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 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:

The vital import of a discrimination-free educational environment cannot be overstated. As the Seventh Circuit Court of Appeals explained:

> [A] nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives. A sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program.

Mary M. v. N. Lawrence Community Sch. Corp., 131 F.3d 1220, 1226 (7th Cir. 1997).

At stake in the Department of Education's proposed rule is access to education for tens of thousands of victims of sexual harassment, whether their academic achievement will be based on merit or undermined by sexual harassment, and the contribution those victims will make to society if their educational access is realized or instead denied. The proposed rule seeks to, and if put into effect will, severely limit the scope of sexual harassment a school may respond to under Title IX, tip the scales of disciplinary proceedings from an equal footing to one favoring those reported for committing sexual harassment, and prevent victims from receiving essential accommodations and remedies to address the harassment they have endured. The limited 60-day window for submitting a comment to the proposed rules means that I am only able to comment in detail on a portion of the rules, but please know that I oppose the rules in their entirety, based on my extensive experience working with survivors.

I am Cari Simon, a Title IX attorney with a national practice representing survivors of sexual assault, stalking, dating violence, and sexual harassment in both university and K–12 settings. I have represented nearly one hundred victims, both women and men, ranging from as young as junior high, to PhD students, to faculty and staff. I have represented students sexually harassed by peers, by school employees, by their program directors, by women and by men. In that role, I provide direct services, representing survivors in school and campus grievance proceedings, often from reporting through any appeal processes, and in obtaining remedies and accommodations to ensure student-survivors may safely and fully access the benefits of their education. In this work, I have the honor of being in the role of ensuring survivors' civil rights are protected and fulfilled. I also represent survivors in Title IX litigation against universities, and

have assisted survivors in filing complaints and participating in federal investigations by the Department of Education, Office for Civil Rights and Clery Compliance Division.

I graduated cum laude from Harvard Law School, where I was the Editor-in-Chief of the Harvard Journal on Law and Gender, and President of the Women's Law Association. After law school, I clerked for a judge on the Ninth Circuit Court of Appeals. I also served as the inaugural fellow for the Harvard Law School Gender Violence Program, through which I assisted survivors under Title IX.

I formerly served as the Director of the Congressional Victims' Rights Caucus while working as a legislative assistant for a Member of the United States House of Representatives. Through that work, I gained substantial experience in the area of gender-based violence policy.

I currently serve on the advisory board of the National Crime Victims Law Institute. I have conducted trainings nationally, including for the National Association of Attorneys General, Yale Law School and Harvard Law School, and the End Violence Against Women Project of the Colorado District Attorneys' Council. I am also an instructor for the National Organization for Victim Assistance Campus Advocacy Training.

It is through this extensive work and expertise in the field of gender violence and Title IX that I submit my strong opposition to the proposed rules, which will ultimately allow sexual harassment to thrive in our schools and prevent survivors from accessing to their education and its benefits. As a result, we as a country will lose out on the full contribution of survivors whose education was stifled and undermined by sexual harassment. I urge the Department to withdraw the proposed draft entirely. In the alternative, I ask the Department to revise the proposed rule in accordance with the recommendations described in this letter. Finally, although I have chosen only a select number of issues to comment on, I am deeply concerned about many other portions of the proposed rules. I offer my expertise to the Department in crafting an entirely new rule after this draft is, hopefully, rescinded.

I. The Far-Too-Narrow Definition of "Sexual Harassment" Will be Detrimental to the Education of Victims, Particularly to Victims of Stalking, Dating Violence, and Off-Campus Rape

The extremely narrow definition of "sexual harassment" contained in the proposed rule puts students and their education at risk because it requires that harassment escalate before the Department permits Title IX-based action by schools. The proposed definition limits sexual harassment to which a school may respond to: (1) quid pro quo sexual harassment by an employee; (2) "unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the [school's] education program or activity"; and (3) sexual assault as defined by the Clery Act.[1] When reported harassment does not meet the stringent prong two definition, under the proposed rules, a school *must* dismiss the complaint. This narrow definition and mandatory dismissal will have deleterious effects on students' education. In

[1] §§ 106.30, 106.45(b)(3).

particular, three groups of victims will suffer the most: stalking victims, dating and domestic violence victims, and off-campus sexual assault victims.

A. The Proposed Definition of "Sexual Harassment" Places Victims of Gender-Based Stalking or Dating and Domestic Violence at High Risk and Will Be Detrimental to their Education

The proposed definition will leave many victims without recourse and is particularly dangerous and concerning for victims of gender-based stalking or dating and domestic violence, both of which are endemic on college campuses and in schools. Under the proposed definition of "sexual harassment," victims of either gender-based stalking or dating and domestic violence would fall under prong two of the definition (unless otherwise coupled with a sexual assault or quid pro quo conduct).

Despite the seriousness of stalking and the negative impact it has on victims' educational opportunities and access, the proposed rule will nonetheless often require schools to dismiss those reports. Reports of stalking are even more likely to be dismissed when such conduct is reported in its earliest stages—a critical moment to intervene—for failure to meet the unreasonable "severe, pervasive, and objectively offensive" standard. Stalking behavior often escalates in frequency and severity over time, and a failure to intervene at the early stages will effectively require such conduct, as it often does, to progress to physical attacks and even murder before a school can take action.

