girls inc.

Inspiring all girls to be strong, smart, and bold

January 29, 2019

Submitted via Federal Rulemaking Portal

Kenneth L. Marcus
Assistant Secretary for Civil Rights
Department of Education
400 Maryland Avenue S.W.
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 Inc. to express our strong opposition to the Department of Education's proposed rules relating to sexual harassment, as published in the Federal Register on November 29, 2018.

Girls Inc. is the national organization that inspires all girls to be strong, smart, and bold, through direct service and advocacy. Our 81 local affiliates in the U.S. and Canada serve girls ages 5-18, primarily through afterschool and summer programs. We reach over 156,000 girls annually, 62% of whom come from families earning less than $30,000 a year and 74% of whom identify as girls of color. We also advocate, with our girls, for policies and practices that will help break down barriers so that all girls and young women can have the chance to grow up healthy, educated, and independent.

Enacted in 1972, Title IX[1] established that any educational program or activity receiving federal funds cannot discriminate against an individual on the basis of sex. In the decades since the law's passage, courts all the way up to the Supreme Court have ruled that Title IX requires schools to address sexual harassment and assault so it does not interfere with a student's civil right to an education free from sex discrimination. Over the last few decades, the Department has also emphasized that remedying sexual harassment in schools is necessary in order to provide students with an optimal learning environment.[2]

[1] "Title IX and Sex Discrimination." Home. September 25, 2018. Accessed December 12, 2018. https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html.

[2] "Harassment of Students by School Employees, Other Students, or Third Parties." Home. September 26, 2018. Accessed December 12, 2018. https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html.

Previous administrations released guidance documents to inform the public, especially schools, about how to interpret and comply with Title IX. The Department's 2001 Guidance went through public Notice-and-Comment and has been enforced by both Democratic and Republican administrations. While it did begin to provide instruction on how schools should implement Title IX, the Obama administration heard that further clarification was needed because sexual harassment and assault were still pervasive in our nation's schools. That administration released guidance in the form of a 2011 Dear Colleague letter and a 2014 Questions and Answers document, both of which provided schools with more clarity on how to handle sexual harassment and assault.

In September 2017, Secretary Betsy DeVos announced the rescission of the Department's 2011 and 2014 Guidance.[3] Because so many schools, particularly at the higher education level, had been making progress and investing in Title IX compliance, the rescission of the 2011 and 2014 Guidance was alarming, and the interim Questions and Answers document issued by Secretary DeVos created confusion. Fourteen months later, in November 2018, the Department published a Notice of Proposed Rulemaking with a new set of proposed rules regarding how federally funded schools must address the sexual harassment and assault of students.[4] The proposed regulations represent a departure from decades of precedent and are confusing, unrealistic, and misguided; we believe they will harm students and make schools less safe. We urge the Department to withdraw the proposed regulations and instead provide schools with support and technical assistance with Title IX compliance.

Girls Inc. is committed to promoting safe and supportive learning environments so that all girls can grow up without barriers to their educational, physical, and emotional wellbeing. One in four girls experiences sexual abuse or sexual assault by the age of 18,[5] and more than two in three girls (68%) and over half of boys report being sexually harassed at some point in high school.[6] The statistics are even more staggering for individuals who identify as people of color or LGBTQ. In one report, it was found that 78% of transgender or gender non-conforming youth are sexually harassed in K-12 schools.[7]

At a time when our nation is finally acknowledging the widespread nature of sexual harassment and assault, the Department should encourage schools to continue their efforts to comply with the law and strengthen survivor support, not to reverse course. The proposed regulations are a tremendous step backwards for student survivors and school safety. While the focus of this Girls Inc. letter is the impact of the proposed rules on K-12

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[3] 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.

[4] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462 (November 29, 2018) [hereinafter NPRM] (to be codified at 34 C.F.R. pt. 106).

[5] National Sexual Violence Resource Center. Get Statistics. Accessed December 12, 2018. https://www.nsvrc.org/statistics.

