



January 30, 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: Docket No. ED-2018-OCR-0064, RIN 1870-AA14, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Dear Mr. Marcus:

I am writing on behalf of Girls for Gender Equity (GGE) in response to the Department of Education's (ED) Notice of Proposed Rulemaking (NPRM) to express our strong opposition to the proposed rules relating to sexual harassment as published in the Federal Register on November 29, 2018.

GGE is a Brooklyn, New York based organization, that engages in local and national work serving young people ages 12 to 24. For more than 16 years, GGE has worked closely with middle and high school students of all genders, and has equipped them with the tools to build out their own leadership and live self-determined lives. To that end, we have worked directly with young people to identify their needs and concerns about attending public school.

For years, GGE has been a home for young people who experienced sexual harassment in their communities and in their schools, dating back to 2011 when GGE Founder and President, Joanne Smith published, *Hey, Shorty!*¹ In 2016, over one hundred young people connected to GGE again, and engaged in a participatory action research process, where they were able to identify key barriers to their ability to attend schools that were safe, supportive, and effective. In that research process, GGE published a report, *The School Girls Deserve*, and the report shared that 1 in 3 students in New York City public schools experiences some form of sexual harassment.

¹ Joanne Smith, et. al, *Hey Shorty! A Guide to Combating Sexual Harassment and Violence in Schools and on the Streets*, 2011.



According to GLSEN’s National School Climate Survey, more than 57 percent of lesbian, gay, bisexual, transgender, and queer (LGBTQ) students between the ages of 13 and 21 experience some form of sexual harassment while in school.² This demonstrates that sexual harassment presents a significant and pervasive challenge for thousands of public school students in New York, and likely, across the United States. Further, student-researchers from GGE articulated that they very rarely felt safe and supported to report sexual harassment. National data aligns with what students shared, according to the National Womens Law Center (NWLC), only 2% of girls between the ages of 14 and 18 report sexual assault to their schools or police. This does not mean that sexual assault is not happening in school, it simply means that schools must be encouraged to foster the type of environment where student-survivors can receive the help that they need in order to continue their education. Schools should foster safe, supportive communities, where all students, regardless of their gender are free to access quality education. Students should not be denied access to education based upon their gender. Yet, this is what can happen under the NPRM. This could happen in the following ways:

Waiting for the most egregious forms of sexual violence to occur before taking action.

In §106.44(a) of the NPRM, Title IX fund recipients (schools districts) are allowed to completely ignore many forms of sexual harassment; for example catcalling, lewd messages through texts and social media, as long as the harassment does not rise to the level of “severe, pervasive, and so objectively offensive that it denies a person equal access to [education].” In our report, a student reported being catcalled in the hallway in elementary school. This student shared that they did not feel comfortable reporting it to any adult. Attending school everyday where students make comments about a girl’s body is not only humiliating, but it can prevent a student from wanting to attend school. Yet, under the NPRM, schools would have no obligation to respond to or prevent this type of behavior. Further, under §106.45(b)(3) of the NPRM, schools would be *required* to completely ignore a student, who bravely comes forward to report abuse if the abuse has not risen to an extreme level.

Making reporting sexual harassment cumbersome, confusing, and unlikely.

² Joseph G. Kosciw, et al., *2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation’s Schools*, GLSEN 26 (2018). <https://www.glsen.org/sites/default/files/GLSEN%202017%20National%20School%20Climate%20Survey%20%28NSCS%29%20-%20Full%20Report.pdf>.



Under the NPRM, if a student in grades K-12 was to report their harassment to any trusted adult; a lunch aid, a school nurse, or a guidance counselor, the school would be under no obligation to take action in order to support that student, or prevent future harassment. This is a frightening possibility. It is not unlikely that a first-year high school student, would not have established a close enough relationship with her teachers, and would perhaps report sexual harassment to a nurse or guidance counselor. That brave report should have meaning, and create a duty for the school to take action. Yet under the NPRM, it would not.

