Prosecutors Cross-Examine Adolescents How Should Courts Respond?*, 16 Widener L. Rev. 335, 337 (2010) (citing John Henry Wigmore, Evidence in Trials at Common Law, § 1367, at 32 (James H. Chabourn ed., Little Brown 1974)).

[31] *E.g.*, "Michigan, like other jurisdictions, has numerous provisions in the law intended to protect child witnesses who appear in child protection proceedings. These include the use of leading questions on direct examination, videorecorded statements and special hearsay exceptions, closed circuit television to prevent children from having to confront directly those who are alleged to have harmed the child, and impartial questioners to pose questions to child witnesses." Vandervort, *supra* note 30, at 337.

discomfort academics or administrators will feel playing this role, the requirement also pushes the parties towards retaining lawyers rather than a teacher, trusted mentor, or other school official. This cycle will contribute to an unnecessary and counterproductive legalization of the Title IX process that will not be a superior method of producing the truth. Further, the new legalistic tint of these hearings could drastically increase costs for funding recipients, who will likely feel pressure to hire lawyers, and perhaps even retired judges, to conduct these processes.

While Title IX investigations must retain appropriate protective procedures, the proposed regulations mandating cross-examination go beyond those needs and turn a classroom into an off-brand courtroom. Given the obvious risks of such an adversarial form of confrontation and the Department's own recognition that written questions can be appropriate and serve the same purpose,[32] ELC objects to the proposed regulations on cross-examination, especially as applied to younger students.

PROPOSED SECTION 106.45(b)(4)(i)

The proposed regulations incentivize funding recipients to make "clear and convincing" the standard by which evidence is judged in any disciplinary hearing. This proposal is a mistake in judgment and seems to rest on flawed and dangerous assumptions about the testimony of survivors of sexual violence. Standard legal practice and substantial case law demonstrate why the preponderance of the evidence standard is preferable, and the attempt to deflect scrutiny by providing institutions with a modicum of choice is insufficient to mollify concerns about the way that the clear and convincing standard can systematically disenfranchise survivors. ELC objects to the Department's proposed regulations regarding use of the clear and convincing standard of evidence because the preponderance standard properly allocates the risk of error between the parties and is utilized in practically all comparable civil rights cases and adjudications.

(a) The evidence demonstrates that underreporting, rather than false reports, should be the Department's primary concern when devising a standard of review

There seems to be a belief, pervasive throughout these proposed regulations, that additional and substantial protections need to be put into place to protect against a slew of false accusations. Indeed, it is difficult to read the combination of proposing a presumption of non-responsibility,[33] an increased standard of proof,[34] evidentiary rules that focus heavily on interrogating the complainant,[35] and placing the general focus almost entirely on the rights of the accused, rather than the complainant, in any other way. Implicitly, this seems to posit that the current system and historical enforcement of Title IX leaves us in a place where false reports and

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[32] *See* proposed section 106.45(b)(3)(vi).
[33] Proposed section 106.45(b)(1)(iv).
[34] Proposed section 106.45(b)(4)(i).
[35] *E.g.*, proposed section 106.45(b)(3)(vi).

false accusations pose a great and unchecked risk, while perpetrators of actual sexual violence not being held responsible rarely occurs.[36]

Public comments from the administration mirror this theme and strongly suggest that an inaccurate understanding of the prominence of false accusations undergirds the Department's thought process while designing these proposals.[37] It is demonstrably false that "the accusations — 90 percent of them — fall into the category of 'we were both drunk,' 'we broke up, and six months later I found myself under a Title IX investigation because she just decided that our last sleeping together was not quite right.'"[38] To the contrary, no credible evidence exists to suggest that false reports are endemic to Title IX proceedings.[39] Instead, the history of sexual assault, both on and off-campus, is rife with underreporting, offensive and off-putting investigative techniques, and sexist and demeaning themes and laws. 56% of girls and 40% of boys in grades

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[36] If the implication is that perpetrators of sexual violence not being held responsible occurs but is simply an unimportant consideration, that is far more troubling.

