January 29th, 2019

Submitted via www.regulations.gov
Kenneth L. Marcus
Assistant Secretary for Civil Rights
Department of Education
400 Maryland Avenue SW
Washington DC, 20202

Re: ED Docket No. ED-2018-OCR-0064-0001, RIN 1870-AA14, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.

Dear Mr. Marcus,

We are writing on behalf of the Maryland Coalition Against Sexual Assault (MCASA) and the Sexual Assault Legal Institute (SALI) in response to the Department of Education's (the Department) Notice of Proposed Rulemaking to express our strong concern to the Department's proposal to amend rules implementing Title IX of the Education Amendment Act of 1972 (Title IX) as published in the Federal Register on November 29, 2018.

The mission of MCASA is to help prevent sexual assault, advocate for accessible, compassionate care for survivors of sexual violence, and work to hold offenders accountable. As the federally recognized statewide coalition MCASA provides technical assistance and support to Universities, Title IX Coordinators, Advocates, Peer Leaders, and other individuals who are involved in helping student sexual assault survivors. With legislation, grant funded projects, trainings, and legal assistance, MCASA has forged a network of direct service providers, rape crisis center advocates, lawyers, and elected officials working to end sexual violence in our schools and universities and protect and provide resources for student sexual assault survivors. In addition, the Sexual Assault Legal Institute provides direct legal services to survivors of sexual assault, including students. MCASA has several serious concerns regarding the proposed Title IX regulations. The Department's proposed rules have positions which are dangerous for our students and disastrous for survivors of sexual harassment and sexual assault.

106.44(a) – When a School is Required to Act

The Department of Education should broaden the situations in which schools are required to protect students from sexual harassment to ensure protection for all survivors.

The proposed rules state that a school is required to act only when: 1. Sexual harassment occurred against a person in the United States; 2. In an education program or activity of a school and; 3. The school has "actual knowledge" of the harassment.[1] These narrowly defined instances create arbitrary parameters to limit and reduce protection from sexual assault or harassment for the majority of students.

First, the Department of Education's requirement and limitation of "actual knowledge" is harmful to student survivors. This attempt to reduce protections for student survivors by

[1] Nondiscrimination on the basis of sex in education programs or activities receiving federal financial assistance, 83 Fed. Reg. 61462 (Proposed Nov. 29, 2018) (to be codified at 34 CFR 106) at 61466.

limiting the employees obligated to act on their report is troubling. Because it is unlikely that the student will know these members of administration, this proposed change creates a barrier to reporting. In past years, MCASA had concerns with making it mandatory for faculty and staff to report sexual harassment incidents, thinking this would prevent students from seeking resources for fear of automatic reporting obligations. However, the much broader impact of the OCR's guidance from 2011[2], mandating that nearly all faculty, staff, coaches, teachers and others report incidents of sexual misconduct, was a culture shift that empowered large numbers of employees with appropriate information on helping students that have experience sexual violence, harassment or intimate partner abuse. Limiting a student's scope of responsible employees, any employee who has the authority to take action to redress the harassment and can assist in guiding them through the first steps after a trauma, will leaves faculty and staff with fewer resources for assisting their students. Disempowering educators in this way can reverse the cultural shift that many educational institutions have seen in recent years. Empowering educational communities, by continuing to require responsible employees to report, reduces reporting barriers for students and engages educators and staff to continue the culture change to end sexual violence.

Second, the proposed rules eliminating the responsibility of schools to address sexual harassment that occurs against a person outside the United States, leaves thousands of students who study abroad or travel abroad on school trips without any Title IX protection. Additionally, students who lack Title IX protections may endure further trauma upon returning to campus if their attacker returns to or remains on campus. The proposed definition fails to provide survivors with tools to hold their abusers accountable and fails to provide schools with the tools to keep their students safe.

