Comment Opposing Proposed §§106.45(B)(4)(i) and 106.30 Specifically and the Proposed Rules Inappropriate "Criminalization" of Title IX Generally

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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 file this comment, with supporting documents, as the second in a series of four comments regarding the proposed rules in the *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, ED-2018-OCR-0064, RIN 1870-AA14, proceeding. Although each of my separate comments focuses on a more narrow issue or specific proposed provision, all of my comments fit into a common theme: as a whole, these proposed rules upend the purpose and violate the spirit of Title IX. They do so in the manner of a cancer, attempting to establish enforcement rules that go beyond just failing to fulfill Title IX's goal of ending discrimination, but actually facilitate that discrimination against the very classes of people that the statute is designed to protect, essentially eating away at Title IX from the inside. I therefore write this cover note to make clear that I oppose these proposed rules in their entirety, and I urge the Department of Education (ED) to withdraw all of these proposed rules and withdraw its rescission of the 2011 Dear Colleague Letter and the 2014 Questions & Answers regarding sexual harassment and sexual violence.

I say that these proposals are cancerous to the purpose and spirit of Title IX because they not only subvert Title IX's effectiveness in preventing sexual harassment (including in its most severe forms, such as sexual violence) but also enable and encourage recipients to actively discriminate against women, girls and gender-minorities. The methods these proposals use to accomplish planting this cancer include: (1) directly discriminating against girls, women and gender minorities by trading on sex stereotypes, often racialized, as well as selectively ignoring the voices of those in historically-disenfranchised and now protected classes (2) drastically changing the definition of "sexual harassment" to make what counts as sexual harassment so narrow that schools will be allowed to ignore the vast amount of sexual harassment that harms their students, (3) importing and/or deferring to standards and methods used in the criminal justice system, which treats victims and accused perpetrators unequally, giving much greater rights to the accused than to the victim, (4) making it as difficult as possible for victims to report or seek meaningful redress from their schools after having experienced sexual harassment, and (5) requiring and/or encouraging schools to establish grievance procedures that named harassers can use to intimidate and traumatize victims and make it needlessly difficult for recipients to prevent and end sexual harassment and gender-based violence affecting their students. I discuss method number 3 in greater detail in this comment and provide additional documents in support of my analysis.

This comment details my specific objections to proposed §106.45(B)(4)(i), which strongly pushes recipients to adopt the Clear & Convincing (C&C) evidentiary standard, as an example of a larger attempt by these proposed rules to "criminalize" Title IX by importing standards and procedures used in the criminal justice system into enforcement of a civil rights law. In doing so, the NPRM departs from ED's consistent and at least 24-year-old practice of

requiring schools to use the preponderance of the evidence in investigating and resolving sexual harassment complaints. Available records of enforcement actions show that, in 1995, during the Clinton administration, ED's Office for Civil Rights (OCR) required Evergreen State College to use the preponderance standard in its investigation of a case where a student victim had complained that a professor had sexually harassed her.[1] In 2004, under the George W. Bush administration, OCR again required a school to change its evidentiary standard in sexual harassment to the preponderance standard.[2] Finally, first in 2011[3] and then in 2014,[4] OCR issued proactive guidance documents warning schools that OCR would expect them to use a preponderance standard in sexual harassment cases. This meant that if OCR investigated that school and discovered that the school was not using the preponderance standard, the school was at risk of a finding that it had violated Title IX.

In contrast to these decades of consistent enforcement, the NPRM proposes that:

> [I]n reaching a determination regarding responsibility, the recipient must apply either the preponderance of the evidence standard or the clear and convincing evidence standard. The recipient may, however, employ the preponderance of the evidence standard only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. The recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.[5]

The NPRM cites as support for proposed §106.45(B)(4)(i) the approach taken in the years prior to the history reviewed above, when the NPRM says ED allowed recipients to choose whether to use the preponderance or C&C standard. There are multiple problems with this formulation. As an initial matter, the language quoted above clearly shows that proposed §106.45(B)(4)(i) does not present recipients with a neutral choice between two alternatives. Rather, the NPRM uses two methods to push schools to adopt the 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 sexual harassment. In addition, many colleges and universities

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[1] *OCR Letter of Findings in The Evergreen State College*, OCR Case No. 10-92-2064 at 3 (Apr. 4, 1995) (on file with author).

