



BOARD OF DIRECTORS

President
Peter B. Edelman
Georgetown University Law Center

Vice President
Christopher Wu
Casey Family Programs

Secretary
Brian Rocca
Morgan, Lewis & Bockius LLP

Treasurer
James D. Weill
Food Research & Action Center (FRAC)

Mary Bissell
ChildFocus

Alexander L. Brainerd
Judicial Arbitration and Mediation
Services, Inc. (JAMS)

David E. Brown
The Annie E Casey Foundation

Thomas Ehrlich
Stanford University School of Education

Laura K. Lin
Munger Tolles & Olson LLP

Jack Londen
Morrison & Foerster LLP

Walter Patrick Loughlin
K&L Gates LLP

Mary E. McCutcheon
Farella, Braun + Martel LLP

Ryan J. Smith
The Education Trust-West

Jory C. Steele
Stanford Law School

Executive Director
Jesse Hahnel

January 30, 2019

Re: Proposed Rule Regarding Nondiscrimination on the
Basis of Sex in Education Programs or Activities
Receiving Federal Financial Assistance –
Docket ID ED-2018-OCR-0064-0001

Dear Assistant Secretary Marcus:

For over four decades, the National Center for Youth Law (NCYL) has improved the lives of vulnerable children and youth by transforming the public systems that serve them. NCYL files these comments in opposition to the Notice of Proposed Rulemaking (NPRM) published at 83 Fed. Reg. 61,642 (November 29, 2018).

Before explaining why this NPRM is fatally flawed, it is important to stress that NCYL believes there is an important and robust role for the federal government in protecting the civil rights of all students, including through appropriate procedural protections. And NCYL believes there is much productive work that can be done improving the administration of school discipline. In our experience, the administration of school discipline in many public schools, including charter schools, requires significant reform. Some of procedural protections proposed by the NPRM, if properly implemented as part of comprehensive reform, might be of benefit to students.

But the NPRM's heavy-handed proposals, weighted severely against people who have experienced sexual harassment, including sexual violence, will not improve school districts' systems. The proposals will simply add complexity, uncertainty, and further arbitrariness to existing discipline systems.

The NPRM is flawed in multiple respects. As we discuss in detail in the attached, the Department of Education did not engage in all the requirements of laws and Executive Orders before issuing the NPRM. And the substantive proposals it contains make bad law and bad policy. This NPRM should be withdrawn in its entirety.

Sincerely,

Jesse Hahnel

Executive Director

I. Ms. DeVos Is Not The Secretary Of Education Because, Contrary To The Constitution, She Was Not Confirmed By A Majority Of The Senate

The NPRM relies on Betsy DeVos, by name and title, as the person who authorized the proposed regulations. 83 Fed. Reg. at 61,495/2. But she lacks the authority to propose or promulgate these regulations because she was not confirmed by a majority of the Senate and thus is not the Secretary of Education.

The Constitution requires that principal “Officers of the United States,” such as the head of a federal agency, may only be appointed by the President “with the advice and consent of the Senate.” Art. II, § 2, cl. 2. When Ms. DeVos’ nomination to be Secretary of Education was put up for a vote, a majority of Senators did not support her confirmation. It was a tie.¹ The Vice-President purported to break the tie. But the Vice President can play no role in the Senate’s duty under Article II to consent to Presidential nominees. And absent his participation, there is no argument that Ms. DeVos could have been confirmed by a tie vote.

This involvement of the Vice President in Ms. DeVos’ confirmation is a historical rarity. According to the U.S. Senate’s Historical Office, Ms. DeVos is the first cabinet secretary in United States history where the Vice President voted on one of the President’s nominations.² She is one of less than five presidential nominees in our Nation’s history where the Vice President purported to cast a tie breaking vote on an Executive Branch confirmation (all for positions of lesser rank); prior to Ms. DeVos, the most recent occasion was in 1862.³ This extremely rare participation of the Vice President in confirmations supports our argument that such participation is inconsistent with the Constitution’s first principles.

The Constitution provides that “[t]he Senate of the United States shall be composed of two Senators from each State.” Art. I, § 3, cl. 1. Article I also provides that the Vice President will be “President of the Senate” but states that he may not vote “unless they be equally divided.” Art. I, § 3, cl. 4. This authorization of the Vice President to vote appears in Article I and thus is most reasonably read as applying to the power exercised by the Senate under Article I, which begins by

¹ <https://www.congress.gov/nomination/115th-congress/37>.

² U.S. Senate Historical Office, *Occasions When Vice Presidents Have Voted to Break Tie Votes in the Senate*, at 9 n.3 (Nov. 9, 2018), <https://www.senate.gov/artandhistory/history/resources/pdf/VPTies.pdf>.

³ Samuel Morse, *The Constitutional Argument Against the Vice President Casting Tie-Breaking Votes on Judicial Nominees*, *Cardozo L. Rev. De Novo* 142, 144, 146, 150-151 (2018).

saying that “[a]ll legislative powers herein granted” are “vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” Art. I, § 1.⁴

But the Senate’s authority to consent (or not) to a Presidential nomination is not a legislative power granted by Article I of the Constitution, but a distinct non-legislative authority granted by *Article II* as an express limitation on the President’s power to appoint principal officers. And in sections 2 and 3 of Article II, which identify the powers granted the President, there is no mention of a role for the Vice President. The distinct placement of the Vice President’s voting authority and Senate’s confirmation authority in different articles of the Constitution demonstrates that the Vice President was not authorized to break a Senate equally divided over a Presidential nominee.⁵

The *Federalist Papers*, which often are relied upon to discern the meaning of the Constitution, understood that when the Senate was exercising its consent power over nominees, and was equally divided, the confirmation would fail.⁶ Federalist 69, authored by Alexander Hamilton, contrasted the appointments power of the President to that held by Governor of New York. According to Federalist 69, the Governor had the sole power to nominate officials and was a voting member of the five-member council that voted whether to confirm nominees. Thus, “if the council be divided, the governor can turn the scale, and confirm his own nomination.” By contrast, “[i]n the national government, *if the Senate should be divided, no appointment could be made.*”⁷ If the Vice President could vote on nominees whenever there was a tie, however, there could never be an equally divided vote.

As noted above, the issue has arisen only rarely in the Nation’s history, but at least one Senator made clear his view that the Vice President had no role in the confirmation of Presidential nominees. In 1850, Senators addressed the distinct but related question of whether the Vice President could break a tie for selection of a Senate employee, i.e., the Senate chaplain. Senator William King – who himself

⁴ Morse, *supra*, at 147-148.

⁵ Morse, *supra*, at 147-148; John Langford, *Did the Framers Intend the Vice President to Have a Say in Judicial Appointments? Perhaps Not.* (Oct. 5, 2018), <https://balkin.blogspot.com/2018/10/did-framers-intend-vice-president-to.html> (there are “at least two textual clues in the Constitution which suggest[] that the Framers may not, in fact, have contemplated that a Vice President would or could break a Senate equally divided over a Presidential nominee”).

⁶ Langford, *supra*, at footnote 3 and accompanying text.

⁷ Federalist No. 69 (Alexander Hamilton) (emphasis added).

would later be Vice President for President Franklin Pierce – argued in the negative. He started by analogizing the vote on the chaplain to a vote on Presidential nominees, and, in language very similar to the *Federalist Papers*, noted: “Clearly the Vice President has no power to vote on executive nominations, because if the Senate is equally divided in regard to the propriety of their confirmation, they are rejected.” When a different Senator pointed out that a Vice President had cast a notorious vote in 1832 that *rejected* a Presidential nominee upon whom the Senate was equally divided, Senator King explained that in that case the Vice President’s vote was unnecessary because the nominee was already “rejected if he did not receive a majority of the votes.” Senator King pressed the view that “individuals nominated must receive the votes of a majority of the Senate to be confirmed, and there can be no necessity, therefore, for the presiding officer to give his vote.”⁸

Further, from a functional perspective, it makes little sense to give the Vice President a role in the nominations process because the Senate’s consent function was intended as a check on the Executive Branch. To permit the Vice President to vote on such matters in the event of a tie would be, in essence, giving the Executive Branch a decisive role in both the nomination and then the confirmation.⁹

For all these reasons, Betsy DeVos was not confirmed by the Senate and thus could not be appointed by the President as Secretary of Education. Under the Federal Vacancies Reform Act, her actions in this matter are illegitimate, have no force or effect, and cannot at this stage be ratified. 33 U.S.C. § 3348(d). The Because no prior Secretaries delegated the authority to issue NPRM’s or final regulations such as this to anyone else in the Department’s chain of command,¹⁰ the NPRM cannot be issued until a new Secretary is nominated.¹¹

⁸ All the quotations in this paragraph are from Cong. Globe, 31st Congress, 1st Session 129 (Jan. 9, 1850). The notorious 1832 vote was arranged by the Vice President’s allies so that he had the opportunity to cast a vote against a political rival. Langford, *supra*, at footnote 23 and accompanying text.

