



January 29, 2018

Submitted via www.regulations.gov

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

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

Dear Mr. Marcus:

The National Center for Transgender Equality (NCTE) writes to express our strong opposition to the Department of Education's proposed regulations regarding the implementation of Title IX as published in the Federal Register on November 29, 2018. Founded in 2003, NCTE is one of the nation's leading social justice organizations working to improve the lives of the nearly two million transgender people in the United States and their families, including hundreds of thousands of transgender students.

Through our research and advocacy, we have seen the devastating impact that sexual assault and harassment have on transgender students, who are disproportionately likely to face sexual violence and too often face barriers to reporting their experiences and obtaining fair resolutions that protect their rights to equal educational opportunities under Title IX. We are deeply troubled by the Department's proposal, which fails to recognize the realities of sexual assault in our nation's schools, the obligations that schools have under Title IX, and the importance of fair and equitable practices supported by case law, education experts, and nearly twenty years of the Department's enforcement activities. The proposed rule represents a betrayal of the Department's legal and moral responsibility to protect the well-established rights of students under federal law and ensure that sexual harassment or assault never denies a student the opportunity to enjoy equal educational opportunities.

Additionally, we have grave concerns that the Department's proposal to allow schools to assert religious exemptions to Title IX without any advance notice would subject transgender students, among others, to higher rates of discrimination. NCTE opposes the adoption of this rule and calls on the Department to withdraw it.

I. The proposed rule disregards the scope and impact of sexual assault in schools.

There is little debate that sexual assault and harassment is an epidemic in our nation's schools and can have lasting, devastating impacts on the lives and educational attainment of survivors. The

barriers that survivors face to reporting incidents of sexual abuse and receiving the support they need from their schools demands concerted action by the Department and robust enforcement of Title IX's well-recognized protections. The Department's proposal to perversely make it harder for survivors to report assault and obtain the help they need to continue their education threatens to exacerbate these barriers.

Sexual assault and harassment are pervasive in U.S. schools.

Students in K-12 schools and colleges face sexual assault and harassment at unconscionable rates. For example, in grades 7-12, more than half (56%) of girls and nearly half (40%) of boys are sexually harassed each year.¹ And during college, nearly two-thirds of women (62%) and men (61%) are sexually harassed,² and more than 1 in 5 women and nearly 1 in 18 men are sexually assaulted.³ Contrary to suggestions that efforts to address sexual harassment and violence threaten the rights of boys, men and boys are far more likely to be victims of sexual violence than to be falsely accused of it.⁴

The rates of sexual harassment and violence are substantially higher among historically marginalized student populations. For example, people of color, especially Black and Native American women, face disproportionately high rates of sexual violence.⁵ Students with disabilities are approximately three times more likely than non-disabled students to be sexually assaulted.⁶ Lesbian, gay, and bisexual (LGB) students are also at heightened risk of sexual assault and harassment:

- **Lifetime:** CDC data indicates that 46% of bisexual women have been raped, compared to 17% of heterosexual women, and that 75% of bisexual women and 46% of lesbians have experienced forms of sexual violence other than rape, compared to 43% of heterosexual women.⁷ The CDC also estimates that 47% of bisexual men, 40% of gay men, and 21% of heterosexual men have experienced sexual violence other than rape over their lifetimes.⁸
- **College:** Lesbian, gay, and bisexual students in college face high rates of sexual harassment. One study found that nearly three-quarters (73%) of LGB students were sexually harassed in college, compared to 61% of heterosexual college students.⁹ Nearly

¹ Catherine Hill & Holly Kearn, *Crossing the Line: Sexual Harassment at School* 11 (2011), <https://www.aauw.org/research/crossing-the-line>.

² Catherine Hill & Elena Silva, *Drawing the Line: Sexual Harassment on Campus*, 17 (2006), <https://history.aauw.org/aauw-research/2006-drawing-the-line>.

³ David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, 13-14 (2015), <https://www.aau.edu/key-issues/aau-climate-survey-sexual-assault-and-sexual-misconduct-2015>.

⁴ E.g., Tyler Kingkade, *Males Are More Likely to Suffer Sexual Assault than to Be Falsely Accused of It*, HUFFINGTON POST (Dec. 8, 2014), https://www.huffingtonpost.com/2014/12/08/false-rape-accusations_n_6290380.html.

⁵ Women of Color Network, *Domestic Violence in Communities of Color* (2006), http://www.doj.state.or.us/wp-content/uploads/2017/08/women_of_color_network_facts_domestic_violence_2006.pdf.

⁶ Karen Schulman, Kayla Patrick & Need Chaudry, *Let Her Learn: Stopping School Pushout for Girls with Disabilities* 7 (2017), <https://nwlc.org/resources/stopping-school-pushout-for-girls-with-disabilities>.

⁷ Walters, M., Chen, J., & Breiding, M, *National Intimate Partner and Sexual Violence Survey 2010: Findings on Victimization by Sexual Orientation* 10 (2011), https://www.cdc.gov/violenceprevention/pdf/nisvs_sofindings.pdf.