[37] *See, e.g.*, Jeremy Bauer-Wolf, *Education Dept. Clarifies DeVos Comments on Sexual Assault*, INSIDE HIGHER ED (Mar. 14, 2018), https://www.insidehighered.com/news/2018/03/14/education-department-devos-says-false-reports-sexual-assault-are-rare (noting Secretary DeVos's much-maligned comment in which "DeVos said 'I don't know' when asked if the number of false accusations is equivalent to the number of sexual assaults."). *See also* Ryan Teague Beckwith, *'A Scary Time for Young Men.' President Trump Decries Sexual Assault Allegations*, TIME (Oct. 2, 2018), http://time.com/5412955/donald-trump-says-scary-time-men-sexual-assault-allegations/ (quoting President Trump claiming that "[i]t is a very scary time for young men in America when you can be guilty of something that you may not be guilty of," while it is a "great time for women" when discussing sexual assault accusations.).

[38] Erica L. Green & Sheryl Gay Stolberg, *Campus Rape Policies Get a New Look as the Accused Get DeVos's Ear*, NY TIMES (July 12, 2017), https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html.

[39] Despite the number of high-ranking officials, including the President, Secretary, and Acting Assistant Secretary, that have made comments indicating their belief in this narrative, the Department proffers no evidence regarding a high risk of false reporting other than claiming that they had "reviewed" "white papers, reports, and recommendations issued over the past several years," which are then listed in a footnote. Because of this, advocates must look elsewhere for the federal government's position on the subject, and those numbers flatly contradict the dubious claims from Department officials that a great number of Title IX cases involve false claims. "The FBI estimates that somewhere between 2 percent and 10 percent of sexual assault allegations are false, while a 2015 Bureau of Justice Statistics study found that just 12.5 percent of surveyed rape survivors on campus reported their experiences to school officials." Mili Mitra, *What Betsy DeVos doesn't understand about Title IX and campus sexual assault*, WASHINGTON POST (July 18, 2017), https://www.washingtonpost.com/opinions/what-betsy-devos-doesnt-understand-about-title-ix-and-campus-sexual-assault/2017/07/18/918a4366-6b36-11e7-9c15-177740635e83_story.html?utm_term=.4eaf3d3e6404.

7-12 are sexually harassed each school year.[40] Meanwhile, more than 1 in 5 girls between the ages of 14 and 18 are kissed or touched without their consent.[41] Yet only 2% of 14 to 18 year old girls report sexual assault to their schools or the police.[42] These sobering statistics are buttressed by data indicating that 79 percent of public schools implausibly reported zero incidents of sexual harassment to the Civil Rights Data Collection in 2013-2014.[43] Students are being sexually harassed and assaulted, yet they are not reporting it. The Department's regulations must reflect, and seek to combat, this reality, rather than focusing on an imagined flurry of false reports—both because that is the statutory mandate of Title IX itself and because it is simply what is happening on campuses today.

Perhaps most importantly, the historical trend of underreporting—and the ability of the Department to influence it via agency action—is borne out by statistics kept by the Department itself. As all stakeholders recognize, "media and government attention put more pressure on schools to address sexual violence" in the aftermath of the 2011 "Dear Colleague Letter."[44] As a result, the Department saw complaints involving sexual violence at the K-12 level increase 277 percent between 2011 and 2016.[45] As of 2016, nearly half of the office's investigations for Title IX violations involve K-12 schools, and 47 percent of those are for sexual violence issues.[46] And yet, even with this increase in attention, it is still clear that the vast majority of sexual violence goes unreported. We absolutely cannot return to the status quo prior to increased enforcement efforts by the Department, a world in which the vast majority of federal funding recipients reported practically no sexual assaults or harassment whatsoever.

Though it may seem tangential to the legal question, the historic disbelief of survivors' experiences is actually crucial to the issue of deciding a standard of proof. If there is no reason to deviate from the preponderance standard, it should be utilized, as it is in all comparable

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[40] Catherine Hill & Holly Kearl, *Crossing the Line: Sexual Harassment at School*, AAUW (2011), https://www.aauw.org/research/crossing-the-line.
[41] National Women's Law Center, *Let Her Learn: Stopping School Pushout for: Girls Who Have Suffered Harassment and Sexual Violence* 1 (Apr. 2017), https://nwlc.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence.
[42] *Id.*
[43] 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/.
[44] Maile Marriot & Erica Evans, *Sexual harassment happens in elementary, middle and high schools. But not much is being done about it*, DESERET NEWS (Jan. 17, 2019), https://www.deseretnews.com/article/900051220/sexual-harassment-happens-in-elementary-middle-and-high-schools-but-not-much-is-being-done-about-it.html?fbclid=IwAR0mscvDC66dLNPwVT9s_-TpzoUXp6hn3Khvq82eyvS9LDoyndHv3mS17vY.
[45] U.S. Dep't of Educ. Office of Civil Rights, Serial Reports Regarding OCR Activities (last visited Jan. 23, 2019), https://www2.ed.gov/about/offices/list/ocr/congress.html.
[46] *Id.*

proceedings. Because there is no empirical evidence of a rash of false reports, while common misconceptions about the testimony of survivors of sexual violence still pervade our society,[47] deviating from the near-universal preponderance standard for civil rights cases is particularly objectionable.