⁹ Morse, *supra*, at 155-156.

¹⁰ U.S. Department of Education, Delegation of Authority to Approve and Sign Documents for Publication in Federal Register, EA/GEN/12, at 4 (Pt. II) (June 15, 2006) (Secretary has not delegated authority to approve or sign “[p]roposed regulations” or “[n]otices that contain final regulations adopted through a rulemaking action”).

¹¹ S. Rep. No. 105-250, at 19 (1998) (Federal Vacancies Reform Act) (“If the head of the agency position is vacant for more than [210] days without a nomination being sent to the Senate, the office is to remain vacant.”).

II. The Department Has Not Complied With Title IV's Statutory Requirements Of Negotiated Rulemaking And Delayed Effective Dates

The NPRM states that “the changes made in the regulatory action materially alter the rights and obligations of federal financial assistance under Title IV” of the Higher Education Act, 20 U.S.C. §§ 1070-1099d. 83 Fed. Reg. at 61,483/3. But these regulatory changes are not being adopted in compliance with requirements that apply to all regulations “pertaining to” or “affecting” Title IV programs.

A. Title IV's Negotiated Rulemaking Requirement Applies to the NPRM and Was Not Followed

Title IV requires negotiated rulemaking. Congress provided that “[a]ll regulations *pertaining to this subchapter* [Title IV] that are promulgated after October 7, 1998, shall be subject to a negotiated rulemaking.” 20 U.S.C. § 1098a(b)(2). While it is true that the NPRM does not expressly rely on any Title IV provision as the authority for its proposed regulations, Congress did not limit the negotiated-rulemaking obligation to such regulations. By contrast, in surrounding provisions of Title IV, Congress used words that demonstrated less capacious coverage, such as “promulgated pursuant,” “prescribed under” or “issued under.”¹²

Instead of focusing on the source of authority to regulate, Congress used the phrase “pertaining to this subchapter” when describing when negotiated rulemaking was required. The phrase “pertaining to” is “very sweeping in nature, not requiring an overly close nexus to the subject matter to which it refers. Indeed, under common usage, the word ‘pertain’ merely requires some connection, even if weak, to the subject matter.”¹³ The NPRM pertains to Title IV for precisely the reason identified in the NPRM: it will “materially alter the rights and obligations” of every Title IV recipient. 83 Fed. Reg. at 61,483/3. If Congress had wanted narrower coverage of the negotiated-rulemaking requirement, it clearly knew how to do so. But it did not. And, under the plain meaning of the statute, the NPRM was issued unlawfully because it was not preceded by negotiated rulemaking.

Section 1098a(b)(2) does authorize the Secretary to waive the negotiated-rulemaking requirement if the Secretary determines that compliance is “impracticable, unnecessary, or contrary to the public interest.” But in order to

¹² See, e.g., 20 U.S.C. §§ 1090(b) (governing regulations “promulgated pursuant to this subchapter”), 1090(e)(6) (“regulations prescribed under this subchapter”), 1091(e) (“regulations issued under this subchapter”), 1094(c)(1) & (c)(3)(B)(i)(I) (prescribed).

¹³ *United States v. Rainbow Rugs, Inc.*, 838 F. Supp. 11, 14 (D. Me. 1993).

qualify for that waiver, the Secretary must “publish[] the basis for such determination in the Federal Register *at the same time as the proposed regulations in question are first published.*” The NPRM did not contain such a determination, much less the basis for such a determination, and thus this waiver provision is of no help to the validity of the NPRM.

We submitted a FOIA request for prior Departmental interpretations of this provision, docketed as 18-02772-F. We have not yet received any responsive records, in violation of the timelines established by FOIA. This violation prejudices our ability to further make our argument. After the Department fully responds to this FOIA, the Department should re-open the comment period to allow us and other members of the public with whom we share the responses to submit any additional evidence and arguments.

The Department lacks the authority to promulgate regulations other than in the manner prescribed by Congress. In this instance, that manner is negotiated rulemaking. The NPRM did not go through the negotiated-rulemaking process and was thus unlawful.

B. Title IV’s Master Calendar Provision, Not The Administrative Procedure Act, Governs the Effective Date of Any Final Regulations

Distinct from the negotiated rulemaking requirements, Title IV also requires that “any regulatory changes initiated by the Secretary *affecting the programs under this subchapter* [Title IV] that have not been published in final form by November 1 prior to the start of the award year shall not become effective until the beginning of the second award year after such November 1 date.” 20 U.S.C. § 1089(c)(1).

Notably, this language is also not limited to regulations that rely on any Title IV provision as their authority for the proposed regulations, despite Congress’ use of such language elsewhere.¹⁴ Indeed, the use of the term “affecting” is just as broad (if not broader) than Section 1098a(b)(2)’s use of the term “pertaining.”¹⁵ As the NPRM itself acknowledges, these proposed regulations would “materially alter the rights and obligations” of every Title IV recipient and thus are plainly “affecting” the programs. 83 Fed. Reg. at 61,483/3.

¹⁴ See, e.g., 20 U.S.C. §§ 1090(b) (governing regulations “promulgated pursuant to this subchapter”), 1090(e)(6) (“regulations prescribed under this subchapter”), 1091(e) (“regulations issued under this subchapter”), 1094(c)(1) & (c)(3)(B)(i)(I) (prescribed).

¹⁵ *Surfrider Found. v. Int’l Boundary & Water Comm’n*, No. 18CV1621 JM (JMA), 2018 WL 6504154, at *4 (S.D. Cal. Dec. 11, 2018) (“affect” defined to mean “[m]ost generally, to produce an effect on; to influence in some way”).

The drafting history of this provision confirms Congress’s intent that it be read broadly. Initially, Section 1089(c)(1) was limited to “regulatory changes initiated by the Secretary affecting the *general administration of the programs*” under Title IV. But Congress struck out the term “general administration” in 1992, thus broadening the remaining provision’s coverage. The House Report explained that Congress removed that language because the Secretary had relied on it as an excuse not to engage in negotiated rulemaking on some regulations. The report explained that the Secretary had interpreted Section 1089(c)(1) “too narrowly” so that “only those provisions affecting all programs” were subject to the effective date language. By removing that language, Congress “intend[ed] that the effective dates of *all regulations* on Title IV are driven by the Master Calendar requirements.”¹⁶

We submitted a FOIA request for prior Departmental interpretations of the Master Calendar requirement, docketed as 18-02772-F. We have not yet received any responsive records, in violation of the timelines established by FOIA. This violation prejudices our ability to further make our argument. After the Department fully responds to this FOIA, the Department should re-open the comment period to allow us and other members of the public with whom we share the responses to submit any additional evidence and arguments.

In any event, the 30-day minimum effective date provision of the Administrative Procedure Act, 5 U.S.C. § 553(d), is superseded by longer effective date prescribed by 20 U.S.C. § 1089(c)(1), were this NPRM to result in a final rule.

III. The Department Failed To Obtain Approval From The Department of Justice Or Work With The Small Business Administration, Contrary To Executive Orders And The Regulatory Flexibility Act

The Department appears to have made no effort to work with other federal agencies as required by law and Executive Order.

