END SEXUAL VIOLENCE

National Alliance to End Sexual Violence

January 22, 2019

Submitted via www.regulations.gov

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

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

Dear Secretary Marcus,

The National Alliance to End Sexual Violence (NAESV) respectfully submits this comment in fervent opposition to the Department's Notice of Proposed Rulemaking concerning Title IX of the Education Amendments of 1972, as published in the Federal Register on November 29, 2018.

NAESV is the voice in Washington for the 56 state and territorial sexual assault coalitions and 1300 rape crisis centers working to end sexual violence and support survivors. The local rape crisis centers in our network see every day the widespread and devastating impacts of sexual assault upon survivors and provide the frontline response in their communities advocating for victims, spreading awareness and prevention messages, and coordinating with criminal justice and other professionals who respond to these crimes. Our mission is to advance and strengthen public policy on behalf of state coalitions, rape crisis programs, individuals, and other entities working to end sexual violence. Most importantly, the NAESV advocates on behalf of the victim/survivors—women, children and men—who have needlessly suffered the serious trauma of sexual violence and envisions a world free from sexual violence.

www.EndSexualViolence.org
(202)869-8520
1875 Connecticut Avenue NW, FL 10, Washington, DC 20009

The proposed rule would profoundly limit the legal duties of institutions of higher education and K-12 schools to respond to sexual harassment and violence, it would create new and unnecessary hurdles for students to seek help, and, ultimately, it would result in educational settings that are more tolerant of sexual harassment and more hostile to women, girls, and gender nonconforming students. The proposed rule would severely undermine the progress made over the last twenty years to lessen the effects of sexual harassment in schools, reduce the stigma of experiencing sexual harassment and violence, and improve educational outcomes for student survivors. For these reasons, we adamantly oppose the proposed rule.

I. The proposed rule constrains schools' authority to respond and limits the Department's enforcement actions thereby allowing more sexual harassment against students.

The proposed rule departs from longstanding Title IX guidance in many troubling ways, however, we find these three components especially problematic. Specifically, the proposed rule (1) profoundly narrows the definition of "sexual harassment" to which schools must respond, (2) limits the circumstances in which schools are deemed to have received notice of harassment, and (3) institutes an express mandate not to respond to sexual harassment in many circumstances, even when it has subjected a student to a hostile learning environment.

These provisions, considered together, supply schools with a clear framework for avoiding an adverse enforcement action by the Office of Civil Rights (OCR), even if they have failed to remedy—or, in many cases, ignored—hostile learning environments. Additionally, the proposed rule would hamper schools that wish to protect their students and would permit more—and more severe—harassment against students. We believe that the proposed rule prioritizes educational institutions' financial and reputational interests over students' interests in equal educational access, in conflict with the Department's statutory charge.

a) The proposed definition of sexual harassment would force students to endure more severe harassment before receiving help.

Schools must intervene in sexual harassment and assault before it causes irreparable harm in order to protect equal educational access. More than one-third of students experiencing sexual

assault in college drop out of school.[1] By severely narrowing the definition of sexual harassment in which schools must intervene, the proposed rule would force students to endure more severe harassment for longer periods of time before getting help undoubtedly resulting in greater deprivations of educational access, especially burdening women, girls, gender nonconforming students, and students with disabilities.[2]

Since 2001, the Department has defined sexual harassment as "unwelcome conduct of a sexual nature" for purposes of Title IX enforcement.[3] In contrast to previous guidance, the proposed rule defines sexual harassment as "unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the [school's] education program or activity."[4] By including only the most severe instances of sexual harassment, which have already caused a material deprivation of educational access, the proposed rule would dramatically limit the circumstances in which schools have a duty to intervene forcing students to endure more severe harassment, and the concomitant interference with their educational access, before their schools respond.

The Department, following Supreme Court guidance, has long recognized that it is necessary for schools to intervene in sexual harassment before it escalates to the level that a student has

---

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

[2] *See* David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, ASSOCIATION OF AMERICAN UNIVERSITIES 13-14 (Sept. 2015), *available at* https://www.aau.edu/key-issues/aau-climate-survey-sexual-assault-and-sexual-misconduct-2015 (Nearly 25% of transgender and gender nonconforming students, more than 20% of women, and 5% of men experience sexual assault in college); National Women's Law Center, *Let Her Learn: Stopping School Pushout for Girls Who Are Pregnant or Parenting* 12 (2017), available at https://nwlc.org/resources/ stopping-school-pushout-for-girls-who-are-pregnant-or-parenting (56% of girls aged 14-18 who are pregnant or parenting are kissed or touched without consent); Joseph G. Kosciw et al., *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools*, GLSEN 26 (2018), *available at* https://www.glsen.org/article/2017-national-school-climate-survey-1 (More than 50% of LGBTQ students aged 13-21 are sexually harassed at school); National Women's Law Center, *Let Her Learn: Stopping School Pushout for: Girls With Disabilities* 7 (2017), *available at* https://nwlc.org/resources/stopping-school-pushout-for-girls-with-disabilities (students with disabilities are 2.9 times more likely to be sexually assaulted than their peers).