(b) The preponderance standard is both the universally accepted basis for adjudicating civil rights cases and the best way to allocate the risk of a mistaken outcome

Given their reliance on federal precedent elsewhere, the Department's lack of discussion of relevant precedent and practice on the issue of deciding standards of proof is striking. The Supreme Court has spoken clearly on the issue; "[b]ecause the preponderance-of-the-evidence standard results in a roughly equal allocation of the risk of error between litigants, we presume that this standard is applicable in civil actions between private litigants unless 'particularly important individual interests or rights are at stake.'" *Grogan v. Garner* (1991) 498 U.S. 279, 286 (quoting *Herman & MacLean v. Huddleston* (1983) 459 U.S. 375, 389). Yet despite importing civil litigation standards in other contexts,[48] the Department abandons its rhetoric of deference to Supreme Court precedent wholesale here.[49] For decades, preponderance of the evidence has been the standard used to decide civil rights cases both in federal court and within

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[47] For a chilling and personal take on the history of rape law that is, unfortunately, still very relevant today, *see* Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1092 (1986). Estrich describes a few situations in which adjudicators often misunderstand the nature of rape or exhibit an unwarranted disbelief of the survivor. "Where less force is used or no other physical injury is inflicted, where threats are inarticulate, where the two know each other, where the setting is not an alley but a bedroom, where the initial contact was not a kidnapping but a date, where the woman says no but does not fight, the understanding is different. In such cases, the law, as reflected in the opinions of the courts, the interpretation, if not the words, of the statutes, and the decisions of those within the criminal justice system, often tell us that no crime has taken place and that fault, if any is to be recognized, belongs with the woman." These common misconceptions imply that rape cannot occur between people who have previously had consensual sexual encounters, that rape isn't "real" if the survivor knows the perpetrator, that a lack of physical resistance indicates implicit consent, and that the testimony of a survivor is insufficient to "really know what happened." None of those common misconceptions reflect the reality of sexual assault in America, and regulations designed to effectuate a mandate of non-discrimination must take this history and context into consideration when deciding on rules of evidence and proof.

[48] *E.g.*, the deliberate indifference standard, the definition of sexual harassment, and the actual knowledge standard discussed in the portion of this comment objecting to proposed sections 106.30 & 106.44(a).

[49] Because we do not support lifting standards from the federal courts merely for "uniformity" purposes, we do not wish to imply that the Department should do that in this instance. We note that private lawsuits for money damages under Title IX are judged by the preponderance standard only because the Department does rely extensively on that logic elsewhere. *See, e.g.*, *Bostic v. Smyrna Sch. Dist.*, 418 F.3d 355, 360 (3d Cir. 2005) ("to establish her Title IX claim against the Institutional Defendants, [the plaintiff] has the burden of proving by a preponderance of the evidence" a violation.)

administrative agencies. Rather than discussing any of the many federal court cases engaging in substantial discussion of the factors used in deciding an appropriate standard of proof, the Department cites a single piece of federal case law: a trial court order that makes a conclusory statement on the issue without making a single citation to any precedent whatsoever. The Department otherwise relies on a few state court cases. This is an extraordinarily weak justification for what would be a radical departure in making Title IX adjudications differ from essentially every other kind of comparable case. As the Association of Title IX Administrators recently summarized:

> Preponderance of the evidence is the standard used universally in civil rights resolutions in the United States. It is not unique to Title IX. It is the standard for Title IV, Title VI, and Title VII, at the federal level, and for almost all state civil rights laws. It is the standard utilized by OCR and all other federal agencies that oversee civil rights equity. In 2011, when OCR imposed the preponderance standard on schools under Title IX, it wasn't imposing a new standard, it was simply stating the (already existing) fact that preponderance of the evidence is the applicable standard of the courts and of OCR, and thus must be applied by colleges to achieve equitable compliance. No other standard is appropriate because these are civil discrimination protections, not criminal statutes.[50]