¹⁶ Both quotations in this paragraph are from H.R. Rep. 102-447, 76-77, 1992 U.S.C.C.A.N. 334, 409-410. In the second quotation, emphasis was added.

A. The Department Did Not Obtain Approval of the NPRM from the Attorney General, in Violation of Executive Order 12250

Executive Order 12250 requires any NPRM that addresses sex discrimination under Title IX to be reviewed and approved by the Attorney General prior to its publication in the Federal Register. §§ 1-202, 1-402.¹⁷ That authority (although not the authority to approve final regulations) has been delegated to the Assistant Attorney General for Civil Rights. 28 C.F.R. § 0.51(a).

There is no indication in the NPRM that this requirement was met. Indeed, there is no mention of this Executive Order in the NPRM at all. We submitted a FOIA request for records showing that the Department's communications with the Assistant Attorney General on this NPRM, docketed as 19-00577-F. We have not yet received any responsive records, in violation of the timelines established by FOIA. This violation prejudices our ability to further make our argument. After the Department fully responds to this FOIA, the Department should re-open the comment period to allow us and other members of the public with whom we share the responses to submit any additional evidence and arguments.

The probable failure to comply with the letter and spirit of Executive Order 12250 may be one reason why, as we note later in this comment, there has been no thought given to how these proposed changes will interact with the Title IX regulations of 25 other federal agencies. And, as we further show in the comment, the Department's positions about how to interpret Title IX are contrary to previously-expressed policies of the Department of Justice.

Further, close coordination with the Department of Justice is crucial with regard to Title IX and sexual harassment in particular. The Solicitor General of the United States previously informed the Supreme Court that it was view of the United States that the deliberate indifference standard identified in *Gebser* did not apply to a federal agency enforcing Title IX administratively.¹⁸ It should necessarily be involved in any reversal of that longstanding position.

¹⁷ See also Memorandum from John Gore, Acting Assistant Attorney General, to Federal Agency Civil Rights Directors re: *Clearance Requirements for Title VI, Title IX, Section 504, and Related Nondiscrimination Regulations and Policy Guidance Documents* (Apr. 24, 2018).

¹⁸ U.S. *Amicus* Brief, *Davis v. Monroe County Bd. of Educ.*, No. 97-843, at 19-25 (Nov. 1998).

B. The Department Did Not Notify the Small Business Administration Early in the Process, in Violation of the Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act (RFA), 5 U.S.C. § 601 et al., and Executive Order 13272 are intended to ensure that federal agencies consider the effect of proposed regulations on small governmental and private entities. To further that goal, both the statute and executive order require the Department to involve the Office of Advocacy of the Small Business Administration at critical stages. (Other obligations of the RFA and Executive Order 13272 are discussed later in this comment).

The NPRM contained an initial regulatory flexibility analysis (IFRA). 83 Fed. Reg. at 61,490-493. The NPRM estimates that the overwhelming majority of school districts (more than 99%) are small entities, 83 Fed. Reg. at 61,490/3; and that 68% of all two-year institutions of higher education and 43% of all four-year institutions of higher education are small entities, *id.* at 61,491/2-3. These entities are entitled to the Office of Advocacy's advocacy.

But the NPRM did not say that the Department had shared a draft IFRA with the Office of Advocacy when the Department submitted its draft rule to Office of Information and Regulatory Affairs of the Office of Management and Budget (OIRA) under Executive Order 12866 (i.e., August 31, 2018), as required by Executive Order 13272 § 3(b).

The NPRM also did not say that the Department was transmitting a copy of the IFRA to Office of Advocacy after it was published in the Federal Register, as required by the RFA, 5 U.S.C. § 603(a). In fact, we have been informed by the Office of Advocacy that the Department did not transmit the IFRA to it.

Absent such transmission, the Office of Advocacy had no formal notice of the NPRM and thus missed its opportunity to comment on behalf of affected small entities. This is why, at a minimum, the Department should hold a second round of comments to give the Office of Advocacy and the small entities it represents an opportunity to submit comments.

We submitted a FOIA request for records showing that the Department's communications with the Office of Advocacy on this NPRM, docketed as 19-00577-F. We have not yet received any responsive records, in violation of the timelines established by FOIA. After the Department fully responds to this FOIA, the Department should re-open the comment period to allow us and other members of the public with whom we share the responses to submit any additional evidence and arguments.

C. The Government Shutdown Denied the Department the Opportunity to Receive and Give Appropriate Consideration to the Comments of the Small Business Administration, in Violation of the Regulatory Flexibility Act and Executive Order 13272

The inability of the Office of Advocacy of the Small Business Administration to submit comments due to the shutdown of the Small Business Administration is an independent reason why, at a minimum, the Department should hold a second round of comments after the Office of Advocacy has an opportunity to submit comments.

As noted above, the NPRM estimates that the overwhelming majority of school districts (more than 99%) are small entities, 83 Fed. Reg. at 61,490/3; and that 68% of all two-year institutions of higher education and 43% of all four-year institutions of higher education are small entities, *id.* at 61,491/2-3.

The Regulatory Flexibility Act (RFA), 5 U.S.C. § 601 et al., and Executive Order 13272 anticipate a significant role for the Office of Advocacy in rulemakings that affect small entities. If the Office of Advocacy submits comments on the initial regulatory flexibility analysis (IFRA) during the comment period, the Department is required to give “every appropriate consideration” to the Office of Advocacy’s views, Executive Order 13272 § 3(c), to give a “response ... to any comments filed,” 5 U.S.C. § 604(a)(3), and to issue a “detailed statement of any change made to the proposed rule in the final rule as a result” of the Office of Advocacy’s comments, *id.*

The Office of Advocacy “represents the views and interests of small businesses [including small government entities] before other Federal agencies,” 15 U.S.C. § 634c(a)(4), and is run by a senate-confirmed presidential appointee, *id.* § 634a. Unfortunately, the Office of Advocacy was not operating for 35 days of the comment period due to a lapse in federal funding for its agency, reopening only 3 days before the end of the comment period. Thus, it has not been able to perform its critical function to provide knowledgeable comments regarding the effects of the proposed regulations on small entities. Until the Office of Advocacy’s agency has time to recover from the shutdown, the Office of Advocacy cannot engage in these critical tasks assigned by the RFA and the Executive Order. Nor is this a mere hypothetical concern. Less than five months ago, the Office of Advocacy submitted negative comments on another Department NPRM.¹⁹

¹⁹ Letter from Office of Advocacy, U.S. Small Business Administration to Sec. Betsy DeVos (Aug. 30, 2018), https://www.sba.gov/sites/default/files/SBA_Advocacy_BD_comment.pdf.

And while other commenters might be able to raise some of the same concerns, the special solicitude the Department is required to give the Office of Advocacy's views, Executive Order 13272 § 3(c), and the requirement that it must provide a "response" to "any comments" from the Office of Advocacy and issue a "detailed statement" in response, 5 U.S.C. § 604(a)(3), distinguish the Office of Advocacy from other commenters.

This is why, at a minimum, the Department should hold a second round of comments to give the Office of Advocacy and the small entities it represents an opportunity to submit comments.

IV. The Department Failed To Engage In Required Consultation With Native American Tribes, Elected Officials, And Small Entities, Contrary To Executive Orders And The Regulatory Flexibility Act

The NPRM identified the types of stakeholders with whom it purportedly conducted listening sessions and discussion. 83 Fed. Reg. at 61,463/3-464/1, 61,464/3. Notably absent from those lists were officials from Indian Tribes, elected officials, and small entities. Those omissions reflect a violation of several significant Executive Orders and the Regulatory Flexibility Act.