The Department would allow sexual harassment to occur during study abroad trips and off-campus with no consequences. This is in conflict with Maryland state law that determines that sexual assault policies apply to "each student, faculty member, and employee of the institution."[3] The Department is leaving a many students, including students in study abroad programs and students who live off-campus, without any recourse against their perpetrator. During the 2016 – 2017 school year, 332,727 students participated in a credit-baring study abroad program.[4] In Maryland, over 4,000 students studied abroad in credit barring programs during the 2016 – 2017 school year.[5] These numbers do not include the hundreds of thousands of students that participate in short term experiential learning trips like Alternative Spring Break or other service trips. The Department's proposed definition would leave all these students without any Title IX protection from sexual harassment and sexual assault.

Imagine for a moment, a 20-year-old student that is studying abroad for a few weeks in Europe. During this academic program, another student starts harassing her. The behavior begins to escalate throughout the trip including insults, touching the other student without consent, following them back to their room, and engaging in other intimidating behavior. Should this

[2] Office for Civil Rights, U.S. Dep't of Educ., *Dear Colleague Letter*, April 4, 2011
[3] Md. Code Ann., Educ. § 11-601(a)(2).

[4] Open Doors, 2018 Fast Facts, https://www.iie.org/Research-and-Insights/Open-Doors/Fact-Sheets-and-Infographics/Fast-Facts (Dec. 11, 2018)
[5] Open Doors, Data by State, 2018 Fact Sheet Maryland, https://www.iie.org/en/Research-and-Insights/Open-Doors/Fact-Sheets-and-Infographics/Data-by-State-Fact-Sheets (Dec. 11, 2018)

student not be held accountable just because he is in another country? Does the victim of this treatment have to drop out of this program and fly home to get relief? Are the chaperones on this trip not trained to address this serious situation?

Finally, by limiting a school's responsibility to only protect student survivors who experience sexual harassment or violence that occurs in an "education program or activity of the school", the proposed definition does nothing to protect survivors assaulted off campus. The Department of Education's woefully inadequate definition discounts all survivors of sexual violence, who are not on campus, by giving schools the ability to refuse to act to address assaults that occur outside of this narrow parameter. This can disproportionality impact commuter schools, community colleges, and any educational program where students are more likely to live off campus. Additionally, very few Middle School, High School, Technical School, Community College and Graduate students live on campus and many undergraduate students choose housing options that are managed independent of their university.

For example, at the University of Maryland College Park, Maryland's flagship educational institution, 59% of its nearly 30,000 undergraduate students live off – campus.[6] With students spending a majority of their time outside of school activities and off of school property, the outside of classroom experiences, clearly impact their education. It is, therefore, unreasonable to maintain a definition of sexual harassment that would exclude this much of their educational program.

When considering the definition of sexual misconduct, it is essential to broaden our thinking about education. Learning is greatly influenced by the broader educational experiences and social context that surround students from kindergarten through college. Complicating the reporting process in these ways and creating access barriers to reporting will silence survivors and sexual misconduct, in its many forms, will flourish. Limiting the scope of educational institutions' responsibility to act and the irresponsible narrowing of the definition of sexual harassment is dangerous to all students and undermines an organization's ability to work to end sexual violence.

The Department argues that schools will be responsible for conduct that the school was not aware happened if schools are required to continue to follow the responsible employee standard; however, this argument lacks merit. Under the 2011 guidelines for Title IX, the Department made clear that schools were required to act when a school "knew or should have known" that sexual harassment occurred.[8] The previous guidance did not make schools responsible for harassment that was unknown to the school. Rather, it provided clear guidelines for the schools to keep survivors safe and to hold perpetrators accountable.

106.30 – Sexual Harassment Definition

The Department's definition for sexual harassment is too restrictive and forces students to endure assaults without any Title IX recourse or provision for safety. The Department proposes to define sexual harassment as:

[6] Us News and World Report Rankings, https://www.usnews.com/best-colleges/university-of-maryland-2103/student-life

[8] Id, at 15

> "an employee of the recipient conditioning the provisions of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; or unwelcome 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; or sexual assault as defined in 34 CFR 668.46(a)."

