Comment Regarding the Process for the ED-2018-OCR-0064 Proceeding & Its Reflection in the Overall Themes and Goals of the Proposed Rules

By Nancy Chi Cantalupo, http://ssrn.com/author=884485

Filed in Response to the Notice of Proposed Rulemaking regarding Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Office of Civil Rights, Department of Education, ED-2018-OCR-0064, RIN 1870-AA14

I write this comment to put on the record various facts about events leading up to this proceeding and the content of these proposed rules. These facts are relevant to the concern—extant since federal administrative agencies like the Department of Education began to be created and the bedrock difficulty upon which U.S. administrative law is built—that federal administrative agencies do not appear in the U.S. Constitution and put unelected officials in charge of lawmaking in a democratic nation.

The notice and comment process was created to deal with these fundamental concerns regarding whether our "constitutional democracy should permit unelected administrators to define fundamental regulatory policies,"[1] since administrative agencies are not authorized by the U.S. Constitution. The Administrative Procedure Act was passed in 1946 with a primary goal of dealing with this constitutional problem, and it created "a brilliantly crafted check and balance on governmental regulation… [that] rests in the people," rather than another branch of government.[2] In this "commenting power," structured so that, "[w]hen an agency proposes a rule, individuals get a chance to comment, and an agency must respond to significant comments raised during the rulemaking before the rule can become final and effective,"[3] lies what many consider "one of the most fundamental, important, and far-reaching of democratic rights."[4]

Simultaneously a democratic right and a check and balance on bureaucratic power, the commenting power implicates civil rights. The United States is a nation that used its laws to create and uphold slavery, including through constitutional provisions that once counted enslaved persons as 3/5ths of a person but did not allow them to vote, and where women's right to vote has not been recognized by the Constitution for even 100 years yet. In light of this history, we must be especially vigilant to guarantee equally all rights fundamental to the full participation of all persons in democratic processes.

Given the centrality of the democratic check and balance goals to the commenting power, and the equal protection implications of protecting it, events that occurred in the summer and fall of 2017 with regard to Title IX and sexual harassment are an important backdrop to the even more recent issuance of the NPRM with which this comment begins. Beginning in June and ending on September 21, 2017, ED opened a comment period during which the public was invited to share ideas with ED regarding the Trump administration's Executive Order 13777, establishing a federal policy to "alleviate unnecessary regulatory burdens." Thousands of

[1] Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HAV. L. REV. 1511, 1513 (1992).
[2] Donald J. Kochan, *The Commenting Power: Agency Accountability through Public Participation*, 70 OKLA. L. REV. 601, 601–2 (2018).
[3] *See id.* at 601.
[4] *Id.* at 602.

comments were filed, and this flood prompted two of my law students, a colleague, and I to read all of the comments and to code the comments that addressed Title IX to see how many commenters urged the Trump administration to change its enforcement of Title IX.

We found that of the 16,376 comments filed with ED, 12,035 comments addressed Title IX, and 99 percent (n: 11,893) of these comments were filed in support of Title IX.[5] Furthermore, 96 percent of these comments (n: 11,528) specifically urged ED to uphold the 2011 Dear Colleague Letter on Sexual Violence (2011 DCL).[6] Only one percent (n: 137) filed comments opposing Title IX, of which even fewer (n: 123) specifically urged that ED rescind the 2011 DCL.[7]

Of the 11,893 comments that were filed in support of Title IX, 0.9 percent (n: 104) were posted anonymously. Of the 137 comments that opposed Title IX, 44.5 percent (n: 61) were posted anonymously.[8] Commenters who described themselves self-identified as attorneys; college/university professors (of multiple disciplines, including law); family members or friends of accused students or student victims/survivors; non-profit professionals; people who work in state Departments of Education, school principals; students accused and/or found responsible of sexually harassing/assaulting other students; teachers; therapists and counselors (including those working in schools and colleges or universities); U.S. veterans; and victims/survivors of sexual violence (both students and non-students).[9] As our report on our review of the comments documents, many of the comments filed by Title IX supporters were quite substantive and many were deeply personal accounts of the commenter's own experiences with sexual harassment and/or her/his/their friends or family members' with such experiences.[10]

One group of comments (n: 10,363) comments used similar language, with 749 of these comments including unique language added by the individual commenter. Even if all of these 10,363 comments were counted as only one comment (including the 749 with unique individual additions), then 1,673 total comments on Title IX were filed, and of those comments, those supporting Title IX were still among the overwhelming majority, with 92 percent supporting Title IX and only 8 percent opposed to Title IX.[11]

Two non-profit organizations filed comments that represented individual members of the public who signed petitions or similar joint statements, including one comment representing 38,713 signatories to a petition and sixty comments representing 10,190 individuals in all 50 states, as well as the District of Columbia, U.S. territories, and commenters serving in the military, all in support of Title IX and the 2011 DCL.[12] Thus, when all the individual comments,