A. The Department Failed to Consult Indian Tribal Governments, in Violation of Executive Order 13175 and the Department's Consultation Policy

Title IX applies to any recipient that receives federal financial assistance for an education program or activity, including education programs or activities operated by Indian Tribes.²⁰ Over than 25,000 students attend more than 125 school districts controlled by Tribes and there are over 17,000 students enrolled in more than 30 institutions of higher education controlled by Tribes.²¹ The proposed regulations would dictate how school districts and colleges operated by Tribes would have to adjudicate allegations of sexual harassment, including sexual violence. We cannot and do not speak on behalf of the Tribes, but there is

²⁰ See Office of Legal Counsel, U.S. Department of Justice, *Applicability of Section 504 of the Rehabilitation Act to Tribally Controlled Schools*, 28 Opinions of Office of Legal Counsel 276 (Nov. 16, 2004); Office for Civil Rights, U.S. Department of Education, *Office for Civil Rights Jurisdiction Over Tribally Controlled Schools and Colleges* and accompanying *Questions and Answers Regarding Tribally Controlled Schools and Colleges* (Feb. 14, 2014).

²¹ Office for Civil Rights, U.S. Department of Education, *Questions and Answers Regarding Tribally Controlled Schools and Colleges* (Response to Question 1) (Feb. 14, 2014).

evidence that sexual harassment, including sexual assault, is a problem for tribally-operated schools.²²

By regulating when and how these tribally-operated schools will investigate and adjudicate complaints of sexual harassment, these proposed regulations have tribal implications and thus required consultation with tribal officials under section 5(a) of Executive Order 13175. But the Department does not appear to have met any of the requirements of its own Consultation Plan: there is no indication that the Department notified potentially affected Indian tribes in writing that the proposed regulations has tribal implications and gave them at least 30 days to prepare for a consultation activity (Part IV.B); that the Department engaged in any of the specified consultation mechanisms (Part IV.A.2 & C); or that the Department diligently and seriously considered tribal views (Part IV preamble & D). Merely allowing comment on the NPRM is plainly not sufficient to meet these obligations.²³

Further, as we discuss below, these regulations appear to potentially preempt tribal laws, and thus the Department was required to consult with tribal officials “early in the process of developing the proposed regulation,” Executive Order 13175 § 5(c)(2); Department of Education’s Consultation Plan, Part IV.A.1.d. There is no evidence that the Department did so, and thus is missed the opportunity to learn from those tribal consultations.

Given the important government-to-government relationship that has been acknowledged by the United States with tribal nations, it is particularly concerning that the Department would engage in such a significant matter without full consultation with tribal leaders. The NPRM should be withdrawn until such consultations can occur.

²² National Indian Country Clearinghouse on Sexual Assault, *Students at Schools and Universities*, <http://www.niccsa.org/students-at-schools-and-universities/>

²³ *Wyoming v. Department of Interior*, 136 F. Supp.3d 1317, 1346 (D. Wyo. Sept. 30, 2015); Government Accountability Office, *Food Safety: FDA Coordinating with Stakeholders on New Rules but Challenges Remain and Greater Tribal Consultation is Needed*, GAO-16-425, at 20-23 (2016) (interpreting Executive Order 13175); see also *The California Wilderness Coal. v. U.S. Dep’t of Energy*, 631 F.3d 1072, 1087 (9th Cir. 2011) (statutory obligation to “consult” means “more than notice-and-comment;” agency must “confer” with relevant parties before undertaking a course of action); *Confederated Tribes & Bands of Yakima Indian Nation v. FERC*, 746 F.2d 466, 475 (9th Cir.1984) (regulatory requirement to consult was not met merely by giving notice; “The consultation obligation is an affirmative duty.”).

B. The Department Failed to Consult Elected Officials, in Violation of Executive Order 13132 and the Department’s Consultation Process

Title IX applies to any recipient that receives federal financial assistance for an education program or activity, including education programs or activities operated by state and local governments. The proposed regulations would dictate how school districts and state- and locally-operated colleges would have to adjudicate allegations of sexual harassment, including sexual violence.

Thus, as the NPRM acknowledges (83 Fed. Reg. at 61,495/2), these proposed regulations have federalism implications and thus require consultation with “state and local officials” under section 6(a) of Executive Order 13132. The Executive Order defines that term to mean “elected officials of State and local governments.” § 1(d). OMB has made clear that this requirement is not satisfied by consulting with non-elected officials, even if they work for state or local governments.²⁴

The Department is required by Executive Order 13132 to create an “accountable process to ensure meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications.” The Department’s 2000 process, which appears to be its most recent, committed that it “will [u]se” ED Review, “a biweekly electronic newsletter,” “to alert interested State and local elected officials of opportunities for consultation” and will “[u]se ED’s Office of Constituent Affairs’ listserv to notify the National School Boards Association (‘and others?’) of opportunities for consultation.” These opportunities for consultation were *in addition* to “[s]pecifically invit[ing] input from State and local elected officials in the preamble of any notice of proposed rulemaking.” There is nothing in the NPRM itself that suggests the Department complied with this commitment, which is part of the accountable process required by Executive Order 13132 to alert state and local elected officials of “opportunities for consultation” apart from the NPRM. For example, we reviewed the ED Review newsletters from 2017 and 2018 and did not see any mention of opportunities for consultation around Title IX prior to the issuance of the NPRM.²⁵

We are informed that a number of state legislators have also objected to the Department’s failure to consult with them. Merely allowing comment on the

²⁴ U.S. Office of Management and Budget, *Guidance for Implementing E.O. 13132*, M-00-02, at 4 (Response to Question 8) (Oct. 28, 1999).

²⁵ <https://www2.ed.gov/news/newsletters/edreview/index.html>.

NPRM is plainly not sufficient to meet these obligations.²⁶ The NPRM should be withdrawn until such consultations can occur.

Further, as we discuss below, these regulations appear to preempt state and local laws, and thus the Department was required to consult with elected state and local officials “early in the process of developing the proposed regulation.” Executive Order 13132 § 6(c)(1). There is no evidence that the Department did so, to its detriment and the detriment of the state and local officials and the people who elected them.

C. The Department Failed to Assure that Small Entities Have Been Given an Opportunity to Participate in the Rulemaking, in Violation the Regulatory Flexibility Act

Title IX applies to a diverse range of school districts and institutions of higher education. As required by the Regulatory Flexibility Act (RFA), 5 U.S.C. § 603(b)(3), the NPRM contains an estimate of the number of small entities to which the proposed rule will apply. The NPRM estimates that the overwhelming majority of school districts (more than 99%) are small entities, 83 Fed. Reg. at 61,490/3; and that 68% of all two-year institutions of higher education and 43% of all four-year institutions of higher education are small entities, *id.* at 61,491/2-3. The Department did not certify that the regulations, if promulgated, would not have a significant economic impact on small entities. *Cf.* 5 U.S.C. § 605(b). Thus, the Department implicitly found that the regulations would have a significant economic impact. (To the extent the Department did not expressly made such a finding because it estimated that small entities would experience a net cost savings, that would disregard the plain text of the statute; the statute does not require that the economic impact be adverse in order to trigger the RFA’s requirements.)²⁷

In that circumstance, the RFA provides that the Department “shall assure that small entities have been given an opportunity to participate in the rulemaking for the rule through the reasonable use of techniques such as –

²⁶ *Cf. The California Wilderness Coal. v. U.S. Dep’t of Energy*, 631 F.3d 1072, 1087 (9th Cir. 2011) (statutory obligation to “consult” means “more than notice-and-comment;” agency must “confer” with relevant parties before undertaking a course of action); *Confederated Tribes & Bands of Yakima Indian Nation v. FERC*, 746 F.2d 466, 475 (9th Cir.1984) (regulatory requirement to consult was not met merely by giving notice; “The consultation obligation is an affirmative duty.”).

²⁷ Office of Advocacy, U.S. Small Business Administration, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* 20 n.70, 23-24 (Aug. 2017).

- (1) the inclusion in an advance notice of proposed rulemaking, if issued, of a statement that the proposed rule may have a significant economic effect on a substantial number of small entities;
- (2) the publication of general notice of proposed rulemaking in publications likely to be obtained by small entities;
- (3) the direct notification of interested small entities;
- (4) the conduct of open conferences or public hearings concerning the rule for small entities including soliciting and receiving comments over computer networks; and
- (5) the adoption or modification of agency procedural rules to reduce the cost or complexity of participation in the rulemaking by small entities.