[2] *OCR Letter of Findings in Georgetown University*, OCR Case No. 11-03-2017 at 3 (May 5, 2004). Available at, https://www.ncherm.org/wp-content/uploads/2017/08/199-GeorgetownUniversity--11032017DeGeoia.pdf

[3] *See Dear Colleague Letter: Sexual Violence*, U.S. DEP'T OF EDUC. OFFICE FOR CIV. RIGHTS (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/ letters/colleague-201104.pdf [hereinafter 2011 DCL].

[4] *See Questions and Answers on Title IX and Sexual Violence*, U.S. DEP'T OF EDUC. OFFICE FOR CIV. RIGHTS (Apr. 24, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf [hereinafter OCR Questions and Answers]

[5] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462, 61477 (Nov. 29, 2018) (to be codified at 34 CFR pt. 106). Available at: https://www.govinfo.gov/content/pkg/FR-2018-11-29/pdf/2018-25314.pdf.

have adopted the AAUP's standards even without a collective bargaining agreement because norms of faculty governance in American higher education[6] 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 *all other forms* of misconduct at a lower standard. Allowing schools to adopt C&C evidence *only* for sexual harassment creates legal and administrative barriers for student survivors of sexual harassment that do not apply to the vast majority of comparable populations involved in civil or civil rights proceedings, all of which use the preponderance standard. These groups include, to name just a few, other students alleging other kinds of sex discrimination; students alleging discrimination based on other protected categories, like race or disability; gender-based violence survivors seeking protection orders in civil court; students alleging other forms of student misconduct; and students accused of sexual or any other misconduct who sue their schools in civil court. In reality the preponderance standard is used in the vast majority of cases, not only in internal disciplinary proceedings[7] but also in other administrative or civil court proceedings[8] and under other civil rights statutes that protect equality. These include other education-related statutes and civil rights statutes outside of education, like Title VI of the Civil Rights Act of 1964, which prohibits discrimination in schools based on race, and Title VII, which prohibits sexual harassment in employment settings.[9]

Indeed, separating out sexual violence victims for different procedural treatment would enact a new kind of damaging "rape exceptionalism," reminiscent of the de jure discrimination practiced against rape victims for centuries by the criminal law, including a series of special requirements for the common law crime of rape included the rule that a woman had to be chaste

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[6] *See* Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection Of Academic Freedom and Governance*, 97 GEORGETOWN L. J. 946 (2009).

[7] Research shows that the majority of higher education institutions had voluntarily adopted a preponderance of the evidence standard for *all* student conduct proceedings by the early 2000s. *See* Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 1000 (2004); Heather M. Karjane et al., *Campus Sexual Assault: How America's Institutions of Higher Education Respond* 122 tbl.6.12 (2002), http://www.hhd.org/sites/hhd.org/files/mso44.pdf [http://perma.cc/9Z57-PHR5]. Therefore, using a different standard from the preponderance standard in cases involving sexual or other forms of gender-based violence would mean that student victims of gender-based violence would be less protected than students who are victimized by another student *in any other way*.

[8] Letter from Fatima Goss Graves, Vice President of Education and Employment at the National Women's Law Center, to Catherine Lhamon, Assistant Sec. for Civil Rights 7-10 (Nov. 21, 2013).

[9] *Id.* at 8. *See also Dear Colleague Letter: Sexual Violence*, U.S. DEP'T OF EDUC. OFFICE FOR CIV. RIGHTS 10-11 (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/ letters/colleague-201104.pdf [hereinafter 2011 DCL].

(meaning as close to a virgin as possible) in order to credibly allege rape,[10] the requirement that a rape victim's testimony had to be corroborated by third party evidence[11] 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.[12] By pushing recipients to adopt the C&C standard, ED is signaling its encouragement for giving one group of women and girls, as well as men and boys who are gender-minorities and victimized because of it, *un*equal treatment when compared to everyone else. In other words, ED is practically requiring recipients to actively discriminate against the class of persons that Title IX seeks to protect.