---

[5] *See* Tiffany Buffkin, Nancy Chi Cantalupo, Mariko Cool & Amanda Orlando, *Widely Welcomed and Supported by the Public: A Report on the Title IX-Related Comments in the U.S. Department of Education's Executive Order 13777 Comment Call* 2 (September 25, 2018). California Law Review Online (Forthcoming). Available at SSRN: https://ssrn.com/abstract=3255205 or http://dx.doi.org/10.2139/ssrn.3255205.
[6] *See id.* at 1.
[7] *See id.* at 2
[8] *See id.*
[9] *See id.*
[10] *See id.* at 3–27.
[11] *See id.* at 2.
[12] *See id.*

as well as the petition and jointly-signed comments, are included, 60,796 expressions of support for Title IX were filed by members of the public, in marked contrast to the 137 comments in opposition.[13] More details, as well as excerpts of certain comments that could be organized into various themes that could be seen in the comments as a whole, can be found in the report itself, *Widely Welcomed and Supported by the Public: A Report on the Title IX-Related Comments in the U.S. Department of Education's Executive Order 13777 Comment Call*, CALIFORNIA LAW REVIEW ONLINE (forthcoming 2019), which is attached and available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3255205.

Of course, ED's call for comments on Executive Order 13777 was not part of an official notice and comment rulemaking process. Therefore, ED was not legally required to respond or engage in the specific steps set out by the APA, nor did it do so. Nevertheless, ED's call for these comments seem to have been intended to function as a measure of the public's views on ED's work and thus appear to have been seeking to fulfill the democratic purposes that the commenting power was created to serve. Had ED actually read and used those comments in the manner in which it appears to have intended to do, the comments on Executive Order 13777 could not have been interpreted by ED as anything other than a loud indication that a wide swath of the public was deeply concerned about the civil rights of survivors and potential victims of sexual harassment and saw the enforcement of Title IX existing at that time and historically (i.e., before ED's subsequent rescission of the 2011 DCL) as important to retain in some meaningful way.

Instead, Secretary DeVos gave a speech weeks before the comment period closed but after thousands of pro-Title IX comments had already been filed, stating that the Obama administration's enforcement of Title IX was a "failed system" that had been "widely criticized."[14] On the basis of this gross misrepresentation of what the public had actually said (and was still saying at the time she gave the speech), DeVos announced her intention to issue what would become this current NPRM in comments where she discussed "due process" ten times but never once mentioned equality, equal rights or anything similar (a very strange omission when discussing a civil rights statute that protects equal educational opportunity) and the only "discrimination" she denounced was so-called reverse discrimination against accused harassers (a claim repeatedly rejected by courts[15]).

Two weeks later and less than 24 hours after the Executive Order 13777 comment period closed, ED rescinded the 2011 DCL, along with other Obama-era guidance and replaced it with a "Q&A on Campus Sexual Misconduct" ("Interim Guidance").[16] The rescission was announced

---

[13] *See id.*

[14] Susan Svrluga, *Transcript: Betsy DeVos's remarks on campus sexual assault*, WASH. POST (Sept. 7, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/09/07/transcript-betsy-devoss-remarks-on-campus-sexual-assault/?utm_term=.abc3866968fc; *see also* Press Release, Dep't of Ed, Department of Education Issues New Interim Guidance on Campus Sexual Misconduct (Sept. 22, 2017). Available at: https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct.

[15] *See* Erin E. Buvuzis, Title IX and Procedural Fairness: Why Disciplined-Student Litigation Does Not Undermine the Role of Title IX in Campus Sexual Assault, 78 MONT. L. REV. 71 (2017).

[16] OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., Q&A ON CAMPUS SEXUAL MISCONDUCT (2017), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf [https://perma.cc/D2PE-XFWZ] [hereinafter

by acting assistant secretary for civil rights, Candice Jackson,[17] in a letter that made no mention of the comments filed in the Executive Order 13777 comment call. Jackson, to provide context, is the Trump administration appointee who, months earlier, had been quoted by the *New York Times* as saying, "90 percent of [sexual assault accusations by students — fall into the category of 'we were both drunk,' 'we broke up, and six months later I found myself under a Title IX investigation because she just decided that our last sleeping together was not quite right.'"[18] In a press release announcing the lawsuit against ED brought by a group of civil and victims' rights organizations challenging these actions, Democracy Forward also stated that "While [ED] was considering the new Title IX policy, Jackson and other senior officials solicited input and were in regular contact with men's rights activists who espouse similar views of sexual assault survivors. It wasn't until she received public pressure that Secretary DeVos even met with survivors to hear their concerns." [19]

Jackson's offensive stereotyping of women and girl victims of sexual harassment were not the only stereotypes displayed by ED's decision to rescind the Obama/Biden-era guidance documents. In fact, the Interim Guidance's departure from ED's historical enforcement only applied to sexual harassment; the evidentiary standard for racial harassment investigations was unchanged. This fact is relevant because before September 2017, schools had to use a preponderance of the evidence standard in *both* sexual[20] *and* racial harassment[21] cases. The Interim Guidance authorizes schools to adopt a clear and convincing evidence standard of proof only in "campus sexual misconduct" cases.[22] The Interim Guidance—which is the guidance under which ED must continue to operate unless or until the NPRM is finalized—says nothing about the Office for Civil Rights (OCR) changing its requirements for racial harassment, however, so the preponderance standard remains in place in racial harassment cases.[23]

Interim Guidance]. https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct [https://perma.cc/3GQJ-68YC].

