



CENTER FOR SURVIVOR AGENCY & JUSTICE

January 30, 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: ED Docket No. ED-2018-OCR-0064, RIN 1870-AA14, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.

Dear Mr. Marcus:

I am writing on behalf of the Center for Survivor Agency and Justice in response to the Department of Education's (the Department) Notice of Proposed Rulemaking ("NPRM," "proposed rules," "proposed regulations") to express our strong opposition to the Department's proposal to amend rules implementing Title IX of the Education Amendment Act of 1972 (Title IX) as published in the Federal Register on November 29, 2018.

The Center for Survivor Agency and Justice (CSAJ) is a national organization dedicated to enhancing economic advocacy for survivors of domestic and sexual violence. We develop and promote advocacy approaches that remove systemic barriers, enhance organizational responses, and improve professional practices to meet the self-defined needs of domestic and sexual violence survivors. Collectively, our staff possesses decades of experience working with advocates, programs, and survivors from across the country and in various contexts. Through this work, CSAJ has emerged as a national leader in understanding and addressing the reciprocal relationship between sexual/domestic violence and poverty. Advocacy for survivors must account for: structural inequalities and economic barriers to long-term safety; the unjust systems that reinforce batterers' abuse; and the unique needs created by the intersecting experiences of domestic/sexual violence and poverty.

CSAJ works in partnership with on-the-ground experts in advocacy, law, research and policy as well as advocacy organizations from anti-violence, anti-poverty, anti-racists and other social justice movements. We currently lead three national projects dedicated to addressing the profound and long-term costs, economic barriers, and structural inequities facing survivors and their communities, and we work to equip organizations and systems with effective responses that remove economic barriers to safety and promote human agency and dignity. The *Consumer Rights for Sexual & Domestic Violence Survivors Initiative* seeks to leverage the power of consumer law and partnerships to remove the multitude of economic harms survivors endure. The *Race & Economic Equity for Survivors Project* uplifts advocacy strategies that address the unique structural inequities faced by survivors from marginalized communities. And the *Access to Justice Project* seeks to equip community based advocates with strategies to address the full costs of abuse and remove economic barriers in the court and service systems. In addition, we are partners with researchers at Michigan State University in a groundbreaking national study, *Economic*

Well-Being of Survivors Study, to better understand survivors' experiences of economic abuse, and its relationship to their economic well-being, help seeking, and help attainment for financial security.

Taken together, our work and these partnerships lead us to an inexorable conclusion: ***the Department's proposed rule will only serve to jeopardize the financial security of survivors of sexual assault in educational environments.*** Changes under the proposed rule would, in effect: discourage the reporting of sexual assault; disable critical education staff from promptly, compassionately and effectively responding; disproportionately impact off-campus and non-traditional students by imposing different standards for reporting on and off campus harassment complaints --indeed *requiring* that schools ignore off-campus complaints; exacerbate the trauma and costs of sexual assault by limiting "supportive measures" to survivors; and will institute both a muddy and ineffective investigation process that goes against all evidence-based standards of trauma-informed investigations. These all have costs: financial and personhood costs to survivors, as well costs to educational institutions that the regulation fails to account for in its cost savings calculations.

What CSAJ hears through our work with advocates, programs, and survivors - including campus advocates and statewide sexual assault coalitions - gives voice to the detrimental effect of these rules. In August 2018, CSAJ facilitated a workshop at the Washington Coalition of Sexual Assault Programs, where workshop participants shared their experiences to craft a narrative of the "economic ripple effect" of sexual violence in Washington State:

We see the economic impact of sexual violence show up in multiple ways: We work with survivors who experience sexual assault in college, are left with no recourse and leave school on the hook with massive debt; survivors who have grappled with the effects of child sexual abuse throughout their development and education; immigrant survivors who have been sex and labored trafficked with limited legal options to access education or employment, which might create new opportunities for them; and survivors who've experienced dating violence and/or intimate partner violence that has interfered with their access to education or ability to complete school.

As just one "ripple effect" example: Marisol is a student at a state university who's sexually assaulted by a classmate. Fearful of interacting with him, she begins to skip class and her grades suffer. The instructor is uncompromising with assignments, and as a result, she eventually loses a scholarship. With her family unable to fill the need, she decides to drop out and get a job. Unfortunately, with incomplete education she doesn't qualify for jobs she's interested in and her current salary doesn't cover her student loan payments. We started working with Marisol when she reached out for counseling and later wanted to try to go back to school. However, with her loans in default and a record of failing grades after the assault, she can't access additional financial aid to make applying and explaining her situation worthwhile. Where was the school? Why did she have to leave and drop out because of the assault? What are her future options, given the current reality? This shouldn't be all on her.¹

The Department "[asserts that it] does not believe it is reasonable to assume that these proposed regulations will have a quantifiable effect on the underlying rate of sexual harassment occurring in the education programs or activities of recipients," yet proposes rules meant to explicitly limit survivors' redress despite the prevalence of sexual harassment and assault. Creating a rule that limits an educational institution's obligation to acknowledge or investigate certain instances of sexual harassment is not the same as creating a rule with no adverse impact upon the prevalence thereof.