⁸ *Id.* at 11.

⁹ Hill & Silva, *supra* note 2 at 19.

one in five (18%) were harassed on a frequent basis, more than twice the rate among heterosexual students (7%).¹⁰

- **Middle and high school:** Data from the Centers for Disease Control and Prevention (CDC) indicate that 22% of LGB youth have experienced sexual violence, more than double the rate reported by heterosexual youth.¹¹ Additionally, examining the experiences of lesbian, gay, bisexual, transgender, and queer (LGBTQ) students overall, the 2017 National School Climate Survey (NSCS), a study of more than 23,000 LGBTQ middle and high school students, found that more than 8 in 10 LGBTQ students experienced harassment or assault at school and more than half (57%) were sexually harassed at school.¹²

For many students, facing sexual harassment and abuse often means a loss of educational opportunities in addition to long-term ramifications. Survivors often change schools or even drop out entirely because they do not feel safe on campus, and some are even expelled for lower grades or poor attendance after their trauma.¹³ For example, one major study found that 34% of survivors of college sexual assault drop out.¹⁴ Similarly, in the 2017 NSCS, LGBTQ middle and high school students who faced higher levels of in-school victimization were three times as likely to have missed school in the past month because they felt unsafe, were less likely to plan on pursuing post-secondary education, and had lower GPAs than other LGBTQ students.¹⁵

Transgender students are especially vulnerable to sexual assault.

Transgender students are among the most vulnerable to sexual harassment, sexual assault, and other forms of sex-based discrimination. A recent study published by the CDC is one of the latest in a lengthy line of research to document the high rates of sexual assault and harassment faced by transgender students. The study, which analyzed 2017 Youth Risk Behavior Survey data from jurisdictions that piloted a question on transgender identity, found that transgender students, who represented 1.8% of high school respondents, faced far higher rates of assault and harassment than their peers¹⁶:

¹⁰ *Id.*

¹¹ Ctrs. for Disease Control & Prevention, *Youth Risk Behavior Survey Data Summary and Trends Report: 2007-2017* (2018), <https://www.cdc.gov/healthyyouth/data/yrbs/index.htm>.

¹² 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*, 23-26 (2018).

¹³ E.g., 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-students-every-year>; Audrey Chu, *I Dropped Out of College Because I Couldn't Bear to See My Rapist on Campus*, VICE (Sept. 26, 2017), https://broadly.vice.com/en_us/article/qvjzpd/i-dropped-out-of-college-because-i-couldnt-bear-to-see-my-rapist-on-campus.

¹⁴ 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), <https://doi.org/10.1177/1521025115584750>.

¹⁵ Kosciw et al, *supra* note 12 at 43.

¹⁶ Michelle M. Johns et al., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students—19 States and Large Urban School Districts, 2017*, 63 MORBIDITY AND MORTALITY WEEKLY REPORT 67, 69 (Jan. 25, 2019), <https://www.cdc.gov/mmwr/volumes/68/wr/pdfs/mm6803a3-H.pdf>.

- **Nearly one-quarter (24%) of transgender students had been forced to have sexual intercourse**, compared to 4% of male cisgender (non-transgender) students and 11% of female cisgender students.¹⁷
- **Nearly one-quarter (23%) experienced sexual dating violence**, compared to 4% of male cisgender students and 12% of female cisgender students.¹⁸
- **More than one-quarter (26%) experienced physical dating violence**, compared to 6% of male cisgender students and 9% of female cisgender students.¹⁹
- Transgender students were more likely to face bullying and violence in school overall compared to cisgender students. For example, **24% had been threatened or injured with a weapon at school** (compared to 6% of male cisgender students and 4% of female cisgender students), **35% had been bullied in school** (compared to 15% of male cisgender students and 21% of female cisgender students), and **27% felt unsafe traveling to or from school** (compared to 5% of male cisgender students and 7% of female cisgender students).²⁰

The disturbing patterns of victimization emerging from the CDC's data echo the findings of numerous other studies. For example, the 2015 U.S. Transgender Survey (USTS), a study of nearly 28,000 transgender adults, found that **nearly half (47%) had been sexually assaulted over their lifetime**²¹ and **one in ten (10%) had been sexually assaulted in just the past year**.²² Rates of lifetime sexual assault were especially high among respondents of color, including Native American (65%), multiracial (59%), Middle Eastern (58%), Black (53%), and Latino/a (48%) respondents.²³ Rates of sexual assault were also higher among respondents with disabilities, with nearly two-thirds (61%) having been sexually assaulted.²⁴

The 2015 USTS also found high rates of sexual assault and harassment among respondents during their time in K-12 schools. Out of respondents who were out as transgender at some point between Kindergarten and Grade 12 or who were perceived by classmates, teachers, or school staff to be transgender:

- Approximately **one in eight (13%) was sexually assaulted in K-12** because of being transgender.²⁵
- Additionally, more than half (54%) were verbally harassed and 24% were physically attacked because of being transgender.²⁶
- Overall, **more than three-quarters (77%) faced some form of mistreatment in K-12** because of being transgender—with higher rates among respondents with disabilities

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey* 205 (2016).