[17] *Dear Colleague Letter*, OFFICE FOR CIVIL RIGHTS U.S. DEP'T OF EDUC. (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.

[18] Katie Mettler, *Trump official apologizes for saying most campus sexual assault accusations come after drunken sex, breakups*, WASH. POST (July 13, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/07/13/trump-official-apologizes-for-saying-most-campus-sexual-assault-accusations-come-after-drunken-sex-breakups/?utm_term=.0659e1772358.

[19] *Id.*

[20] *See* 2011 DCL, *supra* note *18.*

[21] Voluntary Resolution Agreement, Wallingford Bd. of Educ., Compl. No. 01-13-1207 (Office for Civil Rights, U.S. Dep't of Educ.), http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01131207-b.pdf [https://perma.cc/UU4H-3UXG] [hereinafter Wallingford Bd. of Educ.].

[22] *See* Interim Guidance, *supra* note 20, at 5.

[23] Note that footnote 19 of the Interim Guidance says: "The standard of evidence for evaluating a claim of sexual misconduct should be consistent with the standard the school applies in other student misconduct cases," thereby implying that schools should not adopt different standards for racial harassment and sexual harassment. *Id.* at 5 n.19. Because the Interim Guidance does not state explicitly that schools may adopt "clear and convincing evidence" for racial harassment investigations—as it does with sexual harassment—footnote 19 may operate to discourage schools from exercising the option that the Interim Guidance otherwise suggests they have: to adopt "clear and convincing evidence" in sexual harassment cases. The facial approval of a "clear and convincing evidence" option combined with footnote 19's potential practical undermining of that option may also simply sow confusion into schools' expectations of how OCR will enforce the civil rights laws under its jurisdiction, should OCR investigate a particular school for potential violations of those laws. Such confusion is likely to undercut meaningful enforcement by OCR because schools can credibly argue that OCR's own guidance is contradictory. As former Assistant Secretary for Civil Rights Catherine Lhamon explained to Senator Lankford, OCR's guidance should not be

Thus, the Interim Guidance changed the allowable evidentiary standards so that they are no longer consistent across all the statutes OCR enforces, creating a particular problem for women victims of color, should they be harassed in a manner that is both racial and sexual. Under the Interim Guidance, such racialized sexual harassment (or sexualized racial harassment) leads to the following questions: if a school has adopted different evidentiary standards for sexual and racial harassment, what happens when a woman of color is sexually and racially harassed? What standard will be used if she experiences racialized sexual harassment or sexualized racial harassment? Will she be a woman first or a person of color first? Which of her identities will the school declare to be the important one? These questions are fundamentally "intersectional" and "multidimensional" ones,[24] in that they recognize the multiple communities with which women of color identify or may be identified, as well as the discrimination we likely face as a result of that identification.

The NPRM appears to recognize the inconsistency of the Interim Guidance, because the proposed change quoted above requires consistency in certain circumstances. However, such consistency is not required in all circumstances, and the NPRM uses two methods to push schools to adopt the clear and convincing (C&C) standard. First, many campuses use C&C evidence for faculty discipline cases, a choice which may be a result of collective bargaining by a faculty union such as the American Association of University Professors (AAUP), which insists that C&C evidence is the appropriate standard for faculty misconduct, even in cases of

---

categorized as "law" or "regulation," but is designed to inform schools of what to expect when OCR investigates their compliance with the applicable civil rights statute. *See* Letter from Catherine E. Lhamon, Ass't Sec'y of Civil Rights, to the Hon. James Lankford, Chairman, Subcomm. on Reg. Aff. & Fed. Mgmt., Comm. on Homeland Sec. & Gov't Aff., U.S. Senate (Feb. 17, 2016). The effect of footnote 19 is to obfuscate what OCR will do should it undertake an investigation of a school that has adopted "clear and convincing evidence" only for sexual harassment cases or for both sexual and racial harassment cases. Thus, a school could reasonably decide that there would be little risk of OCR finding a civil rights violation if the school exercised its "clear and convincing evidence" option, even though there would be zero risk of such a violation if the school opted to keep the preponderance standard for investigations involving racial, sexual, and all other forms of discriminatory harassment.