¹ See also a graphic illustration of the "Economic Ripple Effect of Violence," which informed the development of the ripple effect with WCSAP. Here: Shoener & Sussman. "Economic Ripple Effect of IPV: Building Partnerships for Systemic Change." DOMESTIC VIOLENCE REPORT, (Aug/Sep 2013), available at: <https://csaj.org/library/view/economic-ripple-effect-of-ipv-building-partnerships-for-systemic-change>

Below, we draw on our work across the country, rich partnerships, and the research base to underscore key concerns about the Department’s proposed rules: Firstly, survivors of sexual harassment and sexual violence will face increased personal devastation from the “economic ripple effect” of violence as a result of these rules.² Secondly, there are many key costs to educational institutions that have not been calculated prior to the proposed rule change. Thirdly, the proposed rule is an unprecedented use of the federal regulations to dictate specific activities that universities should undertake in investigating and adjudicating instances of sexual harassment. Finally, the proposed rules fail to effectuate Title IX’s anti-discrimination mandate by telling schools when they *cannot* protect students against sex discrimination. For the reasons discussed at length in this comment, **CSAJ** unequivocally opposes the Department’s proposed rule.

I. The proposed rules aggravate the economic harm that survivors face after sexual violence.

The proposed rules not only ignore the devastating amount and impact of sexual violence in schools, but also ignore, and even exacerbate, the many economic harms faced by survivors of sexual violence. Instead of effectuating Title IX’s purpose of keeping students safe from sexual abuse and other forms of sexual harassment — that is, from unlawful sex discrimination — they make it harder for students to report abuse, allow (and sometimes require) schools to ignore reports when they are made, and unfairly tilt the investigation process in favor of respondents to the direct detriment of survivors.

A. Immediate & Short Term Costs to Survivors

There are both short and long term costs to survivors of sexual violence that the proposed rules will worsen; either by ignoring them with the effect of merely displacing compounded costs on other systems in the future (e.g. healthcare), or by increasing the already high economic burden placed on survivors to shoulder what are public safety and public health costs. Immediate and short-term costs to survivors after sexual assault include: medical and health costs, missed class and school/professional development activities, missed paid work or jeopardized employment, relocation or housing costs, and legal and other service fees. Basic estimates for these costs include: \$2,084 for forensic exams,³ \$5,150 of tuition per lost semester (the average U.S. university tuition in 2017-2018 was \$11,721.67 per semester⁴), \$140 or more per counseling session when not offered by schools or covered by health insurance, and hundreds or even thousands to break a lease, move, and relocate. Transportation, lost wages, and time to travel to and between services (missing more class) add to this.

Schools, and whole state economies, have a stake in these costs. For example, in California alone, mental health care that prevents and responds to sexual violence cost \$620 million.⁵ And in 2017, the average cost of a victim’s sexual assault claim filed against a college or university was approximately \$350,000.⁶ As described below, the proposed rules will not lower these costs, but will likely create

² Based on field research by CSAJ’s former Director of Research, Sara Shoener, CSAJ has coined the term “the economic ripple effect.” It’s not just that IPV leads to incidents of economic harm. Rather, the economic impact of IPV is profound and compounded over the life course. Also see: Shoener, S. “The Price of Safety: Hidden Costs and Unintended Consequences for Women in the Domestic Violence Service System.” VANDERBILT UNIVERSITY PRESS, (2016).

³ Farris, Schell, & Tanielian, The RAND Corporation, “Enemy Within: Military Sexual Assault Inflicts Physical, Psychological, Financial Pain,” 2013

⁴ Powell, Farran, “What You Need to Know about College Tuition Costs,” 2018 <https://www.usnews.com/education/best-colleges/paying-for-college/articles/what-you-need-to-know-about-college-tuition-costs>

⁵ California Coalition Against Sexual Assault. “The Costs and Consequences of Sexual Violence in California.” (June 2018), available at: http://www.calcasa.org/wp-content/uploads/2018/02/CALCASA_CCoSV_FINAL_2018.pdf

⁶ Sutton, Halley, “Study outlines cost of sexual assault litigation for universities,” 2017 <https://onlinelibrary.wiley.com/doi/pdf/10.1002/casr.30275>

additional costs by virtue of silencing reports, restricting response options, and muddying the investigation process.

B. The Economic Impact of Proposed Rules: Restricting reporting and undermining evidence-based response will increase survivor and institution costs

The proposed rules make it harder to report sexual harassment and assault as well as undermine well-defined, evidence-based standards of response by individual teachers, faculty and staff and educational institutions alike.