²² *Id.* at 206.

²³ *Id.* at 205.

²⁴ *Id.*

²⁵ *Id.* at 134.

²⁶ *Id.* at 133.

(82%) and respondents of color, including Native American (92%), Middle Eastern (84%), and multiracial (81%) respondents.²⁷

- Indeed, out of all respondents who were out or perceived as transgender in K-12, **nearly one in five (17%) left a school because of the severity of mistreatment they faced.** Native American (39%), Middle Eastern (36%), and Black (22%) respondents were especially likely to have left a school due to mistreatment.²⁸
- For many respondents, mistreatment in school led to a loss of educational opportunities, as well as lifelong impacts on health, employment, and economic stability.²⁹

Other studies have similarly found high rates of assault and harassment among transgender students in K-12. For example, the 2017 National School Climate Survey found that **85% of transgender students have experienced assault and/or harassment because of their gender.**³⁰ These incidents pushed many students out of school: nearly half (48%) of transgender students missed school in the previous month because they felt unsafe and 23% changed schools because of safety concerns.³¹

High rates of victimization continue to follow transgender students into college. According to the 2015 USTS, out of respondents who were out or perceived as transgender in college or vocational school, **24% were verbally, sexually, or physically harassed** because of being transgender.³² Of those who faced harassment, 16% left college or vocational school because of the severity of the mistreatment they faced.³³ Another study on rates of sexual assault on college campuses found that transgender respondents were among those who faced the highest rates of assault, with one in four transgender and gender-nonconforming students being sexually assaulted during college.³⁴

Barriers to reporting sexual assault discourage many survivors from coming forward.

Even under existing Department guidance and practice, only a minority of survivors of sexual assault report their experience. A mere 12% of college survivors³⁵ and 2% of girls ages 14-18³⁶ report sexual assault to their schools or the police. Students often decline to report for fear of reprisal, because they believe their abuse was not important enough, or because they think that no one would do anything to help.³⁷ These concerns are especially common among members of historically marginalized communities, who are often more likely to be disbelieved or even

²⁷ *Id.* at 132.

²⁸ *Id.* at 135.

²⁹ *Id.* at 132.

³⁰ Kosciw et al., *supra* note 12 at 95.

³¹ *Id.* at 97.

³² James et al., *supra* note 21 at 136.

³³ *Id.*

³⁴ Cantor et al., *supra* note 3 at 13-14.

³⁵ *Poll: One in 5 Women Say They Have Been Sexually Assaulted in College*, WASHINGTON POST (June 12, 2015), <https://www.washingtonpost.com/graphics/local/sexual-assault-poll>.

³⁶ Kayla Patrick & Neena Chaudry, *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence* 1 (2017), <https://nwlc.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence>.

³⁷ RAINN, *Campus Sexual Violence: Statistics*, <https://www.rainn.org/statistics/campus-sexual-violence>.

punished by schools for reporting sexual assault³⁸—including girls of color,³⁹ pregnant and parenting students,⁴⁰ and students with disabilities,⁴¹ as well as LGBTQ students. According to 2017 National School Climate Survey (NSCS), the majority of LGBTQ students who were harassed or assaulted at school did not report these incidents to school staff.⁴² The most common reasons students gave for not reporting their experiences were doubts that school officials would help and fears that reporting the incidents would make the situation worse.⁴³ Many LGBTQ students also fear that if they report their experience, they would be mistreated, disbelieved, or blamed for their own assault, often because of hostility by school staff and discriminatory school policies or practices.⁴⁴

These fears can be borne out when schools too often fail to sufficiently address reports of harassment and assault, further discouraging students from coming forward. For example, the NSCS revealed that LGBTQ students who reported their experiences to school staff often found their complaints ignored. Nearly two-thirds (60%) said that school staff did nothing in response or just told them to ignore the harassment, while over one in five (21%) said that school staff told the student to change their behavior to avoid harassment, like not to act “so gay” or dress in a certain way.⁴⁵

While reporting sexual assaults to schools serves a very different function than reporting them to police, it is worth noting that many students are reluctant or unable to report their experiences to police, often making their school’s Title IX procedure the only viable avenue available to them for resolution. There are many reasons why survivors do not report their experiences to police. Many worry that they will be blamed or disbelieved, many are overwhelmed by self-blame or by other mental health ramifications of the trauma, and many fear the deeply entrenched stigma of sexual assault.⁴⁶ Many more believe that police will do little to help them, that reporting their assault

³⁸ E.g., 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.

³⁹ See, e.g., 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), <https://ssrn.com/abstract=3168909>; Nat’l Women’s Law Ctr., *Let Her Learn: A Toolkit To Stop School Pushout for Girls of Color* 1 (2016), <https://nwlc.org/resources/let-her-learn-a-toolkit-to-stop-school-push-out-for-girls-of-color>.