An additional reason why the NPRM's justification of offering the supposed "choice" between evidentiary standards is a problem is because it ignores the decades of learning, research, and reform that led ED to originally change from giving schools a choice of evidentiary standards to requiring them to use the preponderance standard. Much of that history is discussed in the White Paper signed by over 110 law faculty, attached and available at http://www.feministlawprofessors.com/wp-content/uploads/2017/07/Title-IX-Preponderance-White-Paper-signed-7.18.17-2.pdf, detailing the many reasons why recent events and longstanding legal principles support requiring a preponderance standard of proof, as OCR did for 24 years prior to September 2017.

The strong push to get recipients to adopt the C&C evidence standard, moreover, is an example of the NPRM's overall effort to "criminalize" a civil rights law and appropriate its operation so that it cannot and will not advance its equality goals.[13] Criminalization impedes civil rights laws' functions because equality is not a goal of the criminal justice system, which is focused on keeping the abstract, generalized community safe from violence, which primarily relies on incarceration of criminal actors to protect that community,[14] and which will not—because it structurally *can*not—protect victims' rights to equal treatment and protection. In other words, even if criminal law enforcement officials did their jobs perfectly, 100-percent of the time, they would not be able to offer student survivors—of any kind of discriminatory harassment—what a civil rights approach can. Thus, if Title IX is criminalized with regard to

[10] 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.")
[11] 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/.
[12] 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.")
[13] *See Questions and Answers on Title IX and Sexual Violence*, U.S. DEP'T OF EDUC. OFFICE FOR CIV. RIGHTS 32-33 (Apr. 24, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf (describing the measures schools must undertake after a sexual violence allegation); OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENT BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 3–4 (2001) www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf (summarizing the extensive obligations schools undertake under Title IX to avoid sex discrimination).
[14] WAYNE R. LAFAVE, PRINCIPLES OF CRIMINAL LAW §§ 1.2(e), 1.3(a) (2d ed. 2010).

how it protects students from harassment, it will be unable to reach its equality goals and will be sapped of its power.

If one considers the differences between the criminal law and Title IX, the ways in which criminalizing Title IX prevents it from achieving its purposes is clear. And because the central goal of Title IX is to ensure equal treatment and protect students from discrimination, criminalizing Title IX also harms those students who face discrimination. Therefore, it is important to understand the differences between the criminal law and civil rights law and to use that understanding to prevent criminalization.

The first of the four main differences between criminal and civil rights law deals with whose rights are the focal point. The criminal justice system relies primarily on incarceration to achieve its goals, but such incarceration needs to be just, and as a society we have rejected depriving citizens of their liberty based on crimes they did not commit. Therefore, the focus of the criminal justice system is on defendants: the people who might be incarcerated as a result of investigation and prosecution. In fact, crime victims are not even parties to criminal proceedings; they are "complaining witnesses" whose participation is limited to giving testimony.[15] For these reasons, the criminal justice system is not focused on—or even much concerned with—the victim's needs.

The exact opposite is true for civil rights laws' equality-based regimes. For one thing, civil rights laws are not concerned with incarceration[16] because, as a practical matter, schools cannot incarcerate individuals—they are not empowered to enforce the criminal law. More importantly, however, Title IX is concerned with discrimination and therefore protects the rights of discrimination victims. Its focus is on the victim and the victim's legal rights, not on protecting a defendant from unjust incarceration.

This first difference not only underpins the other three, but also leads very directly to the second difference. That is, unlike the limited scope of what the criminal law can accomplish, because Title IX is focused on the victims' needs, it aims and is able to do a lot more to re-establish an equal education for the victim than simply investigating the victim's report and, where warranted, punishing the perpetrator. This focus enables this civil rights system to recognize the wide range of needs that many victims have after experiencing sexual harassment, needs that cannot be addressed by investigation and punishment.