[24] Both "intersectional" and "multidimensional" are terms used first by academics but increasingly found—at least in the case of "intersectional" and "intersectionality"—in mainstream conversation. Intersectionality was first articulated by Professor Kimberlé Crenshaw as a way to describe women of color's (particularly Black women's) experience of multiple, intersecting forms of discrimination based on gender and race. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991). It has since become a "feminist buzzword." *See, e.g.*, Christine Emba, *Intersectionality*, WASH. POST (Sept. 21, 2015), https://www.washingtonpost.com/news/in-theory/wp/2015/09/21/intersectionality-a-primer/. Indeed, the Women's March included the term in the organization's mission and shared the concept with the millions of people who marched in 2017 and 2018. *See Our Mission*, WOMEN'S MARCH, https://www.womensmarch.com/mission/ (last visited September 21, 2018). While "multidimensionality" has a long history in legal theory, intersectionality has informed and altered this term's use. Since the mid-1990s, it has been used by legal scholars struggling to understand the position of individuals whose experiences involve intersecting discrimination and privilege, such as men of color who experience discrimination due to racial identity but benefit from the power associated with masculinity. Multidimensionality is grounded in two principles, "(1) identities are co-constituted and (2) identities are context dependent. A multidimensional approach argues that since identities are co-constituted, race, gender, class, sexual orientation, and other discrete identities are actually imbricated within one another and cannot be understood in isolation." Ann C. McGinley & Frank Rudy Cooper, *Masculinity, Multidimensionality, and Law: Why They Need One Another*, *Introduction to* MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH 1, 6–7 (Frank Rudy Cooper & Ann C. McGinley eds., 2012); *see also* Athena D. Mutua, *Multidimensionality is to Masculinities What Intersectionality is to Feminism*, 13 NEV. L.J. 341, 351–54 (2013); Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 309–10 (2001).

sexual harassment. In addition, many colleges and universities have adopted the AAUP's standards even without a collective bargaining agreement because norms of faculty governance in American higher education[25] give faculty much power to set such policies even outside of a collective bargaining context. Thus, at many schools, particularly where a collectively bargained agreement is in place, changing the C&C standard for faculty misconduct will be more challenging than changing the evidentiary standard for sexual harassment, compelling many institutions to adopt the C&C standard for sexual harassment rather than changing the evidentiary standard for faculty misconduct or even making an exception for complaints of faculty sexual harassment.

Second, because the NPRM's proposed rule only requires consistent standards for student misconduct if a school adopts the preponderance standard for sexual harassment, the NPRM allows schools to adopt the C&C standard for sexual harassment but to keep the preponderance standard for racial harassment. Without a requirement of consistent standards if a school adopts the C&C evidence standard, a school can still adopt policies that create the potential for intersectional legal conflict for women students of color in particular that was opened up as a possibility by the Interim Guidance. This intersectional legal conflict is both a reflection of and an addition to the intersectional and heightened vulnerability that women of color face with regard to sexual harassment.

As I discuss in *And Even More of Us Are Brave: Intersectionality and Sexual Harassment of Women Students of Color*, 42 HARV. J.L. & GENDER __ (forthcoming 2019), which is attached and available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3168909, decades of studies in the workplace, education and the criminal justice system have shown that women of color are both disproportionately targeted for sexual harassment and face particular barriers to getting legal redress. Several factors likely contribute to this vulnerability, but racialized sex stereotypes (or sexualized racial stereotypes) have a particularly pernicious effect, regularly erasing women of color from recognition by harassers, employers, schools, courts, and society in general as sexual harassment victims. Racialized sex stereotypes / sexualized racial stereotypes accomplish this by stereotyping women of color as prostitutes or promiscuous. African American women are stereotyped as "Jezebels,"[26] Latinas as "hot-blooded,"[27] Asian Pacific Islander and Asian Pacific American (API/APA) women as "submissive, and naturally erotic,"[28] multiracial women as "tragic and vulnerable"[29] and American Indian/Native American women as "sexual punching bag(s)"[30] who are "sexually violable" as a "tool of war" and colonization.[31] As

---

[25] *See* Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection Of Academic Freedom and Governance*, 97 GEORGETOWN L. J. 946 (2009).
[26] Joan C. Williams, *Double Jeopardy? An Empirical Study with Implications for the Debates Over Implicit Bias and Intersectionality*, 37 HARV. J.L. & GENDER 185, 214 (2014); *see also* Harris, *supra* note 25, at 49.
[27] Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817, 820 (1993)*; see also* Darlene C. DeFour, *The Interface of Racism and Sexism on College Campuses*, in SEXUAL HARASSMENT ON COLLEGE CAMPUSES: ABUSING THE IVORY POWER 49, 52 (Michele A. Paludi ed., 1996).
[28] Ontiveros, *supra* note 30, at 819; *see also* Harris, *supra* note 25, at 49; Ciera V. Scott et al., *The Intersections of Lived Oppression and Resilience: Sexual Violence Prevention for Women of Color on College Campuses, in* INTERSECTIONS OF IDENTITY, *supra* note 25, at 119, 125–26.
[29] Harris, *supra* note 25, at 49–50.
[30] *See* Debra Merskin, *The S-Word: Discourse, Stereotypes, and the American Indian Woman*, 21 HOW. J. COMM. 345, 353 (2010).
[31] Harris, *supra* note 25, at 49; Scott et al., *supra* note 31, at 126.