[6] Espelage, D., Low, S., Anderson, C., & De La Ru, L. (2014). Bullying, sexual, and dating violence: trajectories from early to late adolescence. Washington, DC: National Institute of Justice. Retrieved from https://www.ncjrs.gov/pdffiles1/nij/grants/246830.pdf

[7] Sexual Violence & Individuals Who Identify as LGBTQ. National Sexual Violence Research Center. 2012. Accessed December 12, 2018. https://www.nsvrc.org/sites/default/files/Publications_NSVRC_Research-Brief_Sexual-Violence-LGBTQ.pdf.

schools and students, we also are very concerned about the impact of these rules on post-secondary education campuses and students.

I. The proposed definition of sexual harassment would prevent schools from taking the steps necessary to create a safe learning environment.

Girls Inc. strongly opposes the Department's proposal to narrow the definition of sexual harassment to "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."[8] For decades, the definition of sexual harassment for purposes of the Department's Office for Civil Rights' (OCR) investigations has been "unwelcome conduct of a sexual nature," and schools were encouraged to intervene to prevent harassment from escalating to the point where a student was denied the opportunity to benefit from the education program.[9]

Under the proposed, significantly narrowed definition, a school would be *required* to ignore a student's claim of harassment until the misconduct is so severe AND pervasive that it has already denied the student's access to education. For example, a school would not be able to address the harassment of a student until the misconduct intensifies and escalates to the point where the student suffers a drop in grades, withdraws from a class, or even drops out of school. Not only is this bad educational policy, it also ignores the reality that a student who is turned away by their school after reporting sexual harassment will be extremely unlikely to report a second time when the harassment escalates.

Schools are supposed be safe places for children to grow, explore and learn. Educational institutions are charged with the daily care of our children and helping them to become responsible and thoughtful adults. The current definition of sexual harassment for administrative enforcement purposes - in place for decades through both Democratic and Republican administrations - rightly charges schools with responding to harassment *before* it escalates to a point that students suffer severe harm. The proposed regulations require schools to ignore alarming behavior and let harassment reach a dangerous point, with the possibility that the harassment will escalate and even more students will be harmed or victimized and suffer severe educational and mental health consequences.

The Department repeatedly attempts to justify its proposed definition by citing "academic freedom and free speech."[10] But harassment is not protected speech if it creates a "hostile environment,"[11] i.e., if the harassment limits a student's ability to participate in or benefit

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[8] NPRM, *supra* 4 at § 106.30.

[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, 2 (2001) [hereinafter 2001 Guidance], *available at* https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html.

[10] 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."

[11] *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, Verdict (Nov. 29, 2018), *available at* https://verdict.justia.com/2018/11/29/a-sharp-backward-turn-department-of-education-proposes-to-protect-schools-not-

from a school program or activity.[12] And 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."[13] There is no conflict between Title IX's regulation of sexually harassing speech in schools and the First Amendment.

II. The proposed rule limiting school investigations to sexual harassment and assault that take place *in a school program or activity* endangers students and will subject survivors to further trauma.

The proposed regulations would require schools to dismiss any complaints of sexual harassment or assault that do not occur "within a school's program or activity."[14] Unfortunately, this restriction ignores the reality that many K-12 students face harassment and assault on their way to and from school, across the street from school, and online. Harassment and assault, even when committed off of school grounds, can make the learning environment hostile and have a profound impact on a student's ability to succeed in school, particularly if they must continue to interact with the harasser.

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 . . . ."[15] For almost two decades, the Department's guidance documents have agreed that schools are responsible for addressing sexual harassment if it is "sufficiently serious to deny or limit a student's ability to participate in or benefit from the education program,"[16] regardless of where it occurs.[17]

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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.").

[12] 2001 Guidance, *supra* 9.

[13] 393 U.S. 503, 513, 514 (1969)

[14] NPRM, *supra* 4 at § 106.45(b)(3).

[15] 20 U.S.C. § 1681(a).

[16] 2001 Guidance, *supra 9.*

[17] 2017 Guidance, *supra 3* at 1 n.3, ("Schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities"); U.S. Dep't of Educ. Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* 1-2 (Apr. 29, 2014), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf ("a school must process all complaints of sexual violence, regardless of where the conduct occurred"); U.S. Dep't of Educ. Office of Civil Rights, *Dear Colleague Letter: Sexual Violence* at 4, 6, 9, &16 (Apr. 4, 2011), *available at* https://ww2ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf ("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"); U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter: Harassment and Bullying* at 2 (Oct. 26, 2010), *available at* https://ww2ed.gov/about/offices/ list/ocr/letters/colleague-201104.pdf (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).