Indeed, by definition, under the proposed rules, a school *must* dismiss early reports of stalking that have not yet crossed the threshold of "severe, pervasive, and objectively offensive." Instead of seeking recourse early and protecting herself, a victim must wait until the stalking behavior become worse and worse, so bad that her education is effectively denied. It is not enough to report severe stalking. It is not enough to report pervasive stalking. It is not enough to report a limited number of instances. It is not enough to report objectively offensive stalking. It is not enough if the victim's education is only limited. It is not enough if a victim reports a combination, but not all, of those things.

Yet, stalking is often trivialized, misrepresented, and misunderstood. For example, I recently represented a stalking victim who dropped out of school to avoid the stalker. The stalker's attorney contacted me and described his client as "Lloyd Dobler with Internet access." "But," he continued "we are in a new age, so you and I find ourselves lawyering *Say Anything*." The stalker's conduct forced the victim not only to drop out of school, but to change her phone number multiple times, hide her address, and delete her social media accounts. The stalker also targeted several of her family and friends. It is this kind of misconception and misunderstanding about the impact and seriousness of stalking as a form of harassment that, under the limited second prong of the proposed sexual harassment definition, will make reports even more likely to be dismissed.

The Department must understand that if a school dismisses a victim's first report, because the conduct has not yet escalated to the unreasonably rigid "severe, pervasive, and objectively offensive" standard, or that his or her education is not yet denied, it is a folly to think that the victim will come back again and seek help when the stalking gets worse. Most victims never report. If and when a victim makes the decision to report, only to have that report rejected because

the school deems the conduct not "severe, pervasive, and objectively offensive enough," or the impact on the victim's education is not harsh enough, they will lose faith in the institution they reported to, and will be very unlikely to return for help. As a result, even the incidents of stalking that do meet the high threshold will not be brought to the school, because reporting on the whole will be chilled and the victims' educations will suffer as a result.

Under this ill-conceived rule, a school *must* dismiss the stalking victim's Title IX complaint in any of the scenarios described above. In those cases, she will be told that she has to come back when it gets worse. This is wrong.

Similar to stalking, domestic and dating violence often escalate with time. Like stalking, domestic and dating violence generally include a variety of concerning behavior and red flags that need prompt and effective intervention in order to protect the safety and education of victims. Early intervention is key to ending domestic and dating violence before it escalates. However, like stalking, any one of the following behaviors—all of which my clients have described experiencing—or even a combination of them, could be evaluated as not severe OR not pervasive, OR not objectively offensive, OR not denying a victim's education. And, under the proposed rules, those reports would be required to be dismissed:

- A perpetrator preventing a victim from communicating with her family (controlling her relationships or isolating her);

- A perpetrator making derogatory comments about a victim in front of peers, such as calling her a "dumb slut," "pathetic whore," "fat bitch," or other vulgar comments (for the purpose of decreasing her self-esteem and increasing her reliance on perpetrator);

- A perpetrator threatening to kill himself if the victim breaks up with him (a common tactic to exert and maintain control, which is also a sign of lethality);

- A perpetrator requiring a victim to take pictures of who they are with and send those pictures to the perpetrator (another method of control); or

- A perpetrator going through a victim's cell phone and removing contacts or reviewing messages (a method of control).

Like stalking, dating violence has serious consequences on a victim's educational access. A study of dating violence or intimate partner violence victims found that the resulting "changes in routines and behaviors may lead to decreased class attendance and, ultimately, to college failure."[2]

Once again, just as with stalking, once a victim's initial report is dismissed, she will be forced with the untenable choice of continuing to face the abusive conduct or to leave the educational institution in order to protect herself.

[2] Amar & Gennaro, 2005.

B. The Proposed Definition of "Sexual Harassment" Will Deeply Harm Off-Campus Rape Victims' Education

The effect of the narrow sexual harassment definition is compounded by the off-campus/online limitation. Under §§ 106.30 and 106.45(b)(3), schools "must dismiss" a formal complaint when the reported conduct "did not occur within the [school's] program or activity." These sections, together with the unreasonably narrow definition of "sexual harassment" would, in effect, mean that a student who is raped at an off-campus party or off-campus apartment by a another student, or a student who is sexually assaulted by a teacher or professor at his or her home and subsequently harassed by that person would be without recourse. Under these sections, the offender would be allowed continue to harass the victim in school and on campus without triggering Title IX, as long as it was done in the following ways:

- Severe and pervasive, but not objectively offensive;
- Severe and objectively offensive, but not sufficiently pervasive;
- Pervasive and objectively offensive, but not severe enough;
- Severe, but not sufficiently pervasive or objectively offensive;
- Objectively offensive, but not sufficiently severe or pervasive; or
- Objective offensive, *and* severe, *and* pervasive, but the victim is able to maintain her education enough so that it is not effectively denied.

Under the proposed rules, any of this conduct committed by a victim's reported rapist or assailant would be permitted under Title IX and a report of such conduct would be required to be dismissed.