[3] U.S. Department of Educ., Office for Civil Rights*, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001) [hereinafter 2001 Guidance], *available at* https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html.

[4] Proposed rule § 106.30.

experienced irreparable harm, such as being deprived of participation in an educational program or activity. Although recovery of monetary damages against a school for Title IX violations requires the school's deliberate indifference to harassment that is so severe and pervasive that it deprives a student of educational opportunities or benefits,[5] the Supreme Court has recognized the Department's authority to promulgate rules aimed at preventing such a worst-case scenario. The Court explained that there is a critical distinction between defining the narrow circumstances in which a school's failure to respond to harassment supports a claim for monetary damages and simply "defining the scope of behavior that Title IX proscribes."[6] Accordingly, the Department in its 2001 guidance acknowledged that it would be inappropriate to limit its enforcement activities to the narrower civil damages standard.

The Department now proposes to move in the opposite direction, introducing the definition of sexual harassment applicable in civil damages claims to the administrative enforcement setting. This conflation of judicial processes with administrative proceedings is, as the Department acknowledges in its own Notice of Proposed Rulemaking, unnecessary.[7] It is also dangerous and unjust, as it would prevent students from receiving assistance from their schools until harassment has already caused irreparable harm.

Moreover, the proposed definition would exclude sexual harassment and violence that is perpetrated off-campus and not in connection with a school activity. The proposed rule also fails to protect students from sexual violence that occurs during school programs outside of the United States, like study abroad programs.[8] In fact, the proposed definition would exclude many of the contexts in which sexual violence is most prevalent, such as in off-campus rental housing and bars. This would be true even when continued contact with an assailant on campus impedes a victim's educational access, or when a victim endures further harassment or retaliation by the harasser or

[5] *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 290 (1998).
[6] *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 639 (1999).
[7] 83 Fed. Reg. 61468, 61469 ("[The Department is] not required to adopt the liability standards applied by the Supreme Court in private suits for money damages.").
[8] Proposed rule § 106.45(b)(3).

other students, whether in person or through electronic communications.

The proposed definition would profoundly narrow schools' duty to address sexual harassment, dramatically limits protections for the 87 percent of college students who live off campus, and institute new prohibitions on schools' protective actions on behalf of their students. There is no policy justification for these changes, other than to narrow schools' legal duties and, consequently, reduce their risk of liability.

b) The proposed rule would *prohibit* schools from responding to sexual harassment and assault perpetrated outside of a school activity, even when it creates a hostile environment at school.

Proposed rule § 160.45(b)(3) provides that schools "must dismiss" any complaint of sexual harassment that does not rise to the level described by the new harassment definition at § 160.30, or which occurred outside a school activity.[9] Therefore, the proposed rule expressly prohibits schools from taking action to remedy harassment or assault that was perpetrated off campus or via electronic communication, even if that harassment creates a hostile environment on campus or results in additional harassment or retaliation on campus.

This provision would pose especially harmful consequences for K-12 students and the 87 percent of postsecondary students who live off-campus.[10] The Department's own recent enforcement action against Chicago Public Schools (CPS) is an important example: the Department rescinded funding from CPS, describing its failure to address two off-campus sexual assaults as "serious and pervasive violations under Title IX."[11] One of the assaults involved 13 boys forcing a tenth-grade classmate to perform oral sex on them in an off-campus building. The other involved a teacher providing alcohol to a tenth-grade student before abusing her in his car. In both cases, the off-

[9] Proposed rules §§ 106.30, 106.45(b)(3).
[10] *See* Rochelle Sharpe, *How Much Does Living Off-Campus Cost? Who Knows?*, NEW YORK TIMES (Aug. 5, 2016), https://www.nytimes.com/2016/08/07/education/edlife/how-much-does-living-off-campus-cost-who-knows.html.
[11] *See* David Jackson et al., *Federal officials withhold grant money from Chicago Public Schools, citing failure to protect students from sexual abuse*, CHICAGO TRIBUNE (Sept. 28, 2018), https://www.chicagotribune.com/news/local/breaking/ct-met-cps-civil-rights-20180925-story.html.

campus conduct would clearly result in a hostile learning environment at school, because of the victims' continued proximity to and interaction with their assailants. There is no reasonable justification for absolving a school from the duty to act in the face of such abuses, yet the proposed rule would *require* a school to dismiss these complaints on the ground that the conduct at issue occurred outside of a school activity.