Under the proposed rules, if a student were sexually assaulted by another student on her way home from school one day, and she did not want to then face her attacker every day in class, the school would have to dismiss her complaint because the assault did not happen in the context of "a school program or activity." Similarly, a student could sexually harass multiple classmates online, which could have a grave impact on their ability to succeed in school, yet the school would not be able to investigate the conduct if it happened from the student's home, even if it was done from a school computer.

The proposed regulations send the message to schools to look away in the face of inappropriate or dangerous behavior, rather than take steps to intervene and protect students.

III. The proposed requirement that schools have "actual knowledge" before intervening is irresponsible, unrealistic, and confusing.

Another requirement of the proposed regulations is that a school must have "actual knowledge" of sexual harassment or assault before it is obligated to take action. The regulations explain that a K-12 school will only be considered to have "actual knowledge" of harassment when it is reported to (1) the Title IX coordinator; (2) a school official who has "the authority to institute corrective measures;" (which the regulations do not define) or (3) a K-12 teacher (but only for peer-on-peer harassment, not for employee-on-student harassment).[18] This is a dramatic shift, as the Department has long required schools to address *student-on-student* sexual harassment if almost any school employee[19] either knows about it or should reasonably have known about it.[20] That standard takes into account the reality that many students disclose sexual abuse to employees who do not have the authority to institute corrective measures, both because students seek help from adults they trust the most and because students are not informed about (and cannot be expected to know) which employees have authority to address the harassment. Instead, under the proposed rules, if a K-12 student were to report sexual harassment to a guidance counselor, coach, bus driver, recess monitor, reading specialist, teacher aide, or other adult in the school building with which the student is comfortable, the school technically would not be considered to have "actual knowledge" of the harassment and would not be required to do anything.

Even more outrageous, if a student reported to a teacher that she was being sexually harassed by another *teacher*, the school would not be considered to have "actual knowledge" of the harassment and therefore would not be obligated to address the situation. In contrast, the 2001 Guidance requires schools to address all employee-on-student sexual harassment, "whether or not the [school] has 'notice' of the harassment."[21] The 2001 Guidance recognized the particular harms of students being preyed on by adults

[18] NPRM, *supra* 4 at § 106.44.

[19] This duty applies to "any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility." 2001 Guidance, *supra* 9 at 13.

[20] *Id* at 14.

[21] *Id.* at 10.

and students' vulnerability to pressure from adults to remain silent, and accordingly acknowledged schools' heightened responsibilities to address harassment by their employees. The proposed rules would allow schools to claim ignorance about dangerous and potentially illegal behavior even when teachers, coaches, and guidance counselors are aware of it. For example, even when a child has summoned immense courage to tell his coach that he is being harassed by his music teacher, a school can claim no "actual knowledge" of misconduct, and thereby no responsibility to take action, because it was not reported to the "right" adult.

Sexual harassment and assault are extremely underreported, and in order to make schools safe we need to encourage more reporting. The proposed rules, however, would discourage and decrease reporting, and put unreasonable burdens on child survivors, many of whom will have experienced trauma.

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

The "deliberate indifference" standard adopted by the proposed rules is a much lower standard than that currently required of schools, which is to act "reasonably" and "take immediate and effective corrective action" to resolve harassment complaints.[22] Under the proposed rules, by contrast, schools would simply have to *not* be "deliberately indifferent"—which means that their response to harassment would be deemed to comply with Title IX as long as it was not *clearly* unreasonable. The proposed rule even states that as long as a school follows various procedural requirements set out in the proposed rule, the school's response to harassment complaints could not be challenged. The practical effects of this proposed rule would shield schools from any accountability under Title IX, even if a school mishandles a complaint, fails to provide effective supports for survivors, and wrongly determines against the weight of the evidence that an accused harasser was not responsible for sexual assault.

V. No longer requiring written requests for religious exemptions means that students will not have advance notice about a school's discriminatory practices.