⁴⁰ Brittany D. Chambers & Jennifer Toller Erausquin, *The Promise of Intersectional Stigma to Understand the Complexities of Adolescent Pregnancy and Motherhood*, 3 JOURNAL OF CHILD ADOLESCENT BEHAVIOR, (2015), <https://www.omicsonline.org/open-access/the-promise-of-intersectional-stigma-to-understand-the-complexities-of-adolescent-pregnancy-and-motherhood-2375-4494-1000249.pdf>.

⁴¹ E.g., Nat’l Inst. of Justice, *The Many Challenges Facing Sexual Assault Survivors with Disabilities* (June 18, 2017), <https://www.nij.gov/topics/crime/rape-sexual-violence/Pages/challenges-facing-sexual-assault-survivors-with-disabilities.aspx>; Angela Browne et al., *Examining Criminal Justice Responses to and Help-Seeking Patterns of Sexual Violence Survivors with Disabilities* 11, 14-15 (2016), <https://www.ncjrs.gov/pdffiles1/nij/grants/250196.pdf>.

⁴² Kosciw et al., *supra* note 12 at 28.

⁴³ *Id.* at 29.

⁴⁴ *Id.*

⁴⁵ *Id.* at 31.

⁴⁶ See, e.g., Michael Planty et al, *Bureau of Justice Statistics Special Report: Female Victims of Sexual Violence, 1994-2010* (Mar. 2013, revised May 31, 2016), <https://www.bjs.gov/content/pub/pdf/fvsv9410.pdf>; RAINN, *The Criminal Justice System* (2019), <https://www.rainn.org/statistics/criminal-justice-system>; Beverly Engel, *Stop Shaming Victims of Sexual Assault for Not Reporting*, PSYCHOLOGY TODAY (Sept. 23, 2018),

would not be effective in helping them to be safe or to reach a resolution, and that reporting may even lead to retaliation and further violence.⁴⁷ Some students—especially students of color, undocumented students, students with disabilities, and LGBTQ students—are especially reluctant to report sexual assault to the police due to an increased risk of being subjected to police mistreatment or violence, and in some cases to deportation.⁴⁸ This is often the case for transgender people: the 2015 USTS found that 57% of transgender respondents reported being uncomfortable asking the police for help if they needed it.⁴⁹ These fears can have a basis, particularly in fact in light of the finding that, just in the past year, out of those who interacted with police officers who thought they were transgender, 58% were harassed, assaulted, or faced some other form of mistreatment at the hands of police because of being transgender.⁵⁰

The pervasiveness of sexual assault and harassment in schools and the numerous barriers that students face to reporting and resolving these incidents demonstrate the continued need for robust enforcement of Title IX. The Department’s proposal to instead undermine enforcement of federal law would escalate the crisis of campus sexual assault and exacerbate the barriers survivors face—representing a perversion of the spirit and letter of Title IX.

II. The proposed rules would prioritize shielding schools from liability over the rights of survivors and weaken the enforcement of Title IX.

The proposal to import a narrow liability standard into agency enforcement is improper and unsupported by case law.

For nearly twenty years, the Department has used a single standard to determine if a school violated Title IX by failing to adequately address sexual harassment and assault. The Department’s 2001 Guidance, which went through public notice-and-comment and has been enforced in both Democratic and Republican administrations,⁵¹ defines sexual harassment as “unwelcome conduct

<https://www.psychologytoday.com/us/blog/the-compassion-chronicles/201809/stop-shaming-victims-sexual-assault-not-reporting>.

⁴⁷ *Id.*

⁴⁸ See Jennifer Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation*, NY TIMES (Apr. 30, 2017), <https://www.nytimes.com/2017/04/30/us/immigrants-deportation-sexual-abuse.html?mcubz=3>.

⁴⁹ James et al., *supra* note 21 at 187-88. Respondents with disabilities (70%), those living in poverty (67%), and respondents of color—including Middle Eastern (70%), Black (67%), and multiracial (67%) respondents—were especially likely to report being uncomfortable asking the police for assistance. *Id.*

⁵⁰ *Id.* at 186.

⁵¹ These standards have been reaffirmed multiple times, in 2006 by the Bush Administration, in 2010, 2011, and 2014 in guidance documents issued by the Obama Administration, and even in the 2017 guidance document issued by the current administration. U.S. Dep’t of Educ., *Dear Colleague Letter: Sexual Harassment* (Jan. 25, 2006) <https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html>; U.S. Dep’t of Educ., *Dear Colleague Letter: Harassment and Bullying* (Oct. 26, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; U.S. Dep’t of Educ. *Dear Colleague Letter: Sexual Violence* at 4, 6, 9, 16 (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; U.S. Dep’t of Educ., *Questions and Answers on Title IX and Sexual Violence* 1-2 (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>; U.S. Dep’t of Educ., *Questions and Answers on Campus Sexual Misconduct* (Sept. 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

of a sexual nature.”⁵² 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. In the context of employee-on-student harassment, the Guidance requires schools to address harassment “whether or not the [school] has ‘notice’ of the harassment” in advance.⁵³ Under the 2001 Guidance, schools that do not “take immediate and effective corrective action” would violate Title IX. These standards have appropriately guided the Department’s enforcement activities, effectuating Title IX’s nondiscrimination mandate by requiring schools to quickly and effectively respond to serious incidents of harassment.