The Department’s proposed rules undermine Title IX’s discrimination protections by making it harder to report sexual harassment and assault (§§ 106.44(a) & 106.30). Sexual harassment and assault is hard to talk about, and institutions should be supported in their efforts to be responsive, not see their hands tied or their efforts to eradicate sexual violence constrained. Already, while 1 in 4 women will be sexually assaulted, only 12% of college survivors⁷ and 2% of girls ages 14-18⁸ report sexual assault to their schools or the police. Students often choose not to report for fear of reprisal, because they believe their abuse was not important enough, or because they think the no one would do anything to help.⁹ Some students—especially students of color, undocumented students,¹⁰ LGBTQ students,¹¹ and students with disabilities—are less likely than their peers to report sexual assault to the police due to increased risk of being subjected to police violence and/or deportation. *When institutions are unresponsive or poorly respond to violence, survivors are left to shoulder the trauma of violation and abuses of power along with untenable choices and costs:* they must find and take on increased medical and health care costs, may delay seeking help for serious health concerns, and have to make choices like the cost of relocation versus staying in dangerous proximity to the perpetrator.

In addition to the costs incurred by discouraging reporting, other proposed rules would change response standards in ways that are not only inconsistent and confusing, but harmful to students and costly to institutions. Proposed rules §§ 106.30 and 106.45(b)(3) would require schools to ignore harassment that occurs outside of a school activity, even when it creates a hostile educational environment, and the “deliberate indifference” standard would allow schools to do virtually nothing in response to complaints of sexual harassment and assault. This would disproportionately impact off-campus and non-traditional students, many who are also part of marginalized communities that face increased risks of violence stated above. According to AASA, the School Superintendents Association,¹² the proposed rules would create confusion over *who can* report and *how to* report a claim of sexual harassment or assault. Putting aside the direct impact and costs to student-survivors, the Department has not accounted for the costs associated with additional staff time, new protocol development, and retraining costs on new definitions of harassment, standards of proof, and other response mechanisms.

The proposed rules impermissibly limit the “supportive measures” available to complainants (§ 106.30). In particular, the proposed rules allow schools to deny a student’s request for effective

⁷ 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>.

⁸ National Women’s Law Center. “Let Her Learn: Sexual Harassment and Violence.” Website available at: <https://nwlc.org/let-her-learn/>

⁹ RAINN, *Campus Sexual Violence: Statistics*, <https://www.rainn.org/statistics/campus-sexual-violence>.

¹⁰ See Jennifer Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation*, NY TIMES (April 30, 2017), <https://www.nytimes.com/2017/04/30/us/immigrants-deportation-sexual-abuse.html?mcubz=3>.

¹¹ National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey: Executive Summary* 12 (Dec. 2016) [hereinafter *2015 U.S. Transgender Survey*], available at <https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf>.

¹² AASA, The School Superintendents Association. “Title IX Comments.” (January 22, 2018), available at: [http://aasa.org/uploadedFiles/AASA_Blog\(1\)/AASA%20Title%20IX%20Comments%20Final.pdf](http://aasa.org/uploadedFiles/AASA_Blog(1)/AASA%20Title%20IX%20Comments%20Final.pdf)

“supportive measures” on the grounds that the requested measures are “disciplinary,” “punitive,” or “unreasonably burden[] the other party.” Notwithstanding the fact that this assumes equal power and responsibility of both parties in a sexual harassment/assault case, it will lead to further harm as well as longer term economic impacts. For example, without a full range of support, if a survivor stops attending classes due to the sexual violence, their GPA may drop which can lead to delays in their pursuit and completion of higher education, getting expelled for substandard performance, and foregoing their professional advancement.¹³ One study estimates that with a semester averaging \$5,150, the cost of sexual violence of a single national graduating class would be nearly \$2 billion.¹⁴ And institutions will suffer associated administrative and operational costs.

Supportive measures also means holding perpetrators accountable. Advocates of sexual violence and school administrators alike note that the proposed rules will incentivize people to take cases to court rather than OCR, increasing litigation costs. Even a simple legal matter can lead to multiple court dates due to overwhelmed court dockets, judge and attorney rescheduling, administrative errors, and more.¹⁵ Borrowing from extensive literature and experience in the context of family and domestic violence courts, survivors with fewer financial resources will either be forced to drop lengthy cases or incur extensive debts to see them through. Thus, these rules will have a disproportionate impact on less resourced students. At the same time, litigation abuse by perpetrators of violence is well-documented: purposefully prolonging cases to deplete survivors’ time and resources, using cases to continue manipulation, intimidation, threats, etc.¹⁶ The proposed rules disproportionately favor protections and due process for the accused, when there is no evidence-base for systematic false reporting or investigation processes that unduly burden the accused. In addition to resulting costs to survivors, accused, and institutions, this undermines the purpose of Title IX’s discrimination protections.

II. Long-Term Costs & Cost to Institutions/Systems

The short-term costs of violence have rippling and long-term collateral consequences. The short-term costs described above will be compounded by longer-term costs for which the regulation fails to account, and further impacted by critical new costs that the proposed court-like investigation process would impose.