Moreover, as a system that centers its attention on the victim of the civil rights violation, it is of particular concern that, if victims' many needs are not met, they are at serious risk of experiencing a downward spiral that can seriously derail and even ruin their lives.[17] For instance, sexual harassment can cause serious health problems. In the case of students, those health problems can require time off from school, usually causing a drop in grades and even a decline in overall

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[15] *See* Sue Anna Moss Cellini, *The Proposed Victims' Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 14 ARIZ. J. INT'L & COMP. L. 839, 849 (1997) (observing that the victim is sometimes excluded from the courtroom to ensure that the defendant has a fair trial).

[16] *See* OCR Questions and Answers, *supra* note 4, at 27.

[17] Terry Nicole Steinberg, *Rape on College Campuses: Reform Through Title IX*, 18 J.C. & U.L. 39, 44–47 (1991) (detailing the possible physical and psychological harms that can affect sexual violence victims long after the initial incident).

educational performance.[18] The effect on educational performance can then result in economic losses, such as loss of financial aid, tuition dollars, or scholarship money.[19] And in the worst cases, the student may drop out or transfer to a less desirable school because of the cumulative effects of the sexual harassment.[20] The negative impact on future earning potential can be large, diminishing a student's equal employment opportunities as well, even before s/he or they enter the workforce. Even more problematic, certain groups of students, such as first-generation college students, often cannot depend on getting help from their families to heal after the harassment, since their families often have fewer resources, resulting in the sexual harassment having an even greater negative impact on their lives.

These reasons establish why proposed section §106.30's limitations on "supportive measures" (analogous to "accommodations" in my usage here) are so damaging to Title IX and to those it is supposed to protect. Without accommodations, victims whose trauma makes it impossible for them to continue with their education will not be able to stay in or succeed in school. These accommodations may include making changes to the victim's housing, working, commuting, and academic arrangements, possibly obtaining a stay-away order, and/or refunding tuition, as well as providing other types of relief.[21] The criminal law—again, even if it operated flawlessly, without exception—is not structured to provide this kind of assistance to victims and cannot aim at making a victim whole like the civil rights approach can through such accommodations.

The third difference centers on who decides whether an investigation of a victim's report will occur. Almost every case taken up by the criminal system will involve an investigation, and police and prosecutors will dictate the course of that investigation[22]; indeed, they decide whether the case is investigated at all. In instances of sexual violence, police and prosecutors decide to advance very few cases through the criminal system,[23] and few survivors give police or prosecutors the chance to make that decision at all.[24] This is because the vast majority of survivors will use what Professor Douglas Evan Beloof characterizes as the "victim's veto," a decision not to report sexual violence,[25] which thirty years of social science research on campus sexual violence shows is just as relevant to campus sexual violence survivors as to sexual violence survivors generally.[26]

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[18] *See* Kathryn M. Reardon, *Acquaintance Rape at Private Colleges and Universities: Providing for Victims' Educational and Civil Rights*, 38 SUFFOLK U.L. REV. 395, 396 (2005) ("The end result for victims is falling grades, prolonged school absence, and for many, eventual school drop out or failure. Simply put, sexual assault is a significant barrier to equal education for young women today.").

[19] Anna Kerrick, *Justice is More than Jail: Civil Legal Needs of Sexual Assault Victims*, ADVOCATE, Jan. 2014, at 40.

[20] *Id.*

[21] *See* OCR Questions and Answers, *supra* note 4, at 32.

[22] *Id.* at § 1.4(c).

[23] Tamara F. Lawson, *A Shift Towards Gender Equality in Prosecutions: Realizing Legitimate Enforcement of Crimes Committed Against Women in Municipal and International Criminal Law*, 33 S. ILL. U.L.J. 181, 188–90 (2008).

[24] *See* Kimberly A. Lonsway & Joanne Archambault, *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 147 (2012) (finding that only five to twenty percent of victims will report a sexual assault to law enforcement).

[25] Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 306 (1999) (arguing that the "victim veto" occurs when the victim does not even report the wrongdoing).