The 2001 Office of Civil Rights Guidance letter on Sexual Harassment defined a consistent standard to determine if a school violated Title IX. For more than 15 years this directive provided information on schools responsibility and timeline for responding to sexual harassment. The letter, after going through the public notice–and-comment process, defines sexual harassment as "unwelcome conduct of a sexual nature.". The 2001 Guidance requires schools to address student-on-student harassment if *any employee* "knew, or in the exercise of reasonable care should have known" about the harassment.[9] Schools were also required to take immediate and effective corrective action or risk being in violation of Title IX. These standards have been the foundation for schools' policies and procedures for nearly 2 decades. They have served the intention of Title IX well and provided a clear standard for school administrators. They are consistent with other equality laws and school policies. Changing this solid definition of sexual harassment ripples into all corners of education and strips students of protections that should be guaranteed.

The new proposed definition is further concerning because it puts an untenable burden on the student survivor to show not only that the conduct occurred, but that it also denied the person equal access to education. This definition is in direct conflict with the expressed legislative purpose of Title IX. In addition, both the Equal Employment Opportunity Commission (EEOC) and the University System of Maryland (USM), have definitions that conflict with the Department's proposed definition.

For example, the EEOC defines harassment as conduct that forces someone to endure offensive conduct as a condition of continued employment or conduct that is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.[10] Further, the EEOC describes sexual harassment as harassment based on a person's sex that may include unwelcomed sexual advances, requests for sexual favors, or other verbal or physical harassment of a sexual nature.[11] The EEOC also makes clear that sexual harassment does not always need to be of a sexual nature and can include offensive remarks about a person's sex.[12]

Additionally, USM, which includes 12 of Maryland's higher education institutions,[13] defines sexual harassment for all of its affiliated schools as:

---

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

[10] Equal Employment Opportunity Commission, Types of Discrimination: Harassment, https://www.eeoc.gov/laws/types/harassment.cfm (Dec. 11, 2018)

[11] Equal Employment Opportunity Commission, Types of Discrimination: Sexual Harassment, https://www.eeoc.gov/laws/types/sexual_harassment.cfm (Dec. 11, 2018)

[12] Id.

[13] University System of Maryland, University System of Maryland – Home, https://www.usmd.edu/ (Dec. 6, 2018)

> "any unwelcome sexual advance, unwelcome request for sexual favors, or other unwelcome verbal or physical conduct of a sexual nature when: (1) Submission to or rejection of such conduct is made, either explicitly or implicitly, a term or condition of an individual's employment, evaluation of academic work, or participation in any aspect of a USM or USM institution or activity; (2) Submission to or rejection of such conduct by an individual is used as the basis for academic, employment, or activity or program participation related decisions affecting an individual; or (3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work or academic performance, i.e., it is sufficiently severe or pervasive to create an intimidating, hostile, humiliating, demeaning or sexually offensive working, academic, residential or social environment."[14]

The Department's concerning definition sets a lower threshold for sexual harassment when compared to other similar laws governing sexual misconduct. As illustrated above, both the EEOC and the University System of Maryland have definitions and standards that allow both student survivors and employees access to respective remedies to keep them safe at work and at school. Further, neither the USM policy nor the EEOC definition of harassment requires survivors to prove that the harassment denies them the ability to continue in school. In contrast, USM's policy allows students to seek assistance from the Title IX Office before the conduct interferes with their access to education. At a minimum, student survivors deserve the same standard and threshold as other survivors of sexual misconduct. The Department defends its definition of sexual harassment by reasoning the definition will allow schools to only focus on the "sufficiently serious"[15] forms of sexual harassment; however, <u>any</u> form of sexual harassment preventing a student from accessing his or her education is serious.

The Department's proposed definition for sexual harassment will force many students to endure embarrassing and offensive conduct unless the student can prove that the conduct forced them out of school. Schools should be allowed to create their own definitions of what constitutes sexual harassment, using 2001 OCR guidance as a reference.