There is no statutory basis for constraining schools' remedial action in this way. Title IX prohibits discrimination that "exclude[s a person] from participation in . . . [or] denie]s a person] the benefits of . . . any education program or activity."[12] The statute is silent on the location or circumstances of the underlying conduct from which such an educational deprivation arises. For this reason, the Department's guidance has, for nearly 20 years, sensibly and consistently provided that schools are responsible for addressing sexual harassment, regardless of where it occurs, if it is "sufficiently serious deny or limit a student's ability to participate in or benefit from the education program."[13]

c) The proposed rule's notice and reporting provisions would make it harder for students to seek help regarding sexual harassment.

In an additional untenable departure from longstanding Title IX guidance, the proposed rule would severely limit the type of school employees whom students may notify in order to trigger an institutional response. These rules would apply regardless of whether harassment or abuse was committed by a school employee or another student.

[12] 20 U.S.C. § 1681(a).

[13] 2017 Guidance, *supra* note **Error! Bookmark not defined.** at 1 n.3 (("Schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities"); 2014 Guidance, *supra* note **Error! Bookmark not defined.** ("a school must process all complaints of sexual violence, regardless of where the conduct occurred"); 2011 Guidance, *supra* note **Error! Bookmark not defined.** ("Schools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school's education program or activity"); 2010 Guidance, *supra* note **Error! Bookmark not defined.** at 2 (finding Title IX violation where "conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school," regardless of location of harassment).

Previously, a school was considered to have notice of sexual harassment, and therefore have a legal duty to investigate and remedy the harassment, if a "responsible employee" knew or reasonably should have known about the harassment. At most schools, this covered almost all employees who did not have an independent ethical duty to maintain confidentiality.[14]

This notice standard is crucial in the context of sexual harassment, assault, and abuse, because these experiences are often very difficult to talk about. Further, many students are not informed of which specific school officials are responsible for handling sexual harassment complaints. Instead, students frequently seek assistance from an authority figure they trust and perceive as having the ability to help. Assigning notice to a school based on a responsible employee's knowledge of harassment has been effective at encouraging institutions to adopt policies that require responsible employees to connect students with officials who can investigate complaints, institute supportive measures, and help students navigate privacy considerations.

Problematically, the proposed rule takes the opposite approach and absolves schools from any duty to respond to sexual harassment unless a narrow category of employees received a report: (1) the school's Title IX coordinator, (2) a K-12 teacher (but only if the harasser is a fellow student—not if the harasser is a school employee), or (3) an official with "authority to institute corrective measures."[15] Under the proposed rule no disclosure of harassment would trigger a school's legal duty unless it is in writing and signed by the complainant or the Title IX coordinator.[16]

As a result, under the proposed rule, schools would be deemed to have no notice of sexual harassment—and, therefore, no legal duty to act—in a distressingly wide variety of circumstances.

---

[14] U.S. Department of Educ., Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001) [hereinafter 2001 Guidance], *available at* https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html ("A responsible employee would include 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").

[15] Proposed rule § 106.30.

[16] Proposed rule § 106.44.

For example, a K-12 student who tells her teacher than another teacher is sexually harassing her would have no legal right to assistance from her school. Similarly, if a K-12 student tells a teacher's aide or athletics coach that another student sexually assaulted her, the school would have no obligation to act. In the higher education context, a student who sought help from her professor, advisor, athletics coach, or other school employee after being sexually assaulted by another student or employee would have no legal right to assistance from her school. In the latter scenario, even if the Title IX coordinator received credible information about the assault, but did not receive a signed, written complaint from the victim, the Title IX coordinator would be legally permitted to ignore it. Additionally, as described in the previous section, if the assault occurred off campus, the proposed rule would *require* the Title IX coordinator to dismiss the complaint, regardless of any ongoing harassment or retaliation.

Various sexual assault and abuse scandals in recent years demonstrate the serious danger the proposed notice and reporting scheme would create. At Penn State, the school had a legal obligation to intervene in Jerry Sandusky's sexual abuse because employees like athletics coaches and trainers had knowledge of it. Likewise, at Michigan State, the school had an obligation to investigate Larry Nassar's abuse based on victims' disclosures to athletics staff. At Baylor and Florida State, the failure of football coaches and other athletics staff to take action concerning sexual assault complaints against football players served as the basis for the schools' Title IX liability.

These cases show clearly the immense pressure that some school officials feel to ignore abuse, or even sweep it under the rug, especially when it threatens harm to institutions' or athletic programs' reputations. The risk of enforcement action by the Department must remain a strong and meaningful counterweight to the impulse to sweep sexual assault under the rug. Astonishingly, however, the proposed rule would treat these bad actors *more* permissively, not less.

The proposed rule would serve institutional interests at the direct expense of students. Although schools have always avoided liability when they lack notice of sexual harassment, the proposed rule would expand this to an unprecedented degree. Taken together, the narrowed definition of

sexual harassment, the mandate to dismiss certain complaints, and the notice and reporting scheme is a significant setback to decades of advocacy work to hold institutions accountable and find support for students coping with sexual violence.

