PUBLIC JUSTICE
IMPACT. CHANGE.

[**Docket ID ED-2018-OCR-0064**]

January 30, 2019

Submitted electronically via www.regulations.gov

The Honorable Betsy DeVos
Secretary
U.S. Department of Education
400 Maryland Avenue SW
Washington DC, 20202

Kenneth L. Marcus
Assistant Secretary for Civil Rights
U.S. Department of Education
400 Maryland Avenue SW
Washington DC, 20202

Re: Docket ID ED-2018-OCR-0064, RIN 1870-AA14, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Dear Secretary DeVos and Assistant Secretary Marcus:

Public Justice, a non-profit legal advocacy organization with programs dedicated to protecting civil, consumer and workers' rights, as well as environmental sustainability and access to the courts, is writing in response to the Department of Education's Notice of Proposed Rulemaking to comment on the Department's proposed amendments to regulations implementing Title IX of the Education Amendments of 1972. Public Justice strongly opposes the Department's proposed Title IX regulations because they would make schools less safe for students; make it harder for students to report sexual harassment, get help, and stay in school; permit (and often require) schools to ignore students who report sexual harassment; and allow (and sometimes require) schools to deny student survivors a fair process. Title IX is a crucial civil rights law that addresses the far-reaching impact of sexual harassment—including sexual assault—on students' education by requiring schools to respond appropriately and effectively to sexual harassment. But the proposed rules would protect schools that ignore sexual harassment, instead of the students Title IX was designed to protect. Public Justice is deeply concerned that the proposed rules would eliminate longstanding protections for students, abdicating the Department's legal responsibility to enforce Title IX's nondiscrimination mandate of sex equality in education. For the reasons explained below, Public Justice requests that the Department withdraw its proposed rules and, instead, focus its efforts on enforcing Title IX's mandate of equal access to education for all students, including those who experience sexual harassment.

This request is based on Public Justice's significant experience representing student survivors of sexual harassment—as well as other forms of discrimination and harassment—in federal cases across the country and administrative complaints filed with the Department's Office for Civil Rights ("OCR"). Our Title IX work focuses on ensuring that K-12 schools, colleges, and universities provide *all* students—regardless of sex, sexual orientation, gender identity, race, ethnicity, disability, religion, or family status—a safe educational environment, free from sex

discrimination. And our Title IX work has often resulted in systemic change, designed to make schools safer and protect equal access to education. For example, last year, Public Justice reached a groundbreaking settlement of a Title IX lawsuit against Utah State University on behalf of a former student raped at a fraternity party by a student with a known history of sexual harassment. As part of the settlement, the university is implementing new training and education programs to prevent sexual harassment and strengthening its oversight of the university's Greek organizations.[1] Public Justice also successfully advocated for changes to Claflin University's policies regarding on-campus housing for expectant mothers, convincing the religiously-affiliated university to abandon its discriminatory policies prohibiting pregnant students from residing on campus. As an organization that represents many student survivors of sexual harassment, Public Justice sees the harmful consequences of both sexual harassment and school officials' failure to fulfill their Title IX obligations to address it.

Public Justice believes that the Department's proposed rules ignore the realities of sexual harassment in our nation's schools and would hobble Title IX enforcement, placing a premium on protecting schools from legal liability instead of protecting students from harm. Before detailing our concerns with specific sections of the proposed rules, we offer some background on the realities of sexual harassment in K-12 schools and institutions of higher education.

The Prevalence and Impact of Sexual Harassment in Schools

Sexual harassment is a serious problem in our nation's schools, often with devastating consequences. Far too many students experience sexual harassment:

- In grades 7-12, 56% of girls and 40% of boys are sexually harassed in any given school year.[2] More than 1 in 5 girls ages 14-18 are kissed or touched without their consent.[3]
- During college, 62% of women and 61% of men experience sexual harassment.[4] More than 1 in 5 women and nearly 1 in 18 men are sexually assaulted in college.[5]
- Men and boys are far more likely to be victims of sexual assault than to be falsely accused of it.[6]

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[1] Victoria Hewlett & Noelle E. Cockett, *Commentary: From crisis to opportunity at Utah State University: A model for schools in the #MeToo Age*, Salt Lake Tribune (July 5, 2018), available at https://www.sltrib.com/opinion/commentary/2018/07/05/commentary-crisis/ (a copy of which is attached).

[2] Catherine Hill & Holly Kearl, *Crossing the Line: Sexual Harassment at School*, AAUW 11 (2011), available at https://www.aauw.org/research/crossing-the-line.

[3] National Women's Law Center, *Let Her Learn: Stopping School Pushout for: Girls Who Have Suffered Harassment and Sexual Violence* 1 (Apr. 2017) [hereinafter *Let Her Learn: Sexual Harassment and Violence*], available at https://nwlc.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence.

[4] Catherine Hill & Elena Silva, *Drawing the Line: Sexual Harassment on Campus*, AAUW 17, 19 (2005), available at https://history.aauw.org/aauw-research/2006-drawing-the-line (noting differences in the types of sexual harassment and reactions to it).

[5] David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, ASSOCIATION OF AMERICAN UNIVERSITIES 13-14 (Sept. 2015) [hereinafter *AAU Campus Climate Survey*], available at https://www.aau.edu/key-issues/aau-climate-survey-sexual-assault-and-sexual-misconduct-2015.

[6] Tyler Kingkade, *Males Are More Likely To Suffer Sexual Assault Than To Be Falsely Accused Of It*, HUFFINGTON POST (Dec. 8, 2014), available at https://www.huffingtonpost.com/2014/12/08/false-rape-accusations_n_6290380.html.

In addition, historically marginalized and underrepresented groups are more likely to experience sexual harassment than their peers:

- 56% of girls ages 14-18 who are pregnant or parenting are kissed or touched without their consent.[7]
- More than half of lesbian, gay, bisexual, transgender or queer ("LGBTQ") students ages 13-21 are sexually harassed at school.[8]
- Nearly 1 in 4 transgender and gender-nonconforming students are sexually assaulted during college.[9]
- Students with disabilities are 2.9 times more likely than their peers to be sexually assaulted.[10]

Despite the prevalence of sexual harassment in our schools, it often goes unreported. Only 12% of college survivors and 2% of girls ages 14-18 report sexual assault to their schools or the police.[11] Students often choose not to report because they fear reprisal, believe their abuse was not important enough, or think that no one would do anything to help.[12] Some students—especially students of color, undocumented students, LGBTQ students, and students with disabilities—are less likely than their peers to report sexual assault to the police due to increased risk of being subjected to police violence and/or deportation.[13] For these students, schools are often the only avenue for relief.

In Public Justice's experience, schools often fail to respond appropriately to students who report sexual harassment. They fail to take action to protect and support the students or—even worse—punish the students for reporting.[14] The consequences of experiencing sexual harassment are hard enough; when schools fail to respond effectively, the impact on their education can be ruinous. For example, more than one-third (34.1%) of college students who experience sexual assault drop out of college, which is higher than the overall dropout rate for college students.[15]

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[7] *Let Her Learn: Sexual Harassment and Violence*, *supra* note 3, at 12.

[8] Joseph G. Kosciw et al., *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools*, GLSEN 26 (2018), available at https://www.glsen.org/article/2017-national-school-climate-survey-1.

[9] *AAU Campus Climate Survey*, *supra* note 5, at 13-14.

[10] National Women's Law Center, *Let Her Learn: Stopping School Pushout for: Girls With Disabilities* 7 (2017), available at https://nwlc.org/resources/stopping-school-pushout-for-girls-with-disabilities.

[11] *Poll: One in 5 women say they have been sexually assaulted in college*, WASHINGTON POST (June 12, 2015), available at https://www.washingtonpost.com/graphics/local/sexual-assault-poll; *Let Her Learn: Sexual Harassment and Violence*, *supra* note 3, at 1.

[12] RAINN, *Campus Sexual Violence: Statistics*, available at https://www.rainn.org/statistics/campus-sexual-violence.

[13] *See, e.g.,* Jennifer Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation*, NY TIMES (April 30, 2017), https://www.nytimes.com/2017/04/30/us/immigrants-deportation-sexual-abuse.html?mcubz=3; National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey: Executive Summary* 12 (Dec. 2016), available at https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf.

[14] Research shows that schools are more likely to ignore or punish women of color who report sexual harassment because of harmful race and sex stereotypes that label them as "promiscuous." National Women's Law Center, *DeVos' Proposed Changes to Title IX Explained* (2018), available at https://nwlc.org/resources/devos-proposed-changes-to-title-ix-explained/.

[15] Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18 J.C. STUDENT RETENTION: RES., THEORY & PRAC. 234, 244 (2015), available at https://doi.org/10.1177/1521025115584750.

Too many survivors end up dropping out of school because they don't feel safe and are afraid of seeing the person who sexually assaulted them; some are even required to leave due to plummeting grades in the wake of their trauma.[16] Public Justice has also represented students whose plans to attend college or pursue graduate degrees were derailed when their grades dropped significantly after they were sexually harassed.

Schools can reduce the educational impacts of sexual harassment when they support students who have experienced this trauma. But the Department's proposed rules would discourage schools from responding effectively by, among other things, giving schools carte blanche to ignore the vast majority of students' complaints of sexual harassment. The Department's proposed rules would result in a radical—and legally unjustifiable—departure from the standards it has been using for nearly two decades to determine schools' compliance with Title IX. This would not only harm students who experience the trauma of sexual harassment, but would undermine schools' efforts to ensure that their students have a safe and healthy learning environment.

Specific Objections to the Department's Proposed Rules

For nearly two decades, the Department has used one consistent standard to determine whether a school violated Title IX by failing to adequately address sexual harassment. The Department's 2001 Guidance, which went through public notice-and-comment and has been enforced in both Democratic and Republican administrations,[17] defines sexual harassment as "unwelcome conduct of a sexual nature."[18] The 2001 Guidance requires schools to address student-on-student harassment if almost any school employee "knew, or in the exercise of reasonable care should have known" about the harassment. In the context of employee-on-student harassment, the 2001 Guidance requires schools to address sexual harassment "whether or not the [school] has 'notice' of the harassment."[19] Under the 2001 Guidance, schools that do not act "reasonably" and "take

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[16] *See, e.g.*, Audrey Chu, *I Dropped Out of College Because I Couldn't Bear to See My Rapist on Campus*, VICE (Sept. 26, 2017), available at https://broadly.vice.com/en_us/article/qvjzpd/i-dropped-out-of-college-because-i-couldnt-bear-to-see-my-rapist-on-campus; Alexandra Brodsky, *How much does sexual assault cost college students every year?*, WASHINGTON POST (Nov. 18, 2014), https://www.washingtonpost.com/posteverything/wp/2014/11/18/how-much-does-sexual-assault-cost-college-students-every-year/?utm_term=.6f2ca3905c76.

[17] 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. *See* 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://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.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://www2.ed.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.

[18] U.S. Department of Educ., Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* 2 (2001) [hereinafter 2001 Guidance], available at https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html.

[19] *Id.* at 10.

immediate and effective corrective action" would violate Title IX.[20] These standards have appropriately guided OCR's enforcement activities, effectuating Title IX's nondiscrimination mandate by requiring schools to quickly and effectively respond to serious incidents of sexual harassment and fulfilling OCR's purpose of ensuring equal access to education and enforcing students' rights under Title IX.

In contrast, the Department's proposed rules would eliminate, rather than effectuate, many of Title IX's protections, making it harder for students to report sexual harassment, allowing (and often requiring) schools to ignore students' reports of harassment, and unfairly tilting the grievance process in favor of respondents to the detriment of survivors. Instead of ensuring that survivors of sexual harassment are able to continue their education in a safe environment, free from sex discrimination, the proposed rules would create more roadblocks for survivors to navigate. The proposed rules would also force schools into a "one size fits all" approach to addressing sexual harassment, making it harder for schools prevent and respond effectively to sexual harassment.

I. Proposed Rules §§ 106.30 and 106.44 Would Gut Title IX's Protections by Adopting New Administrative Standards that Would Radically Reduce Schools' Duty to Address Sexual Harassment and Are Inconsistent with Title IX's Text and Purpose, and Longstanding Legal Precedent.