The Department correctly notes that there are certain reputational consequences for someone adjudicated responsible for sexual assault or harassment in addition to the punishment that the school might levy, but this paints an incomplete picture for two reasons. First, it fails to contextualize this reputational harm and revocation of privileges within the larger conversation about standards of proof. Practically every case involving a remedy of any kind involves consequences for the parties. The question that courts have historically asked was whether those consequences were so severe and unusual, when compared with consequences in other cases, to justify a departure from the dominant standard of review. The Department has failed to explain why reputational consequences here are so severe as to justify the departure. Second, it fails to recognize the consequences for complainants who cannot access their education as a result of sexual violence. Indeed, while the prospect of someone standing "accused" of sexual violence can create an air of quasi-criminality in the minds of some, the crux of any Title IX hearing is actually only to determine the responsibility of an alleged perpetrator **insofar as it prevents other students from accessing their education on the basis of their sex**. The Department must review their proposed regulations to take this crucial fact into account, that the standard of proof involves **competing** interests, rather than refusing to juxtapose the reputational stakes for a respondent with the potential consequences for complainants. Indeed, many survivors of sexual

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

violence prefer to utilize school-based procedures to the criminal justice system precisely **because** of the availability of alternative remedies that focus on them and their access to education, rather than a single-minded focus on the perpetrator.

The Department further complicates this by proposing a number of evidentiary rules that seem, in the aggregate, designed to cast doubt on a complainant in order to further the presumption of non-responsibility in a manner akin to traditional rules of criminal procedure.[51] But Title IX is not a proxy for a criminal trial, and contrary to practices in that realm, "due process" in civil matters does not exist to provide procedural safeguards for a singular party at the expense of the other. Rather, when deciding on a standard of proof, decision-makers "must be mindful that the function of legal process is to minimize the risk of erroneous decisions." *Addington v. Texas*, 441 U.S. 418, 425 (1979). Because the criminal justice system can result in incarceration or even the death penalty,

> [t]he interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment [against the defendant]. In the administration of criminal justice, our society [instead] imposes almost the entire risk of error upon itself.

Id. at 423-24. But because the other participant is not society writ large in Title IX hearings, the burden of an incorrect ruling against a complainant is not diffused, but rather falls upon them individually to bear.[52]

The posture of the parties and the lack of a threat of criminal conviction has traditionally caused courts dealing with even very serious civil matters to choose the preponderance of the evidence standard because it equally allocates the risk of error. Courts—and other relevant entities, such as administrative agencies enforcing civil rights laws—are hesitant to apply higher standards, such as clear and convincing evidence, which would effectively allocate the risk of a false outcome on one party. That kind of an allocation would be especially problematic here, where the Department raises the importance of reputational stakes for one party, while giving nary a mention to the stakes for the other party—even though the statute that they are ostensibly enforcing has as its sole purpose ensuring the educational access of parties such as complainants here. As noted earlier, this is precisely why all federal civil rights laws, in both administrative and judicial hearings, adhere to the preponderance of the evidence standard. As the Department's

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[51] *See, e.g.*, proposed section 106.45(b)(1)(iv) (presumption of non-responsibility); proposed section106.45(b)(3)(vi) (evidentiary rules that focus heavily on interrogating the complainant).

[52] Unless, of course, that person goes on to commit sexual violence against others. We do not wish to minimize the risk to the community when discussing the difference between criminal cases, where a victim is effectively represented by the state, and Title IX proceedings, where a victim is actually the party in interest.

proffered justification for abandoning the preponderance standard lacks legal support and defies best practices, ELC objects to these proposed regulations.

Additional Concerns

Though this comment is limited in scope in order to focus on some particularly pressing problems in the proposed regulations for elementary and secondary students, ELC has some additional concerns that we hope the Department will consider.