One of the changes buried in the proposed regulations would open the door to unchecked discrimination against students by religious schools that receive federal funding. Currently, schools that want to claim a religious exemption from Title IX compliance have to send a written request to the Department notifying them of the tenets of their religion that prohibit them from complying and with which Title IX requirements they cannot comply. These requests have been kept on file at the Department, and in the past have been made publicly available so that students can find out whether an institution in which they are interested would be welcoming to them. In contrast, the proposed rules would allow schools to claim an exemption at any time, even *after* a complaint of discrimination is filed, without any

[22] 2001 Guidance, *supra* 9.

prior notice to the Department of their intention to be considered exempt.[23] This means that students would not be able to learn in advance that a school may discriminate against them. For example, a student could arrive on campus to move into their dorm only to find out that the school refuses to house them because they are LGBTQ or pregnant and unmarried. This would put students at huge financial and emotional risk.

VI. The proposed rule's requirement that a respondent be presumed not responsible for harassment is inequitable and inappropriate in school proceedings.

Under proposed rule § 106.45(b)(1)(iv), schools would be required to presume that the reported harassment did not occur, which would ensure partiality to the respondent. This presumption also would exacerbate the myth that women and girls often lie about sexual assault.[24] The presumption of innocence is a criminal law principle, incorrectly imported into this context;[25] criminal defendants are presumed innocent until proven guilty because their very liberty is at stake—criminal defendants go to prison if they are found guilty. There is no such principle in civil proceedings or civil rights proceedings, and Title IX is a civil rights law that ensures that sexual harassment is never the end to anyone's education.

Section 106.45(b)(1)(iv) would only encourage schools to ignore or punish historically marginalized and underrepresented groups that report sexual harassment for "lying" about it.[26] Schools may be more likely to ignore or punish survivors who are women and girls of color,[27] pregnant and parenting students,[28] and LGBTQ students[29] because of harmful race and sex stereotypes that label them as "promiscuous."

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[23] NPRM, *supra* 4 at § 106.12(b).

[24] Tyler Kingkade, *Males Are More Likely To Suffer Sexual Assault Than To Be Falsely Accused Of It*, HUFFINGTON POST (Dec. 8, 2014) [last updated Oct. 16, 2015], https://www.huffingtonpost.com/2014/12/08/false-rape-accusations_n_6290380.html (Indeed, the data shows that men and boys are far more likely to be victims of sexual assault than to be falsely accused of it).

[25] *See also* the Department's reference to "inculpatory and exculpatory evidence" (§ 106.45(b)(1)(ii)), the Department's assertion that "guilt [should] not [be] predetermined" (83 Fed. Reg. 61464), and Secretary DeVos's discussion of the "presumption of innocence" (Betsy DeVos, Betsy DeVos: It's time we balance the scales of justice in our schools, Washington Post (Nov. 20, 2018), https://www.washingtonpost.com/opinions/betsey-devos-its-time-we-balance-the-scales-of-justice-in-our-schools/2018/11/20/8dc59348-ecd6-11e8-9236-bb94154151d2_story.html.

[26] 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.

[27] 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) [hereinafter Let Her Learn: Girls of Color], available at https://nwlc.org/resources/let-her-learn-a-toolkit-to-stop-school-push-out-for-girls-of-color.

[28] Chambers & Erausquin, The Promise of Intersectional Stigma to Understand the Complexities of Adolescent Pregnancy and Motherhood, Journal of 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.

[29] David Pinsof, et al., The Effect of the Promiscuity Stereotype on Opposition to Gay Rights (2017), available at https://doi.org/10.1371/journal.pone.0178534.

VII. The proposed rules would allow schools to pressure survivors into traumatizing mediation procedures with their assailants.

Proposed § 106.45(b)(6) would allow schools to use "any informal resolution process, such as mediation" to resolve a complaint of sexual harassment, as long as the school obtains the students' "voluntary, written consent." Once consent is obtained and the informal process begins, schools may "preclude[] the parties from resuming a formal complaint."