This standard appropriately differs from the higher bar established by the Supreme Court in the specific and narrow context of a plaintiff seeking monetary damages against a school under Title IX. To recover monetary damages, a plaintiff must show that their school was deliberately indifferent to sexual harassment that was severe and pervasive and deprived the student of access to educational opportunities and benefits.⁵⁴ In establishing that standard, the Court recognized that it applied *only* to private lawsuits seeking monetary damages: it explicitly noted that the standard it relied on did not limit the scope of behaviors prohibited under Title IX or the Department of Education’s authority and responsibility to administratively enforce rules regarding a broader range of conduct.⁵⁵ The 2001 Guidance directly addressed this distinction, concluding that it was inappropriate for the Department to limit its enforcement activities to the narrower damages standard and that the Department would continue to enforce the full scope of protections provided under Title IX. It recognized that the Supreme Court’s notice requirement, definition of harassment, and deliberate indifference standard were designed to account for the unique circumstances involved in the judicial determination of damages and were irrelevant to the far different context of administrative enforcement. By choosing to import the damages-specific liability standard, the Department confuses its enforcement mechanisms with court processes that have no place in administrative proceedings.

The proposed notice unreasonably exempts schools from liability unless the harassment was reported to one of a small subset of school employees.

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.⁵⁶ This is a dramatic change, as the Department has long required schools to address student-on-student sexual harassment if almost any school employee⁵⁷ either knew about it or should reasonably have known

⁵² U.S. Dep’t of Educ., *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001) [hereinafter “2001 Guidance”], <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>.

⁵³ *Id.*

⁵⁴ *Gebser v. Lago Vista Ind. 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).

⁵⁵ *Gebser*, 524 U.S. at 291-92 (citing 20 U.S.C. § 1682).

⁵⁶ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462 § 106.30 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106) [hereinafter “Proposed Rule”].

⁵⁷ 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,

about it.⁵⁸ This 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 seeking help turn to the adults they trust the most and because students may not know which employees have authority to address the harassment or reasonably believe that most school employees are obligated to report sexual abuse to appropriate school authorities. The 2001 Guidance also requires schools to address all employee-on-student sexual harassment, “whether or not the [school] has ‘notice’ of the harassment.”⁵⁹ The 2001 Guidance recognized the unique harms to students who are abused by adults and their vulnerability to pressure from adult abusers to remain silent, and accordingly it acknowledged schools’ heightened responsibilities to address harassment by their employees.

Under the proposed rules, in contrast, if a K-12 student told a non-teacher school employee they trust that they had been sexually assaulted by another student, the school would have no obligation to help the student.⁶⁰ If a K-12 student told a teacher that she had been sexually assaulted by another teacher or other school employee, the school would have no obligation to help her.⁶¹ And if a college student told their professor or resident assistant that they had been raped by another student, a professor, or another university employee, the school would have no obligation to help them.

The proposed definition of harassment impedes schools’ ability to protect students by requiring them to dismiss many Title IX complaints.

The Department proposes to abandon the definition of sexual harassment in the 2001 Guidance in favor of a sharply limited one: “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 [school’s] education program or activity.”⁶² In addition, the proposed rule not only *allows* schools to dismiss Title IX complaints of harassment that do not meet this definition—it exceeds the Department’s authority by *requiring* them to do so.

Under this definition, a school would be required to ignore a student’s Title IX complaint if the harassment has not yet advanced to a point that it prevents a student from accessing educational programs—even if it involved harassment of a minor student by a teacher or other school employee. The proposed rules would also require schools to dismiss Title IX complaints of harassment that occurs outside of a school activity, even when it creates a hostile environment at school. For example, schools would be forced to dismiss off-campus or online sexual harassment that happens outside of a school-sponsored program, even if the student is forced to see their harasser on campus every day and the harassment directly impacts their education as a result. The proposed rule ignores the reality that sexual assault and harassment faced by students—including

or an individual who a student could reasonably believe has this authority or responsibility.” 2001 Guidance, *supra* note 52 at 13.

⁵⁸ *Id.* at 14.

⁵⁹ *Id.* at 10.

⁶⁰ See Proposed Rule, *supra* note 56 at § 106.30 (for K-12, limiting notice to “a teacher in the elementary and secondary context with regard to student-on-student harassment”).

⁶¹ See *id.*

⁶² *Id.*

harassment by school employees or by other students—frequently occurs off school property and yet is no less likely to interfere with their educational opportunities.⁶³ It would also force many schools that already investigate off-campus conduct under their Title IX policies to abandon these nondiscrimination efforts. The proposed rule further conflicts with Title IX’s statutory language, which holds schools responsible for addressing sexual harassment if it affects a student’s ability to enjoy the benefits of an educational program, regardless of where it occurs.⁶⁴

Importantly, requiring schools to dismiss complaints of discrimination exceeds the Department’s statutory authority. Under Title IX, the Department is only authorized to issue rules to effectuate the nondiscrimination protections provided by Title IX. Title IX does not delegate to the Department the authority to limit nondiscrimination protections or tell schools when they are not permitted protect students against discrimination.⁶⁵ By requiring schools to dismiss many complaints of sexual violence or harassment, regardless of whether the harassment denies a student educational opportunities on the basis of sex, the proposed rule undermines rather than effectuates Title IX’s nondiscrimination mandate. While the Department is well within its authority to require schools to adopt civil rights protections to further Title IX’s mandate of prohibiting sex discrimination, it does not have the authority to force schools to ignore sexual violence or harassment.