The proposed rules rewrite Title IX's administrative standards, making them match the stricter standards governing private Title IX lawsuits for monetary damages. Why? Because, according to the Department, the liability standards in two Supreme Court decisions—*Gebser v. Lago Vista Independent School District* and *Davis v. Monroe County Board of Education*[21]—"are based on a textual interpretation of Title IX and on policy rationales that the department finds persuasive for the administrative context." 83 Fed. Reg. 61466.

But *Gebser* and *Davis* are based on a textual interpretation of Title IX involving claims for *monetary damages*. A broader legal standard governs Title IX claims for *equitable relief*, and administrative enforcement provides *equitable relief*. The Department has identified the wrong legal standard. As a result, it has proposed regulations that are inconsistent with the text of Title IX, well-established case law interpreting that text, and the statute's purpose. In addition, contrary to the Department's claim, the policy arguments in *Gebser* and *Davis* do not apply to the administrative enforcement context and, in fact, justify broader standards for administrative enforcement.

A. The proposed deliberate indifference standard, notice requirement, and definition of sexual harassment in §§ 106.30 and 106.44 and would hobble Title IX's discrimination protections and endanger students.

The Department relies on the damages liability standards in *Gebser* and *Davis* to justify three proposed rule changes that would eliminate any meaningful form of institutional accountability

[20] *Id.* at 13-15.

[21] *Gebser v. Lago Vista Indep. Sch. 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).

for the sexual harassment that students too often suffer. These three changes—adopting a "deliberate indifference" standard, changing the "notice" requirement, and changing the definition of "sexual harassment"—would be "a sharp backward turn" for the administrative enforcement of Title IX.[22] A comparison of the damages liability standard and the longstanding administrative standard shows how the Department's proposal to scrap the latter would harm students. To recover monetary damages, a plaintiff must show that (1) their school was deliberately indifferent to sexual harassment; (2) an official with authority to take corrective measures had actual knowledge of the harassment; and (3) the harassment was so severe, pervasive, and objectively offensive that it deprived the student of access to educational opportunities and benefits.[23] As explained below, the Supreme Court's deliberate indifference standard, notice requirement, and definition of sexual harassment—designed to account for the circumstances involved in determining liability for *monetary damages*—are inapposite in the far different context of administrative enforcement.

1. The Department's proposed "deliberate indifference" standard would allow schools to do virtually nothing in response to complaints of sexual harassment.

Proposed rule § 106.44(a) would eliminate a school's responsibility to act "reasonably" and "take immediate and effective corrective action" to resolve sexual harassment complaints;[24] instead, it would require schools to respond in a manner that is not "deliberately indifferent." A school's response to sexual harassment would be deliberately indifferent only if it was "clearly unreasonable in light of the known circumstances."[25] Section 106.44(b) of the proposed regulations creates rigid tests for determining deliberate indifference. As long as a school follows the procedures specified in §§ 106.44(b) and 106.45 of the proposed rules, the school's response to harassment complaints could not be challenged. This would have the untenable effect of encouraging schools to go through the motions—elevating form over substance—instead of taking meaningful action to ensure survivors get the support they need to continue their education, free from further harassment. Going through the motions is not enough. In fact, the procedures and investigation tactics that schools sometimes follow to show they "did something" in response to a student's report of sexual harassment often perpetuate sex discrimination and re-traumatize survivors of sexual assault.[26] The practical effects of the proposed rules would shield schools from any accountability under Title IX, even if a school mishandles a sexual harassment complaint, fails to provide effective support for survivors, or wrongly determines against the weight of the evidence that a named harasser is not responsible for sexual assault.

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[22] Joanna L. Grossman & Deborah L. Blake, *A Sharp Backward Turn: Department of Education Proposes to Undermine Protections for Students Against Sexual Harassment and Assault*, Part One, VERDICT (Nov. 27, 2018), available at https://verdict.justia.com/2018/11/27/a-sharp-backward-turn-department-of-education-proposes-to-undermine-protections-for-students-against-sexual-harassment-and-assault.

[23] *See Gebser*, 524 U.S. at 290; *Davis*, 526 U.S. at 650.

[24] 2001 Guidance, *supra* note 18, at 13-15.

[25] Proposed rule § 106.44 (a) & (b)(4) (83 Fed. Reg. 61497).

[26] *See* American Bar Association, *ABA Criminal Justice Section Task Force On College Due Process Rights and Victim Protections: Recommendations for Colleges and Universities in Resolving Allegations of Campus Sexual Misconduct* 9 & n.69 (June 2017) (recognizing certain procedures can put victims through unnecessary trauma and cause a "secondary victimization"), available at https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/ABA-Due-Process-Task-Force-Recommendations-and-Report.authcheckdam.pdf.

Moreover, the Department's rigid tests for—and "safe harbors" from—finding deliberate indifference are even more stringent than the deliberate indifference standard that courts apply to Title IX claims for monetary damages. A "minimalist response" such as "investigating and absolutely nothing more . . . is not within the contemplation of a reasonable response."[27] Nor may a school hide behind limited, ineffective actions to suggest it is not deliberately indifferent.[28]

2. The Department's proposed notice requirement would allow schools to ignore even the most serious forms of sexual harassment and would make it harder for students to report harassment.

Under the proposed rules, schools would only be responsible for addressing sexual harassment when one of a small subset of school employees actually knew about the harassment. Specifically, under § 106.30, schools would not be required to address sexual harassment unless there was "actual knowledge" of the harassment by (i) a Title IX coordinator, (ii) a K-12 teacher (but only for student-on-student harassment, *not* employee-on-student harassment); or (iii) an official who has "the authority to institute corrective measures."[29]

This is a sharp departure from the Department's longstanding requirement that schools address student-on-student sexual harassment if almost any school employee either knows or reasonably should have known about it.[30] That longstanding requirement comports with the reality that, when students report sexual harassment, many of them tell employees who don't have authority to institute corrective measures simply because, when seeking help, they turn to the adults they trust the most. Additionally, students are not typically informed about which employees have authority to address the harassment. The proposed rule is also a sharp departure from the Department's longstanding requirement that schools address all employee-on-student sexual harassment "whether or not the [school] has 'notice' of the harassment."[31] The 2001 Guidance recognized the particularly egregious harm suffered when students are preyed upon by adults, as well as students' vulnerability to pressure from adults to remain silent, and thus acknowledged schools' heightened responsibility to address harassment by their employees.[32]

The Department's proposed "see-no-evil" approach would torpedo institutional accountability, making it easy for schools to insulate themselves from knowledge of harassment to avoid any responsibility. The proposed notice requirement is especially unsettling in the K-12 school context. Under the Department's proposed rules, if a K-12 student told a non-teacher school

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[27] *Vance v. Spencer Cty. Pub. Sch. Dist.*, 231 F.3d 253, 260 (6th Cir. 2000).
[28] *See Leader v. Harvard Univ. Bd. of Overseers*, No. CV 16-10254-DJC, 2017 WL 1064160, at *4 (D. Mass. Mar. 17, 2017) ("[Our] precedent does not appear to suggest that as long as a university acts in some way in response to reported sexual harassment, it has satisfied its burden under the deliberate indifference standard."); *Brodeur v. Claremont Sch. Dist*., 626 F. Supp. 2d 195, 210 (D.N.H. 2009) (holding that some aspects of a response could be "so lax, so misdirected, or so poorly executed" as to amount to deliberate indifference); *Doe v. Forest Hills Sch. Dist.*, No. 1:13-CV-428, 2015 WL 9906260, at *11 (W.D. Mich. Mar. 31, 2015) ("a school cannot conduct a sub-par investigation and then claim that it did not know about harassment because its investigation did not turn up proof beyond peradventure to support the charges").
[29] Proposed rule § 106.30 (83 Fed. Reg. 61496).
[30] 2001 Guidance, *supra* note 18, at 13-14.
[31] *Id*. at 10.
[32] *Id*. at 10-11.

employee they trust—such as a guidance counselor, teacher's aide, or athletics coach—that they had been sexually assaulted by another student, the school would have no obligation to address the assault.[33] Similarly, if a K-12 student told a teacher she had been sexually assaulted by another teacher or other school employee, the school would have no obligation to address the assault.[34] This is patently ridiculous—and dangerous. Serious sexual harassment could go unchecked simply because a student did not report their sexual assault to the "right" person under the proposed rules' narrow definition. This is also true for students in post-secondary schools. If, for example, a college student told their professor or Resident Advisor that they had been raped by another student, a professor, or another school employee, the college would have no obligation to help them.

Further, the proposed rules in §§ 106.30 and 106.44 would empower serial sexual predators like Larry Nassar at Michigan State University, Richard Strauss at The Ohio State University, George Tyndall at University of Southern California, and Jerry Sandusky at Penn State University. Even if school employees heard repeated complaints or witnessed the sexual abuse themselves, the school would be able to avoid responsibility if no student reported the abuse to the Title IX coordinator or a high-level employee with authority to take corrective action. If a university has no duty to take action on reports to most employees, it is easy for serial sexual predators to continue abusing students for years, even decades. This flies in the face of Title IX's nondiscrimination mandate.

For example, Public Justice represents former students of The Ohio State University ("OSU") who were sexually assaulted and harassed by former OSU physician Dr. Strauss in the guise of medical care. Throughout his two decades of employment at OSU, Dr. Strauss performed prolonged and unnecessary genital and rectal exams, often without gloves. Many students reported their discomfort with Dr. Strauss's exams to coaches, assistant coaches, trainers, athletic directors, other physicians, or other school employees who were not Title IX coordinators or high-ranking school officials with authority to institute corrective action. Under the Department's longstanding rules, OSU was obligated to act on those reports. Under the proposed rules, OSU would have no duty to act. This sends the wrong message to predators, schools and students alike. It tells predators that they can go undetected for years, schools that they have no duty to act on even the most egregious forms of sexual harassment if one of a small subset of the "right" employees didn't know about it, and students that their Title IX right to an education free from sexual harassment is meaningless. Title IX requires the Department to enforce students' civil rights, not put students in harm's way.

Public Justice wholeheartedly agrees with AASA's comments that "allowing schools to ignore reports made to the majority of school employees under the proposed rules would be an unconscionable attack on the safety of students and [school officials'] obligations to ensure their safety in school."[35]

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[33] *See* proposed rule § 106.30 (83 Fed. Reg. 61496) (for K-12, limiting notice to "a teacher in the elementary and secondary context with regard to student-on-student harassment).

[34] *See id.*

[35] Comments of AASA, The School Superintendents Association, on Docket ID ED-2018-OCR-0064, January 22, 2019, at 2.

3. *The Department's proposed definition of sexual harassment prevents schools from providing a safe learning environment.*

Proposed rule § 106.30 improperly grafts the liability standard for monetary damages into the definition of sexual harassment. It defines sexual harassment as "[u]nwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity."[36] It also requires dismissal of complaints that do not meet this definition.[37] Under this definition, even if a student reports sexual harassment to the "right person," their school would still be *required* to ignore the student's Title IX complaint if the harassment hadn't yet advanced to a point that it was actively harming a student's education. A school would be required to dismiss such a complaint even if it involved harassment of a minor student by a teacher or other school employee. The Department's proposed definition conflicts with Title IX's purpose and precedent, discourages reporting, and excludes many forms of sexual harassment that interfere with access to educational opportunities.