A. The full and long-term costs of SA are not accounted for in the development of the rule.

Most strikingly, but overlooked in the proposed rules, are the enduring economic impacts of sexual violence. Survivors of violence experience lifetime impacts such as decreased access to job benefits, job instability, bankruptcy, loan default, damaged credit, and their collateral effects on housing, health, and quality of life. For example, researchers Adrienne Adams and colleagues found that women who experience dating violence in adolescence have lower starting salaries as adults than their

¹³ Farris, Schell, & Tanielian. “Enemy Within: Military Sexual Assault Inflicts Physical, Psychological, Financial Pain.” The RAND Corporation, (2013).

¹⁴ Farris, Schell, & Tanielian, The RAND Corporation, “Enemy Within: Military Sexual Assault Inflicts Physical, Psychological, Financial Pain,” 2013

¹⁵ Smith, J. & Abbasi, N. “Addressing Barriers for Domestic Violence Survivors in Civil Court.” GUIDEBOOK ON CONSUMER & ECONOMIC CIVIL LEGAL ADVOCACY FOR SURVIVORS (May 2017), available at: <https://csaj.org/Guidebook>

¹⁶ Ibid. Also see: Cills, H. “Students Accused of Sexual Misconduct Are Increasingly Filing Defamation Suits Against Their Accusers” JEZEBEL (December 5, 2017), available at: <https://jezebel.com/students-accused-of-sexual-misconduct-are-increasingly-1821026491>

counterparts and slower salary growth over time.¹⁷ Similarly, other research points to the lingering effect of violence: survivors experience *job instability for up to three years* after an abusive relationship has ended¹⁸ and survivors continue to report poorer health,¹⁹ utilize healthcare twice as much,²⁰ and continue to pay increased healthcare costs²¹ even five-plus years *after* abuse has ended.

In the context of campus sexual assault, when survivors miss or drop classes, their course grades may falter or they may fail outright. Additionally, as a result of coping with trauma and attending to safety needs, student survivors may lose supplemental work and income. Consequently, many survivors lose scholarships, grants or the ability to pay off student loans. They are then doubly penalized by a crushing student debt and a stalled education that, in turn, lowers their qualifications for to higher paying jobs needed to pay off such debts. If a survivor then defaults on a federal student loan, they are restricted from future federal financial aid, vulnerable to predatory lending in attempts to pay heavy debts, and federal loans are particularly onerous and unlikely to be discharged in bankruptcy. In addition to lost education and professional growth, this results in damaged credit that interferes with their ability to secure housing, employment, and even access utilities or a phone.

CSAJ's partners at Futures Without Violence underscore this reality: "Research supports the fact that sexual harassment harms individuals in a variety of ways, physically, emotionally, psychologically, and financially. Sexual harassment and violence harms survivors to the extent that it handcuffs their ability to learn free from fear and to achieve success long-term. Too often, negative emotional effects take a toll on students' and especially girls' education, resulting in decreased productivity, and increased absenteeism from school (Chesire, 2004). Indeed, 34% of college survivors of sexual harassment and violence drop out of college."

It comes as no surprise, then, that we see astronomical costs to state and national economies due to related physical and mental health, suicide and substance use consequences of sexual violence.²² According to a study published by the NCBI, the estimated lifetime cost of rape is \$122,461 per victim, with a population economic burden of nearly \$3.1 trillion (2014 U.S. dollars) over victims' lifetimes.²³ The whole point of Title IX is to increase access to safe and enriching education, and its benefits. By denying a role in addressing sexual harassment and assault and by ignoring the real costs, the Department undermines this purpose and will perpetuate enduring negative effects of violence.

B. The proposed rule change will create new costs and enduring impact

When schools fail to provide effective responses, the impact of sexual harassment can be devastating.²⁴ For example, if the proposed rules had been in place, colleges like Michigan State, Penn State and Baylor would have had no responsibility to stop Larry Nassar and Jerry Sandusky, or to

¹⁷ Adams, et al. "The Effects of Adolescent Intimate Partner Violence on Women's Educational Attainment and Earnings." JOURNAL OF INTERPERSONAL VIOLENCE, (2013).

¹⁸ Adams, et al. "The Impact of Intimate Partner Violence on Low-Income Women's Economic Well-Being: The Mediating Role of Job Stability." VIOLENCE AGAINST WOMEN, (2013).

¹⁹ Bonomi, A., et al., "Health Outcomes in Women with Physical and Sexual Intimate Partner Violence Exposure Intimate Partner Violence Exposure." JOURNAL OF WOMEN'S HEALTH, (2007).

²⁰ Bonomi, A., et al. "Health Care Utilization and Costs Associated with Physical and Nonphysical-Only Intimate Partner Violence." HEALTH SERVICES RESEARCH, (2009). 44(3): 1052-67.

²¹ Ibid.