is clear from each of these examples, race and gender are so intertwined in these stereotypes that they cannot be separated into discrete categories of discrimination based on race versus gender. These stereotypes then combine with stereotypes deriving from centuries of discrimination against sexual violence victims in criminal proceedings, in which a series of special requirements for the common law crime of rape included the rule that a woman be chaste (meaning as close to a virgin as possible) in order to credibly allege rape.[32]

This combination of stereotypes about women of color as unchaste with stereotypes of unchaste women as "unrapeable" renders women of color simultaneously more likely to be victimized, since harassers believe these stereotypes, and invisible as victims, since these stereotypes make it nearly impossible for women of color to get legal redress. These dynamics have been confirmed by research on criminal cases. For instance, a 2003 study involving a weighted sample of 41,151 cases from the seventy-five most populous U.S. counties adjudicated between 1990-1996 found that even though most male defendants of color were treated more harshly than white defendants when they were charged with crimes that tend to be *inter*-racial, "African-Americans and Hispanics arrested for sexual assault are significantly less likely to be found guilty and receive significantly fewer months of incarceration compared to Whites arrested for sexual assault."[33] Thus, this study shows that defendants of color who were accused of what the research establishes as the primarily *intra*-racial crime of sexual assault were treated more *leniently* than white defendants, but defendants of color who were accused of primarily *inter*-racial crimes were treated more *harshly*.[34]

This erasure of women of color as sexual harassment victims is reflected not only by the NPRM's and the Interim Guidance's tolerance of the intersectional legal conflict that these documents potentially create, but also in an intersectionally racist and sexist narrative with which the Interim Guidance and the NPRM clearly agree, based on Secretary DeVos's statements in September 2017. In this narrative, accusations of sexual assault by college women have been likened to a modern iteration of the white supremacist excuse for lynching, wherein false accusations by white women of sexual harassment by Black boys and men provided a pretext for murdering those boys and men.[35] Because the narrative presents all complainants as white women and all accused students as black men, it treats women of color as invisible, even when women of color are *actually* complainants.

Treatment by the media and some of her own professors of a student survivor who appeared in *The Hunting Ground* provides an example of this phenomenon. In the documentary, Kamilah Willingham shared her experience of being sexually assaulted while at Harvard Law, along with a

---

[32] Michelle J. Anderson, *Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victim*s, 13 NEW CRIM. L. REV. 644, 645 (2010) ("The marital rape exemption and the historical requirements in rape law of resistance, corroboration, and chastity continue to infect both statutory law and the way that actors with[in] the criminal justice system—police, prosecutors, judges, and juries—see the crime of rape.")

[33] *See* Christopher D. Maxwell et al., *The Impact of Race on the Adjudication of Sexual Assault and Other Violent Crimes*, 31 J. CRIM. JUST. 523, 533 (2003).

[34] *Id.* at 526–27, 533–34; *see also* I. Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345, 1370 (2010) ("[T]he vast majority of rapes involving white victims are intraracial.").

[35] *See* Antuan M. Johnson, *Title IX Narratives, Intersectionality, and Male-Biased Conceptions of Racism*, 9 GEO. J. L. & MOD. CRITICAL RACE PERSP. 57, 72–74 (2017); Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103, 106 (2015).

friend, while both were unconscious, by another Harvard Law student.[36] She did not name the accused assailant in the film,[37] but because he had been charged in criminal court for assaulting Ms. Willingham's friend, the record was public. *Dear Prudence* columnist Emily Yoffe published his name, Brandon Winston, and characterized the night in question as "an ambiguous sexual encounter among young adults that almost destroyed the life of the accused, a young black man with no previous record of criminal behavior."[38] Although Ms. Yoffe later noted that Willingham and Winston are black and Willingham's friend is white, her discussion of Winston's criminal conviction (for "simple or 'non-sexual' assault" on Willingham's unnamed friend)[39] made no mention of how the decision in that case to charge an accused assailant for violence to a white woman but not to a black woman exemplifies the documented racist sexism and sexist racism that faces women victims of color, particularly black women, in most criminal courts. Five months later, a group of Harvard Law professors, including Elizabeth Bartholet, Nancy Gertner, Janet Halley, and Jeannie C. Suk,[40] issued a press release expressing support for the African American male accused student,[41] leading Ms. Willingham to address the professors directly:

> You omit key facts of the case, including the perpetrator, Brandon Winston's own statements [e.g., a text message in response to Ms. Willingham's question regarding her friend and whether he had "put {his} p into her v," stating "No!! I passed out after some minor touchings no more than what you and I were doing a finger briefly in the v at most Tell her not to worry!"], to advance your own false narrative in his defense under the guise of racial justice.
>
> Even while claiming without evidence that Black men are disproportionately and wrongly implicated in on-campus sexual assault proceedings, you—charged with shaping some of the brightest legal minds in the country—ignore well-established research on the disproportionate rate at which women of color are sexually assaulted. It is for these women that I write…[42]