The Department offers no legitimate justification for departing from the definition of sexual harassment in the 2001 Guidance: "unwelcome conduct of a sexual nature."[38] This definition properly requires schools to respond to harassment before it escalates to a point that students suffer severe harm. The Department's proposed, narrower definition of sexual harassment forces students to endure repeated and escalating levels of abuse, whether from another student or a school employee, before their schools would be required to investigate and stop the harassment. And, if a student is turned away by their school after reporting sexual harassment, the student is extremely unlikely to report a second time when the harassment escalates. Furthermore, under the proposed definition, schools would no longer have a duty to intervene to *prevent* the more severe and pervasive forms of sexual harassment. By narrowing the definition of sexual harassment, the Department would be undermining Title IX's very purpose: to "provide individual citizens effective protection against [discriminatory] practices."[39]

The Department attempts to justify its proposed definition by citing "academic freedom and free speech."[40] Academic freedom and free speech do not negate the statutory language of Title IX, and nevertheless, are misplaced justifications here. Harassment is not protected speech if it creates a "hostile environment,"[41] *i.e.*, if the harassment limits a student's ability to participate in or benefit from a school program or activity.[42] Decades of Supreme Court precedent reflect a

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[36] Proposed rule § 106.30 (83 Fed. Reg. 61496).
[37] Proposed rule § 106.45(b)(3) (83 Fed. Reg. 61498).
[38] 2001 Guidance, *supra* note 18, at 2.
[39] *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979).
[40] 83 Fed. Reg. 61464, 61484; *see also* § 106.6(d)(1), which states that nothing in Title IX requires a school to "[r]estrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution."
[41] *See* Joanna L. Grossman & Deborah L. Brake, *A Sharp Backward Turn: Department of Education Proposes to Protect Schools, Not Students, in Cases of Sexual Violence*, Part Two, VERDICT (Nov. 29, 2018) [hereinafter *A Sharp Backward Turn Part II*], available at https://verdict.justia.com/2018/11/29/a-sharp-backward-turn-department-of-education-proposes-to-protect-schools-not-students-in-cases-of-sexual-violence. ("There is no legitimate First Amendment or academic freedom protection afforded to unwelcome sexual conduct that creates a hostile educational environment.").
[42] 2001 Guidance, *supra* note 18.

school or employer's ability to limit "speech" when it is harassing, dangerous, and infringing on another individual's ability to work or learn in an environment free from discrimination. Schools have the authority to regulate harassing speech; the Supreme Court held in *Tinker v. Des Moines* that school officials can regulate student speech if they reasonably forecast "substantial disruption of or material interference with school activities" or if the speech involves "invasion of the rights of others."[43] There is no conflict between Title IX's regulation of sexually harassing speech in schools and the First Amendment.

The Department also attempts to justify its proposal to narrow the definition of sexual harassment as a cost-savings measure for schools.[44] By narrowing the conduct to which schools must respond, schools will supposedly spend less on investigating sexual harassment.[45] This rationale is unavailing. Costs are not saved, they are simply shifted from schools to survivors. The students subjected to sexual harassment that isn't deemed sufficiently "severe and pervasive" will bear the costs of the uninvestigated harassment. As the agency charged with implementing Title IX's nondiscrimination mandate, the Department should not be prioritizing schools' potential cost savings over educational harm to students.[46]

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At bottom, the Department's proposed rules on the deliberate indifference standard, notice requirement, and definition of sexual harassment rest on a misinterpretation of the Supreme Court's decisions in *Gebser* and *Davis*. Applying the damages liability standards in *Gebser* and *Davis* to the administrative enforcement context conflicts with the statutory text, well-established case law, and the policy arguments embedded within *Gebser* and *Davis*.

B. The proposed administrative standards in §§ 106.30 and 106.44(a) conflict with Title IX's text.

Under the text of Title IX, a school can violate the statute without actual knowledge of or deliberate indifference to ongoing sex discrimination. Section 1682, entitled "Federal Administrative Enforcement," empowers the Department to enforce Title IX by withholding financial assistance or "by any other means authorized by law." 20 U.S.C. § 1682. The statute further says "no such action shall be taken until the department or agency concerned has advised the appropriate person or persons *of the failure to comply with the requirement* and has determined that compliance cannot be secured by voluntary means." *Id.* (emphasis added). In other words, the statute assumes that schools might fail to comply with the law without knowing it.

The Supreme Court agrees with this reading of Title IX, explaining that the purpose of § 1682's notice requirement is "to avoid diverting education funding from beneficial uses *where a recipient was unaware* of discrimination in its programs and is willing to institute prompt corrective measures." *Gebser*, 524 U.S. at 289 (emphasis added). Section 1682—which requires the Department to ensure the school is notified of its *violations* and won't voluntarily *comply*

[43] 393 U.S. 503, 513, 514 (1969).
[44] 83 Fed. Reg. 61487.
[45] *Id.*
[46] *A Sharp Backward Turn Part II*, *supra* note 41, at 3.

before the Department takes enforcement action—would be redundant if the school had to know how it was contributing to sex discrimination in violation of Title IX in the first place. Under the proposed rules, only "[o]nce it has been established that a recipient has actual knowledge of sexual harassment in its education program or activity" does it "become[] necessary to evaluate the recipient's response." 83. Fed. Reg. 61468. But the text of § 1682 assumes the Department is evaluating a recipient's conduct *before* the recipient has actual knowledge of sexual harassment or other forms of sex discrimination in its programs.

Additionally, the Department's new administrative standards shift the focus of Title IX from the victim of discrimination to the institutional wrongdoer. Congress, however, drafted the statute with "an unmistakable focus on the benefited class" and did not "writ[e] it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices." *Cannon*, 441 U.S. at 691-93.

Instead of focusing on the discriminator, Title IX was drafted from the perspective of the person discriminated against: "No person . . . shall, on the basis of sex, . . . be subjected to discrimination under any educational program . . ." 20 U.S.C. § 1681(a). The Supreme Court has said "Title IX focuses more on 'protecting' individuals" and that "might explain why" the opinion first recognizing an implied right under Title IX "referred to injunctive or equitable relief in a private action." *Id.* at 287. Thus, the Department's proposed administrative standards, which focus entirely on the wrongdoer's conduct and not on protecting the class subject to discrimination, are inconsistent with the statutory text.

C. The proposed administrative standards in §§ 106.30 and 106.44(a) conflict with case law interpreting Title IX.

Courts apply different standards for Title IX claims, depending on the nature of the relief sought—a stricter liability standard for monetary damages and a broader liability standard for equitable relief. There is no doubt which box administrative enforcement falls under. Agencies enforce statutes like Title IX by "condition[ing] continued funding on providing equitable relief to the victim." *Gebser*, 524 U.S. at 288 (citing *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 518 (1982)). In fact, under the proposed rules, the Department's only form of remedial action would be equitable relief.[47]

The Department justifies its proposed administrative enforcement standard on the ground that "a consistent body of law will facilitate appropriate implementation." 83. Fed. Reg. 61466. Yet, instead of adopting the courts' standards for determining compliance with Title IX in actions for equitable relief, the Department proposes to adopt the standards the Supreme Court has imposed on plaintiffs seeking monetary relief. In other words, in the Department's attempt to adopt a "uniform standard" across the courts and administrative agencies, the proposed rules create a major conflict with well-established case law governing Title IX claims.

[47] *See* 83. Fed. Reg. 61480 ("We propose modifying the language to apply to any violation of part 106 and adding language to § 106.3(a) stating that the remedial action deemed necessary by the Assistant Secretary shall not include assessment of damages.").

1. Courts have had expansive powers to enforce Title IX from the beginning.

The Supreme Court's 1979 decision in *Cannon v. University of Chicago* is the launching point of Title IX enforcement in the courts. There, the Supreme Court held that, in addition to administrative enforcement, Title IX created a private cause of action to help "achiev[e] the statutory purposes." *Cannon*, 441 U.S. at 707. *Cannon* involved a woman who alleged that she was denied admission to two private medical universities on the basis of sex. *Id.* at 677. She never alleged deliberate indifference. And the Court did not impose such a requirement.

Instead, the Supreme Court expressly recognized that "it makes little sense to impose on an individual, whose only interest is in obtaining a benefit for herself, . . . the burden of demonstrating that an institution's practices are so pervasively discriminatory that a complete cut-off of federal funding is appropriate." *Id.* at 705. And that "if merely an isolated violation has occurred," then "the violation might be remedied more efficiently by an order requiring an institution to accept an applicant who had been improperly excluded." *Id.* The Court concluded that such equitable relief is "necessary" to "the orderly enforcement of the statute." *Id.* at 705-06.

Over ten years later, the Court further expanded the courts' power to enforce the statute, holding that money damages are also available for violations of Title IX. *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 63-64 (1992). In *Franklin*, a high school student alleged that her teacher sexually harassed and abused her, and that the school knew about it and had failed to act. *Id.* The Court reasoned that, under the common law tradition, the denial of a remedy was "the exception rather than the rule." *Id.* at 71. The Court explained that in the years since *Cannon*, Congress made two amendments to Title IX suggesting that "Congress did not intend to limit the remedies available in a suit brought under Title IX." *Id.* at 72. In *Franklin*, the student alleged intentional discrimination, so the Court did not address whether monetary damages were also available for unintentional violations of Title IX.

In the late 1990s, the Supreme Court clarified the liability standard that applies when a student seeks damages in a Title IX sexual harassment claim against a school. *Gebser* set forth the standard under which a school may be liable for damages under Title IX for employee-on-student sexual harassment, and *Davis* extended that standard to student-on-student sexual harassment cases. The Court held that, to secure money damages, plaintiffs must establish that the recipient of federal funds acted with deliberate indifference, that a person with authority to take corrective action had actual notice, and that the harassment was so severe and pervasive that it deprived the victim's access to an educational opportunity. *See Gebser*, 524 U.S at 288-90; *Davis*, 526 U.S. at 629.

2. Gebser and Davis do not apply to Title IX suits for equitable relief.

The Department's proposed rules import into the administrative context the *Gebser* and *Davis* standard for obtaining monetary damages under Title IX, rather than the courts' standard for obtaining equitable relief under Title IX—which is what administrative enforcement is all about.

But the Court in *Gebser* and *Davis* focused on the standards applicable to awarding a damages *remedy* under Title IX, not the standards for Title IX compliance. As the Court explained in *Gebser*, the fact that "petitioners seek not just to establish a Title IX violation but to recover

damages" is the "aspect of their action . . . that is most critical to resolving the case." 524 U.S at 283. "Title IX's contractual nature," the Court continued, "has implications for our construction of *the scope of available remedies*." *Id.* at 287 (emphasis added).

Most important, the decisions in *Gebser* and *Davis* were expressly limited to private Title IX actions for *monetary damages.*[48] The "central concern" was "ensuring that the receiving entity of federal funds has notice that it will be liable for a monetary award." *Gebser*, 524 U.S at 287.[49] To ensure adequate notice, the Court in *Gebser* and *Davis* required the plaintiffs to show that the school knowingly subjected students to sex discrimination before seeking monetary damages. But actual notice is only needed to hold schools liable for monetary damages. It's not needed when plaintiffs seek only equitable, including injunctive, relief. [50]

The right to seek equitable relief under Title IX, regardless of whether the school had adequate notice it was violating the law, was established before *Gebser* and *Davis* and remains the law today. The "general rule [is] that all appropriate relief is available in an action brought to vindicate a federal right." *Franklin*, 503 U.S. at 68. And courts have granted equitable, injunctive relief under Title IX even when there was no proof that the school had a discriminatory intent, and thus no proof that the school was "on notice" of its violation. *See Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 833 (10th Cir. 1993). The "Supreme Court never has held that a state must have actual notice of its policy's unlawfulness to be liable for injunctive relief." *Sandoval v. Hagan*, 197 F.3d 484, 499 n.14 (11th Cir. 1999) (reversed on other grounds); *see also Ferguson v. City of Phoenix*, 157 F.3d 668, 674 (9th Cir. 1998) (holding that, under *Gebser*, plaintiff could not seek monetary damages because there was no showing of intent, but that other "[s]ubstantial corrective remedies are available").

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[48] *Id.* at 277 ("The question in this case is when a school district may be held liable in damages in an implied right of action under Title IX . . ."); *Davis*, 526 U.S. at 629 ("[A]t issue here is the question whether a recipient of federal education funding may be liable for damages under Title IX . . .).

[49] This concern arises "when Congress attaches conditions to the award of federal funds under its spending power," but the Court has never held that Title IX was enacted exclusively pursuant to the Spending Clause. *See Franklin*, 503 U.S. at 75 n.8. In fact, it has often suggested Title IX was also enacted pursuant to § 5 of the Fourteenth Amendment. *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 732 (1982) (assuming Title IX is enacted pursuant to § 5); *United Steelworkers v. Weber*, 443 U.S. 193, 206 n.6 (1979) (explaining Title IX is not like Title VII because Title VII was "not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments"). Therefore, while *Gebser* and *Davis* suggest the power to impose *monetary damages* comes from the Spending Clause, the power of administrative action to enforce the non-discrimination mandate may not. Thus, the Spending Clause—and case law interpreting what's required under it—may be irrelevant.