- The cost-benefit analysis is strikingly poor, relying on a number of untenable suggestions, including most notably that "[t]he Department does not believe it is reasonable to assume that these proposed regulations will have a quantifiable effect on the underlying rate of sexual harassment occurring in the education programs or activities of recipients." The Department does not appear to have consulted relevant stakeholders in developing its assumptions and projections. Instead, the cost-benefit analysis simply makes every effort possible to minimize projected costs by making unrealistic assumptions at every turn. As ELC does not believe that the cost-benefit analysis was a good-faith effort to determine the likely costs of these regulations, we object to any effort to modify this section of the proposed regulations. Instead, we call for the Department to start completely anew with a new set of assumptions that will reflect the actual effects of these regulations, rather than a desire to minimize cost calculations as much as possible.
- Under proposed section 106.45(b)(7), institutions would only have to maintain records relating to a Title IX investigation for three years. This length of time is insufficient for several reasons. First, for students attending schools where they could be present for more than three years, such as a K-8 school, students could outlast the record of their harassment or assault, even within a single institution. It makes little sense for a student sexually harassed in the third grade to then enter the seventh grade, at the same institution, without record of her past experiences. Without proper documentation, the perpetrator might be placed in her class and her teachers might not understand how to implement appropriate and needed supportive measures. Second, that information is important to convey when students transfer between institutions; a funding recipient *must* know when a new student at their school has been sexually assaulted or harassed in the past in order to provide appropriate services. Third, the requirement threatens to hamper the legal rights of minor children. New Jersey and many other states allow for minors to file civil suits once they reach the age of majority.[53] Federal and state laws consistently toll relevant statute of limitations periods until minors reach the age of majority and have the ability to vindicate their own rights, recognizing that they should not be punished for the failure of a guardian to file a claim on

[53] *E.g.*, N.J. Stat. Ann. § 59:8-8 ("Nothing in this section shall prohibit a minor . . . from commencing an action under this act within the time limitations contained herein, after reaching majority.")

their behalf.[54] Much of the benefit of these tolled deadlines would be lost if evidence surrounding the student's harassment and their schools' response was unavailable. Record-keeping is not sufficiently onerous to be worth these risks, and ELC objects to these regulations because they do not mandate record-keeping for the entire time that a student attends a particular institution or for a reasonable amount of time after departure so that information can be passed along to other institutions and preserved for any future legal claims.

- Proposed section 106.12 would allow schools to claim a religious exemption to Title IX at any time, including after an investigation has begun, without giving prior notice that they do not or will not comply with Title IX. This proposal must be rescinded so that funding recipients desiring an exemption continue to be required to explicitly claim the exemption. Title IX is a contract, and parents and families should be able to know if a funding recipient is a party to that contract. It is especially inappropriate for the Department to allow a school to suddenly claim a Title IX exemption *after* an investigation has already commenced. This allowance serves no clear purpose other than to provide an avenue for offending institutions to escape liability by retroactively voiding their own contractual liabilities. Though the statute does indeed allow for an exemption for religious institutions, the Department's claim that sending a simple letter to claim that exemption is too "confusing or burdensome"[55] is revealing. Again, the focus is placed on exonerating funding recipients from liability, rather than working as hard as possible to eliminate sexual violence from our society. The families of children who are sexually harassed or assaulted cannot be left without recourse in order to provide a last-minute liability shield for funding recipients that had given no prior indication that they did not intend to abide by the mandate of Title IX despite receiving federal funds.
- Proposed section 106.8(b)(2)(ii) would modify the regulations to forbid stating, explicitly, that the funding recipient discriminates on the basis of sex. This change would place a troubling formalist tint in the regulations when the nature of modern discrimination calls for a more practical approach. In the modern era, overt racism and sexism are less common, and many people have instead begun using "dog-whistle" tactics instead, in which statements hinting towards a policy of sex discrimination are used in lieu of explicit statements in support of it. Instead of stating "a woman's place is in the house, supporting her husband, and we therefore reserve Advanced Placement classes for college-bound men," the funding recipient might state "we promote traditional gender roles and encourage women to take appropriate coursework to prepare for those roles." Both have essentially the same message, and both clearly refer to a school's pattern of violating Title IX by forbidding women from taking some classes within the academic program. But only one is explicit enough to

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[54] *See, e.g., Varnell v. Dora Consol. Sch. Dist.*, 756 F.3d 1208, 1213 (10th Cir. 2014) (applying New Mexico's minority tolling statute to the plaintiff's Title IX claim).

[55] The idea that this letter would be "confusing" is itself confusing, as funding recipients have been required to do this for decades; it is not a novel requirement, nor a particularly complex one.

contravene the proposed regulations, demonstrating why the proposed change to section 106.8(b)(2)(ii) is insufficient to implement Title IX in the modern era.