The proposed “deliberate indifference” standard would shield schools from liability even when they mishandle complaints.

The Department proposes to hold schools liable under Title IX only when they act with “deliberate indifference”—a standard far lower than the one established under existing guidance, which requires schools to act “reasonably” and “take immediate and effective corrective action” to resolve harassment complaints.⁶⁶ 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 Department proposes that as long as a school follows minimal procedural requirements set out in the proposed rules, it will not challenge the school’s response to harassment complaints. This standard would shield schools from accountability under Title IX—even if they mishandle complaints or do next

⁶³ The Department itself recognized the devastating impacts of off-campus sexual assault in its recent decision to cut off partial funding to the Chicago Public Schools for failing to address two reports of off-campus sexual assault, including by a student who was sexually abused by a teacher in his car and a by student who was sexually assaulted in an abandoned building by thirteen boys, including eight whom she recognized from school. 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), <https://www.chicagotribune.com/news/local/breaking/ct-met-cps-civil-rights-20180925-story.html>. See also United Educators, *Confronting Campus Sexual Assault: An Examination of Higher Education Claims* (2015), http://www.ncdsv.org/ERS_Confronting-Campus-Sexual-Assault_2015.pdf; Jennifer J. Freyd, *The UO Sexual Violence and Institutional Betrayal Surveys: 2014, 2015, and 2015-2016* (Oct. 16, 2014), <https://www.uwire.com/2014/10/16/sexual-assault-more-prevalent-in-fraternities-and-sororities-study-finds>.

⁶⁴ See 20 U.S.C. § 1681(a).

⁶⁵ See Michael C. Dorf, *The Department of Education’s Title IX Power Grab*, VERDICT (Nov. 28, 2018), <https://verdict.justia.com/2018/11/28/the-department-of-educations-title-ix-power-grab>.

⁶⁶ 2001 Guidance, *supra* note 52.

to nothing in response, fail to provide effective supports for survivors, or wrongly determine, against the weight of the evidence, that an accused harasser was not responsible for sexual assault.

Under the proposed rules, schools are subject to different liability standards for sexual harassment against students and against its employees.

The Department's proposed notice and deliberate indifference standards and definition of sexual harassment would mean that schools would be held to a lower standard in addressing sexual harassment of students in its care—including minors—than in addressing harassment of its adult employees. In spite of the unique vulnerabilities that students face, the proposed rule would shield schools from liability under Title IX for ignoring sexual harassment complaints by students, even when the same inaction towards sexual harassment experienced by its employees would trigger liability under the closely related Title VII statute prohibiting workplace discrimination.

Under Title VII, a school is potentially liable for harassment of an employee if the harassment is “sufficiently severe *or* pervasive to *alter* the conditions of the victim's employment” (emphasis added). If the employee is harassed by a coworker or other third party, the school is liable if it “knew or should have known of the misconduct” and failed to take immediate and appropriate corrective action.⁶⁷ However, under the proposed rules, a school would only be liable for harassment against a student if it is (1) deliberately indifferent to (2) sexual harassment that is so severe, pervasive, *and* objectively offensive that it *denied* the student access to the school's program or activity; (3) the harassment occurred within the school's program or activity; and (4) a school employee with “the authority to institute corrective measures” had “actual knowledge” of the harassment. In other words, under the proposed rules, schools would be allowed to fail to act on harassment of students under its care even when that inaction would trigger liability when the same harassment is faced by its employees. Indeed, as discussed above, under the proposed rule in many instances schools would be *prohibited* from taking the same steps to protect children in schools that they are *required* to take to protect their adult employees.

III. The grievance procedures required by the proposed rules would impermissibly tilt the process in favor of named harassers, re-traumatize complainants, and conflict with Title IX's nondiscrimination mandate.

Despite purporting to require equitable processes for investigations and resolutions of Title IX complaints,⁶⁸ the proposed rule would in fact require schools to conduct their grievance procedures in a way that is fundamentally inequitable and that disfavors complainants in favor of respondents. The Department attempts to justify its attempt to weaken Title IX protections for complainants by arguing for a need to increase protections of respondents' due process rights,⁶⁹ even though the Department's 2001 guidance already instructs schools to protect the “due process rights of the

⁶⁷ *Meritor Savings Bank v. Vinson*, 477 US 57, 476, 477 (1986) (internal quotations and brackets omitted); Equal Emp't Opportunity Comm'n, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 18, 1999) (an employer is automatically liable for harassment by “a supervisor with immediate (or successively higher) authority over the employee”), <https://www.eeoc.gov/policy/docs/harassment.html>.