[50] *See Doe v. Bibb Cty. Sch. Dist.*, 126 F. Supp. 3d 1366, 1377 (M.D. Ga. 2015), *aff'd,* 688 F. App'x 791 (11th Cir. 2017) ("What funding recipients' responsibilities are under Title IX and what they can be held liable for in a private cause of action for damages, however, are not one and the same."); *Frederick v. Simpson Coll.*, 160 F. Supp. 2d 1033, 1035-36 (S.D. Iowa 2001) (finding "elevated standard stated in *Gebser* and reiterated in *Davis* is specific to plaintiff's claims for damages under Title IX" because "[t]he language in those opinions relied heavily on the fact that damages was the remedy sought by the plaintiffs."); *Palmer ex rel. Palmer v. Santa Rosa Cty., Fla., Sch. Bd.*, No. 3:05CV218/MCR, 2005 WL 3338724, at *5 n.10 (N.D. Fla. Dec. 8, 2005) ("It may be that claims for injunctive relief are not governed by the standards set out in *Gebser* and *Davis*, both of which cases involved monetary liability and a legal rationale which seems largely dependent on the negative impact of monetary damage awards upon educational institutions."); *Hawkins v. Sarasota Cty. Sch. Bd.*, 322 F.3d 1279, 1287 (11th Cir. 2003) (accepting OCR's position, post-*Gebser*, that "for regulatory purposes and for private actions for injunctive and other equitable relief, a school has notice if a responsible employee knew, or in the exercise of care should have known of the harassment").

Courts' enforcement of Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act ("ADA") are also instructive because those statutes share the same remedial scheme as Title IX.[51] Under the ADA and Rehabilitation Act, courts routinely grant plaintiffs injunctive relief regardless of whether the wrongdoer acted with deliberate indifference or actual knowledge of discrimination.[52] Just last year, a deaf patient brought an action against a hospital under the ADA and Rehabilitation Act for failing to provide an interpreter during an involuntary commitment evaluation. *See Crane v. Lifemark Hospitals, Inc.*, 898 F.3d 1130, 1133 (11th Cir. 2018). The Eleventh Circuit explained that "proving the failure to provide a means of effective communication, on its own, permits only injunctive relief" and that "[t]o recover monetary damages, a disabled person must further show that the hospital was deliberately indifferent to her federally protected right." *Id.* at 1134.

Thus, the damages liability standard articulated in *Gebser* and *Davis*—requiring deliberate indifference, actual notice by a person with authority to take corrective action, and sexual harassment so severe and pervasive that it deprives a person of access to an educational opportunity—simply does not apply to private Title IX actions for equitable relief. Since Title IX actions for equitable relief are most analogous to the Department's enforcement of Title IX, the proposal to adopt the damages standard in the administrative context is legally untenable. In short, *Gebser* and *Davis* do not provide a legitimate justification for departing from the Department's well-established Title IX compliance standards on sexual harassment.

3. The U.S. government has long recognized that Gebser and Davis do not apply to private actions for equitable relief or administrative enforcement.

The fact that *Gebser* and *Davis* do not apply to Title IX actions for equitable relief is no secret. Until 2017, it was the Department's own position. The 2001 Guidance states "the Court was explicit in *Gebser* and *Davis* that the liability standards established in these cases are limited to private actions for monetary damages" and that the administrative enforcement standards "apply to private actions for injunctive and other equitable relief."[53] And the Department's 2011 Guidance said that whether a school knows "or reasonably should know" about student-on-student harassment is "the standard for administrative enforcement of Title IX *and in court cases*

[51] Section 504 of the Rehabilitation Act and Title II of the ADA borrow their remedies from Title VI, *see* 29 U.S.C. § 794a(a)(2) & 42 U.S.C. § 12333, and "Title IX was patterned after Title VI," *Cannon*, 441 U.S. at 678.

[52] *See Ability Ctr. v. City of Sandusky*, 385 F.3d 901, 912 (6th Cir. 2004) (granting injunctive relief for ADA violations and stating "Title II reaches beyond prohibiting merely intentional discrimination"); *Henrietta D. v. Giuliani*, 119 F. Supp. 2d 181, 204, 206 (E.D.N.Y. 2000), *aff'd sub nom. Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003) (granting injunctive relief for ADA and Rehabilitation Act and finding intent to discriminate irrelevant); *Washington v. Ind. High Sch. Athletic Ass'n, Inc.*, 181 F.3d 840, 846 (7th Cir. 1999) (granting injunctive relief and stating that it "cannot accept the suggestion that liability under Title II of the Discrimination Act must be premised on an intent to discriminate on the basis of disability"); *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999) (upholding § 504 claim, stating "a plaintiff need not prove that defendants' discrimination was intentional"); *Bravin v. Mount Sinai Med. Ctr.*, 186 F.R.D. 293, 301 (S.D.N.Y. 1999) ("In the context of the [Rehabilitation Act], intentional discrimination against the disabled does not require personal animosity or ill will."); *Helen L. v. DiDario*, 46 F.3d 325, 335 (3d Cir. 1995) (granting injunctive relief for ADA violations because "the ADA attempts to eliminate the effects of 'benign neglect,' 'apathy,' and 'indifference.'"); *Tyler v. City of Manhattan*, 857 F. Supp. 800, 817 (D. Kan. 1994) ("The prohibition of Title II applies to action that carries a discriminatory effect, regardless of the [government's] motive or intent.").

[53] 2001 Guidance, *supra* note 18, at iii-iv, n.2.

where plaintiffs are seeking injunctive relief."[54] Nothing in the law has changed, and the Department does not justify its proposed rules by claiming its prior legal interpretation was wrong—nor could it.

Sowing more confusion, the Department's proposal for new administrative enforcement standards conflicts with the Department of Justice's position. The Department of Justice ("DOJ") Title IX Legal Manual says:

> "It is important to remember that the standard for an agency to determine whether a recipient has violated Title IX differs from the higher liability standard of proof that must be met in a court action before monetary damages are awarded. Recipients have an affirmative duty to correct Title IX violations even if no monetary damages would be awarded because of the violation. As the Supreme Court noted in Gebser, federal agencies have the power to 'promulgate and enforce requirements that effectuate [Title IX's] nondiscrimination mandate," even in circumstances that would not give rise to a claim for money damages. *Gebser*, 524 U.S. at 292. Moreover, *it is the position of the Department of Justice that the standards an agency follows in finding a violation and seeking voluntary corrective action would also apply to private actions for injunctive and other equitable (as opposed to monetary) relief.*[55]

DOJ also took this position in an *amicus* brief in *Davis*. *See Brief of the United States as Amicus Curiae* at 24 in *Davis*, 526 U.S. 629, 1998 WL 798868 (1998) (reasoning that "[a] plaintiff in a private enforcement action should likewise be entitled to equitable relief without a showing of deliberate indifference"). Thus, the proposed rules don't just conflict with the courts—they also conflict with the Department of Education's prior legal analysis and DOJ's longstanding position.

The Department claims its proposed rules stem from an interest in being consistent with the courts and adopting a uniform standard.[56] But by applying the legal standard for Title IX claims for damages instead of Title IX claims for injunctive relief, the Department is throwing a grenade into a well-settled area of law. Under the proposed rules, there would be two different standards for seeking injunctive relief depending on whether the victim is seeking administrative action or a court order.

Not only would this lead to unpredictable outcomes and create confusion for students and schools, but it would cause plaintiffs to flock to the courts for relief. Instead of negotiating a voluntary resolution agreement, victims of sex discrimination would be forced to litigate their claims in court. The courts are less efficient and more costly, which is exactly what Congress sought to avoid by creating an administrative enforcement regime. The "*express* enforcement system" of Title IX is administrative enforcement. *Gebser*, 524 U.S. at 276 (emphasis in original). But under the proposed rules, in a vast majority of cases, courts would be the sole enforcer.

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[54] 2011 Guidance, *supra* note 17, at 4, n.12 (emphasis added).
[55] U.S. Dep't of Justice, Civil Rights Division, Title IX Legal Manual, Note 1, January 28, 1999 Guidance Document (emphasis added), available at https://www.justice.gov/crt/title-ix.
[56] 83 Fed. Reg. 61466.

D. The "policy" arguments in *Gebser* and *Davis* do not justify adopting stricter administrative standards.

The Department further justifies its proposal for new administrative standards based on "policy rationales" in *Gebser* and *Davis* "that the Department finds persuasive for the administrative context." 83 Fed. Reg. 61466. But the policy rationales underlying the Court's decisions do not apply to the administrative enforcement context.

1. The Department cannot justify a stricter administrative enforcement standard based on the notice requirement in Gebser and Davis.

The Department says it agrees with *Gebser* and *Davis* that there must be clear notice of what conduct is prohibited under Title IX because the statute, enacted under the Spending Clause, imposes obligations of a contractual nature. *Id.* This argument is misplaced for two main reasons.

First, the "actual notice" requirement in damages cases does not apply to administrative enforcement because the Department provides mainly equitable relief, which unlike monetary damages, merely ensures compliance.[57] Notice is required before punishing a recipient for breaching a contract or denying recipients the funds they were promised. But notice isn't required to clarify what constitutes compliance. In fact, if equitable relief is a condition for future federal funding, it *is* the notice. The Department tells the recipient what is needed to comply with Title IX and receive future federal funding. If the recipient doesn't like what's required, the recipient can withdraw from federal funding. There must be notice to be held liable for monetary damages because that's a harmful consequence for *past* actions, whereas administrative enforcement is a forward-looking, cooperative process to ensure students are protected from sexual harassment and assault.

Second, notice is baked into the administrative enforcement process. *See* 20 U.S.C. § 1682. As the Supreme Court in *Gebser* explained, "Title IX's express means of enforcement requires actual notice to officials of the funding recipient and an opportunity for voluntary compliance before administrative enforcement proceedings can commence." 524 U.S. at 275. Thus, the Court, in justifying the need for clear notice, expressly distinguished lawsuits for monetary damages from administrative enforcement, which already requires federal recipients to be given actual notice and an opportunity to voluntarily comply. *See id.* The Department's proposal to apply the *Gebser* and *Davis* notice requirement in the administrative enforcement context makes no sense. Under its proposal, a federal recipient would need to have notice that it could receive notice of a violation. This is not a reasonable interpretation of the statute and contravenes the entire purpose of a proactive administrative enforcement scheme.[58]

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[57] Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 Yale L.J. 2038, 2094, 2101 (2016) (explaining OCR uses resolution agreements to resolve complaints and "focuses on steps over results" and "systemic over individual discrimination").

[58] U.S. Dep't of Educ., *Title IX and Sex Discrimination*, https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (last visited January 30, 2019) ("OCR also conducts *proactive* investigations, called compliance reviews, to examine *potential* systemic violations based on sources of information other than complaints.") (emphasis added).

2. The Department cannot justify a stricter administrative enforcement standard based on schools' need for flexibility in disciplinary decisions.

As support for its proposed changes, the Department also cites a policy argument in *Davis* that schools should have flexibility in how they dole out discipline. *See* 526 U.S. at 649.[59] But the Department's current rules already provide schools with flexibility in disciplinary matters; requiring schools to respond in a "reasonable" manner satisfies the need for flexibility. Further, in *Davis*, the Court was particularly concerned with flexibility because money was on the line, noting the lack of a damages cap and the fact that one sexual harassment suit could exceed the total federal funding of many school districts. *Id.* at 680. This concern simply does not apply in the administrative context, since the Department does not impose money damages on schools that fail to comply with Title IX.

The proposed rules would involve a radical change, allowing unfettered flexibility in school disciplinary matters involving sexual harassment. In the Notice for Proposed Rulemaking, the Department says that "[w]here a respondent has been found responsible for sexual harassment, any disciplinary sanction decision rests within the discretion of the recipient." 83 Fed. Reg. 61468. This tracks § 106.44(b), a safe harbor provision, which says that if a school simply "follows procedures . . . consistent with § 106.45" then the school's response is not deliberately indifferent. In short, under the proposed rules, if a school follows the prescribed grievance procedures, it could not be held accountable for imposing meaningless disciplinary sanctions on students found responsible for sexual harassment.

But if schools have no duty to ensure there are real consequences for persons *found responsible* for sexual harassment or assault, then perpetrators will continue harassing and assaulting students with impunity. For example, imagine a school that applies the proper procedures, but every time one of its football players is found to have committed a sexual assault, the school simply requires the player to write a short essay and help clean up after practice. Under the proposed guidelines, the school would be fully in compliance with Title IX.

The whole point of fair, equitable procedures is to determine what happened *and then hold the responsible individuals accountable*. Without real accountability, there is no justice for the survivor and nothing to deter others from engaging in sexual harassment in the future. In fact, a mere slap on the wrist is a green light for other perpetrators, signaling that they may act with impunity. Under the proposed rules, schools could just go through the motions without imposing meaningful consequences on harassers or providing meaningful protections to survivors. Such extreme flexibility contradicts Title IX's nondiscrimination mandate.