Since the NPRM was issued, this narrative, in particular, articles by both Ms. Yoffe and Professor Halley, have once again been cited, this time in support of the NPRM, via an op-ed by Professor Lara Bazelon, the attorney to an accused student, a black man enrolled at one of the California State Universities (CSU),[43] in a downright eerie echo of the public discussion of the

---

[36] *See* THE HUNTING GROUND, at 11:40 (RADiUS-TWC 2015).
[37] *See* Tyler Kingkade, *Harvard Law Grad Kamilah Willingham Fights Back Against Sexual Assault Doubters*, HUFFINGTON POST (Apr. 4, 2016), http://www.huffingtonpost.com/entry/kamilah-willingham-harvard_us_57029258e4b0a06d580631c5 [https://perma.cc/8LLU-TF7W].
[38] Emily Yoffe, *How* The Hunting Ground *Blurs the Truth*, SLATE (June 1, 2015), http://www.slate.com/articles/news_and_politics/doublex/2015/06/the_hunting_ground_a_closer_look_at_the_influential_documentary_reveals.html.
[39] *See* Kamilah Willingham, *To the Harvard Law 19: Do Better*, MEDIUM (Mar. 24, 2016), https://medium.com/@kamily/to-the-harvard-law-19-do-better-1353794288f2 (arguing indictment for "simple or 'non-sexual' assault" shows the grand jury was "not convinced of the seriousness of this action").
[40] *Id.*
[41] *See* Cara Buckley, *Professors Dispute Depiction of Harvard Case in Rape Documentary*, N.Y. TIMES, Nov. 13, 2015, https://www.nytimes.com/2015/11/14/movies/professors-dispute-depiction-of-harvard-case-in-rape-documentary.html.
[42] *See* Willingham, *supra* note 42.
[43] *See* Bazelon, *supra* note 6.

Harvard case. This op-ed specifies that the survivor who accused this student of sexual assault is white and that her accusation resulted in the accused student getting suspended for a little less than one year. However, the op-ed acknowledges in parentheses that a second survivor's accusation against the same student was found to be "unsubstantiated" and is on appeal, without specifying this second survivor's race. Although this omission was initially relevant because the first survivor's race, as well as the accused student's race, had been specified at the beginning of the article[44] (the parenthetical statement regarding the second survivor occurs in the tenth paragraph), a Letter to the Editor from the first survivor revealed its additional relevance because the second survivor, whose accusation was found to be "unsubstantiated," is a woman of color. The first survivor wrote:

> The story Ms. Bazelon relates about a rape accusation was never hers to tell. It's mine.
>
> I am the sexual assault survivor she refers to. She omitted key facts and weaponized my story — a white survivor who brought a complaint about a black student who was later suspended from college — such that it could be used against my fellow survivors, especially survivors of color, who would be the most harmed by Betsy DeVos's proposed reforms. Women of color experience sexual violence at disproportionate rates and have more barriers to reporting and face disbelief.
>
> If Ms. Bazelon truly cared about racial justice in the Title IX process, she would center on survivors of color and not reduce them to a parenthetical. The second accuser of my assailant to whom she refers is my friend, a woman of color; in her case, she wasn't believed.

Thus, despite its attempt to appear to value consistency of evidentiary standards, the NPRM leaves in place—even worsens—the dilemma that the Interim Guidance creates. Should this provision of the NPRM be finalized, any school which has adopted the C&C standard for faculty misconduct will likely have to choose between changing its faculty misconduct standards, which may require re-negotiating an agreement with the faculty union, or setting itself up to make a second impossible choice that will likely open the institution up to charges of both racism and sexism. True, that second impossible choice might never arise, if no woman student of color ever files a complaint alleging the kind of intersectional racialized sexual harassment / sexualized racial harassment commonly directed at women of color, but if a woman of color did make such an allegation, the school would have to decide whether to artificially treat the complaint as alleging only race discrimination or only sex discrimination, since that decision would determine the standard of evidence. Moreover, in light of the disproportionate amount of harassment directed at women of color and the high likelihood that it will be intersectional harassment, the odds are against any school that takes this gamble.

[44] Somewhat confusingly for the op-ed's implication that the first survivor's accusation was based on race, the op-ed also mentions that the first survivor had been dating a teammate of the accused student, who is also a black man. However, the op-ed does not indicate that the first survivor is accusing her ex-boyfriend of sexual assault.

Of course, a school could decide to gamble in a different way: use the more difficult-to-prove C&C evidence standard in racial harassment investigations also, despite past indications by ED, discussed above, that this violates Title VI, and hope that no student complains to OCR, or that OCR finds a reason not to investigate the complaint, or that OCR investigates but finds no violation. If a school wagers in this way, the current administration will have succeeded in making it more difficult for schools to discipline students not only for sexual harassment, but also for racial harassment.