These consequences undermine Title IX's purpose of ensuring equal educational access free from discrimination based on sex. These changes will, with certainty, cause many victims to leave their schools, become suicidal, miss or withdraw class, fail or otherwise poorly perform academically, not participate in extracurricular activities, and otherwise deny victims educational access and the ability to ensure their everyday safety.

Finally, the second prong of the sexual harassment definition is problematic because it requires a school to dismiss reports of sexual harassment, stalking, or domestic and dating violence, until it's too late—*after* a victim's education has been effectively *denied*. Under the proposed rules, even schools that want to continue to help victims of stalking, sexual harassment, or dating and domestic violence will have their hands tied by the Department's rules. Under the proposed rules, a school that receives a report of any of the above *must* reject victims, even those who are subjected to the most horrific sexual harassment, up to and until their education is fully denied. By definition, that is too late. As a result, these rules are serving the opposite purpose of what Title IX is meant to do—guarantee educational access.

C. Suggested Alternatives to the Proposed Definition

In order to ensure the purpose of Title IX is met, and that schools are responsive to student-victims whose educations are at risk, I recommend that the Department of Education define "sexual harassment" more broadly, as "unwelcome conduct of a sexual nature."

Alternatively, at the very least, to protect victims of stalking and dating violence, I recommend revising the third prong of the sexual harassment definition to include all of the VAWA crimes, as defined by the Clery Act. Specifically, I propose that § 106.3, prong three of the sexual harassment definition be revised to read "sexual assault, dating violence, domestic violence, and stalking where based on sex as defined in 34 CFR 668.46(a)."

I recommend revising § 106.3, prong two to replace "denies" with "limits," for the reasons described above, and to indicate that off-campus conduct will be considered when evaluating on-campus harassment under prong two.

Finally, I recommend that the final rule indicate that victims of unwanted conduct of a sexual nature have a right to supportive measures under Title IX, rather than, as the proposed rule currently does, limit that requirement only to victims of severe, pervasive, and objectively offensive harassment.

II. The Proposed Rule Fails to Recognize the Severity of the Impact of Sexual Violence on a Victim's Educational Access, a Failure That in Turn Results in Unfair Disparities in Rights on Appeal, Insufficient Supportive Measures, and an Unequal Standard of Review.

The proposed rules minimize the impact that sexual harassment and assault can have on student-victims. The preamble reasons that grievance processes may result in "sanctions against the respondent [that] could include a ***complete*** loss of access to the education program or activity of the recipient" but, in contrast states that "the complainant's access to the recipient's education program or activity can be ***limited*** by sexual harassment."[3] This distinction is astounding, and reflects a failure to understand of the deep impact of sexual harassment and participation in a corresponding grievance procedure. The characterization in the proposed rules not only minimizes and defies the experience of my clients, but it creates unequal and unfounded attitudes toward addressing reports of sexual assault and harassment. Let me crystal clear: having worked with, and spoken to, more than a hundred victims of campus sexual assault, sexual harassment, including the outcome of a disciplinary proceeding, can result in a "***complete***" loss of access to a recipient's education program or activity for a victim of harassment or assault. I am have personally worked with dozens of victims who have dropped out, taken leave, or transferred from college or graduate school, as discussed in detail below. When a grievance proceeding results in a sanction, or lack thereof, that requires the victim to continue sharing a campus with, or face, an assailant in school, many victim will not be able to return to that institution. So too, have courts have recognized the common-sense notion that victims will sooner leave their school before remaining to attend school alongside the student who raped them.

[3] NPRM Preamble at p. 61472–73.

This disparate characterization rears its head again when the proposed rules quote the Sixth Circuit, comparing the significance of a campus disciplinary proceedings outcome, stating that "Complainants 'have a right, and are entitled to expect, that they may attend [school] without fear of sexual assault or harassment,' while for respondents a "finding of responsibility for a sexual offense can have a lasting impact on a student's personal life, in addition to [the student's] educational and employment opportunities[.]" The experience of my clients and the literature demonstrate that a finding of non-responsibility or a limited sanction can, and frequently does, have a "lasting impact on a student's [*the complainant's*] personal life, in addition to [the student's] educational and employment opportunities[.]" The characterization in proposed rules that suggests *only* a respondent faces a lasting impact on his or her personal life, education, and employment opportunities is simply wrong. The proposed rule must reflect the *equally negative* impact on the victim of harassment.

To resolve this egregious discrepancy, I recommend removing this disparate language, on these and other occasions, to remove all disparate treatment between complainants and respondents based on this rationale.

The Department of Education, supported by many studies and significant research, has long recognized that sexual harassment can, and frequently does, "interfere with a student's academic performance and emotional and physical well-being."[4] For college women, "[t]he psychological and somatic sequelae of rape have been found to include negatively altered self-schemas, disordered eating, chronic pain, anxiety, depression, and posttraumatic stress disorder as well as impairment in social, work, and family domains."[5] Research shows that for rape victims, "[w]hen perpetrators are classmates, thereby remaining a tangible part of the victim's social and academic life, the victim's symptoms become particularly acute."[6]

My clients, like most victims, commonly suffer a dramatic decline in grades in the aftermath of a sexual assault or gender violence, brought on by difficulty concentrating, missed classes—often to avoid the perpetrator who shares their campus—and low performance on assignments and tests.[7] The impact is amplified when a victim opts to participate in a campus disciplinary proceeding or the criminal justice process, both of which require the victim to relive the sexual violence repeatedly, to keep it at the front of her mind, and be brought before strangers

[4] 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 at ii (Jan. 2001) [hereinafter 2001 Guidance], https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.