[26] *See* Kimberly A. Lonsway & Joanne Archambault, *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 159 (2012) (explaining that factors such as "poor evidence gathering by police (especially victim interviews), intimidating defense tactics, incompetent prosecutors, and inappropriate decision making by jurors" result in low sexual assault conviction rates).

In light of this, rather than adopting the criminal system's traditional approach to reporting, a civil rights approach will give victims options through which to exercise their power to decide whether to launch an investigation. Schools were in fact expected to provide such an empowering reporting system by the Obama-Biden administration in its 2014 *Questions and Answers on Title IX and Sexual Violence (2014 Q&As),*[27] the same guidance that DeVos rescinded in 2017.

This guidance, along with the 2011 Dear Colleague Letter, should be re-adopted and their rescission withdrawn because the two-path reporting system that the *2014 Q&As* set up is an example of a reporting system that is consistent with a civil rights approach. The NPRM's approach, in contrast, makes reporting harder, which is exactly the opposite of what a civil rights approach should and would do. In addition, reporting systems like those set out by the *2014 Q&As* have been shown to be a best practice in multiple contexts, as the *2014 Q&As* sought to imitate the restricted and unrestricted reporting system used in the military for many years with significant success.[28] Under systems such as those OCR advised schools to adopt in 2014, with two choices of how to report, survivors can, essentially, make the decision whether to initiate an investigation. If they make an official report to a responsible employee or to the Title IX coordinator, the school must investigate unless the victim explicitly requests that there be no investigation and the Title IX coordinator grants that request, based on multiple factors that the Title IX coordinator should consider.[29] If they choose the confidential path, they can access services and accommodations for healing, but not initiate an investigation unless or until they change their mind and report to a responsible employee or to the Title IX coordinator.[30] In the military system, this process would be described as turning a restricted report into an unrestricted report,[31] which is commonly done.[32]

Because, as the "victim's veto" demonstrates, victims will factor into their reporting decision the processes and parameters by which the investigation will be conducted, the empowering civil rights approach to reporting is intertwined with Title IX's fourth and final difference from the criminal law. Put quite simply, a civil rights approach uses procedures that treat the parties to the proceeding equally—both victims and named harassers.[33] This "procedural equality" contrasts drastically with how the criminal law treats accused assailants and victims, who are radically *unequal* in the criminal process, due largely to the victim's lack of party status in the

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[27] *See* OCR Questions and Answers, *supra* note 4, at 21–22 (describing the relevant factors for reports in weighing a student's request for confidentiality versus a request for a full investigation).

[28] *See Reporting Options*, MYDUTY.MIL, http://www.myduty.mil/index.php/reporting-options (last visited Feb. 24, 2016) (discussing the two reporting options available for sexual assault victims in the military). I know that the Title IX system was designed along the military model because I proposed its adoption to the White House Task Force prior to release of the *2014 FAQs*, which subsequently incorporated a similar system in the guidance it offered to schools.

[29] OCR Questions and Answers, *supra* note 4, at 21, 24 (including factors like risk of additional acts of sexual violence, whether a weapon was involved, means of obtaining relevant evidence, and age of the students involved).

[30] *Id*. at 22, 24 (noting that a student who initially requests confidentiality may later request a full investigation).

[31] *Military Reporting Options FAQ*, DEP'T DEF. SAFE HELPLINE, https://www.safehelpline.org/reporting-options.cfm (last visited Feb. 24, 2016).

[32] DEP'T OF DEF., ANNUAL REPORT ON SEXUAL HARASSMENT AND VIOLENCE AT THE MILITARY SERVICE ACADEMIES, ACADEMIC PROGRAM YEAR 2014–2015, APPENDIX D: STATISTICAL DATA ON SEXUAL HARASSMENT AND ASSAULT 16 (2015) http://sapr.mil/public/docs/reports/MSA/APY_14-15/Appendix_D_Statistical_Data.pdf.