²² California Coalition Against Sexual Assault. "The Costs and Consequences of Sexual Violence in California." (June 2018), available at: http://www.calcasa.org/wp-content/uploads/2018/02/CALCASA_CCoSV_FINAL_2018.pdf

²³ Peterson, C., Deue, S., Florence, C., and Lokey, CN, "Lifetime economic burden of rape among U.S. adults," 2017 <https://www.ncbi.nlm.nih.gov/pubmed/28153649> <https://www.ncbi.nlm.nih.gov/pubmed/28153649>

²⁴ E.g., Audrey Chu, *I Dropped Out of College Because I Couldn't Bear to See My Rapist on Campus*, VICE (Sept. 26, 2017), https://broadly.vice.com/en_us/article/qvjzpd/i-dropped-out-of-college-because-i-couldnt-bear-to-see-my-rapist-on-campus.

investigate sexual assault allegations—because their victims reported their experiences to school employees, like athletic trainers and coaches, who are not considered to be school officials with the “authority to institute corrective measures.” When schools are both constrained from protecting students via restrictive or muddled response policies *and* are required to employ explicit and implicit policies that discourage reporting, sexual harassment and assault inflicts more harm and costs.

At the same time, the Department ignores or discounts the newly created costs institutions will bear due to the proposed “quasi-court” investigation processes.²⁵ The Association of American Universities asserts that the more “adversarial procedures akin to the criminal and civil justice systems” would not only disrupt the internal discipline procedures that match and affirm a safe, educational environment, but would also create new costs. These include:

- appointing dedicated professionals to oversee the process (who would often lack expertise to oversee attorneys and court-processes)²⁶;
- costs of unnecessary contentious and disruptive proceedings;
- universities having to hire expensive litigators to oversee the proceedings; and
- lack of interest among faculty and staff in serving on conduct committees where the experience is so adversarial.

Indeed, the increased likelihood of litigation described earlier would not only be borne by student-survivors, but by faculty and institutions. It may even draw universities into extensive lawsuits where they must proffer records and documents for both parties, risk the release and mishandling of private information, and further chill reporting. Additionally, while CSAJ’s comments are primarily focused on the impact of the proposed regulation in the higher education context, it is crucial to point out that the School Superintendents Association has expressed similar concern about the costs the regulation would impose: “[W]e believe these proposed regulations on Title IX do not have merit. Further, we believe these proposed rules have the potential to increase the likelihood of litigation in [school] districts. [And if the Department’s Office of Civil Rights adopts more stringent Title IX enforcement standards, students will increasingly resort to civil litigation] which could lead to a significant and much costlier redirection of district resources towards addressing Title IX complaints and violations in court.”²⁷

Indeed, survivors of color will be disproportionately affected due to the fact that they may not want to report to the police or engage in a process that adds to the criminalization of men and boys of color. For these students, schools are often the only avenue for relief.

It also appears from the regulation that the Department requested limited categories of cost information from universities and education institutions (e.g. technology options for hearings, § 106.45(b)(3)(vii)) rather than inviting comments from them on the full range of anticipated costs. We applaud efforts to change systemic impacts on campus violence by addressing and reducing costs to survivors and institutions, but these efforts must proactively contend with the real costs associated with the problem. The proposed rules not only fail to do this, but as previously described, constrain access to supportive measures despite the reality that refusing to take action on students’ sexual harassment or sexual violence complaints will yield an increased need for such services. Instead, they suggest that cost savings will result from simply lowering (restricting) the number of reports, while admitting that both the prevalence and costs of sexual harassment and assault will remain.

²⁵ AASA, The School Superintendents Association. “Title IX Comments.” (January 22, 2018), available at: [http://aasa.org/uploadedFiles/AASA_Blog\(1\)/AASA%20Title%20IX%20Comments%20Final.pdf](http://aasa.org/uploadedFiles/AASA_Blog(1)/AASA%20Title%20IX%20Comments%20Final.pdf)

²⁶ CSAJ has heard that a number of universities are concerned that the proposed regulation will leave them little choice but to hire retired judges to conduct their hearings, and to retain counsel for both parties.

²⁷ AASA, The School Superintendents Association. “Title IX Comments.” (January 22, 2018), available at: [http://aasa.org/uploadedFiles/AASA_Blog\(1\)/AASA%20Title%20IX%20Comments%20Final.pdf](http://aasa.org/uploadedFiles/AASA_Blog(1)/AASA%20Title%20IX%20Comments%20Final.pdf)

We can easily anticipate the detrimental consequences of such a view. The voices are louder and the costs become visible in today's society. As has been true throughout recent history, an increased social awareness of sexual assault and violence reduces tolerance for violence, discrimination, and abuse of power that is often immediately followed by a surge of reporting and help-seeking. Most recently we have seen this via dramatic and reported upticks of calls to the national hotline for Rape Abuse & Incest National Network (RAINN) during the Daniel Holtzclaw case, Larry Nassar and Jerry Sandusky sexual abuse hearings, candidate-Trump comments "grab her by the p...", and the Brett Kavanaugh confirmation hearings. Societal and cultural shifts mean that more people will disclose abuse, seek services and supports, demand accountability from perpetrators and appropriate responses from education institutions. Efforts designed to impede disclosure are not cost-effective; they are perversely designed.