Mediation is a strategy often used in schools to resolve peer conflict, where both sides must take responsibility for their actions and come to a compromise. Mediation is never appropriate for resolving sexual assault or harassment, even on a voluntary basis. Survivors should not be pressured to "work things out" with their assailant (as though they share responsibility for the assault) or exposed to the risk of being retraumatized, coerced, or bullied during the mediation process. As the Department recognized in the 2001 Guidance, students in both K-12 and higher education can be pressured into mediation without informed consent, and even "voluntary" consent to mediation is inappropriate to resolve cases of sexual assault. Experts also agree that mediation is inappropriate for resolving sexual violence.

The proposed rule would allow schools to pressure survivors, including minors, into giving "consent" to mediation and other informal processes with their assailants and prevent them from ending an informal process and requesting a formal investigation—even if they change their mind and realize that mediation is too traumatizing to continue.

VIII. The proposed rules would force many schools to use a more demanding standard of proof to investigate sexual harassment than they would use to investigate other types of student misconduct.

The Department's longstanding practice requires that schools use a "preponderance of the evidence" standard – which means "more likely than not"– in Title IX cases to decide whether sexual harassment occurred.[30] Proposed rule § 106.45(b)(4)(i) departs from that practice, and establishes a system where schools could elect to use the more demanding "clear and convincing evidence" standard in sexual harassment cases, while allowing all other student misconduct cases to be governed by the preponderance of the evidence

[30] The Department has required schools to use the preponderance standard in Title IX investigations since as early as 1995 and throughout both Republican and Democratic administrations. For example, its April 1995 letter to Evergreen State College concluded that its use of the clear and convincing standard "adhere[d] to a heavier burden of proof than that which is required under Title IX" and that the College was "not in compliance with Title IX." U.S. Dep't of Educ., Office for Civil Rights, Letter from Gary Jackson, Regional Civil Rights Director, Region X, to Jane Jervis, President, The Evergreen State College (Apr. 4, 1995), at 8, available at http://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed_ehd_1995.pdf. Similarly, the Department's October 2003 letter to Georgetown University reiterated that "in order for a recipient's sexual harassment grievance procedures to be consistent with Title IX standards, the recipient must … us[e] a preponderance of the evidence standard." U.S. Dep't of Educ., Office for Civil Rights, Letter from Howard Kallem, Chief Attorney, D.C. Enforcement Office, to Jane E. Genster, Vice President and General Counsel, Georgetown University (Oct. 16, 2003), at 1, available at http://www.ncherm.org/documents/202-GeorgetownUniversity--110302017Genster.pdf.

standard, even if they carry the same maximum penalties.[31] The Department's decision to allow schools to impose a more burdensome standard in sexual assault cases than in any other student misconduct case appears to rely on the unspoken stereotype and assumption 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.[32]

The preponderance standard is used by courts in all civil rights cases.[33] It is the only standard of proof that treats both sides equally and is consistent with Title IX's requirement that grievance procedures be "equitable." By allowing schools to use a "clear and convincing evidence" standard, the proposed rule would tilt investigations in favor of respondents and against complainants. The Department argues that Title IX investigations may need a more demanding standard because of the "heightened stigma" and the "significant, permanent, and far-reaching" consequences for respondents if they are found responsible for sexual harassment.[34] But the Department ignores the reality that Title IX complainants face "heightened stigma" for reporting sexual harassment as compared to other types of misconduct, and that complainants suffer "significant, permanent, and far-reaching" consequences to their education if their school fails to meaningfully address the harassment, particularly as 34% of college survivors drop out of college.[35] Both students have an equal interest in obtaining an education. Catering only to the impacts on respondents in designing a grievance process to address harassment is inequitable.

IX. The proposed rules fail to impose clear timeframes for investigations and allow impermissible delays.

The proposed rules require schools to have "reasonably prompt timeframes" for investigations, but allows them to create a "temporary delay" or "limited extension" of timeframes for "good cause," which includes "concurrent law enforcement activity."[36] In contrast, Title IX guidance issued by the Obama administration recommended that schools finish investigations within 60 days, and prohibited schools from delaying a Title IX investigation just because there was an ongoing criminal investigation.

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[31] Proposed rule § 106.45(b)(4)(i) permits schools to use the preponderance standard only if it uses that standard for all other student misconduct cases that carry the same maximum sanction and for all cases against employees. This is a one-way ratchet: a school would be permitted to use the higher clear and convincing evidence standard in sexual assault cases, while using a lower standard in all other cases.