II. Proposed Rules §§ 106.30 and 106.45(b)(3) Would Require Schools to Ignore Sexual 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

[59] 83 Fed. Reg. 61466-67.

education as a result. To understand why it is crucial to maintain Title IX protections for off-campus activity, one only need to look at the Department's own recent decision to cut off partial funding to the Chicago Public Schools for failing to address two reports of off-campus sexual assault, which the Department described as "serious and pervasive violations under Title IX."[60] In one case, a 10th grade student was forced to perform oral sex in an abandoned building by a group of 13 boys, 8 of whom she recognized from school. In the other case, another 10th grade student was given alcohol and sexually abused by a teacher in his car. If the proposed rule becomes final, school districts would be required to dismiss similarly egregious complaints simply because they occurred off-campus, even if they result in a hostile educational environment.

The proposed rule 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 . . . ."[61] For almost two decades, the Department has required schools to address sexual harassment if it is "sufficiently serious to deny or limit a student's ability to participate in or benefit from the education program,"[62] regardless of where it occurs.[63]

The proposed rules would not only scrap the Department's longstanding interpretation of Title IX, but would offer students less protection than they could get through filing a lawsuit in court. Recognizing that when a person is assaulted, "the effect of such abusive conduct on a victim does not necessarily end with a cessation of the abusive conduct," courts have found that "the possibility of further encounters between a rape victim and her attacker could create an environment sufficiently hostile" to be actionable under Title IX.[64] The proposed rules ignore this reality. As a result, for example, if a middle school student is being sexually harassed by classmates on Snapchat outside of school, or while walking home from school, the school would

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[60] *See* David Jackson et al., *Federal officials withhold grant money from Chicago Public Schools, citing failure to protect students from sexual abuse*, CHICAGO TRIBUNE (Sept. 28, 2018), available at https://www.chicagotribune.com/news/local/breaking/ct-met-cps-civil-rights-20180925-story.html.

[61] 20 U.S.C. § 1681(a).

[62] 2001 Guidance, *supra* note 18, at 22.

[63] 2017 Guidance, *supra* note 17, 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, *supra* note 17, at 29 ("a school must process all complaints of sexual violence, regardless of where the conduct occurred"); 2011 Guidance, *supra* note 17, at 4 ("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, *supra* note 17, 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).

[64] *Kinsman v. Fla. State Univ. Bd. of Trustees*, No. 4:15CV235-MW/CAS, 2015 WL 11110848, at *4 (N.D. Fla. Aug. 12, 2015) (quoting *Kelly v. Yale Univ.*, No. CIV.A. 3:01-CV 1591, 2003 WL 1563424, at *4 (D. Conn. Mar.26, 2003) (internal quotations omitted); *see also Kollaritsch v. Michigan State Univ. Bd. of Trs.*, 298 F. Supp. 3d 1089, 1102 (W.D. Mich. 2017) (finding deliberate indifference in part because the university "did not put in place any accommodations to prevent [the plaintiff] from encountering her harasser" and failed to "provide any interim safety measures after [the plaintiff] reported the violations of the no-contact order"); *Doe v. Derby Bd. of Educ.*, 451 F. Supp. 2d 438, 445 (D. Conn. 2006) (constant potential for interaction with assailant deprived Doe of school's educational opportunities and benefits and therefore supported an actionable Title IX claim).

be prohibited from taking *any action*, even if the harassment begins to affect their ability to focus in school and even if the harasser sits right next to them in classes.

The proposed rules are especially problematic for students in colleges and universities. Almost 9 in 10 college students live off campus, and much of student life takes place outside of official school-sponsored activities. If a student is assaulted off-campus by a professor, the college would be required to ignore their complaint, even if they have to continue taking the professor's class and are too afraid to attend. If a college student is raped at an off-campus party, the college would be prohibited from taking action, even if the student saw their rapist every day in the dining hall, gym, or residence hall. Similarly, the proposed rules would pose particular risks to students at community colleges and vocational schools. Since none of these students live on campus, if they are harassed by faculty or other students, it is especially likely to occur off campus.

The Department's proposed rules ignore the reality that sexual harassment that happens off campus and outside of a school activity is no less traumatic than on-campus harassment.[65] The negative impact on the student's education is typically the same if they are forced to see their harasser regularly at school. Title IX is about students' ability to continue their education despite discrimination; where it occurred is immaterial to how it may affect a student's educational activities.

III. Proposed Rule § 106.30 Improperly Limits the "Supportive Measures" Available to Students Who Report Sexual Harassment.

Under the proposed rules, even if a student suffered harassment that occurred on campus and it was "severe, pervasive, and objectively offensive," their school would still be able to deny the student the "supportive measures" they need to stay in school. Section 106.30 of the proposed rules would allow schools to deny a student's request for effective "supportive measures" on the grounds that the requested measures are "disciplinary," "punitive," or "unreasonably burden[] the other party." Title IX is about the ability of the persons who experienced discrimination—the survivors—to continue their education. The potential burden on a named harasser is not an appropriate consideration under Title IX. The reality of limiting supportive measures for survivors is plain: a school may feel it is not permitted to transfer a named harasser to another class or dorm because it would "unreasonably burden" him, thereby forcing survivors to change all of their class and housing assignments to avoid their harassers. Nowhere in this scenario are the *survivor's* rights and educational opportunities considered. In addition, schools may interpret this proposed rule to prohibit issuing a *one-way* no-contact order against a named harasser and to require survivors to agree to a *mutual* no-contact order, which implies that survivors are at least partially responsible for their own assault.[66] This is a departure from longstanding practice under the 2001 Guidance, which instructed schools to "direct[] the harasser to have no further contact

[65] 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.

[66] Experts have recognized for decades that *mutual* no-contact orders are harmful to victims, because abusers often manipulate their victims into violating the mutual order. *See* Joan Zorza, *What Is Wrong with Mutual Orders of Protection?* 4 DOMESTIC VIOLENCE REP. 67 (1999).

with the harassed student" but not vice-versa.[67] And groups such as the Association for Student Conduct Administration (ASCA) agree that "[e]ffective interim measures, including . . . actions restricting the accused should be offered and used while cases are being resolved, as well as without a formal complaint."[68] Contrary to the purpose of Title IX, this proposed rule would penalize survivors to the benefit of harassers.

IV. Proposed Regulation § 106.12 Would Allow Schools to Claim "Religious" Exemptions for Violating Title IX With No Warning to Students or Prior Notification to the Department.

The current regulations allow religious schools to claim religious exemptions by notifying the Department in writing and identifying which Title IX provisions conflict with their religious tenets.[69] Proposed rule § 106.12 would remove that requirement and permit schools to opt out of Title IX without notice or warning to the Department or students. This would allow schools to conceal their intent to discriminate, exposing students to harm, especially women and girls, LGBTQ students, pregnant or parenting students, and students who access or attempt to access birth control or abortion.[70]

Further, the Department's proposed rule directly conflicts with the current[71] and proposed[72] rules requiring that each covered educational institution "notify" all applicants, students, employees, and unions "that it *does not* discriminate on the basis of sex." By requiring a school to tell students that it does not discriminate while simultaneously allowing it to opt out of anti-discrimination provisions whenever it chooses, the Department is creating a system that enables schools to actively mislead students. Contrary to Title IX's purpose, the proposed rule would protect schools from liability for sex discrimination instead of protecting students who suffer discrimination.

Students deserve to know in advance whether the school they may attend claims a religious exception to Title IX. Without notice, students may commit to attend a university, but learn, after

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[67] 2001 Guidance, *supra* note 18, at 16.

[68] Association for Student Conduct Administration, *ASCA 2014 White Paper: Student Conduct Administration & Title IX: Gold Standard Practices for Resolution of Allegations of Sexual Misconduct on College Campuses* 2 (2014), available at https://www.theasca.org/Files/Publications/ASCA%202014%20White%20Paper.pdf.

[69] 34 C.F.R. § 106.12.

[70] Transgender students are especially at risk because this proposed change threatens to compound the harms created by (i) the Department's decision in February 2017 to rescind Title IX guidance on the rights of transgender students; (ii) the Department's decision in February 2018 to stop investigating civil rights complaints from transgender students regarding access to sex-segregated facilities; and (iii) HHS's leaked proposal in October 2018 for the Department and other federal agencies to define "sex" to exclude transgender, non-binary, and intersex students. *See* U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter* (Feb. 22, 2017), available at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf; Letter from Anne C. Agnew, *supra* note 65; *see also* Erica. L. Green et al., *'Transgender' Could Be Defined Out of Existence Under Trump Administration*, NEW YORK TIMES (Oct. 21, 2018), https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html; Daniel Politi, *Trump Administration Is Considering New Rules to Flat Out Deny Transgender Identity*, Slate (Oct. 21, 2018), available at https://slate.com/news-and-politics/2018/10/transgender-rights-trump-administration-is-considering-new-rules-to-flat-out-deny-trans-identity.html.

[71] 34 C.F.R. § 106.9(a).

[72] Proposed rule §106.8(b)(1) (83 Fed. Reg. 61496).

withdrawing from other schools, paying tuition, and beginning their studies, that they are getting kicked out of school for being gay[73] or transgender[74] or taking birth control.[75] The legal director of the Human Rights Campaign, Sarah Warbelow, has explained that, under proposed rule § 106.12, "There's no way now for advocates that help students understand what schools are intending to do."[76] The demand is a small one: students just want to know which schools will discriminate against them before they decide to give a school their money and forego other opportunities. But under the proposed rules, gay, transgender, and female students are forced to accept that their right to equal treatment—wherever they go—is uncertain.

Under the proposed rule, religiously-affiliated schools that never intended to claim a religious exemption may claim one to try to avoid liability when they are confronted with the fact that they may have mishandled a sexual harassment complaint or discriminated on the basis of sex in some other way. If schools aren't required to submit notice ahead of time, then Title IX's religious exemption could become a go-to safe harbor, ensuring that religiously-affiliated schools always have an "out." When the religious exemption becomes "something to hide behind," instead of a narrow exemption for institutions that truly have religious tenets inconsistent with Title IX, then an institution's exempt status becomes a source of stigma. This is unfair to the religious institutions that would actually qualify for the exemption.

V. Proposed Rule § 106.45(a) Would Improperly Treat Named Harassers Subjected to an Unfair Grievance Process as Victims of Sex Discrimination under Title IX.

The Department has long recognized that a school's treatment of a complainant may constitute sex discrimination under Title IX, but now the Department proposes adding rule § 106.45(a) to say that a school's treatment of a *respondent* may also constitute discrimination on the basis of sex under Title IX. The Department argues that, just as deliberate indifference to complainants' allegations could deny them an education on the basis of sex, "unfair procedures" could deny a respondents an education on the basis of sex. 83 Fed. Reg. 61472.

However, as the court in *Nungesser v. Columbia University* explained, this argument rests on the logical fallacy of false equivalence: it assumes that just because the allegations against the respondent concern a sexual act that everything that follows from it is "sex-based" within the meaning of Title IX. 169 F. Supp. 3d 353, 364 (S.D.N.Y. 2016). If that were true, then anyone who committed, or was accused of committing, sexual assault would be a protected class under Title IX. *Id.* That's not what Title IX requires. *Id.*

"On the basis of sex," as used in Title IX, "refers to one's status, not to whether the underlying conduct was sexual in nature." *Id.* Allegations of procedural unfairness or bias against the respondent in Title IX proceedings "at best reflect a bias against people accused of sexual

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[73] Charlotte West, *How Title IX Exemptions Allow Religious Colleges to Discriminate Against LGBTQ Students*, TEEN VOGUE (Oct. 15, 2018), available at https://www.teenvogue.com/story/how-religious-colleges-discriminate-lgbtq-students-title-ix-exemptions.

[74] Karen Karas, *Title IX Religious Exemptions and the Transgender Student*, COHEN SEGLIAS (July 2, 2018), available at https://www.investigationslawblog.com/2018/07/title-ix-religious-exemptions-transgender-student/.

[75] Tyler Kingkade, *Betsy DeVos Wants to Make it Easier for Religious Schools to Avoid Title IX*, BUZZFEED (Sept. 14, 2018), https://www.buzzfeednews.com/article/tylerkingkade/betsy-devos-religious-exemption-title-ix-discrimination.