We know that many students have also experienced sexual harassment and assault at the hands of school teachers and other school staff. Under the NPRM, if a student was sexually assaulted by a school employee, and were to tell another teacher, who did not fall into the appropriate category the school would not have a duty to protect them. This is a confusing set of circumstances that a tiny group of students, if any, would be aware of. Essentially, if a student were to experience sexual harassment at the hands of another student, and report that harassment to an adult, who was not the correct, designated teacher, then their school would have no obligation to take action. But if the student experiences sexual harassment from an adult school employee, and that student were to tell a teacher, it would not create an obligation on the part of their school. This functions as a confusing structural barrier to reporting sexual harassment. Moreover, both Republican and Democratic administrations have relied on the 2001 Sexual Harassment Guidance as an effective guide for assessing school's responsibilities to students. That guidance clearly articulates that schools should be responsible for taking action if "any employee knew, or in the exercise of reasonable care should have known" about sexual harassment.³ This is a reasonable standard which encourages schools to diligently seek to protect students from harassment. Moving away from that standard could prove to be extremely harmful to thousands of students.

Ignoring sexual harassment and abuse that takes place online or off-campus.

Under the NPRM, some of the most common forms of peer-to-peer sexual harassment would go completely ignored. So much of student's social interactions take place off of school grounds and through online communication. It is not unheard of for students to send lewd, inappropriate, and pejorative messages using various forms of social media. Those same students come back to

³ 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), available at <https://www2.ed.gov/about/offices/list/ocr/docs/shguide/html>.



school each day and see each other. If a student is being sexually harassed online, and has to come to school the next day and sit next to the student who made those comments to her, it functions as an ongoing form of abuse. To rely exclusively on a narrow interpretation that conduct must occur within the direct oversight or supervision of a school, is an ineffective analysis. In fact, the same 10th Circuit case from which the NPRM proposes that off-campus conduct does not create liability, the concurring justice writes;

“The majority concedes, in a footnote, that it is not true that "harassment occurring off school grounds cannot *as a matter of law* create liability under Title IX." *Id.* at 1121-22 n. 1.[2] But it makes no attempt to delineate the reach of the school district's potential liability in the context of this case, or determine whether the district's legal responsibility extends to some (even if not all) of the boys' misconduct.” *Rost ex rel. K.C. v. Steamboat Springs Re-2 Sch. Dist.*, 511 F.3d 1114, 1129 (10th Cir. 2008)

The concurring justice points to the appropriate analysis, coming from the U.S. Supreme Court, there should be a question of whether or not the school district “exercises substantial control over both the *harasser and the context* in which the known harassment occurs.” citing *Davis*, 526 U.S. at 645. (Emphasis added). To ignore this differing analysis misses an opportunity to provide the type of protection and safety that students deserve, and that allows equitable access to education for all students. When schools have “substantial control over both the harasser and the context” we believe that the school can and should take action. This is in alignment with the ways that students are disciplined in most other types of behavior. For example, if a student were to get into a fist fight with another student at a local pizza store, that same student could be disciplined for the behavior, it should be no different for students who experience sexual violence outside of the school.

Cisgender and transgender girls, and gender-non conforming students all deserve to be protected from sexual violence in school. Experiencing sexual violence can have an extremely detrimental effect on their ability to access education. Without the protection created by holding school districts responsible for fostering safe and supportive environments, students across the gender spectrum are put at risk every day. We would like to ensure that a student does not have to reach their breaking point before a school’s obligation to protect them begins. The interpretation of the statute should also be aligned with the reality of where harassment occurs, and the limits of student’s access to information about who the designated recipient of abuse reports would be.



For these reasons, The Department of Education should immediately withdraw its current proposal and dedicate its efforts to advancing policies which ensure equitable access to education for all students across the gender spectrum.

Thank you for the opportunity to submit comments on the NPRM. Please do not hesitate to contact Ashley C. Sawyer, Esq. at asawyer@ggenyc.org to provide further information.

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