Some may be less concerned about raising the standard of proof in the case of racial harassment, not believing that doing so will, as a practical matter, harm victims of racial harassment, on the assumption that most racial harassment is public and therefore less likely to be a "word-on-word" case where there are no witnesses. In fact, word-on-word racial harassment cases are both easy to realistically hypothesize and to find in real life. For instance, one might imagine a situation where a student sees another student surreptitiously hanging a noose in a place where it is likely to harass African American students but where there are no video cameras or other witnesses besides the single student observer. When the student observer confronts the noose-hanging student, a fist-fight develops, and both students end up in the emergency room with injuries. If the student observer files a complaint against the accused noose-hanger and the accused student denies the charge, the case is a word-on-word racial harassment case.

While such a case is presented hypothetically here, it is hardly outlandish: surreptitious hanging of nooses and other similar visual or verbal symbols happens distressingly frequently on college campuses.[45] In addition, non-hypothetical cases of private racial harassment exist as well. For instance, a white University of Hartford student privately harassed her African American roommate for months, such that the African American woman decided to move out, prompting the white roommate to brag online about the "shockingly gross" ways she had harassed her roommate.[46] Had the African American roommate experienced that harassment without the white roommate bragging online about it, it would again have been a word-on-word case.

It is also worth keeping in mind that misconduct that gets dismissed as "unproveable" because it is word-on-word may have more to do with stereotypes about the victims of that misconduct than it does about the ability to prove the conduct that the victim alleges. In fact, the common use of "he said, she said" to describe word-on-word cases recalls the centuries of *de jure* discrimination against sexual violence victims already mentioned *infra*, and keeps such

---

[45] *See, e.g.*, Mariah Bohanon, *Three Incidents Involving Nooses on College Campuses are Being Investigated as Hate Crimes*, INSIGHT INTO DIVERSITY (May 9, 2017), http://www.insightintodiversity.com/three-incidents-involving-nooses-on-college-campuses-are-being-investigated-as-hate-crimes/; Rachel Chason, *Student Admits to Hanging Noose on Duke Campus*, USA TODAY (Apr. 3, 2015), http://college.usatoday.com/2015/04/03/duke-investigation-underway-after-noose-found-on-campus/; Jingwen Zhang, *Noose Discovery Sparks Campuswide Response*, AMHERST STUDENT (Sept. 12, 2017) https://amherststudent.amherst.edu/?q=article/2017/09/12/noose-discovery-sparks-campus-wide-response; Veronica Hilbring, *It Never Stopped: Here Are 5 Recent Cases of Attempted Lynchings and Noose Intimidation*, ESSENCE (Sept. 15, 2017), https://www.essence.com/news/recent-cases-lynching-noose-intimidation.

[46] Beatrice Dupuy, *White College Student Arrested for Bullying 'Jamaican Barbie' Roommate in Shockingly Gross Ways*, RAWSTORY (Nov. 1, 2017), https://www.rawstory.com/2017/11/white-college-student-arrested-for-bullying-jamaican-barbie-roommate-in-shockingly-gross-ways/.

discrimination alive even though most of the discriminatory rules themselves have been written out of black letter criminal rape law. In addition to the chastity requirement already mentioned, these ancient, "special" rules for proving criminal rape included the requirement that a rape victim's testimony had to be corroborated by third party evidence[47] and that "cautionary instructions" had to be given to juries warning them "to treat a rape complainant's testimony with suspicion" because of the supposed tendency of rape victims to level false accusations.[48] Indeed, plenty of so-called "he said, she said" cases are actually "he said, *they* said," and the use of "he said, she said," by evoking stereotypes, can dismiss not only the victim's testimony but corroborating evidence that actually exists.[49] While the use of such stereotyping can most often be seen with regard to sexual violence victims, racial stereotypes can also undermine the credibility of witnesses, as has been shown in the cases of even third party witnesses who are testifying in non-sexual harassment cases.[50]

Ultimately, with regard to both racial and sexual harassment—and any other kind of discriminatory harassment case—if the case is truly word-on-word, it is fundamentally inequitable to *systematically* and *structurally* privilege the truth-telling presumption given to one party over the other. Although such systematic and structural inequality is built into the criminal justice system, civil rights approaches, whether under Title IX, Title VI or any other civil rights law, cannot tolerate such inequality. If they did, they would undermine their own effectiveness drastically. Indeed, by structuring these proposed rules in a manner that will push schools so strongly to adopt the C&C evidence standard, ED has provided an example of the NPRM's cancer strategy. The NPRM stops just short of requiring the use of the C&C evidence standard, and takes other steps that "criminalize" Title IX and are widely recognized as subverting civil rights goals of protecting equality, thus causing Title IX to essentially undermine its own effective functioning and making it at best a dead letter in fulfilling its own purposes. I address this concern in greater detail in the second of the three comments that I am filing for this NPRM.