[76] *Id.*

harassment and in favor of victims and indicate nothing about gender discrimination." *Haley v. Virginia Comm. Univ.*, 948 F. Supp. 573, 579 (E.D. Va. 1996).

Courts have repeatedly rejected the argument that unfair procedures could constitute discrimination on the basis of sex under Title IX. *See Doe v. Cummins*, 662 Fed. App'x 437, 453 (6th Cir. 2016) (affirming dismissal of respondent's Title IX claim, finding alleged procedural deficiencies showing bias in favor of sexual assault complainants "do[ ] not equate to gender bias because sexual-assault victims can be both male and female"); *Doe v. Rider Univ.*, No. 3:16-CV-4882-BRM-DEA, 2018 WL 466225, at *10 (D.N.J. Jan. 17, 2018) (holding even "allegations of a bias against the alleged perpetrator in favor of the victim is insufficient to show an inference of gender bias" for a Title IX claim); *Doe v. Regents of the Univ. of Cal.*, No. 15–02478, 2016 WL 5515711, at *5 (C.D. Cal. July 25, 2016) (dismissing respondent's Title IX claim because court could not plausibly infer "that a higher rate of sexual assaults committed by men against women, or filed by women against men, indicates discriminatory treatment of males accused of sexual assault in the consequent proceedings"); *Sahm v. Miami Univ.*, 110 F. Supp. 3d 774, 778 (S.D. Ohio 2015) ("Demonstrating that a university official is biased in favor of the alleged victims of sexual assault claims, and against the alleged perpetrators, is not the equivalent of demonstrating bias against male students."); *Marshall v. Ohio Univ.*, No. 2:15-CV-775, 2015 WL 7254213, at *8 (S.D. Ohio Nov. 17, 2015) ("[C]racking down on perpetrators is not the same as cracking down on men."); *Doe v. Univ. of Massachusetts–Amherst*, No. 14–cv–30143, 2015 WL 4306521, at *8 (D. Mass. July 14, 2015) (dismissing Title IX claim where respondent cited only comments that targeted him as a student accused of sexual assault, not any comments "based on his gender" or "suggestive of gender bias"); *King v. DePauw Univ.*, No. 2:14-cv-70, 2014 WL 4197507, at *4 (S.D. Ind. Aug. 22, 2014) (demonstrating a bias against students accused of sexual assault is not the equivalent of demonstrating a bias against males, even if all of the students accused of assault were male).

Thus, while denial of a fair process may certainly amount to a due process violation or a breach of contract, unfair procedures do not constitute discrimination, much less discrimination on the basis of sex. The Department's proposed § 106.45(a) therefore directly conflicts with the express language of Title IX prohibiting "discrimination . . . on the basis of sex" and would only make schools more hesitant to provide meaningful protections to survivors of sexual harassment.

VI. The Proposed Grievance Procedures in § 106.45(b) Are Inconsistent with Title IX's Nondiscrimination Mandate, Inequitable, and Harmful to Survivors of Sexual Harassment.

Current Title IX regulations require schools to "adopt and publish grievance procedures that provide for a prompt and equitable resolution of student and employee complaints" of sexual misconduct.[77] The proposed rules purport to continue this requirement.[78] However, proposed rule § 106.45(b) includes many provisions that would require schools to conduct their grievance procedures in fundamentally *inequitable* ways that favor respondents. The Department focuses on a purported need to increase protections of respondents' "due process rights" to justify

[77] 34 C.F.R. § 106.8(b).
[78] *See* proposed rule § 106.8(c) (83 Fed. Reg. 61496).

undercutting complainants' Title IX protections.[79] But, as explained below, the current Title IX regulations already provide more rigorous due process protections than are required under the Constitution. Moreover, the proposed rules would conflict with Title IX's prohibition of sex discrimination in education and harm survivors of sexual harassment—particularly the procedural rules that would require a presumption of innocence for respondents, allow (and sometimes require) schools to apply a higher evidentiary standard than the preponderance of the evidence, and require live cross-examination by an advisor of choice.

A. Proposed rules §§ 106.45(b)(1)(iv) and 106.45(b)(4)(i), which require schools to adopt a presumption of innocence for respondents and sometimes require schools to apply the "clear and convincing evidence" standard in Title IX investigations, are unlawful and inequitable.

Applying criminal law principles to school disciplinary proceedings, the Department proposes two interrelated rules that would make it much more difficult for survivors of sexual harassment and assault to hold their harassers accountable and continue their education in a safe environment.

First, under proposed § 106.45(b)(1)(iv), schools would be required to presume that the reported harassment did not occur until the investigation was complete and the school made a finding of responsibility. Second, under proposed § 106.45(b)(4)(i), schools would no longer be required to use the "preponderance of the evidence" standard—which means "more likely than not"—in Title IX investigations to decide whether sexual harassment occurred. Instead, schools could use the more demanding "clear and convincing evidence" standard, while allowing all other student misconduct cases to be governed by the "preponderance of the evidence" standard, even if they carry the same maximum penalties. Even worse, proposed rule § 106.45(b)(4)(i) affirmatively *forbids* a school from using the preponderance standard *unless* the school uses that standard for all other student misconduct cases that carry the same potential maximum sanction *and* for all cases against employees. In other words, schools only have "flexibility" to choose a *higher* standard of proof, and only respondents—not complainants—have the right to be treated the same as students involved in other school disciplinary proceedings that don't involve sexual harassment.

Together, these two proposed rules put a whole hand on the scale for respondents, making the process far more difficult for complainants. These proposed rules (i) conflict with well-established legal precedent stating that the preponderance standard should apply in civil rights cases and (ii) tip the balance in favor of respondents, denying complainants equitable treatment and perpetuating harmful, discriminatory stereotypes.

1. The Department wrongly imports principles of criminal law into the civil rights context.

The presumption of innocence applies in criminal, not civil proceedings.[80] And as the Department concedes, civil rights laws, including Title IX and statutes like Title VI and Title

[79] *See, e.g.*, 83 Fed. Reg. 61462, 61465, 61472, 61476, 61480.

[80] *See Estelle v. Williams*, 452 U.S. 501, 503 (1976) ("The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal

VII[81] that serve as a guide for interpreting Title IX, use a preponderance of the evidence standard—not a clear and convincing evidence standard.[82] Courts have already balanced the competing interests and determined what process is due, but the Department's proposed rules seek to wipe the slate clean and override well-established law.

In addressing the dictates of due process protections, courts consider (1) the private interest that will be affected; (2) the risk of an erroneous deprivation of such interest through procedures used, and the probable value, if any, of additional procedural safeguards, and (3) the government's interest. *Mathews v. Eldridge*, 424 U.S. 319 (1976). In a criminal case "the interests of the defendant are of such magnitude that . . . standards of proof [are] designed to exclude as nearly as possible the likelihood of an erroneous judgment. . . . [O]ur society imposes almost the entire risk of error upon itself." *Addington v. Texas*, 441 U.S. 418, 423 (1979). By contrast, the preponderance standard is generally appropriate in the civil context where "[t]he litigants . . . share the risk of error in roughly equal fashion." *Id.*

While there are exceptions in which courts apply the clear and convincing evidence standard, those exceptions are rare. The standard is only applied in a small, well-defined subset of cases that involve extreme government coercion and unusually significant interests at stake, including: termination of parental rights,[83] involuntary commitment,[84] deportation,[85] and denaturalization.[86] And even in some of those rare exceptions, courts still do not apply the presumption of innocence. *See INS v. Lopez–Mendoza,* 468 U.S. 1032, 1043 (1984) ("A person arrested on the preliminary warrant [of deportation] is not protected by a presumption of citizenship comparable to the presumption of innocence in a criminal case.").

A school disciplinary proceeding, even one that could result in expulsion, does not come close to the liberty interests at stake in an involuntary commitment or deportation proceeding. A school disciplinary proceeding is more akin to dishonorable discharge proceedings in the military,

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justice."); *Lilienthal's Tobacco v. United States*, 97 U.S. 237, 267-68 (1877) ("[T]he presumption of innocence as probative evidence is not applicable in civil cases."); *United States v. Scott*, 450 F.3d 863, 883 (9th Cir. 2006) ("[P]resumption of innocence is a doctrine that allocates the burden of proof in criminal trials."); *Hunt v. Liberty Lobby, Inc.*, 707 F.2d 1493, 1497 n.6 (D.C. Cir. 1983) ("[T]he powerful considerations relevant to criminal proceedings—like presumption of innocence and deprivation of liberty—are not implicated in a decision to give effect to a civil judgment pending appeal.").

[81] Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in any program or activity that receives Federal funds or other Federal financial assistance. Title VII of the Act prohibits employment discrimination based on race, color, religion, sex and national origin.

[82] *See Williams ex rel. Hart v. Paint Valley Local Sch. Dist.*, 400 F.3d 360, 364 (6th Cir. 2005) (applying preponderance standard in Title IX action); *Bostic v. Smyrna Sch. Dist.*, 418 F.3d 355, 360 (3d Cir. 2005) (same); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003) (noting that under the "conventional rule of civil litigation," the preponderance standard applies in Title VII cases); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-55 (1989) (applying preponderance standard in Title VII sex discrimination case) (plurality opinion); *Bryant v. Indep. Sch. Dist. No. I-38 of Garvin Cty., OK*, 334 F.3d 928, 930 (10th Cir. 2003) (applying preponderance standard in a Title VI case); *Elston v. Talladega Cty. Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993) (same); *see also* S. Rep. No. 102-197, at 51 (1991) ("Literally thousands of civil rights cases have proceeded under the traditional civil 'preponderance' standard.").

[83] *See Santosky v. Kramer*, 455 U.S. 745, 756, 758 (1982).

[84] *See Addington*, 441 U.S. at 427.

[85] *See Woodby v. INS*, 385 U.S. 276, 286 (1966).

[86] *See Schneiderman v. United States*, 320 U.S. 118, 122, 125 (1943).

which can be for acts like sexual assault or desertion, and for which the "preponderance of evidence" standard applies. *See Hodges v. United States*, 35 Fed. Cl. 68, 78 (1996).

In fact, the preponderance of evidence standard is especially applicable for sexual harassment proceedings at a university because failing to find in favor of a survivor may be just as harmful as finding an innocent respondent responsible. If a survivor's harasser is not found responsible and continues to attend the same school, then the *survivor* may be denied educational opportunities: thirty-four percent of college survivors drop out of college.[87] Additionally, schools are much more likely to fail to find in favor of a complainant than punish an innocent respondent.[88] Thus, there's no reason to tilt the scales in favor of respondents.

Additionally, a preponderance of the evidence standard is appropriate in sexual harassment and assault proceedings because the entire factual record may consist simply of testimony from the complainant and respondent. "In this proverbial 'he said, she said' environment, the standard of proof should be lower, not higher." Matthew R. Triplett, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 Duke L.J. 487, 517 (2012). "When combined with a presumption of innocence in favor of the accused, any standard above a preponderance would produce an insurmountable obstacle for victims with meritorious claims." *Id.*

The Department argues that a presumption of innocence and higher standard of proof are desirable because Title IX grievance processes lack certain features that promote reliability in civil litigation. 83 Fed. Reg. 61477. But first, the fact that disciplinary hearings are more informal than civil proceedings is a reason to have less—not more—due process. The Supreme Court has held that the constitutionally required due process for school disciplinary proceedings is much *lower* than for civil litigation. Public school students are only due "*some* kind of notice and *some* kind of hearing." *Goss v. Lopez*, 419 U.S. 565, 579 (1975). And private school students are due even less. *See Dixon v. Alabama State Bd. of Ed.*, 294 F.2d 150, 157 (5th Cir. 1961) (noting relations between a student and private university are generally a matter of contract, requiring schools to just follow their written policies).

Second, the Department never explains how the lack of certain features of civil litigation, like active participation of counsel or rules of evidence, uniquely disadvantage respondents, creating a need to tip the scales in their favor. If the Department agrees—as it appears to—that (a) the preponderance of the evidence standard is the proper legal standard in the courts, and (b) that standard is based on giving complainants and respondents an *equal* opportunity to prove their case, then simply saying that there are different features in a disciplinary proceeding than in civil court is not enough. The Department has to explain why those different features uniquely disadvantage respondents. But the Department can't do that because the complainant could be just as disadvantaged by the lack of evidence rules or insufficient discovery. Any differences

[87] Mengo & Black, *supra* note 15, at 244.