- Because the preponderance of the evidence standard is the appropriate standard to utilize in these hearings, ELC correspondingly objects to several of the respondent-protecting provisions in the proposed regulations. For example, proposed section 106.45(b)(1)(iv)[56] seeks to protect the respondent at the expense of the complainant. Similarly, proposed section 106.45(b)(1)(ii)[57] seems to forbid basic inferences of bias and motive from the adjudicative process. Of course, no respondent should ever be found responsible based on their status. But insofar as the implication is that adjudicators must pretend that there is no imbalance of incentives between the parties, this proposed regulation is another inappropriate attempt to stack the deck against survivors. These imputations from criminal law are simply inappropriate in this administrative context.
- Proposed section 106.45(b)(6) allows funding recipients to utilize mediation so long as they receive voluntary, written consent from each party involved. In our experience, it is especially difficult for young students to resist overtures from authority figures, and they are very likely to feel pressured to sign the form and indicate their agreeableness, even if mediation is inappropriate for their situation. Young, vulnerable, and impressionable students may not know that mediation is generally inappropriate for issues of sexual harassment and assault, or that the reconciliation might include an effort to get all parties to accept responsibility and apologize for their part in an incident.[58] Mediation is used to resolve peer conflict, not determine whether a sexual assault occurred. Given the misfit between mediation techniques and caring for victims of sexual assault and the likelihood of students feeling pressure to submit to the schools' preferred process, it is especially irresponsible for the Department to allow funding recipients to "preclude[] the parties from resuming a formal complaint." ELC objects to this proposed regulation, as mediation is rarely, if ever, appropriate to resolve issues of sexual violence.

Concluding Comments

The Department has made a series of grievous errors in its attempt to address this pressing, controversial, and important issue. Some of the proposed changes have merit, such as requiring training for employees to ensure that they not base decisions on sex stereotypes. But the bulk of the proposed changes seem to be an overcorrection in response to a perceived overcorrection—a repudiation of the Obama-era policy guidance, rather than an effort to craft new rules centered around victims of sex discrimination and designed to curb sexual harassment and assault.

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[56] Creating a presumption that respondent is not responsible.
[57] Stating that credibility determinations are not able to be based on person's status as complainant or respondent
[58] Which is, of course, inappropriate in instances of sexual violence.

It is crucial to keep two points in mind when evaluating these proposed regulations. First, the Department must remember that the status quo both before and after the 2011 Dear Colleague Letter was that many schools practically ignored their responsibility to combat sexual violence altogether. Even after reporting began to increase in tandem with new enforcement efforts,[59] thousands of institutions serving large numbers of students still implausibly reported that there were zero incidents of sexual assault or harassment under their purview.[60] Contrary to the narrative implied by the Department's proposed regulations, there is still rampant underreporting, rather than a severe problem of overenforcement. Regulations that seek to promote balanced inquiries, provide due process, and simply find the truth would encourage survivors to report their experiences, rather than seek ways in which to dismiss their claims. Second, and most importantly, regulations must implement the underlying mission of the statute. Here, that entails attempting to eliminate sex-based discrimination in educational institutions that receive federal funding. Rather than operating under the primary goal of restoring some imagined equipoise to the system of adjudications, the regulations must be designed to effectuate the statutory text of Title IX. The text of the statute itself tells us what funding recipients must do: ensure 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.A. § 1681(a).

The Department must abandon its stated position that its regulations will have no effect "on the underlying rate of sexual harassment occurring in the education programs or activities of recipients." We must never consider sexual assault or harassment an inevitability, to be managed as best possible. Sexual violence is a scourge that prevents too many people—and especially women and LGBTQ+ students—from accessing the education that they deserve. Title IX insists that this is not acceptable and calls on schools to do better. Indeed, Title IX **has** improved the state of sex equality in many ways, drastically increasing the ability of women to participate in sports, join exclusive organizations, and earn the degrees necessary to participate equally in the workforce. We can continue those laudable efforts if we have fair and compassionate regulations that will fight sexual assault and harassment. ELC objects to the Department's proposed regulations because they fail to do that.

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[59] U.S. Dep't of Educ. Office of Civil Rights, Serial Reports Regarding OCR Activities (last visited Jan. 23, 2019), https://www2.ed.gov/about/offices/list/ocr/congress.html.
[60] 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/.