III. The Department's Proposed Regulation is a Departure From Longstanding Practice, Creates Inconsistencies, and is Unprecedented

The Department's proposed regulation is a departure from longstanding practice, which results in inconsistencies, with no clarity as to how these will be resolved. Furthermore, the proposed rules dictate an unprecedented amount of detail as to how schools are to resolve allegations of harassment. The Department's decision to allow schools to impose a more burdensome standard in sexual assault cases compared to other student misconduct cases appears to rely on the unspoken stereotypes and unfounded assumptions that survivors (who are mostly women) are more likely to lie about sexual assault than students who report physical assault, plagiarism, or other school disciplinary violations. Furthermore, the NPRM subjects universities to an unprecedented amount of federal control when it comes to how to investigate and adjudicate allegations of sexual harassment. The Department has never before attempted to prescribe in this level of detail the process that a university must employ.

A. The proposed rules would force many schools to use a more demanding standard of proof to investigate sexual harassment than they would use to investigate other types of student misconduct.

The Department's longstanding practice requires that schools use a "preponderance of the evidence" standard—which means "more likely than not"—in Title IX cases to decide whether sexual harassment occurred.²⁸ Proposed rule §106.45(b)(4)(i) departs from that practice, and establishes a system where schools could elect to use the more demanding "clear and convincing evidence" standard in sexual harassment cases, while allowing all other student misconduct cases to be governed by the preponderance of the evidence standard, even if they carry the same maximum penalties.²⁹ The Department's decision to allow schools to impose a more burdensome standard in sexual assault cases than in any other student

²⁸ The Department has required schools to use the preponderance standard in Title IX investigations since as early as 1995 and throughout both Republican and Democratic administrations. For example, its April 1995 letter to Evergreen State College concluded that its use of the clear and convincing standard "adhere[d] to a heavier burden of proof than that which is required under Title IX" and that the College was "not in compliance with Title IX." U.S. Dep't of Educ., Office for Civil Rights, *Letter from Gary Jackson, Regional Civil Rights Director, Region X, to Jane Jervis, President, The Evergreen State College* (Apr. 4, 1995), at 8, available at http://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed_ehd_1995.pdf. Similarly, the Department's October 2003 letter to Georgetown University reiterated that "in order for a recipient's sexual harassment grievance procedures to be consistent with Title IX standards, the recipient must ... us[e] a preponderance of the evidence standard." U.S. Dep't of Educ., Office for Civil Rights, *Letter from Howard Kallem, Chief Attorney, D.C. Enforcement Office, to Jane E. Genster, Vice President and General Counsel, Georgetown University* (Oct. 16, 2003), at 1, available at <http://www.ncherm.org/documents/202-GeorgetownUniversity--110302017Genster.pdf>.

²⁹ Proposed rule § 106.45(b)(4)(i) permits schools to use the preponderance standard *only if* it uses that standard for all other student misconduct cases that carry the same maximum sanction *and* for all cases against employees. This is a one-way ratchet: a school would be permitted to use the higher clear and convincing evidence standard in sexual assault cases, while using a lower standard in all other cases.

misconduct case appears to be based on sexist notions about women lying about sexual violence. To rely on such an unfounded belief in the drafting of this regulation constitutes sex discrimination and is itself a violation of Title IX. There is no basis for that sexist belief; in fact men and boys are far more likely to be *victims* of sexual assault than to be *falsely accused* of sexual assault.³⁰

A vast array of Title IX experts support the preponderance standard, which is used to address harassment complaints at over 80% of colleges.³¹ (1) The Association of Title IX Administrators (ATIXA)'s position is that "any standard higher than preponderance advantages those accused of sexual violence (mostly men) over those alleging sexual violence (mostly women). It makes it harder for women to prove they have been harmed by men. The whole point of Title IX is to create a level playing field for men and women in education, and the preponderance standard does exactly that. *No other evidentiary standard is equitable*;"³² (2) the NCHERM Group, whose white paper *Due Process and the Sex Police* was cited by the Department,³³ has promulgated materials that require schools to use the preponderance standard, because "[w]e believe higher education can acquit fairness without higher standards of proof;"³⁴ (3) The white paper by four Harvard professors that is cited by the Department³⁵ recognizes that schools should use the preponderance standard if "other requirements for equal fairness are met;"³⁶ (4) NASPA - Student Affairs Administrators in Higher Education recommends the preponderance standard: "Allowing campuses to single out sexual assault incidents as requiring a higher burden of proof than other campus adjudication processes make it – by definition – harder for one party in a complaint than the other to reach the standard of proof. Rather than leveling the field for survivors and respondents, setting a standard higher than preponderance of the evidence tilts proceedings to unfairly benefit respondents;"³⁷ (5) The Association for Student Conduct Administration (ASCA) agrees that schools should "[u]se the preponderance of evidence (more likely than not) standard to resolve all allegations of sexual misconduct"³⁸ because "it is the only standard that reflects the integrity of equitable student conduct processes which treat all students with respect and fundamental fairness."³⁹

Moreover, the preponderance standard is used by courts in all civil rights cases.⁴⁰ It is the only standard of proof that treats both sides equally and is consistent with Title IX's requirement that grievance procedures be "equitable." By allowing schools to use a "clear and convincing evidence" standard, the proposed rule would tilt investigations in favor of respondents and against complainants. The Department argues that Title IX investigations may need a more demanding standard because of the "heightened stigma" and the "significant, permanent, and far-reaching" consequences for respondents if they are found

³⁰ E.g., Kingkade, *supra* note 5.