[5] Jordan, C. E., Combs, J. L., & Smith, G. T. (2014). An exploration of sexual victimization and academic performance among college women. Trauma, Violence, & Abuse, 15, 191-200. doi:10.1177/. 1524838014520637 (Citing (e.g., Amar & Gennaro, 2005; Kaura & Lohman, 2007; Koss et al., 1994)). See and Review Attachment 1.

[6] Kathryn M. Reardon, *Acquaintance Rape at Private Colleges and Universities: Providing for Victims' Educational and Civil Rights*, 38 Suffolk U.L. 395, 398-99 (2005).

[7] *Id.* at 399.

to discuss the most intimate and violative experience of her life, all while being scrutinized and judged. PTSD, severe depression and anxiety caused by sexual violence, dating violence, and stalking leave many victims in a predictable downward spiral, one I have seen time and time again:

When a student found responsible for sexual harassment, including sexual assault, dating violence, and stalking, receives a sanction that allows that perpetrator to remain in school, the victim's personal life, academic access, and employment opportunities are thus deeply affected. Decreases in GPA that result from victims who are raped and continue to share a campus with the perpetrator also lead to academic penalties, and "have *long-term impacts on employment and graduate school prospects, with significant accompanying financial consequences*."[8] The victim is afraid to leave her or his dorm room, out of fear of seeing the perpetrator. She stops going to the dining hall to avoid him, sometimes not eating at all. Depression and fear of encounters causes her to miss classes, often staying in bed. When many victims do attempt to go to school, seeing the perpetrator often causes panic attacks, vomiting, crying in the bathroom. These uncontrollable reactions often result missed classes. In addition, meetings with the District Attorney or police, or preparing for on-campus grievance proceedings can result in missing class, missing valuable study time, scoring poorly on exams, and other academic detriments.

Falling grades, in my experience and according to research, can and do lead to lost scholarships that require maintaining certain GPAs or a certain course-load that a victim cannot sustain, victims being placed on academic probation, and subsequently dropping out of college entirely.[9] A study found that 34.1 percent of students who experienced sexual assault drop out of college.[10] In other words, one in three victims is completely denied educational access.

In my experience representing student survivors, I have had clients suffer academic penalties including: (1) losing a full ride scholarship due to PTSD arising from sexual assault because the survivor could not maintain the required 12 units a semester course load and, as a result, being forced to pay out-of-pocket for her education; (2) receiving her only "F" of her life after being triggered by the assault; (3) dropping out college; (3) having to complete a Stanford degree from home and, as a result, losing contact with her professors; (4) having to withdraw from classes after the withdrawal deadline (because the rape occurred after the deadline); (5) dropping out of medical school; (6) dropping out of business school and thereby losing a significant tuition payment the university refused to reimburse for the remainder of the semester she did not complete; and (7) receiving low grades that led to a decreased GPA just below the standard of required to enter her professional school goals. One client stayed up all night staring at a blank computer screen, unable to complete her assignment due the next day. Another had panic attacks over pop quizzes. Another gave a presentation after spending the entire night in with the District Attorney's Office after her perpetrator was arrested, and the university refused to recalculate her

[8] *Id.*

[9] Kathryn M. Reardon, *Acquaintance Rape at Private Colleges and Universities: Providing for Victims' Educational and Civil Rights*, 38 Suffolk U.L. 395, 399 (2005).

[10] Mengo, C., & Black, B. M. (2015). Violence victimization on a college campus: Impact on GPA and school dropout. Journal of College Student Retention. Advance online publication. http://dx.doi.org/10.1177/ 1521025115584750.

grade without the impacted presentation. The examples of seriously negatively impacted grades and education are endless—it is a universal experience of nearly all of my clients.

These impacts often have lasting impacts for years beyond the immediate aftermath of a sexual assault or harassment. Diminished GPAs follow students who are victimized in elementary and secondary school. One study found that "[t]he differences between women with and without sexual victimization exposure are seen immediately: Women with prior sexual victimization experiences tended to enter college with lower GPA scores and tended to earn lower grades during their first freshman year than did nonvictimized women."[11] The study demonstrated that women raped or assaulted as in their teen years or during her first semester in college are more likely than non-impacted women to finish her freshman year with a lower GPA. The same study concluded that when rape was the form of the victimization, the resulting GPA was even lower.[12] Women who are raped during the first semester of college experienced a GPA drop, "both at the end of that semester and the following semester."[13] A "significantly higher percentages of those women have GPAs below 2.5. The most dramatic impact is seen for women who experience a forcible rape in their first semester of college; fully 14.3% of those women end the semester with a GPA below 2.5. This latter point communicates that the level of negative academic impact is positively related to the severity of a woman's victimization."[14]

In one public example, former Amherst Student Angie Epifano "detailed the hostile environment she encountered from college officials after she reported her sexual assault. Epifano said she was raped in a campus dorm her freshmen year, and *after struggling to find support at the school, she dropped out after her sophomore year* in July 2012."[15] In the wake of publicly disclosing her experience, Amherst "established a task force, which authored the report," in response. "Gina Smith, an attorney assisting Amherst's reform effort, said Epifano did provide a credible account of her experience, and the college failed to respond properly," according to an email Martin sent to faculty and students."