106.45(b)(2) – Notice of allegations – Presumption of not responsible
The Department of Education should not force schools to include a statement in their notice of allegations that the respondent is presumed not responsible for alleged conduct. The Department fails to give a reason for this troubling policy, forcing schools to include this statement of innocence in the notice. Including a statement about the accused's presumed innocence in the notice to both parties is unnecessary and may serve as a notice to the complainant that the investigation and process is not a neutral. It is unclear why the Department added this notice to the proposal. It is appropriate to protect the due process rights of the accused student; however, this notice to the complainant does nothing to guarantee the protection of those rights. Further, this is not a necessary notice that needs to go to the complainant in any proceeding. Even in criminal proceedings, it is not required that the notice include a presumption

[14] University System of Maryland Policy on Sexual Misconduct §IV – 1.60(I)(i).
[15] Nondiscrimination on the basis of sex in education programs or activities receiving federal financial assistance, 83 Fed. Reg. 61462 (Proposed Nov. 29, 2018) (to be codified at 34 CFR 106) at 61467.

of innocence.[16]Simply, providing notice and an opportunity to be heard to the accused is enough to protect his or her due process rights.

106.45(b)(3)(vii) – Grievance Procedures – Cross-Examination

The Department of Education should not re-victimize students by forcing them to endure cross-examination by the respondent or respondent's advisor during a hearing. The Department proposes that schools establish grievance procedures that include not only a live hearing, but also an opportunity for a respondent's advisor to cross-examine the complainant. Cross-examination is not appropriate for student misconduct hearings. Allowing the practice of cross-examination will have devastating consequences on survivors. Many student survivors opt to participate in the student misconduct process rather than the criminal process to avoid testifying in open court and enduring a traumatic cross-examination. With this policy, the Department, in effect, is turning a school into a courtroom and the fact-finder into a judge. Maryland law allows all parties to participate in the disciplinary process, which includes allowing each party to ask the opposing party questions through a neutral investigator or "adjudicating official or body."[18] When an impartial investigator questions each party, the party's right to have their questions answered is preserved, while traumatization is minimized.

Additionally, under the Maryland Law, each party is entitled to an advisor of their choice – including a free attorney.[19] The attorney is allowed to attend all hearings, meetings and interviews; have private consultations with their client during hearings, meetings, and interviews, except during questioning of the student at a hearing; and assist with exercising any right during the disciplinary proceedings.[20] Allowing the parties to have advisors in the room, without the advisors questioning the opposing party, still provides each party with the necessary support they need and ensures that none of their rights are violated.

With all the safeguards the Department proposes in the rules to ensure that neither student faces unbiased treatment, the Department can be assured that the investigators posing the questions will, in fact, be neutral and unbiased. The focus of a Title IX investigation is truth seeking and schools will be better equipped to find the truth if they use trained, neutral investigators to question the parties.

106.45(b)(3)(vii) – Grievance Procedures – Rape Shield Provisions

The Department should not prevent students from using a party's prior sexual history to show prior sexual misconduct and to impeach a party. The Department's proposed rape shield provision bans the use of evidence related to a party's prior sexual history unless the evidence is used to prove that

> "someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent."[21]

---

[16] Goldburg v. Kelly, 397 U.S. 254, 267 – 68 (1970) (Requiring only that notice be sufficient to inform the receiving party of the allegations against him and what he must do to protect his rights.)

[18] Md. Code Ann., Educ. § 11-601(d)(v)(3)

[19] Md. Code Ann., Educ. § 11-601(d)(vi)

[20] Id.

[21] Nondiscrimination on the basis of sex in education programs or activities receiving federal financial assistance, 83 Fed. Reg. 61462 (Proposed Nov. 29, 2018) (to be codified at 34 CFR 106) at 61475.

With this proposal, the Department fails to acknowledge, the ever-evolving situation of consent. Therefore, even if a party gave consent at one time, that does not mean consent for future sexual acts. Consent must be freely given for each new sexual encounter and each new sexual act. The rape shield provision proposed by the Department incorrectly suggests that a person need only to obtain consent for one sexual act and that consent carries on indefinitely. **This proposal and limitation of the rape shield provision is concerning and would result in conflict between the federal law and the Maryland law, as well as with the University Systems of Maryland's current sexual assault policy.**

Maryland law currently allows both parties to use sexual history in four ways to: "1. prove the source of injury; 2. prove prior sexual misconduct; 3. [To] support a claim that a student has an ulterior motive; or 4. impeach a student's credibility after that student has put his or her own prior sexual conduct at issue."[22]