⁶⁸ See Proposed Rule, *supra* note 56 at § 106.8(c).

⁶⁹ *Id.* at § 106.6(d)(2).

accused”⁷⁰ and existing Title IX regulations already provide more rigorous due process protections than are required under the Constitution. Rather than providing necessary protections for respondents, the new procedural requirements proposed by the Department inappropriately purports to pit Title IX’s civil rights mandate against the Constitution’s Due Process requirements when no such conflict exists.

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

Under the proposed rule, schools would be required to presume that the reported harassment or violence did not occur, skewing the proceedings in favor of the respondent.⁷¹ This presumption would also reinforce myths upon which much of the proposed rules is based—namely, the myth that false allegations of sexual assault are a widespread and serious danger. Importing the presumption of innocence, a criminal law principle, into the enforcement of a civil rights law is contrary to basic legal principles. Criminal defendants are presumed innocent until proven guilty because their very liberty is at stake, while there is no such principle in civil proceedings or civil rights proceedings—including under Title IX—even when the defendant stands to face monetary, reputational, or other losses.

The proposed rules would re-traumatize many survivors and deter reporting by requiring them to submit to live cross-examination by their named harasser’s advisor of choice.

The proposed rule 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,” which can include an attorney who is prepared to grill the survivor about the traumatic details of the assault or a parent or close friend of the named harasser. The adversarial and contentious nature of cross-examination could further traumatize survivors who seek help through Title IX and discourage many students from participating in a Title IX grievance process, chilling those who have experienced or witnessed harassment from coming forward. The proposed rules would not entitle the survivor to the procedural protections that witnesses have during cross-examination in the very criminal court proceedings that seem to have inspired this requirement. For example, schools would not be required to apply rules of evidence or make a prosecuting attorney available to object to irrelevant or unnecessarily aggressive questions.

Contrary to the Department’s suggestions, neither the Constitution nor any federal law requires live cross-examination in school proceedings.⁷² The Department itself admits that written

⁷⁰ 2001 Guidance, *supra* note 52 at 22.

⁷¹ 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/betsy-devos-its-time-we-balance-the-scales-of-justice-in-our-schools/2018/11/20/8dc59348-ecd6-11e8-9236-bb94154151d2_story.html).

⁷² See, e.g., *Goss v. Lopez*, 419 U.S. 565, 583 (1975) (10-day suspension does not require “the opportunity...to confront and cross-examine witnesses”); *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 158 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961) (approving circuit court decision holding that expulsion does not require “a full-dress

questions submitted by students or oral questions asked by a neutral school official are fair and effective ways to discern the truth in K-12 schools,⁷³ and proposes retaining that method for K-12 proceedings. The Department has not explained why the processes that it considers effective for addressing harassment in proceedings involving 17- or 18-year-old students in high school would be ineffective for 17- or 18-year-old students in college.

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 in Title IX cases to decide whether sexual harassment occurred.⁷⁴ By contrast, the proposed rule 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 standard, even if they carry the same maximum penalties.⁷⁵ The Department's decision to allow schools to impose a more burdensome standard in sexual assault cases than in any other student misconduct case perpetuates the false and baseless stereotype that survivors are more likely to lie about sexual assault than students who report physical assault, plagiarism, or other school disciplinary violations.

The preponderance standard is used by courts in almost all civil rights cases.⁷⁶ It is the only standard of proof that treats both sides equally and remains 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. In spite of the fact that many other forms of misconduct carry serious implications for the education of students who are found responsible, the Department argues that Title IX

judicial hearing, with the right to cross-examine witnesses"); *see also* *Coplin v. Conejo Valley Unified Sch. Dist.*, 903 F. Supp. 1377, 1383 (C.D. Cal. 1995); *Fellheimer v. Middlebury College*, 869 F. Supp. 238, 247 (D. Vt. 1994).

⁷³ Proposed Rule, 83 Fed. Reg. at 61476.

⁷⁴ 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, 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, <http://www.nchern.org/documents/202-GeorgetownUniversity--110302017Genster.pdf>.

⁷⁵ Proposed § 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. No such restriction applies for schools who wish to use the clear and convincing standard for sexual assault cases and the preponderance standard in all other cases: under the proposed rule, they are free to subject sexual assault complaints to a higher standard than all other cases of student misconduct.

⁷⁶ Katharine Baker et al., *Title IX & the Preponderance of the Evidence: A White Paper* (July 18, 2017), <http://www.feministlawprofessors.com/wp-content/uploads/2017/07/Title-IX-Preponderance-White-Paper-signed-7.18.17-2.pdf>.

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 harassment⁷⁷—all the while ignoring the “heightened stigma” complainants face for reporting sexual harassment and violence compared to other types of misconduct, and the “significant, permanent, and far-reaching” consequences to their education if their school fails to meaningfully address the harassment or violence they have experienced.

The proposed rules would require schools to give unequal appeal rights to complainants and respondents.