Likewise, courts have repeatedly recognized the corrosive effect that encountering a perpetrator at school has on a victim, preventing her educational access. In *Spencer v. University of New Mexico Board of Regents*, the plaintiff was raped in a car, outside an off-campus party, by

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[11] Jordan, C. E., Combs, J. L., & Smith, G. T. (2014). An exploration of sexual victimization and academic performance among college women. Trauma, Violence, & Abuse, 15, 191-200. doi:10.1177/. 1524838014520637. See and Review Attachment 1.

[12] *Id.*

[13] Dana Bolger, *Gender Violence Costs: Schools' Financial Obligations Under Title IX*, Yale L.J 2106, 2116 (2016).

[14] Jordan, C. E., Combs, J. L., & Smith, G. T. (2014). An exploration of sexual victimization and academic performance among college women. Trauma, Violence, & Abuse, 15, 191-200. doi:10.1177/. 1524838014520637. See and Review Attachment 1.

[15]Amherst College Releases Review Of Sexual Violence Policies In Reaction To Angie Epifano Op-Ed, Kinkade https://www.huffingtonpost.com/2013/01/31/amherst-college-sexual-violence_n_2585084.html.

multiple students.[16] The New Mexico District Court denied the university's motion to dismiss, concluding:

> A jury may conclude that harassment is severe, pervasive, and objectively offensive from evidence that a student who is known to have perpetrated a sexual assault upon another student is permitted to continue attending the same school as the victim, leaving open the potential for interactions between the two. *Id.*

Similarly, the Eleventh Circuit in *Williams v. Board of Regents of the University System of Georgia*, the court recognized that "[i]n light of the harrowing ordeal that [plaintiff] faced," sexual assault by fellow students, "her decision to [immediately] withdraw from UGA was reasonable and expected."[17] In *Kinsman v. Florida State University Board of Trustees*, the district court denied FSU's motion to dismiss the plaintiff's Title IX claim, *because she sufficiently pled the mere presence on campus of the student who raped her,* Jameis Winston, *created a hostile environment*, even though the rape occurred at an off-campus apartment.[18] The court explained "[i]t does not require mental gymnastics to reach th[e] conclusion" that "the possibility of further encounters" between a plaintiff and the student who assaulted her could create a hostile educational environment on campus.[19] An Indiana district court, looking to workplace discrimination laws, held that the principle that "[t]he continued presence of a rapist in the victim's workplace can render the workplace objectively hostile because the rapist's presence exacerbates and reinforces the severe fear and anxiety suffered by the victim," applies "if not more so, in a school."[20] As these cases demonstrate, the damaging impact on student-victims of sexual assault and harassment is well-established and significant.

These negative impacts are enduring. Sexual harassment triggers "changes in education attainment," and this, in turn, impacts "occupation, and earnings"; many survivors experience significant drops in income as compared to peers who were not victims of sexual violence.[21] One study estimated that the direct costs associated with one incident of rape total $5,605, plus $88,385 for lost quality of life.[22]

The proposed rule's failure to understand the depth and significance of the impact sexual harassment and assault have on a victim's education detailed above is compounded when it is

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[16] No. 1:15-CV-00141-MCA-SCY at *16.

[17] 477 F.3d 1282 (11th Cir. 2007).

[18] No. 4L15cv235-MW/CAS at *10 (N.D. Fla. 2015).

[19] *Id.* (citing *Kelly v. Yale Univ.*, No. 3:01-CV-1591, 2003 WL 1563424, at *3 (D. Conn. 2003)).

[20] *McGinnis v. Muncie Cmty. Sch. Corp.*, No. 1:11-cv-1125-WTL-TAB, 2013 U.S. Dist. LEXIS 79548, *37 (S.D. Ind. 2013) (quoting *Lapka v. Chertoff*, 517 F.3d 974, 984 (7th Cir. 2008).

[21] Loya at v-vi.

[22] *Id.* at 34.

relied upon to make bad policy. I will focus on two in the remainder of this comment: (1) unequal rights to appeal, and (2) insufficient accommodations and remedies.

A. The Proposed Rule Contains Unequal Appeal Rights, with Only Victims Unable to Appeal Sanctions

Section 106.45(b)(5) of the NPRM states that if a school offers an appeal, "it must allow both parties to appeal," *but*, where a school finds a student responsible for sexually harassing or sexually assaulting another student, the student-victim may ***only*** appeal for better "remedies" and is "*not* entitled to a particular sanction." In effect, this means that once a student is found responsible for sexual assaulting or harassing a fellow student and receives a sanction, a school may allow that perpetrator to appeal, seeking a decreased sanction, but *must* deny the victim the right to appeal an insufficient or disproportionate sanction. As a result, this proposed rule requires that if schools give appeal rights, they are required to provide *unequal grounds for appeal*. This requirement conflicts directly with Title IX's equality mandate and should be removed. To compound this injustice, the unequal rights to appeal would be relevant only in situations where a school has found that sexual harassment or assault occurred. In other words, the requirements of the proposed rule create an inexplicable situation where a school acknowledges there is a victim of harassment or assault, but is required to take away that victim's rights and hand them to the person found to have harassed or assaulted them.