II. The proposed grievance procedures are fundamentally inequitable, in conflict with Title IX's nondiscrimination mandate.

While claiming to provide "equitable" processes,[17] the proposed rule would, in reality, require schools to grant unequal rights to sexual harassment complaints and respondents in a manner that favors respondents. This represents a profound departure from longstanding Title IX guidance, and from administrative civil rights enforcement generally, which has required an equitable consideration of both parties' rights.[18]

The Department has asserted that this approach is necessary to protect respondents' due process rights, but the procedural protections required under Title IX guidance have long been stronger than those required under the United States Constitution.[19] To the extent that individual schools have violated either respondents' or complainants' due process rights, those violations have also run counter to the Department's guidance.[20] The claim that previous and current Title IX guidance has not protected due process rights is simply unsound: it both ignores the consistent requirement under Title IX guidance that schools protect students' due process rights and wrongly implies that the degree of process afforded to sexual harassment respondents under current guidance is legally insufficient.

---

[17] *See* proposed rule § 106.8(c).

[18] 2001 Guidance, *supra* note 1 at 22 (instructing schools to protect the "due process rights of the accused").

[19] *See Goss v. Lopez*, 419 U.S. 565 (1975) (holding public school students facing short-term suspensions require only "some kind of" "oral or written notice" and "some kind of hearing"); *see also Gomes v. Univ. of Maine Sys.*, 365 F. Supp. 2d 6, 23 (D. Me. 2005); *B.S. v. Bd. of Sch. Trs.*, 255 F. Supp. 2d 891, 899 (N.D. Ind. 2003); *Coplin v. Conejo Valley Unified Sch. Dist.*, 903 F. Supp. 1377, 1383 (C.D. Cal. 1995); *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 247 (D. Vt. 1994).

[20] *See*, *e.g.*, Dept. of Ed., Office for Civil Rights Review No. 11-11-6001, Letter of Review (Sept. 21, 2015)(finding University of Virginia complaint resolution process was inequitable for both respondents and complainants); Dept. of Ed., Office for Civil Rights Review No. 05-14-2061, Letter of Review (July 7, 2016)(finding Minot State University's sanction against a respondent without investigation of complaint was inequitable).

The grievance procedures required under the proposed rule would subject sexual harassment complaints to heightened scrutiny compared with complaints of other types of discrimination and serious misconduct. This unjustified, disparate treatment of sexual harassment and assault complainants directly conflicts with Title IX's nondiscrimination mandate. We are extremely concerned it would reinforce the damaging, sex-based stereotype that sexual assault and abuse survivors are not credible—stereotypes that make it more difficult for survivors to obtain safety, support, and accountability for their assailants. Specifically, we oppose the proposed grievance procedure for the following reasons:

a) The proposed rule improperly requires unequal procedural rights for complainants and respondents.

The proposed rule improperly applies criminal-law principles into Title IX's civil and administrative contexts. By conflating the procedural rights appropriate in these legal settings, the Department undermines the core function of civil rights law—to ensure equal educational access—and creates internal conflicts with its own proposed rule.

Proposed rule § 106.45(b)(1)(iv) provides that schools must presume that reported harassment did not occur, which parallels the constitutional principle of presumption of innocence applicable in criminal proceedings.[21] By definition, a presumption of innocence favors the accused. These procedural rights are appropriate when the government seeks to deprive a person of fundamental liberty interests through criminal charges. However, no such presumption has ever been required for civil or administrative causes of action, such as personal injury or defamation, even when significant financial or other interests are at stake. The degree of process due to a respondent in a civil rights complaint or a school-based disciplinary proceeding simply does not equate to the degree of process due to a criminal defendant.

In addition, the proposed rule would require schools to offer unequal appeal rights to sexual harassment complainants and respondents. Under proposed rule § 106.45(b)(5), although a

[21] Proposed rule § 106.45(b)(1)(iv).

complainant may be permitted to appeal a determination on the ground that the school's remedy "is not designed to restore or preserve" the complainant's educational access, no ground of appeal would be available to a complainant based on the specific type or degree of sanction imposed.[22] This is in direct contrast to the grounds of appeal available to respondents, who would be given no limitations on their grounds for appeal. Equal appeal rights are also endorsed by a range of experts, including the American Bar Association,[23] the Association of Title IX Administrators,[24] and even the four Harvard law professors who authored a white paper critical of the procedural protections afforded under previous Title IX guidance.[25]

The unequal treatment of parties required under the proposed rule creates internal conflicts within the proposed rule itself. An evidentiary presumption against complainants and unequal appeal rights are inherently inequitable. These provisions conflict directly with proposed rules §§ 106.8(c) and 106.45(b), which require schools' grievance procedures to treat parties equitably.

b) The proposed rule would permit—and in some cases require—schools to subject sexual harassment complaints to a higher evidentiary burden than complaints of other serious misconduct.