Although Secretary DeVos claims that the proposed rules make “[a]ppeal rights equally available to both parties,”⁷⁸ they do not in fact provide equal grounds for appeal to both parties. Complainants are barred from appealing a school’s resolution of a harassment complaint based on inadequate sanctions imposed on the respondent, even though respondents would have the right to appeal sanctions. Giving only the respondent the right to appeal a sanction decision is both fundamentally unfair and a violation of Title IX’s requirement of equitable procedures. Doing so fails to recognize that survivors as well as respondents are impacted by the sanctions a school imposes. For example, if a school determines that a respondent is responsible for a sexual assault but still permits them to live in the same dormitory as the survivor or attend the same classes, the survivor may continue to face daily re-traumatization that impedes their educational opportunities and even be put at risk for further violence.

IV. The proposed rules would allow schools to claim religious exemptions for violating Title IX with no warning to students or prior notification to the Department.

Since 1975, § 106.12 has provided for religious institutions to claim an exemption from Title IX by providing a written notification to the Department of Education stating which portions of Title IX or its accompanying regulations are in conflict with the tenets of their faith. The proposed rule eliminates this provision and would allow and encourage a religious institution to avoid disclosing their intent to discriminate and retroactively claim an exemption only after a Title IX complaint has been filed against it. This dramatic and unjustified change could result in fundamentally unfair surprises and educational harms to students—especially women and girls, LGBTQ students, pregnant or parenting students, and students who seek to access reproductive health care.

Many transgender students are people of faith, and the ability to make an informed decision about their education is often deeply important to them. For example, the 2015 U.S. Transgender Survey found that approximately two-thirds (66%) of the nearly 28,000 transgender respondents had been part of a faith community at some point in their lives,⁷⁹ and 63% currently had a religious or spiritual affiliation.⁸⁰ Many transgender students seek to attend religious schools, and under the proposed rule, they would often have no way of knowing in advance whether a particular school

⁷⁷ Proposed Rule, 83 Fed. Reg. at 61477.

⁷⁸ DeVos, *supra* note 71.

⁷⁹ James et al., *supra* note 21 at 76.

⁸⁰ *Id.* at 54. See also Laurel Powell, *A New Trump Plan Could Encourage Religious Colleges to Reject Trans Students* (Dec. 12, 2018), <https://medium.com/transequalitynow/a-new-trump-plan-could-encourage-religious-colleges-to-reject-trans-students-ddf33666eade>.

would subject them to discrimination. Simply knowing the faith tradition of a school is not adequate notice, since one church or religious institution may not ascribe to the same beliefs or interpretations about transgender people as another institution of the same faith tradition. Transgender students should not have to avoid attending religious colleges and universities or live in fear of discrimination because of a lack of transparency about a school's intentions.

Students should have the opportunity to make determinations about school attendance based on complete information regarding a university's ability and possible intent to discriminate against them. For some students, that may mean choosing an alternate school during the application process, transferring to another university, or even, for example, making the extremely difficult decision to not disclose their transgender status or to delay a gender transition until after graduation. In the absence of communications between religious institutions and the Department of Education, current and prospective students and their families may lack the information necessary to make informed decisions. When schools are not required to disclose to students their intent to avail themselves of an exemption, or even notify the Department in advance, LGBTQ and other students can face enormous harms: for example, a transgender student could get expelled from school with no advance warning midway through their degree simply because they were outed as transgender. While the Department must apply Title IX statutory exemption language and has not denied exemptions solely on the basis of a school's failure to provide advance notice, such notice is an important indicator that an exemption request is bona fide, and directing institutions to provide notice helps ensure fundamental fairness for students.

While notifying the Department of objections under Title IX represents only a negligible burden on schools, the potential impact on students, including lost tuition and professional opportunities, can be far-reaching. In order to ensure fundamental fairness to students, the Department should ensure that students are able to obtain information about any religious exemptions asserted by schools. If the Department is serious about ensuring fair processes for all students under Title IX, it should give institutions every incentive to take the simple step of providing advance notice of their intent to claim an exemption. Accordingly, the Department should withdraw the proposed change to § 106.12.

V. Conclusion

The Department's proposed rules would fundamentally weaken enforcement of Title IX, and they would make it more difficult for survivors to report sexual assault and harassment and receive the help they need to continue their education. The proposed rule disregards the reality of sexual assault in schools, imports unsupported and inequitable legal standards into agency enforcement, and imposes procedural requirements that bias Title IX investigations in favor of named harassers and that may subject survivors to further trauma. Through this rule, the Department proposes to shield schools from liability even when they fail to address complaints of sexual harassment and assault, in addition to expanding schools' ability to claim religious exemptions from Title IX at the cost of students' rights. Instead of effectuating Title IX's prohibition on sex discrimination in schools, the proposed rule threatens to instead encourage or even require schools to sweep sexual harassment and assault under the rug and deny survivors the right to enjoy the same educational opportunities as their peers.

The proposed rule is beyond the Department's authority and inconsistent with its mission and the purposes of Title IX. NCTE calls upon the Department of Education to withdraw this rule immediately and instead ensure the robust and equitable enforcement of Title IX's protections for all students.