In the September 2017 Interim Guidance issued by the Department of Education, the Department provided the following footnote to support its position that schools may provide total inequity in appeal rights, providing the right to appeal ONLY to respondents and not to complainants reporting sexual harassment and assault. The guidance explained, in part that the respondent "is the one who stands to suffer if any penalty is imposed."[23] As explained herein, the victim absolutely stands to suffer if an insufficient sanction is imposed; she could completely lose out on her education.

The ability of a victim to appeal a sanction that does not protect her educational access is crucial to her ability to access the benefits of her education. The bottom line is, at a disciplinary hearing for sexual harassment, assault, sexual violence, gender-based stalking, dating violence, or domestic violence, *both the respondent and complainant's educations are equally on the line*. Title IX's equality mandate thus requires equal rights to appeal.

Under this proposed rule, a victim can do nothing about a sanction that is a mere slap on the wrist and fails to protect her education. In the face of what IS sexual assault, quid pro quo, or severe, pervasive, and objectively offensive sexual harassment, the victim could not appeal any of the following sanctions:

- Expulsion *after* graduation, as was the sanction for three students at James Madison University (JMU) who recorded themselves groping another student without her

[23] Interim Guidance, September 2017 https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf

consent and then circulated to fellow students.[24] The university investigated and found three men responsible for the sexual assault and harassment. Even so, the men were sanctioned with expulsion "upon graduation" only. Under the Department's proposed rule, a university would lawfully be allowed to have a procedure that prohibited the victim from appealing that sanction, while simultaneously allowing the students who committed the sexual harassment and sexual assault to appeal. Simply put, the victim would have no recourse. The JMU victim, left with a sanction that did nothing to protect her educational access, withdrew from JMU, and faced a complete denial of her education from the recipient.

- Writing an essay for sexually assaulting a fellow student, which is, in effect, a slap on the wrist. At Occidental College "[o]ne student found responsible for raping a woman was given the punishment of writing a five-page book report, according to the complaint."[25]

- Suspension *after* the end of a football season.

Fair proceedings would require, that if appeals are allowed, the student-victim be able to appeal these sanctions, just as the respondent would be able to, on the grounds that they are not commensurate with the severity or impact of the finding, and fail to protect in any way, the victim's educational access.

As a solution, I recommend that the rule provide all students with equal rights to appeal and *equal grounds for appeal*, which would simply require treating all students equitably, as Title IX mandates.

B. Supportive Measures, Remedies, and Accommodations prescribed by the rule are limited and insufficient to address the impact of harassment on victims educations.

The Department has long recognized that "[r]emedying sexual harassment in schools is essential to ensuring a safe environment in which students can learn."[26] Those remedies include academic accommodations necessary to ensure discrimination does not deleteriously effect the victim's education.[27] The U.S. Department of Education has urged schools to "ensure that none of the changes" necessary for a student-victim to avoid a hostile environment "adversely affect the

[24] Please see Washington Post article here: https://www.washingtonpost.com/local/education/former-jmu-student-says-assailants-were-given-light-punishment/2014/06/19/3df175ac-f7f4-11e3-a3a5-42be35962a52_story.html?noredirect=on&utm_term=.aaceac0587ab

[25] Please see https://www.huffingtonpost.com/2013/04/19/occidental-sexual-assault_n_3118563.html.

[26] 2001 Guidance, *supra* note 8, at ii.

[27] *Id.* at iii.

student's academic record."[28] Academic integrity does not override a student's civil rights under Title IX; "if discrimination," like sexual harassment "occurred, [federal-funding] recipients need[] to implement effective remedies."[29]

For over 15 years, the U.S. Department of Education has acknowledged that a sexual assault survivor's ability to fully perform in school and her grades may suffer as an effect of sexual assault.[30] Most recently, the U.S. Department of Education's September 2017 "Q&A on Campus Sexual Misconduct" reiterates that if a hostile environment limits a student's access to a school's programs, the victim's school "must respond" and "remedy its discriminatory effects."[31]

The U.S. Department of Education has previously outlined the steps a school must take to remedy the academic effects of a hostile environment. These remedies include offering students "the chance to make up any work missed during the classes they skipped"[32] and providing victims of harassment with "tutoring, other academic assistance, or counseling as necessary to remedy the effects of the harassment."[33] Other examples of actions required by the Department have included recalculating grades without penalizing a student for missing assignments, providing an opportunity to make-up missing assignments, or "arranging for an independent assessment of the student's work."[34] Where harassment victims must withdraw from class due to a hostile environment, the school should "assist the student in making program or schedule changes and ensure that none of those changes adversely affect the student's academic record."[35] Courts have reached the same conclusion. In *Kelly v. Yale University*, for example, the court held that Yale's failure to provide a student sexual assault victim with either academic or residential accommodations could be found clearly unreasonable by a jury and denied Yale's motion for summary judgement on the student's Title IX claim.[36]

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[28] 2001 Guidance, *supra* note 8, at 16.