[33] *See* OCR Questions and Answers, *supra* note 4, at 26 (listing the equal procedural requirements provided to both parties).

criminal proceeding.[34] Because victims are merely complaining witnesses in criminal proceedings, they enter the courtroom, give their testimony, and then are often not even allowed to remain in the courtroom for the rest of the trial.[35] Their lack of party status means that victims have no legal representation in the proceeding, since the prosecutor represents the State, which may have very different interests from the victim,[36] and do not get equal evidentiary access or privacy protections from either the prosecution or defense, neither of whom is accountable to the victim. Without party status, victims also have no right to appeal.[37] The procedurally equal system required by a civil rights approach is starkly different, since it considers the victim an equal party to the proceeding and follows the principle that any procedural right provided to one party must be provided to the other.

Procedural equality simply cannot exist without the preponderance standard. Those seeking to criminalize Title IX insist that only the criminal standards of proof are fair to accused students,[38] an argument showing in and of itself that criminalization proponents are not concerned about the rights of *all* students, but simply with those of accused students. However, if one considers *all* students, then it quickly becomes clear that the preponderance standard is the only appropriate standard for a civil rights proceeding. This is so because, of all the potential evidentiary standards, the preponderance standard comes closest to treating both parties equally.

The first reason why the preponderance standard is the most equal of evidentiary standards is because it gives as equal as possible presumptions of truth telling to both parties. The reasonable doubt and C&C standards give heavy presumptions in favor of the accused and signal that factfinders should be so skeptical of the truth of victims' accounts that they have to be at least *clearly convinced* of that truth before they can believe it. Creating a presumption in favor of one party while signaling skepticism of the other's account is, by definition, treating the parties unequally.

Second, in light of the centuries of *de jure* discrimination against sexual violence victims accomplished through the special corroboration rules and "cautionary instructions… to treat a rape complainant's testimony with suspicion"[39] mentioned earlier, selecting a standard of evidence that

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[34] *See* Sue Anna Moss Cellini, *The Proposed Victims' Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 14 ARIZ. J. INT'L & COMP. L. 839, 849 (1997) (noting the various procedures developed to protect defendants and that no comparable body of law has developed to protect victims).

[35] *See* ARK. CODE ANN. § 16-90-1103(a) (LexisNexis, LEXIS through Reg. Sess. & 1st Extraordinary Sess.) (excluding victim from proceedings when "necessary to protect the defendant's right to a fair trial"); UTAH R. EVID. 615(d) (LexisNexis, LEXIS through Dec. 1, 2015) (sequestering victim witnesses from proceedings unless "prosecutor agrees with the victim's presence"); *But see* 18 U.S.C. § 3510 (2012) (prohibiting district courts from sequestering victim witnesses during the trial of the accused); ALASKA STAT. § 12.61.010 (LexisNexis, LEXIS through 2015 1st Reg. Sess. and 1st, 2d, and 3d Spec. Sess. 29th State Leg.) (listing the right of a crime victim to be present during any prosecution).

[36] *See* RUSSELL L. WEAVER et al., PRINCIPLES OF CRIMINAL PROCEDURE 5–6 (4th ed. 2012) (noting the policies and authorizations that affect federal and state prosecutors in practice).

[37] 15A CHARLES ALAN WRIGHT et al., FEDERAL PRACTICE AND PROCEDURE § 3902.1 (2d. ed. 1991).

[38] *See* Nancy Chi Cantalupo & John Villasenor, *Is a Higher Standard Needed for Campus Sexual Assault Cases?*, N.Y. TIMES, Jan. 4, 2017, https://www.nytimes.com/roomfordebate/2017/01/04/is-a-higher-standard-needed-for-campus-sexual-assault-cases [https://perma.cc/RNM8-EGNH].

[39] 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,

signals skepticism of a victim's account—and only the victim's account—is a form of gender stereotyping.[40] Such gender stereotyping is a clear civil rights violation recognized repeatedly under our civil rights statutes dealing with sex discrimination.[41]

Third, the preponderance standard is the standard used in cases involving disputes between two or more private (i.e. non-State) parties, and victims have party status in civil rights cases but not in criminal cases. Indeed, the vast majority of cases in our legal system use the preponderance standard,[42] including, as already indicated, other civil rights cases, as well as administrative proceedings conducted by private entities and government actors, and most school disciplinary proceedings for any student misconduct.[43] And it is the preponderance standard that is used in the vast majority of civil court cases, including those that would be brought by students against their schools for either Title IX violations or for allegations of due process violations on the part of the school.[44] Thus, if we used a different evidentiary standard in campus sexual violence cases under Title IX, we would essentially be saying that victims of sexual harassment should be treated unequally compared to all other analogous cases and compared to all other students in our system.