5 U.S.C. § 609(a).

The Department does not appear to have engaged in any such techniques. The NPRM itself is silent on any steps it took to notify small entities of the NPRM. Contrary to the mandatory requirements of the RFA, the Department apparently did nothing special to notify and solicit comments from small entities. The Federal Register notice alone is not sufficient, otherwise the list in section 609(a) would have no meaning.

These omissions are particularly material because, as we note elsewhere, the Office of Advocacy of the Small Business Administration could not fulfill its role as the advocate for small entities because the Department did not comply with the requirements to keep the Office of Advocacy informed and because the Office of Advocacy's agency was not operating for 35 days of the comment period due to a lapse in federal funding for its agency, reopening only 3 days before the end of the comment period. This statutory violation regarding notifying small entities requires, at a minimum, a second round of comments after the Department has used reasonable techniques to notify small entities of the opportunity to participate in the rulemaking.

V. The Department Did Not Address And Justify The Preemptive Effect Of Its Proposed Regulations, Contrary To Executive Orders 13132 and 12988 And The 2009 Presidential Preemption Memorandum

The NPRM proposes to set a national standard on various matters related to the investigation and adjudication of claims of sexual harassment, including sexual assault, by school districts and public and private institutions of higher education. Those same topics are the subject of state, local, and tribal laws. Yet the NPRM contains no discussion of preemption, contrary to both Executive Order 13132 and Executive Order 12988 and the 2009 Presidential Preemption Memorandum.

These Executive Orders have recognized the special federalism concerns when a federal agency preempts state law. The 2009 Presidential Memorandum requires that “preemption of State law by [federal] executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption.”²⁸ The NPRM seems to have engaged in no such consideration. Here, not only do the proposed regulations purport to negate state law provisions, they appear to attempt to require state, local, and private entities to violate state law.

For example, proposed § 106.45(b)(4)(i) identifies two – and only two – potential standards of proof that a recipient’s decision-maker may use to determine whether the respondent had engaged in sexual harassment, as that term is defined: preponderance of the evidence or clear and convincing evidence. On their face, the proposed regulations would seem to preempt, in whole or in part, state laws that require a decision-maker to use the “substantial evidence” or “substantial and competent evidence” standard in sexual harassment cases²⁹ which is generally different than the preponderance of the evidence standard.³⁰

The proposed regulation also requires that same standard must be used in resolving complaints against students and employees; and a preponderance standard may only be used if the recipient uses that standard for (some?) other conduct code violations that carry the same maximum disciplinary sanction. These provisions would seem to preempt state laws that *always* require the use of preponderance of the evidence standard for sexual harassment cases.³¹ Depending

²⁸ Memorandum from the President for the Heads of Executive Agencies re: *Preemption* (May 20, 2009).

²⁹ Cal. Educ. Code § 48918(h) (“A decision of the governing board of the school district to expel shall be supported by substantial evidence showing that the pupil committed any of the acts enumerated in Section 48900,” including “an allegation of committing or attempting to commit a sexual assault ... or to commit a sexual battery”); Kan. Stat. Ann. § 72-6116(a)(8) (student suspension of more than 10 days must be “based on substantial evidence”); *Bd. of Educ. of City Sch. Dist. of City of New York v. Mills*, 741 N.Y.S.2d 589, 591 (App. Div. 2002) (explaining that in New York the “substantial and competent” evidence standard for student suspension proceedings is “imposed by statute,” citing State Administrative Procedure Act § 306[1]); Minn. Stat. Ann. § 122A.40(14) (“substantial and competent evidence” before teacher may be terminated); Miss. St. § 37-9-1 (“The standard of proof in all [student] disciplinary proceedings shall be substantial evidence.”).

³⁰ *Mills*, 741 N.Y.S.2d at 591 (“the Court of Appeals has defined substantial evidence as ‘less than a preponderance of the evidence ...’” but “we are unconvinced that use of the competent and substantial evidence standard risks an erroneous deprivation of the student’s liberty and property interests”); Christine Ver Ploeg, *Terminating Public School Teachers for Cause Under Minnesota Law*, 31 Wm. Mitchell L. Rev. 303, 313 (2004) (“substantial and competent evidence” standard is “typically viewed as less burdensome than the ‘preponderance’ standard”).

³¹ Cal. Educ. Code § 67386(3) (requiring all institutions of higher education that accept state financial assistance to provide that “the standard used in determining whether the elements of the complaint against the accused have been demonstrated is the preponderance of the evidence”).

on whether that recipient uses the preponderance standard for other conduct code violations, the law could be preempted or not.

Similarly, a state law provision granting a student the right to present the testimony of the student's witnesses by affidavit may be preempted by the proposed § 106.45(b)(3)(vii)'s prohibition against relying on any statement of a person who does not submit to cross-examination.³²

These are only a few examples. We lack the resources to search the statutes and regulations of every state, tribe, and locality. But Executive Order 13132 anticipated that problem by requiring the Department to consult with elected state and local officials "early in the process of developing the proposed regulation," § 6(c)(1), and to publish a federalism summary impact statement, § 6(c)(2). Executive Order 13175 imposes the same early consultation and impact statement requirements for preemption of tribal laws. Executive Order 13175, § 5(c); Department of Education's Consultation Plan, Part IV.A.1.d. "The consultation obligation is an affirmative duty."³³ And the Department failed to meet its duty and thus did not have even a sense of what state, tribal, and local laws were currently in effect. Indeed, we are informed that a number of state legislators have submitted comments objecting to the Department's failure to consult.

Presumably because of the lack of knowledge, the proposed regulations fail to meet the requirements imposed on the Department regarding regulations that may have preemptive effect. First, the proposed regulations fail to specify "in clear language the preemptive effect, if any, to be given the regulation[s]." Executive Order 12988 § 3(b)(2)(A). Second, there is no finding that the implicit regulatory preemption in the proposed regulations is "restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated." Executive Order 13132 § (4)(c).

To be sure, we believe there is an important and robust role for the federal government in protecting the civil rights of all students, including through appropriate procedural protections. And we believe there is much productive work that can be done reforming school discipline policies. But this Administration has

³² Kan. Stat. Ann. § 72-6116(a)(5) (student potentially subject to suspension of more than 10 days must be granted right "to present the pupil's own witnesses in person or their testimony by affidavit").

³³ *Confederated Tribes & Bands of Yakima Indian Nation v. FERC*, 746 F.2d 466, 475 (9th Cir.1984) (regulatory requirement to consult was not met merely by giving notice); *cf. The California Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1087 (9th Cir. 2011) (statutory obligation to "consult" means "more than notice-and-comment;" agency must "confer" with relevant parties before undertaking a course of action);

adopted a different view, prioritizing state and local control of school discipline over civil rights protections.³⁴ The Department offers no reasoned explanation in the NPRM for its change in position. That is, why is it appropriate for the Department to take a hands-off approach to the administration of school discipline except that a uniform federal process around school discipline is required for this purportedly discrete issue?

VI. The Department Failed To Disclose The Reports And Statistical Analysis And Models That It Relied On In The NPRM, Contrary To The Administrative Procedure Act And Executive Order 13563

The Administrative Procedure Act (APA) requires that agencies reveal “for public evaluation” the “‘technical studies and data’ upon which the agency relies” in rulemaking. “More particularly, ‘[d]isclosure of staff reports allows the parties to focus on the information relied on by the agency and to point out where that information is erroneous or where the agency may be drawing improper conclusions from it.’”³⁵ This includes information, data, and studies an agency used to assess the costs and benefits of the proposed changes (and alternatives) for the Regulatory Impact Analysis required by Executive Order 12866.³⁶

Similarly, Executive Order 13563 requires agencies to “provide, for both proposed and final rules, *timely online access* to the rulemaking docket on regulations.gov, including *relevant scientific and technical findings*, in an open format that can be easily searched and downloaded. For proposed rules, *such access shall include*, to the extent feasible and permitted by law, an opportunity for public comment on *all*

³⁴ Office for Civil Rights, U.S. Department of Education, *Dear Colleague Letter on Withdrawing School Discipline Guidance* (Dec. 21, 2018) (“States and local school districts play the primary role in establishing educational policy, including how to handle specific instances of student misconduct and discipline”); *Final Report of the Federal Commission on School Safety* 71 (Dec. 18, 2018) (“[T]he Department of Education Organization Act warns the Department not to ‘exercise any direction, supervision, or control over the...administration...of any educational institution, school, or school system.’ As the Supreme Court has emphasized, ‘public education in our Nation is committed to the control of state and local authorities,’ which should be respected even when student dismissals reflect ‘subjective’ policy decisions. Schools should have the flexibility to enforce disciplinary rules in light of their ‘need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process.’” (footnotes omitted)).