[29] *Id.* at 28 n.20.

[30] *Id.* at 6.

[31] U.S. Dep't of Educ. Office for Civil Rights, Q&A on Campus Sexual Misconduct 1, 3 (Sept. 2017), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf.

[32] U.S. Dep't of Educ. Office for Civil Rights, Guidance on Gender Equity in Career and Technical Education 15 (June 2016), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201606-title-ix-gender-equity-cte.pdf.

[33] U.S. Dep't of Educ. Office for Civil Rights, Guidance on Schools' Obligations to Protect Students from Student-on-Student Harassment on the Basis of Sex; Race, Color and National Origin; and Disability 7 (October 2010), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.

[34] U.S. Dep't of Educ. Office for Civil Rights, Sexual Harassment: It's Not Academic 13-14 (September 2008), https://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.pdf.

[35] 2001 Guidance, *supra* note 8, at 16.

[36] *Kelly v. Yale University*, 2003 WL 1563424, at *4 (D. Conn 2003); *See also Doe ex. Rel. Doe v. Coventry Bd. Of Educ.*, 630 F.Supp.2d 226, 236 (D. Conn. 2009).

Voluntary Resolution Agreements with the U.S. Department of Education, Office for Civil Rights (OCR) have long required schools make necessary academic adjustments, including modification of grades, to address and remedy the effects of sexual harassment.[37] In 2005, OCR required Riverside Community College to expunge a student complainant's transcript and replace an affected "F" grade with a "W."[38] In 2001 OCR required the University of Colorado, Boulder, to expunge a complainant's grade in the impacted course.[39] In 2007, OCR commented that Indiana University-Bloomington changed a student's impacted grades from "D" and "D+" to withdrawals, despite the school's general policy not to permit to withdrawals from complete courses.[40] In 2017, OCR required Butte-Glenn Community College to review two years of reports to determine appropriate remedies such as "counseling and academic adjustments."[41]

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act") requires institutions of higher education provide academic accommodations to victims who endure sexual violence regardless of whether the victim formally reports the perpetrator.[42] However, it does not provide the same protections to K–12 students.

The Department indicates that it intended to create a rule that encourages schools to provide harassment victims, and those who have been accused of committing that harassment, with support. However, the "supportive measures" definition and limitations largely miss the mark to ensure the effects of sexual harassment are remedied and guarantee survivors full access to the benefits of their education. The following improvements would make a significant difference. I ask that you consider each proposal for revising the proposed rules.

1. **Location of assault does not matter for a victim and her educational access.** The supportive measures requirement under the proposed rule applies *only* to sexual assaults committed on campus or in a program or activity of the school. For survivors, the need for supportive measures to stay in school and access their education in the face of sexual violence, dating violence, harassment, and gender-based stalking, is equally necessary

[37] Minot State University, Resolution Agreement 19 (2016) (requiring university to modify transcript); *see also* Michigan State University, Resolution Agreement (2015) (requiring academic adjustments, ability to retake classes without penalty).

[38] U.S. Dep't of Educ. Office for Civil Rights, Letter Re: Case No. 09-03-2139 to Riverside Community College Chancellor 6, 20 (2005).

[39] University of Colorado at Boulder, Commitment to Resolve: Case #08012004, 3 (2001).

[40] U.S. Dep't of Educ. Office for Civil Rights, Letter Re: OCR Docket #05062138 to Indiana University-Bloomington President 5 (2007).

[41] Butte-Glenn Community College, Resolution Agreement 15 (2017).

[42] 20 U.S.C. § 1092(f); 34 C.F.R. § 668.46(b); 34 C.F.R. § 99.39; 34 C.F.R. Pt. 99, App. A.; see also U.S. Dep't of Educ., Office of Postsecondary Educ., Handbook on Campus Safety and Security Reporting (2011); U.S. Dep't of Educ., Office of Postsecondary Educ., Handbook on Campus Safety and Security Reporting (2016).

regardless of the location of where the assault occurred. As written, this rule allows sex discrimination in the form of sexual violence to prevent and deny a victim's educational access simply based on which side of the street the student was victimized on. The location of the harassment is not what undermined the victim's education. It is the harassment itself that prevents and risks her educational access.

This is even more true based on the other portions of the proposed rule that require universities to dismiss sexual harassment by a professor, fellow student, or even group of fellow students, that occurs, for example, at an off-campus apartment. For example, under the proposed rule, the school would be required to dismiss a victim's complaint of a group rape or a rape by a professor, yet expect her to continue attending the university alongside those students or professor *without* access to any supportive measures. This limitation means that, in effect, a rape victim will be stuck in school with the person who raped her, and the school is not required to provide her with extensions on exams or counseling, or, even if they did provide them, could charge her for such accommodations (i.e. counseling).