[88] *See* David Lisak, et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 Violence Against Women 1318, 1318, 1321, 1329-30 (2010) (estimating the false reporting rate at 2-10%, similar to other crimes); *see also* Michelle Ye Hee Lee, *The truth about a viral graphic on rape statistics*, The Wash. Post (Dec. 9, 2014), https://www.washingtonpost.com/news/fact-checker/wp/2014/12/09/the-truth-about-a-viral-graphic-on-rape-statistics/?utm_term=.10c5c3d8fab3 (noting that "violent crimes generally do not have high rates of false reporting").

between school proceedings and formal civil proceedings is a two-way street; the different features could equally benefit or disadvantage complainants or respondents.

The Department also tries to analogize to two state court cases that applied a "clear and convincing" evidence standard in a professional disciplinary proceeding. 83 Fed. Reg. 61477. But in one of those cases, *Disciplinary Counsel v. Bunstine*, 136 Ohio St. 3d 276 (2013), the court never even says what the standard is. The court finds the evidence is clear and convincing, but never discusses whether a preponderance of evidence standard would also be sufficient. *Id.* at 280. The second case, *Nguyen v. Washington Dep't of Health*, 144 Wash. 2d 516 (2001), did apply a "clear and convincing" standard to a professional disciplinary proceeding for a medical doctor, but twenty-one other jurisdictions disagree and apply a preponderance of evidence standard to disciplinary proceedings.[89] And so does the Supreme Court. *See Steadman v. SEC*, 450 U.S. 91, 102 (1981) (upholding preponderance standard in an administrative hearing before the SEC to determine whether federal security law violations warranted disciplinary suspension); *Steadman v. Sec. & Exch. Comm'n*, 450 U.S. 91, 103-04 (1981) (upholding preponderance standard in a disciplinary proceeding against a stockbroker); *see also Rivera v. Minnich*, 483 U.S. 574, 579-82 (1987) (upholding preponderance standard to determine paternity, "an interest far more precious than any property right").

Finally, the Department tries to suggest courts are starting to appreciate the grave consequences of school disciplinary proceedings on a respondent's reputation and cites a three-page unpublished order in a New Mexico district court case from a few months ago, *Lee v. University of New Mexico*, No. 1:17-cv-01230-JB-LF (D. N.M. Sept. 20, 2018). In *Lee*, a former student sued his university after the school expelled him for an incident of sexual misconduct, alleging the school denied him adequate procedural safeguards. But the court's bare assertion that a preponderance of the evidence wasn't the proper standard for a school disciplinary proceeding, supported without any citations, was mere dicta. The court order cited by the Department granted all of the defendants' motions to dismiss, explaining that the plaintiff plausibly alleged due process violations but couldn't sue for damages under § 1983. *See id.* Further, the Supreme Court has made it clear that reputational harm is not a liberty interested protected by the Fourteenth Amendment. S*ee Siegert v. Gilley*, 500 U.S. 226, 233, (1991); *Paul v. Davis*, 424 U.S. 693, 711-12 (1976); *see also Tigrett v. Rectors & Visitors of the Univ. of Va.*, 290 F.3d 620, 628 (4th Cir. 2002) (holding that a disciplinary proceeding's potential reputational harm to students did not warrant due process protections).

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[89] *See, e.g.*, *In re Miller*, 186 Vt. 505 (2009); *Granek v. Tex. Bd. of Med. Exam'rs*, 172 S.W.3d 761 (Tex. App. 2005); *Parrish v. Ky. Bd. of Med. Licensure*, 145 S.W.3d 401 (Ky. Ct. App. 2004); *Snyder v. Colo. Podiatry Bd.*, 100 P.3d 496 (Colo. Ct. App. 2004); *Gallant v. Bd. of Med. Exam'rs*, 159 Or. App. 175 (1999); *Giffone v. De Buono*, 693 N.Y.S.2d 691, 263 A.D.2d 713, (1999); *Anonymous (M–156–90) v. State Bd. of Med. Exam'rs*, 329 S.C. 371 (1998); *Ga. Bd. of Dentistry v. Pence*, 223 Ga. App. 603 (1996); *In re Pet. of Grimm*, 138 N.H. 42 (1993); *Pickett v. Utah Dep't of Commerce*, 858 P.2d 187 (1993); *Gandhi v. State Med. Examining Bd.*, 168 Wis. 2d 299 (1992); *Boswell v. Iowa Bd. of Veterinary Med.*, 477 N.W.2d 366 (Iowa 1991); *Johnson v. Ark. Bd. of Exam'rs in Psychology*, 305 Ark. 451 (1991); *In re Disciplinary Action Against Wang*, 441 N.W.2d 488 (Minn. 1989); *Lyness v. State Bd. of Med.*, 127 Pa. Comm. 225 (1989), rev'd on other grounds, 529 Pa. 535 (1992); *Foster v. Bd. of Dentistry*, 103 N.M. 776 (1986); *Rucker v. Mich. Bd. of Med.*, 138 Mich. App. 209 (1984); *In re Revocation of License of Polk*, 90 N.J. 550 (1982); *Ferguson v. Hamrick*, 388 So.2d 981 (Ala. 1980); *Sherman v. Comm'n on Licensure to Practice the Healing Art*, 407 A.2d 595 (D.C. 1979); *In re Wilkins*, 294 N.C. 528 (1978).

Courts have long upheld schools' use of the preponderance standard in sexual harassment and assault investigations. *See Doe v. Cummins*, 662 F. App'x 437, 449 (6th Cir. 2016) (finding use of preponderance standard in sexual assault investigation did not violate due process). "Outside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment."). *Lavine v. Milne*, 424 U.S. 577, 585 (1976). Over 80% of colleges use the preponderance standard to address harassment complaints.[90] It would be inconsistent with well-established jurisprudence to impose a higher standard.

2. Granting respondents a presumption of innocence and elevating the standard of proof to "clear and convincing evidence" denies students an equitable grievance process.

According to the Department's proposed rules, schools must "treat complainants and respondents equitably," § 106.45(b), and have "grievance procedures providing for prompt and equitable resolution of student and employee complaints," § 106.8(c). But the Department's proposed changes under § 106.45(b)(1) & (b)(4) require schools to favor respondents over complainants.

First, under proposed § 106.45(b)(1)(iv), schools would be required to presume that the reported harassment did not occur. A presumption in favor of one party against the other is not equitable. As Nancy Chi Cantalupo explains, "[s]exual violence cases are often credibility contests," so "a process that builds a strong presumption in favor of the accused can be seen as a symbol that we believe that the likelihood that victims *across the board* will lie is *so much greater* than that perpetrators will lie that we have to build safeguards against that lying into the very *structure* of our proceedings. Such an assumption is manifestly unequal because giving presumptions in favor of one side or the other is by definition treating them unequally."[91]

Additionally, "a systemic assumption that victims lie is a kind of gender-stereotyping that is widely recognized as a violation of equality rights." *Id.* This kind of gender-stereotyping can have real, harmful consequences. For example, schools may be more likely to ignore or punish historically marginalized and underrepresented groups that report sexual harassment for "lying" about it.[92] Schools may be more likely to ignore or punish survivors who are women and girls of color,[93] pregnant and parenting students,[94] and LGBTQ students[95] because of harmful race and sex stereotypes that label them as "promiscuous."

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

[91] Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE L.J. FORUM 281, 288–89 (2016).

[92] *See* Tyler Kingkade, *When Colleges Threaten To Punish Students Who Report Sexual Violence*, HUFFINGTON POST (Sept. 9, 2015), https://www.huffingtonpost.com/entry/sexual-assault-victims-punishment_us_55ada33de4b0caf721b3b61c.

[93] *See* Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARVARD J.L. & GENDER 1, 16, 24-29 (forthcoming), available at https://ssrn.com/abstract=3168909; National Women's Law Center, *Let Her Learn: A Toolkit To Stop School Pushout for Girls of Color* 1 (2016), available at https://nwlc.org/resources/let-her-learn-a-toolkit-to-stop-school-push-out-for-girls-of-color.

Second, schools' use of a clear and convincing evidence standard under § 106.45(b)(4)(i) would tilt investigations in favor of respondents and against complainants. As the Association of Title IX Administrators (ATIXA) explains: "any standard higher than preponderance advantages those accused of sexual violence (mostly men) over those alleging sexual violence (mostly women). It makes it harder for women to prove they have been harmed by men. The whole point of Title IX is to create a level playing field for men and women in education, and the preponderance standard does exactly that. *No other evidentiary standard is equitable*."[96]

The clear and convincing evidence standard is inequitable in and of itself. Yet, the Department subjects complainants—but not respondents—to standards of proof not used for other conduct code violations. The Department says: "To ensure that recipients do not single out respondents in sexual harassment matters for uniquely unfavorable treatment, a recipient would only be allowed to use the preponderance of the evidence standard for sexual harassment complaints if it uses that standard for other conduct code violations that carry the same potential maximum sanction as the recipient could impose for a sexual harassment conduct code violation." 83 Fed. Reg. 61477. But the Department's proposed rules would allow schools to apply the clear and convincing standard in sexual harassment matters while applying the lower preponderance standard for other conduct code violations.

In other words, under the proposed rule, a school *must* treat respondents like anyone else accused of misconduct—from plagiarism to vandalism to physical assault, but a school *may* treat sexual assault survivors differently than students who report other types of misconduct. This approach promotes the harmful stereotype that survivors (who are mostly women) are more likely to lie about sexual assault than students who report physical assault, plagiarism, or other school disciplinary violations. There is no basis for that sexist belief and in fact men and boys are far more likely to be *victims* of sexual assault than to be *falsely accused* of sexual assault.[97]

As the National Association of Student Personnel Administrators explains, "Allowing campuses to single out sexual assault incidents as requiring a higher burden of proof than other campus adjudication processes make it – by definition – harder for one party in a complaint than the other to reach the standard of proof. Rather than leveling the field for survivors and respondents,

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[94] *See* Brittany D. Chambers & Jennifer Toller Erausquin, *The Promise of Intersectional Stigma to Understand the Complexities of Adolescent Pregnancy and Motherhood*, 3 J. CHILD ADOLESCENT BEHAVIOR (2015), available at https://www.omicsonline.org/open-access/the-promise-of-intersectional-stigma-to-understand-the-complexities-ofadolescent-pregnancy-and-motherhood-2375-4494-1000249.pdf.

[95] *See* David Pinsof & Martie G. Haselton, *The Effect of the Promiscuity Stereotype on Opposition to Gay Rights* (2017), available at https://doi.org/10.1371/journal.pone.0178534.

[96] Association of Title IX Administrators, *ATIXA Position Statement: Why Colleges Are in the Business of Addressing Sexual Violence* 4 (Feb. 17, 2017), available at https://atixa.org/wordpress/wp-content/uploads/2017/02/2017February-Final-ATIXA-Position-Statement-on-Colleges-Addressing-Sexual-Violence.pdf; *see also* Triplett, *Sexual Assault on College Campuses*, 62 Duke L.J. at 517 (explaining preponderance of evidence standard most appropriate because "institution has competing obligations to the victim and to the accused . . . setting the scale either below or above the midline of certainty skews the balance too far in the favor of the advantaged party").

[97] Kingkade, *supra* note 92.

setting a standard higher than preponderance of the evidence tilts proceedings to unfairly benefit respondents."[98]

Finally, the Department argues that Title IX investigations may need a presumption of innocence and a more demanding standard of proof because of the "heightened stigma" and the "significant, permanent, and far-reaching" consequences for respondents if they are found responsible for sexual harassment.[99] But as discussed above, the consequences for respondents in school proceedings involving sexual harassment are a far cry from the consequences in which courts have historically applied the clear convincing evidence standard. And more important, the Department ignores the fact that Title IX complainants face a "heightened stigma" for reporting sexual harassment compared with other types of misconduct, and that complainants suffer "significant, permanent, and far-reaching" educational consequences if their school fails to meaningfully address the harassment. As noted earlier, 34% of college survivors drop out of college.[100] Complainants and respondents have an equal interest in obtaining an education. But designing a grievance process that caters to the impact on respondents is inequitable, violating Title IX's prohibition of sex discrimination and conflicting with other provisions of the Department's proposed rules.

B. Proposed rule § 106.45(b)(3)(vii) would require survivors to submit to live cross-examination even though it's not required by law and may cause further trauma.