The University System of Maryland (USM) is Maryland's public higher education system, encompassing 12 institutions and two regional higher education centers. USM's mission to improve the quality of life in Maryland includes keeping students safe and fostering a learning environment free of harassment and violence. With this system they have built a comprehensive policy on sexual misconduct that includes definitions of sexual harassment, sexual violence and consent. The current USM sexual assault policy defines consent as:

> "a knowing, voluntary, and affirmatively communicated willingness to mutually participate in a particular sexual activity or behavior. It must be given by a person with the ability and capacity to exercise free will and make a rational and reasonable judgment. Consent may be expressed either by affirmative words or actions, as long as those words or actions create a mutually understandable permission regarding the conditions of sexual activity. Consent may be withdrawn at any time. Consent cannot be obtained by force, threat, coercion, fraud, manipulation, reasonable fear of injury, intimidation, or through the use of one's mental or physical helplessness or incapacity. Consent cannot be implied based upon the mere fact of a previous consensual dating or sexual relationship. Consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another."[23]

Maryland law allows both parties to use sexual history to prove prior sexual misconduct. USM policy clearly and expressly states that consent is required for each sexual encounter, and can be withdrawn at any time. The Department's policy must do the same. Further, the Department's policy must make clear that people are required to obtain consent for each sexual encounter and each sexual act.

A provision, such as the one currently proposed, clearly and unfairly favors the respondent. To ensure a fair and neutral fact-finding process, both sides must be able to present this information. Last, both the complainant and respondent should have the ability to use sexual history to

[22] Md. Code Ann., Educ. § 11-601(d)(4)(iv)(1)(A-D)
[23] University System of Maryland Policy on Sexual Misconduct §IV – 1.60(I)(a).

impeach the opposing party. Impeachment is a common method used in both criminal and civil court cases to challenge the veracity of the testifying party. [24]

106.45(b)(3)(viii) – Grievance Procedures – Access to evidence upon which the school does not intend to rely in reaching a determination regarding responsibility.
The Department should limit access to evidence obtained during the investigation to only the evidence that will be used to reach a determination regarding responsibility. The proposed rules state that parties to Title IX investigations must have an equal opportunity to inspect and review all evidence related to the case obtained by the school including evidence that will not be relied on to reach a decision. MCASA commends the Departments desire to provide students with a meaningful opportunity to participate in the grievance process by accessing needed information gathered by the school. However, allowing individuals to access evidence not relied on by the decision-maker to reach a decision presents a potentially dangerous situation for all students involved. The Department states that recipient schools cannot deny students any right guaranteed to them by the First Amendment of the United States Constitution. While the proposed rules make clear that the decision-maker can exclude irrelevant information during the hearing, there is no such protection from parties spreading irrelevant information among the school community. Parties will be able to use the information they obtain to intimidate, embarrass, or otherwise harass the opposing party. This could cause additional trauma for the complainant and the respondent.

"Evidence related to the matter" is evidence obtained during the school's investigation that the decision-maker will use to reach a determination of responsibility. Defining the term in this manner will ensure that all parties to the investigation are protected from retaliation and the additional harassment or embarrassment that would come from having irrelevant information disclosed to members of the campus community or others outside of the investigation.

106.45(b)(4)(i) – Standard of Evidence
The Department of Education should allow the recipient schools the ability to determine the evidentiary standard used for Title IX hearings. The proposed rules allow schools to use either a lower evidentiary standard, the preponderance of the evidence, or a higher evidentiary standard, the clear and convincing, in Title IX hearings. The proposed rules also state that schools may only use the lower standard, preponderance of evidence, if the school uses that same standard for all other conduct code violations that carry the same maximum disciplinary sanction. However, the proposed rules allow schools to use the higher standard, clear and convincing, for Title IX violations regardless of if the school uses a clear and convincing standard for other conduct code violations. This is troublesome because with this policy, the Department is seemingly encouraging schools to unexplainably use a higher standard of proof for Title IX cases even if the school uses a lower standard of proof for any other conduct code violation.