³¹ Heather M. Karjane, et al., *Campus Sexual Assault: How America's Institutions of Higher Education Respond* 120 (Oct. 2002), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf>.

³² Association of Title IX Administrators, *ATIXA Position Statement: Why Colleges Are in the Business of Addressing Sexual Violence* 4 (Feb. 17, 2017), available at <https://atixa.org/wordpress/wp-content/uploads/2017/02/2017February-Final-ATIXA-Position-Statement-on-Colleges-Addressing-Sexual-Violence.pdf>.

³³ 83 Fed. Reg. 61464 n.2.

³⁴ The NCHERM Group, *Due Process and the Sex Police* 2, 17-18 (Apr. 2017), available at <https://www.ncher.org/wp-content/uploads/2017/04/TNG-Whitepaper-Final-Electronic-Version.pdf>.

³⁵ 83 Fed. Reg. 61464 n.2.

³⁶ Elizabeth Bartholet, Nancy Gertner, Janet Halley & Jeannie Suk Gersen, *Fairness For All Students Under Title IX* 5 (Aug. 21, 2017), available at <https://dash.harvard.edu/bitstream/handle/1/33789434/Fairness%20for%20All%20Students.pdf>.

³⁷ *NASPA Title IX Priorities*, *supra* note 97 at 1-2.

³⁸ *ASCA 2014 White Paper*, *supra* note 55.

³⁹ 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>.

⁴⁰ 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).

responsible for sexual harassment.⁴¹ But the Department ignores the reality that Title IX complainants face “heightened stigma” for reporting sexual harassment as compared to other types of misconduct, and that complainants suffer “significant, permanent, and far-reaching” consequences to their education if their school fails to meaningfully address the harassment, particularly as 34% of college survivors drop out of college.⁴² Both students have an equal interest in obtaining an education. Catering only to the impacts on respondents in designing a grievance process to address harassment is inequitable, and thus, contravenes the governing mandate of Title IX, which is to ensure gender equity.

B. The proposed rules are inconsistent with the Clery Act

A number of the Department’s proposed rules are inconsistent with the Clery Act, which the Department also enforces, and which also addresses the obligation of colleges and universities to respond to sexual assault and other behaviors that may constitute sexual harassment, including dating violence, domestic violence, and stalking. For example, the proposed rules prohibiting schools from investigating off-campus and online sexual harassment conflict with Clery’s reporting requirements. The Clery Act requires colleges and universities to notify all students who report sexual assault, stalking, dating violence, and domestic violence of their rights, regardless of “whether the offense occurred on or off campus.”⁴³ The Clery Act also requires colleges and universities to report all sexual assault, stalking, dating violence, and domestic violence that occur on “Clery geography,” which includes all property controlled by a school-recognized student organization (such as an off-campus fraternity); nearby “public property”; and “areas within the patrol jurisdiction of the campus police or the campus security department.”⁴⁴ The proposed rules would undermine Clery’s mandate and create a perverse system in which schools would be required to report instances of sexual assault that occur off-campus to the Department, but would be required by the Department to dismiss these complaints and not investigate them.

Clery also requires that investigations of sexual harassment and assault be “prompt, fair, and impartial.”⁴⁵ But the proposed rules’ unclear timeframe for investigations conflicts with Clery’s mandate that investigations be prompt. And the many proposed rules discussed above that tilt investigation procedures in favor of the respondent are anything but fair and impartial.

Although the Department acknowledges that Title IX and the Clery Act’s “jurisdictional schemes ... may overlap in certain situations,”⁴⁶ it fails to explain how institutions of higher education should resolve the conflicts between two different sets of rules when addressing sexual harassment. These different sets of rules would likely create widespread confusion for schools.

C. The Unprecedented Nature of the Proposed Regulation

The NPRM subjects universities to an unprecedented amount of federal control when it comes to how to investigate and adjudicate allegations of sexual harassment. The Department has never before attempted to prescribe in this level of detail the process that a university must employ. The level of detail within this proposed regulation would essentially turn classrooms into courtrooms, something that has never been required of universities in the past and ignores hundreds of different models for fact

⁴¹ 83 Fed. Reg. 61477.

⁴² 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>.

⁴³ 20 U.S.C. § 1092(f)(8)(C).