³⁵ Both quotations in the paragraph are from *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008). The first quotation is, itself, quoting in part *Chamber of Commerce v. SEC*, 443 F.3d 890, 899 (D.C. Cir. 2006). The second quotation is quoting in part *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 737 F.2d 1095, 1121 (D.C. Cir. 1984).

³⁶ See *Owner-Operator Indep. Drivers Ass’n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 199, 201-202 (D.C. Cir. 2007).

pertinent parts of the rulemaking docket, including relevant scientific and technical findings.” § 2(b) (emphases added).

The Department did not meet either of those requirements. In the NPRM, the Department attempted to assess the costs of the regulation through a regulatory impact analysis (RIA). It said that in doing so, it “examined public reports of Title IX reports and investigations at 55 [institutions of higher education] nationwide,” and reported various conclusions. 83 Fed. Reg. at 61,485/2. It also mentioned a “sample of public Title IX documents” reviewed by the Department. *Id.* at 61,487/1. But it did not make available those public reports or documents online, or even identify which IHEs were the subject of those reports and what documents it reviewed. It is thus impossible for members of the public to determine whether any of that information is erroneous or whether the agency may be drawing improper conclusions from it.

Similarly, in attempting in the NPRM to determine the current number of Title IX investigations occurring in school districts and institutions of higher education eligible for Title IV federal funding, the Department engaged in an analysis spanning 5 pages of the Federal Register. 83 Fed. Reg. at 61,485-491. It appears to have engaged in nine different simulations of its model, *id.* at 61,489/3, and also generated alternative estimates. *Id.* at 61,485/3 n.18, 61,486/2 n.22, 61,487/1 n.27, 61,487/2 n.28, 61,489/1 n.34. None of those models or the underlying data was made available to the public, much less available on the rulemaking docket.

Additionally, in the portion of the NPRM containing the initial regulatory flexibility analysis (IFRA), the Department relied on various calculations or estimates. 83 Fed. Reg. at 61,491-493. Among the studies relied on were “[p]rior analyses” that “show that enrollment and revenue are correlated for proprietary institutions,” *id.* at 61,491/1, and an analysis of “a number of data elements available in IPEDS,” *id.* at 61491/1-2. None of these calculations, estimations, or analyses were made available to the public for review, much less available on the rulemaking docket.

We submitted a letter on January 17, 2019, respectfully demanding an extension of time to comment until all these materials were released. (See Attachment A). We received no response.

Previously, we had filed a FOIA request for the records relied on by the Department in its RIA and IFRA, docketed as 19-00576-F. We have not yet received any responsive records, in violation of the timelines established by FOIA. This violation prejudices our ability to further make our argument. After the Department fully responds to this FOIA, the Department should re-open the

comment period to allow us and other members of the public with whom we share the responses to submit any additional evidence and arguments.

The failure to provide all these critical data, studies, and analyses denies the public the opportunity to assess the accuracy of the Department's claims or otherwise critique the Department's model. These failures to disclose violate the APA and Executive Order 13563 and require, at a minimum, a second round of comments after all the materials have been released and the public has a sufficient amount of time to review and respond.

VII. The Department Did Not Assess The Accuracy Of The Data It Relied Upon In Its Regulatory Impact Analysis And Initial Regulatory Flexibility Analyses, Contrary To The Administrative Procedure Act And Information Quality Act

Despite the failure to disclose the data and studies on which it relied in, the Department's Regulatory Impact Analysis (RIA), which attempts to assess the costs of the proposed regulations as required by Executive Order 12866 as modified by Executive Order 13563, and its initial regulatory flexibility analysis (IFRA) as required by the Regulatory Flexibility Act, 5 U.S.C. § 603, cannot be accepted because the Department did not ascertain or account for the potential inaccuracy of some the data it relied heavily upon.

In seeking to estimate the number of cases of sexual harassment that are currently being investigated and resolved by recipients and that would be investigated and resolved by recipients under the proposed regulations, the NPRM puts almost exclusive reliance on two Departmental data collections: the Civil Rights Data Collection (CRDC) and the collection of data required Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act). 83 Fed. Reg. at 61,485/2-3.

The CRDC is an important data collection that serves many critical purposes for the Department and the public. It should be continued and, in some ways, expanded. But the data it contains is only as good as the data that is submitted to it. And, unfortunately, there have been problems reported with regard to the accuracy of some of the data school districts provided the Department in the most recent CRDC.³⁷ Indeed, the Department just recently launched a campaign around

³⁷ See, e.g., Evie Blad, *How Bad Data from One District Skewed National Rankings on Chronic Absenteeism*, Education Week (Jan. 9, 2019) http://blogs.edweek.org/edweek/rulesforengagement/2019/01/chronic_absenteeism.html; Anya Kamenetz, *The School Shootings that Weren't*, National Public Radio (Aug. 27, 2018),

(Continued on next page)

inappropriate restraint and seclusion in which improving CRDC data quality on that issue through reviews and technical assistance is a key component.³⁸

There is no reason to think that the CRDC's sexual harassment data on which the NPRM heavily relies is immune from these problems. For years, the American Association of University Women has analyzed the CRDC sexual harassment data and determined that many school districts were simply reporting zeros, rather than collecting and reporting the actual numbers of cases of sexual harassment that were reported or resulted in discipline.³⁹

We submitted two FOIA requests for records of any analysis, assessment, study, audit, report, or other document generated by OCR or its contractors that assessed the reliability, validity, accuracy, quality, or integrity of the data submitted by school districts to the CRDC, docketed as 18-02382-F and 19-00149-F. We have not yet received any responsive records from OCR, in violation of the timelines established by FOIA. This violation prejudices our ability to further make our argument. After the Department fully responds to this FOIA, the Department should re-open the comment period to allow us and other members of the public with whom we share the responses to submit any additional evidence and arguments.

Clery Act data is also an important resource, but must likewise be approached with an understanding of its limitations. Once again, the American Association of University Women for years has been highlighting data suggesting underreporting and has concluded that the numbers reported reflect the fact that “some schools have built the necessary systems to ... disclose accurate statistics – and others

<https://www.npr.org/sections/ed/2018/08/27/640323347/the-school-shootings-that-werent>; Andrew Ujifusa & Alex Harwin, *There Are Wild Swings in School Desegregation Data. The Feds Can't Explain Why*, Education Week (May 2, 2018), <https://www.edweek.org/ew/articles/2018/05/02/there-are-wild-swings-in-school-desegregation.html>.

³⁸ U.S. Department of Education, Press Release, *U.S. Department of Education Announces Initiative to Address the Inappropriate Use of Restraint and Seclusion to Protect Children with Disabilities, Ensure Compliance with Federal Laws* (Jan. 17, 2019).