Proposed rule § 106.45(b)(4) permits schools to apply a higher evidentiary standard to sexual harassment complaints that it applies to all other types of student misconduct, even if they carry the same maximum sanctions. The proposed rule would allow schools to apply the "clear and convincing evidence" standard in determining a student's responsibility for sexual harassment, even if the school applies a "preponderance of the evidence" standard in all other misconduct

[22] Proposed rule § 106.45(b)(5).

[23] American Bar Association, *ABA Criminal Justice Section Task Force On College Due Process Rights and Victim Protections: Recommendations for Colleges and Universities in Resolving Allegations of Campus Sexual Misconduct* 5 (June 2017)([Grounds for appeal should include] "a sanction disproportionate to the findings in the case (that is, too lenient or too severe)").

[24] Association of Title IX Administrators, *ATIXA Position Statement on Equitable Appeals Best Practices* 1 (Oct. 5, 2018), *available at* https://atixa.org/wordpress/wp-content/uploads/2018/10/2018-ATIXA-Position-Statement-Appeals.pdf.

[25] Elizabeth Bartholet, Nancy Gertner, Janet Halley & Jeannie Suk Gersen, *Fairness For All Students Under Title IX* (Aug. 21, 2017), *available at* https://dash.harvard.edu/bitstream/handle/1/33789434/Fairness%20for%20All%20Students.pdf ("[Schools should allow e]ach party (respondent and complainant) [to] request an impartial appeal").

proceedings.

The clear and convincing evidence standard has no place in adjudicating civil rights complaints because it is inherently inequitable. Courts use the preponderance standard in all civil rights cases, because it is the only standard that begins by treating both parties the same, consistent with Title IX's requirement that parties be treated equitably.[26] In contrast, the clear and convincing standard imposes a heightened evidentiary burden on one side, in favor of the other.

Title IX requires that schools protect educational access for all students equally. Sexual harassment complainants, including sexual assault survivors, face immense stigma as compared with victims of other types of misconduct, and when schools fail to remedy hostile environments, they suffer dire consequences to their health and educational access. More than one-third of sexual assault survivors in college drop out of school.[27] To favor respondents' interests in educational access over those of complainants is an affront to Title IX's core equity principle.

For these reasons, more than 80% of colleges currently apply the preponderance standard, and every mainstream associations of higher education administrators endorses the preponderance standard. As the Association of Title IX Administrators explains, "any standard higher than preponderance advantages those accused of sexual violence . . . over those alleging sexual violence . . . The whole point of Title IX is to create a level playing field for men and women in education, and the preponderance standard does exactly that. *No other evidentiary standard is equitable*." Likewise, NASPA – Student Affairs Administrators in Higher Education has admonished, "Allowing campuses to single out sexual assault incidents as requiring a higher burden of proof than other campus adjudication processes make it, by definition, harder for one party in a complaint than the other to reach the standard of proof. Rather than leveling the field for survivors and respondents, setting a standard higher than preponderance of the evidence tilts proceedings to unfairly benefit

[26] *See* Katharine Baker et al., *Title IX & the Preponderance of the Evidence: A White Paper* (July 18, 2017), *available at* http://www.feministlawprofessors.com/wp-content/uploads/2017/07/Title-IX-Preponderance-White-Paper-signed-7.18.17-2.pdf (signed by 90 law professors).
[27] Mengo et al., *supra* note 1.

respondents."[28] Finally, according to the Association for Student Conduct Administration, schools should "[u]se the preponderance of evidence (more likely than not) standard to resolve all allegations of sexual misconduct"[29] because "it is the only standard that reflects the integrity of equitable student conduct processes which treat all students with respect and fundamental fairness."[30]

Such heightened scrutiny is not required to satisfy constitutional due process requirements. Even experts who have expressed concern about the procedural protections afforded to sexual harassment respondents have acknowledged that a heightened, inequitable evidentiary standard is unnecessary to ensure due process in the Title IX setting. For example, the NCHERM Group advises schools to use the preponderance standard, explaining that "We believe higher education can acquit fairness without higher standards of proof."[31] Likewise, even the four Harvard professors whose white paper the Department cites in support of the proposed rule write that preponderance of the evidence is the appropriate standard if "other requirements for equal fairness are met."[32]

Moreover, the disparate treatment of sexual harassment complainants as compared with complainants in all other types of misconduct reinforces the sex-based stereotype that women are likely to lie about sexual violence. By permitting a greater evidentiary standard, mandating a presumption that sexual harassment complaints are unfounded, and affording parties unequal appeal rights, the proposed rule would codify a unique status for sexual harassment and assault

---

[28] NASPA - Student Affairs Administrators in Higher Education, *NASPA Priorities for Title IX: Sexual Violence Prevention & Response* 1-2, *available at* https://www.naspa.org/images/uploads/main/NASPA_Priorities_re_Title_IX_Sexual_Assault_FINAL.pdf.

