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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 write to express my strong opposition to the Department of Education's (the Department) Notice of Proposed Rulemaking ("NPRM" or "proposed rules"), through which it seeks 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.

I am an attorney with a private practice specializing in representing survivors of sexual harassment in Title IX matters, and I am also a former supervisory general attorney in the Department's Office for Civil Rights (OCR). Every day in my work, I see firsthand the destructive impact that sexual harassment, particularly sexual assault, has on my student-clients' access to education. Every day, I also see the crucial role that schools inevitably play in determining the trajectory of a student survivor after the student suffers sexual abuse or other forms of sexual harassment. For example, I frequently see that when a school has adopted the standards and processes detailed in Obama-era Department guidance documents and the Department's 2001 Guidance,[1] its grievance procedures have a critical impact on ultimately enabling a student survivor to continue their education. Additionally, I regularly see that timely and effective interim measures mean the difference between a survivor dropping out of school and continuing their education. On the contrary, when schools do not effectively respond to, address, and remedy sexual harassment and abuse, the result is often devastating to a survivor's ability to function in school, and in all areas of life.

Based on my expertise on these issues, I vehemently oppose the proposed rules. I strongly oppose all aspects of the proposed rules, as they are entirely wrongheaded and prioritize the interests of

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

schools over students, unjustly tilt the scales towards respondents over complainants, and set up processes that will surely deter sexual harassment and assault complaints while at the same time reducing schools' obligations to provide interim measures to help survivors stay in school. More specifically, I oppose all of the proposed procedural changes to the Title IX process, the proposed definitional change to sexual harassment, and proposed changes that allow schools to do nothing in response to sexual harassment unless only a small subset of school employees actually knows about the harassment. In the remainder of my comments, I will focus on two aspects of the proposed rules that are particularly devastating to students.

A. The proposed deliberate indifference standard is inappropriate for the administrative enforcement context and would allow schools to do virtually nothing in response to sexual harassment.

Under the 2001 Guidance, which went through public notice-and-comment and has been enforced in both Democratic and Republican administrations,[2] schools that do not to act "reasonably" and "take immediate and effective corrective action" violate Title IX. [3]

The standard under the 2001 Guidance appropriately differs from the higher bar erected by the Supreme Court in the very specific and narrow context of a Title IX lawsuit seeking monetary damages against a school because of sexual harassment. To recover monetary damages, a plaintiff must show that their school was deliberately indifferent to known sexual harassment that was severe and pervasive and deprived a student of access to educational opportunities and benefits.[4] But in establishing that standard the Court recognized that it was specific to private suits seeking monetary damages, not to administrative enforcement. It specifically noted that the standard it announced did not affect agency action: the Department was still permitted to administratively enforce rules addressing a broader range of conduct to fulfill Congress's direction to effectuate Title IX's nondiscrimination mandate.[5] It drew a distinction between "defin[ing] the scope of behavior that Title IX proscribes" and identifying the narrower circumstances in which a school's failure to

[2] These standards have been reaffirmed time and time again, in 2006 by the Bush Administration, in 2010, 2011, and 2014 in guidance documents issued by the Obama Administration, and even in the 2017 guidance document issued by the current Administration. U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter: Sexual Harassment* (Jan. 25, 2006), *available at* https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html; U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter: Harassment and Bullying* (Oct. 26, 2010) [hereinafter 2010 Guidance], *available at* https://ww2ed.gov/about/offices/ list/ocr/letters/colleague-201104.pdf ; U.S. Dep't of Educ. Office of Civil Rights, *Dear Colleague Letter: Sexual Violence* at 4, 6, 9, &16 (Apr. 4, 2011) [hereinafter 2011 Guidance], *available at* https://ww2ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf; U.S. Dep't of Educ. Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* 1-2 (Apr. 29, 2014) [hereinafter 2014 Guidance], *available at* https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf ; U.S. Dep't of Educ. *Office for Civil Rights, Questions and Answers on Campus Sexual Misconduct* (Sept. 2017) [hereinafter 2017 Guidance], *available at* https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf .

[3] 2001 Guidance.

[4] *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 290 (1998) (detailing standard for employee-on-student harassment); *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999) (detailing standard for student-on-student harassment).

[5] *Gebser*, 524 U.S. at 291-92 (citing 20 U.S.C. § 1682).

respond to harassment supports a claim for monetary damages.[6] The 2001 Guidance directly addressed this, concluding that it was inappropriate for the Department to limit its enforcement activities to the narrower damages standard and that the Department would continue to enforce the broad protections provided under Title IX. Indeed, in the current proposed regulations, the Department acknowledges that it is "not required to adopt the liability standards applied by the Supreme Court in private suits for money damages."[7]

Under the proposed rules, schools would simply have to not be deliberately indifferent—which means that their response to harassment would be deemed to comply with Title IX as long as it was not clearly unreasonable. As long as a school follows various procedural requirements set out in the proposed rules, the school's response to harassment complaints could not be challenged. The practical effects of this proposed rule would shield schools from any accountability under Title IX, even if a school mishandles a complaint, fails to provide effective supports for survivors, and wrongly determines against the weight of the evidence that an accused harasser was not responsible for sexual assault.

If the Department implements this proposed rule, it would be absolutely devastating to schools' responses to sexual harassment. As I have worked with survivors in Title IX proceedings over the course of ten-plus years, I have seen a general trajectory of schools improving their responses to sexual harassment and assault, particularly in response to the Obama-era guidances, when the prospect of accountability for failing to meet standards clarified in those guidances became real to schools. By adopting the deliberate indifference standard, the Department will be telling schools that they are off the hook for egregious conduct as long as they meet basic procedural requirements, which is totally unjustified. This is a clear instance where the Department is choosing to reduce schools' liability at the expense of the welfare of survivors. Moreover, the use of the deliberate indifference standard does not comport with the administrative enforcement standard used by OCR for the other civil rights statutes under its jurisdiction, and therefore sends a clear statement that the special use of this standard for Title IX complaints is motivated by misogyny.

The inappropriate importation of the deliberate indifference standard to the administrative enforcement process wouuld also move potential complainants from the administrative enforcement process to federal courts. Even if a client's main goal is to ensure a recipient changes its policies or practices as opposed to obtaining monetary damages, there would be no incentive to use the administrative complaint process if the likelihood of holding an institution accountable and forcing policy change is no greater through an OCR complaint than through a lawsuit. A client may as well take the route that will have the additional benefit of potential monetary damages. I frequently talk with clients about the pros and cons of an OCR complaint versus civil litigation, so I know that survivors' main goal frequently is institutional accountability in the form of changes to policies and practices, as opposed to monetary damages, but I also know that they would be disinclined to pursue an OCR complaint if there is no greater likelihood of it resulting in any sort of

[6] *Davis*, 526 U.S. at 639.
[7] 83 Fed. Reg. 61468, 61469.

accountability than a private lawsuit. The cost estimate of this proposed rule should include the costs of the additional burden on federal courts that undoubtedly will flow from this change to the standard, as well as the increased litigation costs that schools and other litigants will incur as a result of complaints being diverted from OCR to the courts.

B. Proposed rules §§ 106.30 and 106.45(b)(3) would devastate survivors' access to education by requiring schools to ignore harassment that occurs outside of a school activity, even when it creates a hostile educational environment.

The proposed rules would *require* schools to ignore all complaints of off-campus or online sexual harassment that happen outside of a school-sponsored program, even if the student is forced to see their harasser on campus every day and the harassment directly impacts their education as a result. These proposed rules utterly ignore the reality of student sexual assault and its impacts.