Proposed rule § 106.45(b)(3)(vii) requires colleges and graduate schools to conduct a "live hearing," and requires parties and witnesses to submit to cross-examination by the other party's "advisor of choice"— often an attorney who is prepared to grill the survivor about the traumatic details of the assault, or possibly an angry parent or a close friend of the named harasser. This proposal (i) conflicts with the longstanding majority rule that cross-examination is not required in school conduct proceedings and (ii) risks re-traumatizing victims of sexual harassment and assault, or deterring them from coming forward in the first place.[101]

1. The law does not require live cross-examination in school conduct proceedings.

As stated, public school students are only due "*some* kind of notice and *some* kind of hearing." *Goss*, 419 U.S. at 579. In *Goss*, the Court expressly held that a school did not have to give the respondent "the opportunity . . . to confront and cross-examine witnesses" before suspending the

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[98] NASPA - Student Affairs Administrators in Higher Education, *NASPA Priorities for Title IX: Sexual Violence Prevention & Response* 1-2, available at https://www.naspa.org/images/uploads/main/NASPA_Priorities_re_Title_IX_Sexual_Assault_FINAL.pdf.

[99] 83 Fed. Reg. 61477.

[100] Mengo & Black, *supra* note 15, at 244.

[101] Though not *required*, proposed rule § 106.45(b)(3)(vi) *permits* K-12 schools to subject students to a live hearing. To the extent this would allow K-12 students to be subjected to live cross-examination, Public Justice objects for all the same reasons it opposes requiring live cross-examination of college and graduate students. In addition, in Public Justice's experience, K-12 schools are far less equipped than institutions of higher education to conduct fair and equitable hearings. Moreover, the risk of retraumatizing K-12 students at a botched live hearing is exceeding high. Finally, for the same reasons articulated in AASA's comments on this proposed rule (*see supra* note 35, at 4), Public Justice opposes allowing K-12 students to be subjected to a live hearing.

respondent for ten days. Similarly, the Court denied a petition for review stemming from a Fifth Circuit decision holding that expulsion does not require "a full-dress judicial hearing with the right to cross examine witnesses." *Dixon*, 294 F.2d at 158, *cert. denied*, 368 U.S. 930 (1961).

Nearly every circuit court of appeals has held that students in school disciplinary proceedings do not have a due process right to live cross-examination. *See id.* at 158; *Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 16 (1st Cir. 1988); *Winnick v. Manning,* 460 F.2d 545, 549 (2d Cir. 1972); *Tellefsen v. Univ. of N. Carolina at Greensboro*, 877 F.2d 60 (Table), WL 64301, at *2 (4th Cir. 1989); *Boykins v. Fairfield Bd. of Education,* 492 F.2d 697, 701–02 (5th Cir. 1974), *cert. denied,* 420 U.S. 962; *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993); *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987); *see also Doe v. Princeton Univ.*, No. CV1816539MASLHG, 2019 WL 161513, at *7 (D.N.J. Jan. 9, 2019) (noting Third Circuit does not recognize right to direct cross-examination in student disciplinary proceedings, rejecting *Baum*).

The Department notes that one circuit court has recently held that live cross-examination in Title IX proceedings is constitutionally required. 83 Fed. Reg. 61476, citing *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018). First, the Sixth Circuit is alone in that holding. As noted above, the vast majority of circuits have held there is no such right. Second, the holding in *Baum* is quite narrow. In that case, the school did not provide the respondent *with any hearing whatsoever*, much less an opportunity to submit questions that should have been asked of the other party. *Id.* at 580. Thus, the Sixth Circuit did not need to address whether the opportunity to hear live testimony and submit questions for a neutral official to ask the opposing party would satisfy the accused student's due process interests. And even the court's assertion that there should be "some form of *live* questioning *in front of* the fact-finder" does not mandate the kind of aggressive questioning by an advocate that the rule proposes. *Id.* at 583.

2. Live cross-examination traumatizes sexual assault survivors and deters reporting.

Live cross-examination is uniquely harmful to survivors of sexual harassment because they are often asked detailed, personal, and humiliating questions rooted in gender stereotypes and rape myths; they are made to feel like the assault was their fault.[102] Cross-examination in these contexts is akin to a "public psychoanalysis" digging into a complainant's "private affairs-including her past romantic relationships."[103]

Live cross-examination can also re-victimize a survivor because it forces them to relive the assault.[104] "It is not uncommon for complainants to report that the suspicion and disbelief that they encounter during cross-examination feels like a repeat of the trauma of being raped – a phenomenon often referred to as 'secondary victimization.'"[105] Separating the survivor from her

[102] Sarah Zydervelt, et al., *Lawyers' Strategies for Cross-Examining Rape Complainants: Have we Moved Beyond the 1950s?*, 57 BRITISH J. CRIMINOLOGY (2016), available at https://www.researchgate.net/publication/295084744_Lawyers'_Strategies_for_Cross-Examining_Rape_Complainants_Have_we_Moved_Beyond_the_1950s.
[103] Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353, 1361 (2005).
[104] *See* Linda Mohammadian, *Sexual Assault Victims v. Pro Se Defendants: Does Washington's Proposed Legislation Sufficiently Protect Both Sides?*, 22 CORNELL J.L. & PUB. POL'Y 491, 493 (2012); Fiona Mason & Zoe Lodrick, *Psychological Consequences of Sexual Assault*, 27 BEST PRAC. & RES. CLINICAL OBSTETRICS & GYNAECOLOGY, 33 (2012) (describing severe anxiety caused by recounting a sexual assault).
[105] Zydervelt, *supra* note 102, at 3.

alleged assailant isn't enough because it's the adversarial interrogation into someone's traumatic experience that triggers the harm. The Department claims we need cross-examination to get to the truth, but the Department never explains why a process in which both parties can submit questions to be asked by a neutral officer, after hearing each other's version of events, can't achieve the same benefit.

Finally, fear of embarrassment or of re-living the trauma can also keep survivors from coming forward in the first place,[106] which is especially problematic in context of sexual assault on college campuses where already only 12% of survivors report their assaults.[107] And if survivors don't have the money to afford an attorney, then subjecting themselves to cross-examination by their harasser's attorney seems all the more daunting. On top of that, under the proposed rule, cross-examinations would take place without rules of evidence or an attorney or judge available to make objections. The lack of protections are uniquely harmful to survivors because a respondent's primary strategy is often to destroy the survivor's credibility and play off the gender stereotypes and rape myths in hopes of winning over the disciplinary panel or official.

VII. The Department Does Not Have the Authority to Mandate the Grievance Procedures in Proposed Rule § 106.45(b) Because the Procedures Do Not Effectuate Title IX's Nondiscrimination Mandate.

Proposed § 106.45(b)(3) *requires* schools to dismiss all complaints of sexual harassment that don't meet the specific narrow standards provided for in the rule. If it's determined that the harassment doesn't meet the improperly narrow definition of severe, pervasive, and objectively offensive harassment, it *must* be dismissed. If severe, pervasive, and objectively offensive conduct occurs outside of an educational program or activity, including most off-campus or online harassment, it *must* be dismissed. Additionally, when investigating a formal complaint, the recipient *must* adopt certain procedures—like cross-examination.

Along the same lines, § 106.45(b)(4) forbids the use of a preponderance standard unless a school uses that standard for other conduct code violations that carry the same maximum sanction. The school is also forbidden from using the preponderance standard if it uses a higher standard in cases against faculty.

There are two problems here. First, the Department lacks the authority to require schools to dismiss complaints of discrimination. Under Title IX, the Department is only authorized to issue rules "to *effectuate* the [substantive] provisions of" Title IX. The statute does not authorize the Department to impose restrictions on schools with the aim of protecting persons accused of sexual misconduct. Its regulations must be aimed at "effectuating" Title IX's anti-discrimination mandate. In other words, the statute does not delegate to the Department the authority to tell schools *when they cannot* protect students against sex discrimination.

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[106] *See* Lininger, *supra* note 103, at 1357 ("Victims' willingness to report crimes varies inversely with their fear of embarrassment during cross-examination."); Mohammadian, *supra* note 104, at 503 ("Sexual assault victims . . . fear the legal system because the trial often forces the victims, who may already suffer from psychological trauma, to relive the experience of the attack.").

[107] *Poll: One in 5 women say*, *supra* note 11.

Law Professor Michael Dorf provides a powerful example to illustrate how the proposed rules exceed the Department's authority under Title IX.[108] Imagine if a federal statute delegated the Environmental Protection Agency the authority to "restrict pollution from coal-fired power plants" and then the agency developed substantial regulations, restricting pollution. Now imagine a new administration, less interested in imposing restrictions on coal-fired power plants, comes in. Surely, the new agency head could replace the regulatory scheme with more lax regulations. But, what if the new agency adopted rules that not only allowed coal-powered plants to emit more pollutants, but *required* them to emit higher levels of pollution. Even if the higher level struck the perfect balance between clean air and optimal growth, the agency's regulation would be *ultra vires*. The agency has discretion in how much pollution to restrict, but it can't require coal-powered plants to produce more pollution.

All this is not to suggest that an agency has no authority to prescribe fair procedural rules that take into account the competing interests at stake.[109] But procedural rules that aim to prevent schools from "over-complying" with the statutory mandate go too far. Agencies cannot hide behind the label of "procedural rules" to advance alternative policy agendas that come into direct conflict with the statutory mandate.

For example, under the hypothetical, Dorf explains the Environmental Protection Agency could not promulgate a rule allowing coal plants to adopt cleaner technology, but *only if* every employee at the plant agrees. Such a "procedural rule" clearly establishes an affirmative impediment to the purpose of the anti-pollution statute.

Likewise, the Department of Education cannot *forbid* schools from using a preponderance of the evidence standard—the only equitable standard—to advance the sex equality mandate. Additionally, the Department cannot force schools to ignore all forms of sexual harassment and assault that occur off campus, that aren't severe and pervasive, or that have not yet affected the student's access to educational programs. The proposed rule is requiring schools *not* to address sex discrimination.

The Notice of Proposed Rulemaking says that schools could respond to conduct that does not meet the narrow definition of sexual harassment or that occurred off-campus or online "under a difference conduct code, but not Title IX." 83 Fed. Reg. 61475. Apart from lacking authority to forbid schools to address this conduct under Title IX, this alleged safe harbor doesn't appear anywhere in the proposed regulation. The regulation just says schools are required to "dismiss" these complaints. If schools provided parallel sexual harassment proceedings for conduct that didn't meet the Department's narrow definition of sexual harassment, and schools didn't comply with the detailed, burdensome procedural requirements set out in the rule, those schools would likely face allegations that they were failing to comply with the regulation.

The second problem with proposed § 106.45(b) is that it conflicts with the Department's purported interest in providing schools with more flexibility. *See* 83 Fed. Reg. 61470 (justifying

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

[109] *See* Michael C. Dorf, *Further Questions About the Scope of the Dep't of Education's Authority Under Title IX*, DORF ON LAW (Dec. 3, 2018), available at http://www.dorfonlaw.org/2018/12/further-questions-about-scope-of-dept.html.

safe harbors for schools that *fail* to respond adequately on the basis that the rule should preserve "recipient's flexibility to implement its grievance procedures"); 83. Fed. Reg. 61472 (recognizing "recipient needs flexibility to employ grievance procedures that work best for the recipient's educational environment"); *see also* 83 Fed. Reg. 61466, 61468. By forbidding the school from addressing certain complaints and requiring them to adopt specific, burdensome, and not-legally-required procedures, the Department is denying schools the opportunity to exercise their own discretion and make context-specific determinations based on the unique needs of the school and its students.

Thus, proposed rules §§ 106.45(b)(3) and (b)(4) are an unlawful exercise of the Department's authority, reaching far beyond Title IX's prohibition of sex discrimination and conflicting with the Department's own objective of giving schools more flexibility.

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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 named harassers to the detriment of survivors. Instead of effectuating Title IX's nondiscrimination mandate by protecting students who suffer sexual harassment or assault, the proposed rules would protect schools from liability when they fail to address complaints of sexual harassment and assault. In addition, the Department's proposed grievance procedures exceed its authority under Title IX. Public Justice requests that the Department of Education immediately withdraw the proposed rules and instead focus its efforts on enforcing Title IX's mandate of sex equality in education, to ensure that schools promptly and effectively address sexual harassment.

We appreciate your consideration of our comments. If you have any questions, please contact Adele Kimmel (akimmel@publicjustice.net) at Public Justice.

Sincerely,

Public Justice