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

[30] Chris Loschiavo & Jennifer L. Waller, *The Preponderance of Evidence Standard: Use In Higher Education Campus Conduct Processes*, ASSOCIATION FOR STUDENT CONDUCT ADMIN, *available at* https://www.theasca.org/files/The%20Preponderance%20of%20Evidence%20Standard.pdf.

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

[32] Bartholet, et al, *supra* note 23 at 5.

complaints, explicitly requiring schools to treat them with special, heightened skepticism. This disparate treatment is, itself, contrary to Title IX's anti-discrimination mandate.

Proposed rule § 106.45(b)(4) would undermine equal educational access, introducing procedural inequity into civil rights proceedings meant to achieve equity and adding to sex-based stereotypes about the credibility of sexual harassment and assault complainants.

c) The grievance procedures required by the proposed rule would fail to remedy hostile environments during an investigation.

Even when a student can satisfy the proposed rule's narrowed definition of harassment and additional procedural burdens, the proposed grievance procedures would impede schools' ability to remedy the hostile environment. Impermissible delays in schools' investigations are allowed in the proposed rule while interim supportive measures available to complainants are limited. Moreover, the rule allows informal mediation processes that are inappropriate in cases of sexual assault and intimate partner violence. Finally, the rule requires postsecondary institutions to employ a live hearing, including cross-examination but without protections afforded by ordinary rules of evidence. Taken together, these provisions would allow hostile learning environments to persist for a longer time and with greater severity, almost certainly causing more educational impairments for students experiencing sexual harassment and assault.

d) The proposed rule allows impermissible delays in sexual harassment investigations.

Proposed rule § 106.45(b)(1)(v) allows schools to "delay" or "exten[d]" their timeframes for investigating sexual harassment complaints "for good cause," including because of "concurrent law enforcement activity."[33] In practice, this means that for complaints involving conduct that is also investigated as a criminal offense—such as a sexual assault—schools would be permitted to delay their Title IX investigations for indeterminate lengths of time.

[33] Proposed rule § 106.45(b)(1)(v).

School-based investigations and criminal investigations serve separate, parallel functions. While the objective of a criminal investigation is to punish the offender, the objective of a school's Title IX investigation is to preserve educational access and safety on campus. During a criminal sexual assault investigation, which often involves a lengthy DNA analysis process and could last several semesters, survivors have immediate needs for support and protection. Allowing schools to put Title IX investigations on hold for so long would effectively deprive many survivors of educational access. Even under previous guidance, the failure to obtain prompt support and protection has contributed to the 34% drop-out rate among college survivors.[34] Some students have even been expelled due to falling grades in the midst of post-assault trauma.[35] According to the Association of Title IX Administrators, a school "delaying or suspending its investigation" at the request of law enforcement creates safety risks for the complainant and, potentially, for "other students, as well."[36]

The Department should prohibit schools from suspending a Title IX investigation at the request of law enforcement. Additionally, the Department should establish a clear timeframe for resolving sexual harassment complaints. For example, previous guidance recommended that schools complete investigations within 60 days.

e) The proposed rule inappropriately limits the supportive measures schools may offer sexual harassment and assault survivors.

Proposed rule § 106.30 prohibits schools from offering any temporary "supportive measure" to a complainant during its investigation that is "disciplinary" or "punitive" in nature or that

[34] Mengo, et al, *supra* note 25; *see also* Audrey Chu, *I Dropped Out of College Because I Couldn't Bear to See My Rapist on Campus*, VICE (Sept. 26, 2017), https://broadly.vice.com/en_us/article/qvjzpd/i-dropped-out-of-college-because-i-couldnt-bear-to-see-my-rapist-on-campus.

[35] *See How much does sexual assault cost college students every year?*, WASHINGTON POST (Nov. 18, 2014), https://www.washingtonpost.com/posteverything/wp/2014/11/18/how-much-does-sexual-assault-cost-students-every-year.

[36] Association of Title IX Administrators, *ATIXA Position Statement on the Proposed Legislation Entitled: Promoting Real Opportunity, Success, And Prosperity Through Education Reform (PROSPER) Act (Higher Education Act Reauthorization)* (Jan. 18, 2018), *available at* https://atixa.org/wordpress/wp-content/uploads/2015/03/ATIXA-POSITION-STATEMENT-ON-PROSPER-ACT-Final.pdf.

"unreasonably burdens the other party."