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

⁴⁵ 20 U.S.C. § 1092(f)(8)(b)(iv)(I)(aa).

⁴⁶ 83 Fed. Reg. 61468.

finding and disciplinary determinations that have been demonstrated to be both effective and nondiscriminatory.⁴⁷

The NPRM assumes that the entire existing adjudication system has failed students. As the Association of American Universities 2017 report makes clear, however, universities across the country are continually working on developing effective and varied approaches to adjudicating sexual harassment claims.

The Department should continue to allow institutions to determine what processes are best for their campus community. Different approaches are helpful as institutions strive to create and improve policies and practices and identify and retire what is ineffective. These approaches also allow institutions to maintain, utilize, and respect the different schools' values, student populations, community resources, and educational philosophies. Student populations vary widely in terms of the proportion of students residing on-campus or off-campus, the mix of undergraduate and graduate/professional students, the presence of nontraditional students, and so on. Mandating that all schools address these issues in the same way will limit their ability to tailor their policies and procedures to their campus community and implement their individual educational missions.

IV. The proposed rules *requiring* schools to dismiss harassment complaints go beyond the Department's authority to effectuate the nondiscrimination provisions of Title IX and are practically unworkable.

Section 106.45(b)(3) of the proposed rules *requires* schools to dismiss complaints of sexual harassment if they don't meet specific narrow standards. If it's determined that harassment doesn't meet the improperly narrow definition of severe, pervasive, *and* objectively offensive harassment, it *must* be dismissed, per the command of the rule. If severe, pervasive, *and* objectively offensive conduct occurs outside of an educational program or activity, including most off-campus or online harassment, it *must* be dismissed. However, the Department lacks the authority to require schools to dismiss complaints of discrimination.

Under Title IX, the Department is only authorized to issue rules "to effectuate the [anti-discrimination] provision of [Title IX]." Title IX does not delegate to the Department the authority to tell schools *when they cannot* protect students against sex discrimination.⁴⁸ By requiring schools to dismiss certain types of complaints of sexual harassment, without regard to whether those forms of harassment deny students educational opportunities on the basis of sex, § 106.45(b)(3) fails to effectuate Title IX's anti-discrimination mandate and would force many schools that already investigate off-campus conduct under their student conduct policies to abandon these anti-discrimination efforts. While the Department is well within its authority to require schools to adopt civil rights protections to effectuate Title IX's mandate against sex discrimination, it does not have authority to force schools to violate students' and employees' civil rights under Title IX by forcing schools to ignore sexual harassment.

The Department notes that if conduct doesn't meet the proposed rule's definition of harassment or occurs off-campus, schools may still process the complaint under a different conduct code, but not Title IX. This "solution" to its required dismissals for Title IX investigations is confusing and impractical. The

⁴⁷ *Murakowski v. Univ. of Del.*, 575 F. Supp. 2d 571, 585-86 (D. Del. 2008) ("[N]either a full-scale adversarial proceeding similar to those afforded criminal defendants, nor an investigation, which would withstand such a proceeding, is required to meet due process. A university's primary purpose is to educate students: '[a] school is an academic institution, not a courtroom or administrative hearing room.' A formalized hearing process would divert both resources and attention from a university's main calling, that is education. Although a university must treat students fairly, it is not required to convert its classrooms into courtrooms.")

⁴⁸ See Michael C. Dorf, *The Department of Education's Title IX Power Grab*, VERDICT (Nov. 28, 2018), <https://verdict.justia.com/2018/11/28/the-department-of-educations-title-ix-power-grab>.

proposed regulations offer no guidance or safe harbor for schools to offer parallel sexual harassment proceedings that do not comply with the detailed and burdensome procedural requirements set out in the proposed rule. Schools that did so would no doubt be forced to contend with respondents' complaints that the school had failed to comply with the requirements set out in the NPRM and thus violated respondents' rights as described in the NPRM.

The Department's overreaching and unprecedented proposed rules ignore and increase costs to survivors and institutions and go beyond the Department's authority to enforce Title IX. Instead of effectuating Title IX's prohibition on sex discrimination in schools, these rules serve only to protect schools from liability when they fail to address complaints of sexual harassment and assault. **The Center for Survivor Agency and Justice** calls on the Department of Education to immediately withdraw this NPRM and instead focus its energies on vigorously enforcing the Title IX requirements that the Department has relied on for decades, to ensure that schools promptly and effectively respond to sexual harassment and its profound human and economic costs.

Thank you for the opportunity to submit comments on the NPRM. Please do not hesitate to contact us for further discussion and information.

Sincerely,



Erika Sussman, J.D.
CSAJ Founder & Executive Director
erika@csaj.org



Lisalyn Jacobs, J.D.
CSAJ Director of Law & Policy
lisalyn@csaj.org



Yvette Butler, J.D.
CSAJ Director of Capacity Building and Systems Change
yvette@csaj.org

Center for Survivor Agency and Justice
641 S Street, 3rd Floor
Washington, DC 20001
www.csaj.org