The proposed rules conflicts with Title IX's statutory language, which does not depend on where the underlying conduct occurred but instead prohibits discrimination that "exclude[s a person] from participation in, . . . denie[s a person] the benefits of, or . . . subject[s a person] to discrimination under any education program or activity . . . ."[8] For almost two decades, the Department's guidance documents have agreed that schools are responsible for addressing sexual harassment if it is "sufficiently serious to deny or limit a student's ability to participate in or benefit from the education program,"[9] regardless of where it occurs.[10]

I know from working with students who are survivors of sexual assault that their education is no less impacted by sexual assault when it is committed off campus by someone they attend school with than when the assault occurs on campus. Here, the proposed rules make a distinction that has no real-world difference in the lives of students who Title IX is ostensibly designed to protect.[11] The proposed rules also ignores the reality that almost 9 in 10 college students live off campus,[12] and all community college and vocational school students live off campus, so these populations would be particularly harmed by these rules.

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[8] 20 U.S.C. § 1681(a).
[9] 2001 Guidance.
[10] 2017 Guidance at 1 n.3 (("Schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities"); 2014 Guidance ("a school must process all complaints of sexual violence, regardless of where the conduct occurred"); 2011 Guidance ("Schools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school's education program or activity"); 2010 Guidance at 2 (finding Title IX violation where "conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school," regardless of location of harassment).
[11] The Department itself admitted in the previous leaked draft of the NPRM that 41% of college sexual assaults occur off campus. *See* Letter from Anne C. Agnew to Paula Stannard et al., *HHS Review: Department of Education Regulation – Noon September 10*, U.S. DEP'T OF HEALTH & HUMAN SERVICES 79 n.21 (Sept. 5, 2018), *available at* https://atixa.org/wordpress/wp-content/uploads/2018/09/Draft-OCR-regulations-September-2018.pdf.
[12] Rochelle Sharpe, *How Much Does Living Off-Campus Cost? Who Knows?*, New York Times (Aug. 5, 2016), https://www.nytimes.com/2016/08/07/education/edlife/how-much-does-living-off-campus-cost-who-knows.html (87%).

I will provide just one of many examples from my work with clients that illustrates the severe harm the Department would perpetrate by allowing the proposed rules to take effect. Recently, I represented a college student who was sexually assaulted off campus by another college student who attended the same university. The other student forced my client to engage in vaginal intercourse despite her verbal and physical resistance. My client reported the sexual assault to the local police department, yet this did nothing to assuage the frequent panic attacks and other symptoms that she suffered as a result of the sexual assault generally, and specifically as a result of her fear of seeing the perpetrator on campus. The school's Title IX grievance procedure resulted in a finding that the perpetrator was responsible for the school's most severe category of sexual assault, and the school suspended the perpetrator from the school for a significant period (though declined to expel him despite this finding of responsibility). The crucial point to understand here is that my client expressed that she was finally able to "take a breath" and begin the healing process only after the Title IX proceeding concluded with the perpetrator's suspension. This was the first time she could stop fearing that she would see him on campus, which occurred with some regularity until he was suspended despite the school's implementation of a no-contact order. Under the proposed rules, the university would have been *required* to do *nothing* in response to this severe sexual assault. My client would almost certainly have dropped out of school if she had been forced to continue to run into the sexual assault perpetrator on campus.

This example is not an anomaly. If the Department implements proposed rules §§ 106.30 and 106.45(b)(3), it is a virtual guarantee that many, many more survivors will drop out of school when their only other option is to continue attending school with a sexual assault perpetrator.

In summary, the Department's proposed rules import inappropriate legal standards into agency enforcement, rely on sexist stereotypes about survivors of sexual harassment and assault, and impose procedural requirements that force schools to tilt their Title IX investigation processes in favor of accused students to the detriment of survivors. Furthermore, the proposed rules protect schools from liability when they fail to address sexual harassment and assault, and prohibit schools from addressing a huge amount of sexual harassment and assault that, left unaddressed, is sure to have a devastating impact on survivors' educations. I respectfully request that the Department withdraws this NPRM and instead focuses on vigorously enforcing the Title IX requirements that the Department has relied on for decades.

Thank you for the opportunity to comment on the proposed rules. Please do not hesitate to contact me if I can provide additional information.

Sincerely,

Lisa N. Cloutier
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