³⁹ See, e.g., American Association of University Women, *Three-Fourths of Schools Report Zero Incidents of Sexual Harassment in Grades 7-12* (Oct. 24, 2017), <https://www.aauw.org/article/schools-report-zero-incidents-of-sexual-harassment/>; Lisa Maatz, American Association of University Women, *Why Are So Many Schools Not Reporting Sexual Harassment and Bullying Allegations?*, Huffington Post (October 24, 2016), https://www.huffingtonpost.com/lisa-maatz/why-are-so-many-schools-n_b_12626620.html; American Association of University Women, *Two-Thirds of Public Schools Reported Zero Incidents of Sexual Harassment in 2013-14* (July 12, 2016), <https://www.aauw.org/article/schools-report-zero-sexual-harassment/>;

have not.”⁴⁰ For more than a decade, other studies of Clery Act data and educational institutions have identified serious concerns about underreporting, overreporting, and misreporting of data around sexual assault.⁴¹

This conclusion again appears consistent with the Department’s own enforcement findings in individual school reviews.⁴² In addition, in response to a FOIA request seeking “[a]ny analysis, assessment, study, audit, report, or other document . . . that assesses the reliability, validity, accuracy, quality, or integrity of the crime and fire statistics submitted by postsecondary institutions under the Clery Act,” the Department reported that the only responsive analysis it located was conducted in 2007.⁴³ That analysis advised that the Clery Act “statistics must be viewed with caution” because the process of recording alleged criminal incidents involves “some well-known social filters and steps.” These steps include, after a report is made, that the “event must be recorded, and if it is recorded the nature and type of offense must be classified. This classification may differ from the initial report due

⁴⁰ See, e.g., American Association of University Women, *89 Percent of Colleges Reported Zero Incidents of Rape in 2015* (May 10, 2017), <https://www.aauw.org/article/clery-act-data-analysis-2017/>; American Association of University Women, *91 Percent of Colleges Reported Zero Incidents of Rape in 2014* (Nov. 23, 2015), <https://www.aauw.org/article/clery-act-data-analysis/>

⁴¹ See, e.g., California State Auditor, *Clery Act Requirements and Crime Reporting: Compliance Continues to Challenge California’s Colleges and Universities*, Report 2017-032 (May 2018); National Academies of Sciences, Engineering, and Medicine, *Innovations in Federal Statistics: Combining Data Sources While Protecting Privacy* 44 (2017) (“the data on sexual violence reported by many institutions in response to the [Clery] act’s requirements is of questionable quality”); Corey Rayburn Yung, *Concealing Campus Sexual Assault: An Empirical Examination*, 21 *Psychology, Public Policy, and Law* 1 (Feb. 2015) (“[T]he ordinary practice of universities is to undercount incidents of [on-campus] sexual assault. Only during periods in which schools are audited [by the Department of Education for Clery Act compliance] do they appear to offer a more complete picture of sexual assault levels on campus. Further, the data indicate that the [Department audit] has no long-term effect on the reported levels of sexual assault, as those crime rates returned to previous level after an audit was completed.”); James Guffey, *Crime on Campus: Can Clery Act Data from Universities and Colleges be Trusted?*, 9 *ASBBS eJournal* 51 (Summer 2013) (“under-reporting of burglary and rape among Clery Act required universities is significant”); Kristen Lombardi & Kristin Jones, Center for Public Integrity, *Campus Sexual Assault Statistics Don’t Add Up: Troubling Discrepancies in Clery Act Numbers* (Dec. 2, 2009) (“But there’s little doubt that the differing interpretations of the law are sowing confusion – with one school submitting sexual assault statistics beyond what’s required and another the bare minimum. Ultimately, these loopholes, coupled with the law’s limitations, can render Clery data almost meaningless.”), <https://publicintegrity.org/education/sexual-assault-on-campus/campus-sexual-assault-statistics-dont-add-up/>; Heather M. Karjane, et al., *Campus Sexual Assault: How America’s Institutions of Higher Education Respond* viii (Oct. 2002) (“Only 36.5 percent of schools reported crime statistics in a manner that was fully consistent with the Clery Act.”).

⁴² Kristen Lombardi & Kristin Jones, Center for Public Integrity, *Campus Sexual Assault Statistics Don’t Add Up: Troubling Discrepancies in Clery Act Numbers* (Dec. 2, 2009) (“Nearly half of the 25 Clery complaint investigations conducted by the Education Department over the past decade [1999-2009] determined that schools were omitting sexual offenses collected by some sources or failing to report them at all.”), <https://publicintegrity.org/education/sexual-assault-on-campus/campus-sexual-assault-statistics-dont-add-up/>.

⁴³ Department of Education Letter Responding to FOIA Request No. 19-00144-F (Jan. 15, 2019).

to the collection of additional evidence, interviews with witnesses, or through officer discretion.”⁴⁴

We do not suggest these CRDC and Clery Act data cannot be used. They are clearly incredibly useful for many purposes – possibly even for the purpose that the Department seeks to use it in the NPRM. But it is also clear that in order to use them properly, the Department must account for the high potential of inaccuracy of these data. To do otherwise violates the Administrative Procedure Act (APA). “If an agency fails to examine the relevant data – which examination could reveal, *inter alia*, that the figures being used are erroneous – it has failed to comply with the APA.”⁴⁵

The reliance on these data without acknowledgement of the shortcomings for this purpose also conflicts with the Information Quality Act (IQA).⁴⁶ The Department adopted IQA Guidelines that require it to assess information quality using three factors: utility, objectivity, and integrity.⁴⁷ When information is “reasonably likely to have a clear or substantial impact on” the Department’s policies, it “must meet an even higher level of quality.” For the reasons described at the beginning of this Part, information relied on in the NPRM for the cost-benefit and regulatory flexibility analyses do not appear to meet the requirements for objectivity. Objectivity “refers to the accuracy, reliability, and unbiased nature of information.” In the NPRM analyses, however, there is no discussion of the underlying reliability of the data items – despite the common knowledge of potential weaknesses of certain data elements. In order to “facilitate the public’s understanding of the strengths and potential weaknesses of these data,” the Department must “identify ... any shortcomings or limitations of the data” if it “rel[ies] upon it for decision-making purposes.” The Department did not do that either, violation of its own IQA Guidelines.

⁴⁴ The quotations in these last three sentences in this paragraph are drawn from a summary prepared on April 30, 2007 by an employee of the Department’s National Center for Education Statistics that was released by the Department in response to FOIA Request No. 19-00144-F (Jan. 15, 2019).

⁴⁵ *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 56-57 (D.C. Cir. 2015); *see also id.* (“agencies do not have free rein to use inaccurate data”); *New Orleans v. SEC*, 969 F.2d 1163, 1167 (D.C. Cir. 1992) (“an agency’s reliance on a report or study without ascertaining the accuracy of the data contained in the study or the methodology used to collect the data is arbitrary” (quotation marks omitted)).

⁴⁶ Consolidated Appropriations Act, 2001, Pub. L. No. 106-554 § 515, 114 Stat. 2763, 2763A-153 & 154.

⁴⁷ U.S. Department of Education, *Information Quality Guidelines* (effective Oct. 1, 2002).

VIII. The Department Did Not Identify Costs Of The Proposed Regulations Resulting From Reduced Deterrence Of Sexual Harassment, Including Sexual Violence, Contrary To Executive Order 12866

There are many costs of the proposed regulations that are not accounted for in the NPRM. The Center for American Progress, for example, has submitted comments discussing the multiple omissions and errors in the Regulatory Impact Analysis (RIA). We focus here on the costs resulting from the proposed regulations' reduction in deterrence of sexual harassment, including sexual assault.