2. **Revise example list to include remedial and restorative measures.** The second problem with the proposed supportive measures definition is the limited list of examples of the types of measures schools must provide. The list is entirely made up of forward-looking measures (such as extensions or counseling), but falls short on examples that remedy or restore a harassment victims' education that has already been impacted. In particular, victims need opportunities to restore an already impacted academic record. It is well-established that victims can take months or years to report or seek help. In such cases, they will have already suffered academically and, to restore their educational access, will need opportunities to remedy their record. When a student's grades have already suffered because of a sexual assault, for example because the student had not yet informed the school of the assault or the school failed to provide accommodations, schools should provide opportunities to remedy the survivor's transcript. For example, the school could remove affected grades, allow the survivor to retake a course, replace low passing grades with "passes," or offer to attach an official addendum to transcripts explaining the impacted grades. These examples or suggestive examples such as "academic adjustments," "expungement of affected grades," the opportunity to make up or redo work, the opportunity to retake tests, quizzes, or exams. The proposed rule should also include as an example, that when schools have a GPA requirement for maintaining a scholarship or participation in school programs, survivors be offered a semester or year-long forgiveness period during which their grades would not count towards eligibility.

3. **Remove "designed to" § 106.30 and at § § 106.45(b)(4)(iii).** By placing the unnecessary qualifier "designed to" at the beginning of the supportive measures definition, and even in the obligations at the close of a disciplinary proceeding, the Department has undermined the requirement to preserve and restore educational access and instead allows schools to claim that they have tried to implement such measures, even if they did not actually do so. Rather than insert this unnecessary qualifier, the language should instead state "such measures necessary to restore or preserve access to the recipient's education program or activity." Under the proposed rule an institution could offer weak or ineffective "supportive measures" that are "designed to" help the student but *do not actually* help the

student. The phrase "designed to" takes the teeth out of this requirement and should be removed.

In the alternative, at § 106.44(b)(3), the Department provides that higher education institutions are not deliberately indifferent when, in the absence of a formal complaint of sexual harassment, the institution "implements supportive measures designed to effectively restore or preserve the complainant's access to the recipient's education program or activity." In this portion of the proposed rule, the language improves upon the § 106.30 definition by adding in "effectively." If the Department refuses to remove 'designed to" consider including "effectively" in §§ 106.30 and 106.45(b)(4)(iii).

4. **Require supportive measures for reports of all unwanted conduct of a sexual nature, or for "sexual assault, dating violence, domestic violence, and stalking where based on sex as defined in 34 CFR 668.46(a)."** This change would ensure that all victims would be able to obtain these important measures.

5. **Remove the "mutual" restrictions on contact example, and explicitly indicate that schools must provide one-way no-contact orders.** I recently worked with a school that, at the end of a disciplinary proceeding that found the respondent responsible for sexual harassment, agreed to modify a mutual no contact order, making it a one-way no-contact order to ensure that the victim did not need to worry about modifying her behavior for fear of punishment or being displaced on campus after the school found the respondent responsible. But schools should be able to offer *one-way* no-contact orders to victims in other circumstances as well. Court-issued protective orders do not require limitations on the victim; campus no-contact orders should be no different. Indeed, perpetrators of dating violence and stalking, for example, frequently use such mutual no-orders to drag their victims into court for the purpose of continuing to harass, access, and revictimize them.[43]

6. **I recommend including language that a school must remedy its effects of sexual harassment, per language in previous guidance.**[44]

7. **I recommend the removal of the language qualifying supportive measures "non-disciplinary," "non-punitive," and not "unreasonably burdening the other party."** These all suggest that a school could not take immediate action to remove a reported party from a student housing or from a classroom, and that the burden should always fall on the reporting party. This does not promote equal access to education.

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[43] See Joan Zorza, *What's Wrong with Mutual Orders of Protection?*, in Domestic Violence Rep. (1999), available at http://www .scvan.org/mutual_orders.html.

[44] 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 iii (Jan. 2001) [hereinafter 2001 Guidance], https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.

C. The allowance, and many cases requirement, of the clear and convincing standard in sexual harassment disciplinary proceedings is again a display of inequitable treatment.

As a third, very troubling example of the rule being led by the Department's mistaken belief that the respondent's education is at risk of complete loss, and the victims only limited loss is the allowance of and in many instances the requirement that schools adopt a clear and convincing standard of evidence in order to make findings of responsibility for sexual harassment. § 106.45(b)(4)(i) The preponderance of the evidence standard is the equity standard, putting the complainant and respondent on equal footing. The clear and convincing standard promoted by the Department in the proposed rule, tips the scales in favor of those accused of sexual harassment at the expense of victims. In nearly every disciplinary hearing for sexual assault, dating violence, and stalking, the Respondent and Complainant's educations are on the line. The equity-based preponderance standard is the standard that treats the party's equally, equally taking into account the consequences on both the Respondent and the Complainant's education. I urge the Department maintain the position that preponderance of the evidence is the correct standard for such grievance proceedings.

Thank you for reviewing the above comment. I have attached for the Department's close review, consideration, and response studies and articles that support and give additional evidence for the points made in this comment. I am very willing to speak with the Department further about these comments and my experience assisting survivors in the school setting.

Cari Simon, Esq.
The Fierberg National Law Group
csimon@tfnlgroup.com