Thus, this history of how the Interim Guidance and now this NPRM came into existence demonstrates a process tainted throughout by sexist and sexualized racial stereotyping,

---

[47] Allison Leotta, *I was a Sex-Crimes Prsecutor. Here's Why 'He Said, She Said' Is a Myth*, TIME (Oct. 3, 2018), http://time.com/5413814/he-said-she-said-kavanaugh-ford-mitchell/.

[48] Michelle J. Anderson, *Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victim*s, 13 NEW CRIM. L. REV. 644, 647 (2010) ("The … historical requirements in rape law of resistance, corroboration, and chastity continue to infect both statutory law and the way that actors with[in] the criminal justice system—police, prosecutors, judges, and juries—see the crime of rape.")

[49] An example of such dismissal can be found in the discussion of Christine Blasey Ford's allegations regarding Brett Kavanaugh assaulting her in high school. Although Dr. Ford's allegations had plenty of corroborating evidence, and multiple accusers had come forward with similar allegations that indicated a potential pattern of behavior, there was a persistent tendency to describe the case as "he said, she said," as well as a concerted effort to discount the other accusers' allegations. *See* Aaron Blake, *The Brett Kavanaugh accusation isn't a 'he said, she said' anymore*, WASH POST (Sept. 18, 2018), https://www.washingtonpost.com/politics/2018/09/18/why-brett-kavanaugh-accusation-isnt-really-he-said-she-said-anymore/?utm_term=.00f434c83b08. Neither of the other accusers were asked to testify before the Senate, and one accuser was not even interviewed by the FBI.

[50] *See* Gabriel J. Chin, *"A Chinaman's Chance" in Court: Asian Pacific Americans and Racial Rules of Evidence*, 3 U.C. IRVINE L. REV. 965, 967–68 (2013); Maria L. Ontiveros, *Rosa Lopez, David Letterman, Christopher Darden, and Me: Issue of Gender, Ethnicity, and Class in Evaluating Witness Credibility*, 6 HASTINGS WOMEN'S L.J. 135, 141–43 (1995).

stereotypes that are unsurprisingly reflected in the proposed rules themselves. This history and the proposed codification of such stereotypes into ED's regulations presents serious constitutional questions, and research that I have conducted on the U.S. Supreme Court's equal protection jurisprudence (see *Comparing Single-Sex & Reformed Co-Education: A Constitutional Analysis*, 49 SAN DIEGO L. REV. 725 (2012), attached and available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1940469) indicates that the Supreme Court's scrutiny of such stereotyping by state actors will be very exacting. Furthermore, although that research focused on the constitutionality of single-sex education, other research that I have conducted (for an article entitled *Masculinity & Title IX: Bullying & Sexual Harassment of Boys in the American Liberal State*, 73 MD. L. REV. 887 (2014), attached and available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2490950) demonstrates that single-sex educational environments and sexual harassment of all genders are closely linked.

Although this comment has focused on events preceding or immediately after the rescission of the Obama/Biden-era guidance, it is important to note that, even if one manages to stretch credulity to the point of suggesting that ED was not aware of the widespread opposition to ED's actions at that time, it definitely has had time to educate itself in the 14 months between the rescission and the issuance of the NPRM. I know this because I contacted the Office on Management & Budget (OMB) and met with members of OMB and ED via conference call during the fall of 2018, over a year after the rescission. When I presented the findings reviewed above to the group and let them know where the report was publicly available for free download, the disinterest of the group with whom I met was palpable. There were no questions, and no evidence that ED or OMB would take or did take the opinions of the vast majority of members of the public who commented for that comment call seriously.

Such events must be viewed in light of how this country has failed to equally protect the rights of all people to full participation in democratic processes, in combination with the important democratic and constitutionally-influenced rights given to the public through the commenting power. When considered with those two facts in mind, these events suggest that ED is not merely extremely tone deaf, but is engaging in direct gender discrimination against victims of sexual harassment, who are mainly cisgender women and girls and gender minorities, by refusing to address—or even acknowledge—their comments regarding a law passed to protect their rights to equal treatment, all while cherry-picking and giving outsized influence to comments advocating that ED give inequitably greater rights (please see my second comment as well as my article, *For the Title IX Civil Rights Movement: Congratulations & Cautions*, 125 YALE L.J. F. 281 (2016), attached and available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2720284) to a group that is statistically dominated by cisgender men and boys and that anecdotal evidence indicates is also mainly White.

In sum, even on their own, these events or ED's regulatory proposals demonstrate that the NPRM seeks to rob Title IX of any effectiveness, to damage the civil rights of those Title IX was passed into law to protect, and to deny girls, women, and gender minorities equal protection of the law. In addition, the ED officials who have issued the NPRM have made clear that they hold views rife with gender and race-based stereotypes and have little intention of responding to the public's expressed concerns or respecting democratic principles. Viewed together, the NPRM and the events leading up to it show, in the most stark terms, why these proposed rules cannot be

finalized consistently with either democratic or constitutional values and principles held dear by this nation. This NPRM should be withdrawn and the rescinded Obama/Biden-era guidance put back in place.