The Department argues that it is necessary to have the stipulation on using the preponderance of evidence standard to ensure that schools do not "single out respondents in sexual harassment

[24] Julia Simon-Kerr, Credibility by Proxy, 85 Geo. Wash. L. Rev. 152, 167 (2017) (The transition to impeachment expanded the testimony that could be heard by the jury….legislators did not abandon the idea that it was not just lies, but also liars, with which the justice system should be concerned."

matters for uniquely unfavorable treatment…."[25] However, the Department allows schools to submit complainants to "uniquely unfavorable treatment" by allowing schools to use the higher standard of proof for Title IX violations without requiring that schools use that same higher standard for all other code of conduct violations.[26]Under Maryland law, schools are required to use "the same standard of proof used in other disciplinary proceedings at the institution of higher education for allegations of code of conduct violations involving discrimination or harm to another individual."[27] The new proposed policy would create confusion and conflict between the Maryland law and the federal law.

Additionally, the proposed rules further state that recipient schools must use the same standard of proof as used for employee respondents. The Department argues this will "avoid specially disfavored treatment" of student respondents.[28] The Department is attempting to force schools to use the higher standard of proof for Title IX violations by forcing schools to give special treatment of respondent students based on whether or not the school's faculty/employee union has successfully lobbied for advanced protections for employees. This stipulation puts an unnecessary restraint on a school's ability to determine how to handle student on student sexual harassment.

Allowing recipient schools to use whichever standard of proof the recipient finds necessary for their campus community as long as that same standard is used or all other code of conduct violations involving discrimination or harm to a student, ensures that schools are not instituting higher evidentiary standards in a manner that is "uniquely unfavorable" to complainants. The Department's current proposed standard is discriminatory towards complainants in that it allows a school to use a different standard of proof only for violations of Title IX. The purpose of Title IX is to ensure that students do not face discrimination based on sex. Studies show that victims of sexual assault are most often women.[29] Allowing a school to use a clear and convincing standard of proof only for Title IX violations will violate Title IX and subject complainants, who are mostly women, to sex discrimination.

The Department has given little persuasive justifications for the proposed rules. In many cases these rules place an unfair burden on student-survivors, release the educational institutions of responsibility and liability, and create significant access barriers to reporting. In addition, MCASA has significant concerns that if some or all of these proposed changes would go into effect, they would conflict with our laws concerning sexual misconduct and the policies and procedures of Maryland's institutions of education including K-12, community colleges, universities and other schools. In order to learn, students regardless of whether they are in their first few days of kindergarten or their last few days of graduate school, deserve to be in an

[25] Nondiscrimination on the basis of sex in education programs or activities receiving federal financial assistance, 83 Fed. Reg. 61462 (Proposed Nov. 29, 2018) (to be codified at 34 CFR 106) at 61476
[26] Nondiscrimination on the basis of sex in education programs or activities receiving federal financial assistance, 83 Fed. Reg. 61462 (Proposed Nov. 29, 2018) (to be codified at 34 CFR 106) at 61476
[27] Md. Code Ann., Educ. § 11-601(d)(4)(ii)
[28] Nondiscrimination on the basis of sex in education programs or activities receiving federal financial assistance, 83 Fed. Reg. 61462 (Proposed Nov. 29, 2018) (to be codified at 34 CFR 106) at 61476
[29] Rainn, Victims of Sexual Violence: Statistics, https://www.rainn.org/statistics/victims-sexual-violence (last visited Dec. 11, 2018)

environment free from harassment and sexual violence. It needs to be a fundamental requirement of educational institutions to ensure this environment.

Thank you for the opportunity to submit comments on the NPRM. Please do not hesitate to contact the Maryland Coalition Against Sexual Assault or the Sexual Assault Legal Institute to provide further information.

Maryland Coalition Against Sexual Assault and the Sexual Assault Legal Institute
Website: www.mcasa.org
301.565.2277

Lisae C. Jordan
Executive Director
lcjordan@mcasa.org

Tianna Mays
SALI Managing Attorney
tmays@mcasa.org

Stephanie Erdice
Chief of Programming
serdice@mcasa.org