Fourth, the preponderance standard properly reflects the stakes involved in the proceeding. Although standards of proof are often assumed to reflect the accuracy of the fact-finding—an assumption that implies that some evidentiary standards are more accurate than others—in fact each evidentiary standard simply selects what *kind* of *in*accuracy to risk. Such selections are made based on factors such as societal values and the stakes of the parties involved in that proceeding's outcome.

The NPRM's efforts to criminalize Title IX, including by strongly pushing recipients to change the standard of proof, rely on the perceived unbalanced stakes of victim and accused in criminal proceedings and the knee-jerk analogy of the criminal law to Title IX. Such arguments invoke the high stakes of defendants in the criminal justice system, where a "false positive" or "wrongful conviction" of a sex offense could lead to unjust incarceration and/or lifetime registry as a sex offender, but a "false negative" or "wrongful acquittal" is not perceived as having an important effect on the victim's or complaining witness's future life. In light of these different

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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.")

[40] *See* RANA SAMPSON, U.S. DEP'T OF JUSTICE OFFICE OF CMTY. ORIENTED POLICING SERVS., ACQUAINTANCE RAPE OF COLLEGE STUDENTS 11–12 (2013), http://www.cops.usdoj.gov/html/cd_rom/inaction1/pubs/AcquaintanceRapeCollegeStudents.pdf (explaining how female stereotypes lead to the belief among college men that "most rapes are false reports").

[41] *See* Stephanie Bornstein, *Unifying Antidiscrimination Law through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919 (2016).

[42] *See Judicial Business 2014*, U.S. COURTS (Sept. 30, 2014), http://www.uscourts.gov/statistics-reports/judicial-business-2014 (showing that the number of filings for criminal defendants represented less than a third of all federal case filings in 2014).

[43] *See* 2011 DCL, *supra* note 3, at 8, 11.

[44] *See, e.g.*, Bostic v. Smyrna Sch. Dist., 418 F.3d 355, 360 (3d Cir. 2005) (describing the preponderance of the evidence standard in a Title IX case); Williams v. Paint Valley Local Sch. Dist., 400 F.3d 360, 363 (6th Cir. 2005) (same); Bernard v. E. Stroudsburg Univ., No. 3:09-CV-00525, 2016 WL 755486, at *1, 34 (M.D. Pa. Feb. 24, 2016) (same).

stakes, the criminal law selects standards of proof with higher chances of false negatives and lower chances of false positives.[45]

However, the NPRM's implied or explicit analogies between criminal and civil rights proceedings are once again inapposite. Unlike the unbalanced stakes in criminal proceedings, all students have equal stakes in campus sexual harassment proceedings, regardless of whether they are victims or reported harassers. As already discussed, because schools do not have the powers of the criminal justice system and cannot incarcerate students found responsible of misconduct, accused students' stakes in civil rights law-based sexual harassment proceedings are not analogous to criminal defendants'. Instead, the stakes of students are created by the nature of campuses and similar educational environments, which are usually small communities where all students live and/or attend class in a small geographic area. Accordingly, each student has an equal stake in the ability to remain at the school of the student's choice and to complete her/his/their education there. Accused students could potentially be wrongfully sanctioned, most critically through expulsion, for committing sexual harassment and could conceivably experience unjust difficulties in completing their education elsewhere, even though no research has confirmed that this actually occurs in significant numbers, and several bits of anecdotal evidence indicate that the opposite is true.[46] Likewise, the consequences of a wrongful *failure* to sanction are equally serious for the student victim, and here research has *confirmed* that a high number of student victims transfer schools or drop out entirely[47] to avoid an accused student who is not meaningfully sanctioned. In light of the drop in grades that most victims experience, moreover, many will likely not be able to gain admission at equally prestigious schools, and at least some

[45] For discussion of how procedural choices lead to different balances between wrongful convictions and wrongful acquittals, *see* Christopher Slobogin, *Lessons from Inquisitorialism*, 87 S. CAL. L. REV. 699, 702–04 (2014) (for the proposition that the adversarial system produces wrongful conviction); David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1688 (2009) (for the proposition that the American criminal justice system may benefit from the use of more inquisitorial procedures).