In effect, this means that in imposing any interim measure designed to protect a sexual assault survivor—such as a no-contact order or a change of course schedule or housing—schools would err on the side of burdening the survivor. Under this rule, schools would likely determine that any measure causing a change to the respondent's schedule, housing, or movement on campus could "unreasonably burden" the respondent in violation of the rule. Similarly, schools would likely determine this provision to require any no-contact order to mutually restrict contact from both parties. Experts have long recognized that mutual no-contact orders are ineffective at remedying abuse and harassment and can actively put victims of dating and domestic violence in danger. If a mutual acquaintance or other third party harasses or retaliates against the complainant, a mutual no-contact order would prohibit the complainant from asking the respondent to intervene. Perpetrators of dating and domestic violence also frequently manipulate their victims into violating mutual no-contact orders.[37] In either case, the mutual no-contact order constitutes an impediment to student safety and educational access, not a remedy.

The proposed rule would constrain schools from offering many temporary supportive measures that have helped victims of violence and harassment stay in school safely. This approach is a dramatic break from previous Department guidance, which permitted schools to impose one-way no-contact orders during the pendency of Title IX investigations,[38] as well as the consistent recommendations from student conduct experts.[39] This change will result in less safety and stability for students who have experienced sexual harassment and assault during their schools' investigations, which, as described above, would often remain open for months or years during a concurrent criminal investigation.

---

[37] *See*, *e.g.*, Joan Zorza, *What Is Wrong with Mutual Orders of Protection?* 4(5) DOMESTIC VIOLENCE REP. 67 (1999), *available at* https://www.civicresearchinstitute.com/online/article.php?pid=18&iid=1005.
[38] 2001 Guidance, *supra* note 1, at 16.
[39] *ASCA 2014 White Paper*, *supra* note 27.

f) The proposed rule would require schools to permit live cross-examination of sexual assault survivors by respondents' advisors of choice, without the protection of ordinary rules governing evidentiary relevance and admissibility.

Proposed rule § 106.45(b)(3)(vii) would require that schools adjudicate any formal sexual harassment complaint through a live hearing, during which the parties and witnesses submit for cross-examination through the other party's advisor. Cross-examination on the details of a sexual assault is a tremendously difficult, and often traumatic, experience for survivors, even when the scope of questioning is carefully narrowed by rules of evidence. Even within those constraints, and even when an attorney acts ethically and in good faith on the part of her client, the process involves incredibly personal, detailed, and graphic questions that can be humiliating to answer. Questions are often rooted in sex-based stereotypes that blame the victim for the assault.[40]

It is reasonable to expect that these traumatic features of cross-examination would be exacerbated in the absence of clear evidentiary rules governing the admissibility and relevance of questions posed, and when the questioner is someone close to the accused. This is the scenario the proposed rule allows. The rule would permit a party's advisor of choice to question the other party, such as an angry parent or friend. Except for a qualified prohibition on questions about the complainant's sexual behavior, the rule provides no limit to the nature and content of questions that may be posed and no guidance to schools concerning how, if at all, to adjudicate objections from either party. The proposed rule would create an environment ripe for irrelevant, inflammatory, and traumatizing questioning of rape survivors, conducted by private individuals with personal animosity toward the opposing party, and overseen by school officials with virtually no authority to reign in the parties' worst impulses.

None of the above would be lost on sexual assault survivors. Already, sexual assault is one of the least reported offenses in the country. Only 12% of college survivors report their assaults to either their schools or to police, often because of the expectation that the response will be unhelpful or

[40] *See*, *e.g.*, Zydervelt, S., Zajac, R., Kaladelfos, A. and Westera, N., *Lawyers' Strategies for Cross-Examining Rape Complainants: Have we Moved Beyond the 1950s?*, BRITISH JOURNAL OF CRIMINOLOGY, 57(3), 551-569 (2016).

will result in negative health or safety outcomes.[41] The chilling effect of an unregulated, hostile cross-examination during a Title IX hearing on survivors pursuing formal complaints is the exact opposite of what is needed to improve educational access.

Neither the Constitution nor any statute requires this type of live examination in school conduct proceedings. The vast majority of federal courts considering the issue have concluded that live cross-examination is not required to satisfy due process requirements, as long as there is some meaningful way to question witnesses, such as posing questions through a hearing officer.[42] The Department itself acknowledges that such indirect questioning is a fair and appropriate manner to protect due process in the K-12 setting.[43] Yet, no explanation is offered for it seeks to prohibit this commonly accepted method of questioning in the higher education setting. Notably, the Department's proposal is contrary to school administration and student conduct experts, such as the Association of Title IX Coordinators and the Association of Student Conduct Administration, as well as the American Bar Association.[44]

g) The proposed rule would pressure students into inappropriate mediation processes with offenders.

---

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

[42] *See* Joanna L. Grossman & Deborah L. Brake, *A Sharp Backward Turn: Department of Education Proposes to Protect Schools, Not Students, in Cases of Sexual Violence*, VERDICT (Nov. 29, 2018), *available at* https://verdict.justia.com/2018/11/29/a-sharp-backward-turn-department-of-education-proposes-to-protect-schools-not-students-in-cases-of-sexual-violence.

[43] 83 Fed. Reg. 61476.