[32] Kingkade, *supra* 24.

[33] Katharine Baker et al., Title IX & the Preponderance of the Evidence: A White Paper (July 18, 2017), available at http://www.feministlawprofessors.com/wp-content/uploads/2017/07/Title-IX-Preponderance-White-Paper-signed-7.18.17-2.pdf (signed by 90 law professors).

[34] 83 Fed. Reg. 61477.

[35] Cecilia Mengo & Beverly M. Black, Violence Victimization on a College Campus: Impact on GPA and School Dropout, 18(2) J.C. Student Retention: Res., Theory & Prac. 234, 244 (2015), available at https://doi.org/10.1177/1521025115584750.

[36] NPRM, *supra* 4 at § 106.45(b)(1)(v).

Under the proposed rules, if there is an ongoing criminal investigation, the school would be allowed to delay its Title IX investigation for an unspecified length of time. While criminal investigations seek to punish an abuser for their conduct, Title IX investigations should seek to ensure that complainants are able to access educational opportunities that become inaccessible due to harassment. Students should not be forced to wait months or years until after a criminal investigation is completed in order to seek resolution from their schools. The Association of Title IX Administrators (ATIXA) agrees that a school that "delay[s] or suspend[s] its investigation" at the request of a prosecutor creates a safety risk to the survivor and to "other students, as well.[37]

X. The proposed rules would require schools to give unequal appeal rights.

Although Secretary DeVos claims that the proposed rules make "[a]ppeal rights equally available to both parties,"[38] they do not in fact provide equal *grounds for appeal* to both parties, as complainants are barred from appealing a school's resolution of a harassment complaint based on inadequate sanctions imposed on a respondent. Allowing only the respondent the right to appeal a sanction decision is both unfair and a violation of the requirement of "equitable" procedures, because survivors are also impacted by sanction decisions. For example, if their abuser is still in the same classroom, the survivor may experience further trauma.

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Overall, the proposed regulations would have a chilling effect on the reporting of sexual harassment and assault in K-12 schools and post-secondary institutions. Current statistics reflect that reporting levels are alarmingly low, with only 12% of college survivors and 2% of girls ages 14-18 reporting sexual assault to their schools or the police.[39] The proposed regulations will make it even more difficult for survivors to seek justice, from the harmful new definition of sexual harassment, to the incredibly burdensome evidentiary standard, to the instruction to schools to look the other way when reports of harassment or assault of students do not occur on school grounds or are not made directly to the "right" adult.

Contrary to the Department's mandate, the proposed regulations will not protect students' access to education and enforce civil rights laws. Instead, they will create dangerous and unhealthy school environments. Even K-12 school groups are opposing the proposed rules, which they believe not to be in schools' best interests as they will put children at risk of harm; create confusion among teachers, school leaders, and staff; and subject school districts to more litigation.

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[37] Association of Title IX Administrators, ATIXA Position Statement on the Proposed Legislation Entitled: Promoting Real Opportunity, Success, And Prosperity Through Education Reform (PROSPER) Act (Higher Education Act Reauthorization) (Jan. 18, 2018), available at https://atixa.org/wordpress/wp-content/uploads/2015/03/ATIXA-POSITION-STATEMENT-ON-PROSPER-ACT-Final.pdf.

[38] Betsy DeVos, *Betsy DeVos: It's time we balance the scales of justice in our schools*, Washington Post (Nov. 20, 2018), https://www.washingtonpost.com/opinions/betsey-devos-its-time-we-balance-the-scales-of-justice-in-our-schools/2018/11/20/8dc59348-ecd6-11e8-9236-bb94154151d2_story.html.

[39] Let Her Learn: Girls of Color, *supra* 27 at 1.

Girls Inc. calls on the Department to immediately withdraw the proposed regulations and to focus instead on enforcing Title IX and ensuring schools promptly and effectively respond to sexual harassment and assault.

Thank you for the opportunity to submit comments on the proposed regulations. If you have any questions or need any further information, please contact Girls Inc. Director of Public Policy Lara Kaufmann at lkaufmann@girlsinc.org or 202-463-1881, ext. 301.

Sincerely,

Judy Vredenburgh
President and CEO