[46] The press has covered several instances of students who were suspended or expelled due to being found responsible for severe sexual harassment and who then transferred to other schools to continue their college educations. *See, e.g.*, Tyler Kingkade, *Brandon Austin, Twice Accused of Sexual Assault, Is Recruited by a New College*, HUFFINGTON POST (July 28, 2014), http://www.huffingtonpost.com/2014/07/28/brandon-austin-northwest-florida_n_5627238.html [https://perma.cc/HF39-ZZCP] (discussing a college basketball player who was suspended, along with a teammate, for sexual assault at Providence College, then transferred to the University of Oregon, where he was suspended again with two other teammates for another joint sexual assault, and finally went on to attend and play basketball at a third school, Northwest Florida State College); Todd South, *Jury Finds Sewanee and Student at Fault; Awards Student $26,500*, CHATTANOOGA TIMES FREE PRESS (Sept. 3, 2011), http://www.timesfreepress.com/news/news/story/2011/sep/03/jury-finds-sewanee-and-student-fault-awards-50000-/58021/ [https://perma.cc/67SB-NVS3] (noting that a student expelled from University of the South for sexually assaulting a classmate has "continued his education at another college"); James Taranto, *An Education in College Justice*, WALL ST. J., Dec 7. 2013, http://www.wsj.com/articles/SB10001424052702303615304579157900127017212 [https://perma.cc/GDB8-S5T7] (noting that a student expelled from Auburn University after being found responsible for sexual harassment had transferred to University of South Carolina Upstate and was expected to graduate in May). In addition, the few efforts to gather less anecdotal evidence have found that schools expel students only in a minority, sometimes an extreme minority, of cases. *See* Tyler Kingkade, *Fewer Than One-Third of Campus Sexual Assault Cases Result in Expulsion*, HUFFINGTON POST (Sept. 29, 2014), https://www.huffingtonpost.com/2014/09/29/campus-sexual-assault_n_5888742.html [https://perma.cc/QF5H-DZEU]; THE HUNTING GROUND (detailing numerous cases in which students accused of sexual assault, including students found responsible, were not expelled).

[47] *See* Dana Bolger, *Gender Violence Costs: Schools' Financial Obligations Under Title IX*, 125 YALE L.J. 2106, 2109–10 (2016).

victims have had difficulties obtaining admission at *any* other school. For instance, one student survivor reported submitting fourteen transfer applications to other colleges before finally being accepted to one.[48]

For all of these reasons, the NPRM's attempts to criminalize Title IX must be rejected and the Obama/Biden-era guidance documents be reinstated. I have attached additional research demonstrating the damage that criminalization does to both Title IX's effectiveness and to the classes of students that it seeks to protect, including Lenahan (Gonzales) v. USA *& Collective Entity Responsibility for Gender-Based Violence*, 21 AM. U.J. GENDER SOC. POL'Y & L. 231 (2013), also available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2308424; *"Decriminalizing" Campus Institutional Responses to Peer Sexual Violence*, 38 J.C. & U.L. 483 (2012), also available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2316533, and *Campus Violence: Understanding the Extraordinary through the Ordinary,* 35 J.C. & U.L. 613 (2009), also available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1457343. The NPRM's attempts to criminalize a civil rights statute should be recognized as the cancer that they are and prevented from infecting and weakening or killing altogether the protections for equal educational opportunity that this groundbreaking civil rights statute is supposed to guarantee.

[48] *See* IT HAPPENED HERE, at 1:13:16 (Neponsit Pictures 2014).