[44] *See* Association of Title IX Administrators, *ATIXA Position Statement on Cross-Examining: The Urge to Transform College Conduct Proceedings into Courtrooms* 1 (Oct. 5, 2018), *available at* https://atixa.org/wordpress/wp-content/uploads/2018/10/ATIXA-Position-Statement_Cross-Examination-final.pdf ("[I]nvestigators should solicit questions from the parties, and pose those questions the investigators deem appropriate in the investigation interviews."); *ASCA 2014 White Paper, supra* note 27, at 2 ([Recommending schools "limit[] advisors' participation in student conduct proceedings."); American Bar Association, *ABA Criminal Justice Section Task Force On College Due Process Rights and Victim Protections: Recommendations for Colleges and Universities in Resolving Allegations of Campus Sexual Misconduct* 8-10 (June 2017)(Recommending schools provide "the opportunity for both parties to ask questions through the hearing chair.").

Proposed rule § 106.45(b)(6) would permit schools to use informal resolution processes, including mediation, to resolve sexual harassment and assault complaints. The rule would allow an informal process only if both students consent in writing, but it would also allow schools to prohibit a student from changing their mind and initiating a formal complaint.

Unstructured mediation is not an appropriate process to address sexual harassment and assault. It is designed to address disagreements between parties of equal power, where neither one needs to take responsibility for harming the other. Unlike other types of misconduct that may involve some degree of mutual responsibility between the parties or a need to resolve conflict, the fundamental basis of a sexual harassment or assault complaint is that one party has crossed a boundary with the other party—often violently—and the complaining party seeks a remedy. Unstructured mediation has the capacity to do a great deal of harm in the sexual harassment context, because it sets the harasser and complainant up to negotiate an outcome, instead of requiring the accused to take personal responsibility for their actions. For example, a student enduring a hostile environment as a result of sexual assault should never be asked to "work things out" with their assailant. This dynamic could easily lead to intimidation, coercion, and retaliation, which undermines the basic purpose of mediation—to encourage parties to take responsibility for the harm they have caused. These risks will be significant in any case involving sexual assault, but they are particularly glaring when sexual assault occurs in the context of intimate partner violence.

Although the proposed rule would allow mediation only when both parties consent to it in writing, it is likely that many complainants will feel pressured to agree. Students who have reported violence perpetrated by their dating partners are especially likely to be pressured to forego the formal complaint process, but even beyond dating violence, many complainants on campus share a social circle with their harassers or assailants and are likely to be ostracized or face retaliation for pursuing a formal complaint. The NASPA – Student Affairs Administrators in Higher Education expressed concern in 2018 about students being "pressured into informal resolution against their

will."[45]

In addition, even if none of the above applies, the fear of a mandatory hearing and cross-examination by the respondent's advisor or attorney will certainly discourage many complainants from engaging with the formal complaint process. As a result, signing their consent to an informal mediation process will appear to be the only realistic option. Inexplicably, if a complainant entered into mediation but found the process to be ineffective or exacerbating the hostile environment, the proposed rule would also allow a school to preclude the complainant from making a formal complaint instead.

If the Department is interested in exploring less punitive responses to sexual harassment and assault, it should dedicate resources to studying community-based restorative justice programs, which would require harassers to admit responsibility for the harm they have caused as a premise of the dialogue. There is currently insufficient research on the efficacy of restorative justice programs in the context of sexual harassment and assault, but it would be, at least in principle, an improvement over mediation in that it holds accountability as a prerequisite for participation. Developing the empirical literature on restorative justice would be a more responsible approach than the proposed rule's broad endorsement of mediation for sexual harassment complaints, which experts agree is inappropriate.

III. The proposed rule creates potential conflict with state law.

States from Maryland to Oregon have passed laws to instruct schools in how to respond to sexual harassment and protect survivors. In some cases, state law conflicts with the proposed rule. Additionally, a number of states are continuing to consider legislative reform in this area. We support states' ability to protect students and set standards to keep their campuses safe.

Conclusion

[45] NASPA - Student Affairs Administrators in Higher Education, *NASPA Priorities for Title IX: Sexual Violence Prevention & Response* 1-2, *available at* https://www.naspa.org/images/uploads/main/NASPA_Priorities_re_Title_IX_Sexual_Assault_FINAL.pdf.

END SEXUAL VIOLENCE

National Alliance to End Sexual Violence

On behalf of survivors, the 56 state and territorial sexual assault coalitions, and 1300 rape crisis that provide the frontline response to sexual assault in their communities and based on the foregoing reasons, we adamantly oppose this proposed rule which takes us dangerously backward in our national response to the scourge of sexual violence.

Sincerely,

Theresa N Poore

Terri Poore, MSW
Policy Director

www.EndSexualViolence.org
(202)869-8520
1875 Connecticut Avenue NW, FL 10, Washington, DC 20009