The NPRM says that the “Department does not believe it is reasonable to assume that these proposed regulations will have a quantifiable effect on the underlying rate of sexual harassment occurring in the education programs or activities of recipients.” 83 Fed. Reg. at 61,485/1. The Department does not explain the basis for its non-belief. Elsewhere in the NPRM, the Department acknowledges that sexual harassment can be deterred. *Cf.* Proposed § 106.30 (“supportive measures” includes measures that “deter sexual harassment”).⁴⁸ And it appears to accept that

⁴⁸ Camille Nelson et al., *Organizational Responses for Preventing and Stopping Sexual Harassment: Effective Deterrents of Continued Endurance*, 56 Sex Roles 811, 812 (2007) (“the perception that remedial actions will be taken to punish perpetrators and enforce anti-harassment policies often results in significant decreases in sexual harassment frequency”); Eric Beauregard & Benoit Leclerc, *An Application of the Rational Choice Approach to the Process of Sex Offenses: A Closer Look at the Decision-making*, 19 Sex Abuse 115 (2007); John B. Pryor and Louise F. Fitzgerald, *Sexual Harassment Research in the United States*, 79, 86 in *Bullying and Emotional Abuse in the Workplace* (Ståle Einarsen et al. eds. 2003) (“Men are more likely to harass women sexually at work when management is perceived as tolerating or condoning such behaviour. ... Perceived [employer] efforts related to the implementation of sexual harassment policies (e.g. thoroughly investigating complaints, enforcing penalties against harassers and making honest efforts to stop harassment) were more strongly related to the [reduced] incidence of harassment than training efforts or providing resources to victims.”); Inez Dekker & Jullian Barling, *Personal and Organizational Predictors of Workplace Sexual Harassment of Women by Men*, 3 J. of Occupational Health Psychology 7 (1998) (sexual harassment is “more likely” in an employment setting “if male employees perceive their employer as unwilling to deal seriously with sexual harassment complaints and punish those found guilty of sexual harassment”); Elizabeth Williams et al. *The Impact of a University Policy on the Sexual Harassment of Female Students*, 63 J. of Higher Education 50, 61, 62 (1992) (decline in reports of sexual harassment “represent[] a real change in the behavior of university employees” and “this change most likely occurred in response to the university’s sexual harassment policy and grievance procedure” because knowledge of sanctions being imposed “may have served to deter faculty and staff”); Ronet Bachman et al., *The Rationality of Sexual Offending: Testing a Deterrence/Rational Choice Conception of Sexual Assault*, 26 Law & Society Rev. 343, 357 (1992) (“The more certain respondents were that the scenario male would be dismissed from school or arrested, the less likely they were to report that they would commit sexual assault under the same set of hypothetical conditions.”); Richard Posner, *Sex and Reason* 386 (1992) (rapists are “approximately as responsive to incentives, and hence as deterrable by threat of punishment, as persons who commit property offenses”).

enforcement of Title IX can have a “chilling effect” on behavior and that its proposed regulations will “incentivize” behavior.⁴⁹

At least three elements of the proposed new regulatory system, discussed immediately below, would seem likely separately and in combination to disincentivize people who experienced sexual harassment, including sexual assault, from filing formal complaints. The great hesitancy of people taking any action when sexually harassed or assaulted is well documented.⁵⁰ And the reduction in rates of already-low reporting of sexual misconduct will reduce the risk of such misconduct being detected and punished, which in turn will reduce the system’s general deterrent effect. Thus, the Department must attempt to capture the costs that will arise out the increased number of underlying incidents themselves as part of its cost-benefit analysis.

First, there is no discussion about retaliation in the regulations at all. Indeed, it is missing in portions of the proposed regulations where one would expect to see it. For example, proposed § 106.45(b)(2)(i)(B) provides that the recipient in receipt of a formal complaint must, in the first notice, notify both parties “of any provision in the recipient’s code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.” The Department explained that this provision would “incentivize honest, candid” statements. 83 Fed. Reg. at 61,474/1. But the proposed regulations do not require a notice to preserve evidence for example. Nor does it contain a warning that it is misconduct to retaliate, or to cause others to engage in retaliation. It does not identify the types of retaliation that are prohibited, including threats of civil litigation against the complainant for defamation. The fear of retaliation by the accused or by peers (including the accused’s friends) is a major barrier for people

⁴⁹ 83 Fed. Reg. at 61,480/3 (“the Department heard concerns that Title IX enforcement has had a chilling effect on free speech”), 61,474/1 (requirement that recipient notify parties that recipients prohibit false statements during the grievance process was proposed “to incentivize honest, candid participation” in the process); *id.* at. 61,462/3 (proposed regulations governing formal complaints drafted “with the goal of encouraging more students to turn to their schools for support in the wake of sexual harassment”).

⁵⁰ National Academies of Sciences, Engineering & Medicine, *Consensus Report: Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* 79-82 (2018); Hyungyung Joo, *Factors Impacting Student Reporting Bullying or Cyberbullying to School Personnel* at 67 (The Pennsylvania State University, ProQuest Dissertations Publishing, 2017) ((in a national sample, “only 38.05% of targets of bullying and 23.84% of targets of cyberbullying in the sample notified teachers or adults at school about their victimization”); Ganga Vijayasiri, *Reporting Sexual Harassment: The Importance of Organizational Culture and Trust*, 25 *Gender Issues* 43, 45 (2008) (collecting studies showing that “organizational grievance policies are rarely used by sexual harassment victims”); Anthony Petrosino et al., REL Northeast & Islands, *What Characteristics of Bullying, Bullying Victims, and Schools Are Associated with Increased Reporting of Bullying to School Officials?* App. A, at 17-18 (Aug. 2010) (“bullying often goes unreported to teachers or other school officials”).

to complain about sexual harassment, including sexual assault, that the NPRM ignores.⁵¹

Nor do the regulations tell a complainant whether retaliatory harassment is something that will be processed through the general “prompt and equitable” grievance procedure, or whether it will be processed through the specially prescribed policies for sexual harassment. If, as the NPRM suggests, the reason for these targeted regulations is the “heightened stigma often associated with a complaint regarding sexual harassment,” 83 Fed. Reg. at 61,477/3, it would seem that a complaint for retaliating against someone for filing a complaint about sexual harassment would be too far removed from the stigma described in the NPRM. If retaliatory harassment is folded into the procedural morass of proposed § 106.45, then deterrence of retaliation will also be reduced.

Second, proposed § 106.45(b)(3)(viii) requires that both parties be able to “inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility.” Because the proposed regulations identify some situations where the respondent may be able to rely on the complainant’s “sexual behavior or predisposition,” § 106.45(b)(vi) & (vii), it would seem to follow that everything the investigator learns or hears about the complainant’s sexual history, no matter whether or not it is relied on the investigatory report, is “directly related” to the allegations and must be made available to the accused student and their advisor of choice. That appears to mean that accused students and their advisors are entitled learn irrelevant personal information about the complainant (and witnesses) from medical records, gossip noted by the investigator but never verified, etc.

Even worse, the “inspect and review” provision poses a significant risk of the widespread disclosure of highly personal, possibly inaccurate, information when combined with proposed § 106.45(b)(3)(iii), which prohibits a recipient from restricting the ability of either party “to discuss the allegations under investigation or to gather and present relevant evidence.” While there is a proposed prohibition on “downloading or copying the evidence” collected by the investigator, § 106.45(b)(3)(viii), there is no proposed prohibition on sharing the information

⁵¹ Shelley Hymel & Susan M. Swearer: *Four Decades of Research on School Bullying: An Introduction*, 70 *American Psychologist* 293, 295 (May-June 2015) (“youth are reluctant to report bullying, given legitimate fears of negative repercussions”); Ganga Vijayasiri, *Reporting Sexual Harassment: The Importance of Organizational Culture and Trust*, 25 *Gender Issues* 43, 53-54, 56 (2008) (“fear of adverse career consequences, or being blamed for the incident are a major deterrent to reporting” and this includes peer mistreatment or disapproval).

learned from the evidence orally or describing the information by email, text, etc. with others. Indeed, a party might argue that they need to spread such personal information about the opposing party or witness in order to gather relevant evidence of their own. Whether released in order to retaliate or otherwise, creating a system that empowers one party to learn and disseminate personal information about another by word of mouth (or by the word of the internet) would certainly deter many people from filing complaints.⁵²

And finally, there is the threat of cross-examination under proposed regulation § 106.45(b)(vi) & (vii). People thinking about filing complaints (or even sharing information that might someday trigger a Title IX coordinator complaint) will know that an attorney or advisor will be allowed to cross-examine them. While the accused students are not allowed to do the cross-examination themselves, there is no restriction against their “advisor of choice” being their mother, father, sibling, or friend. Fear of the experience of cross-examination, particularly by a person with a personal (perhaps emotional) stake in the outcome, is a factor that will weigh against people reporting.⁵³

These three factors separately and combined are likely to result in a discernable reduction in the number of complaints of sexual harassment, including sexual violence, filed.⁵⁴ And the reduction in the number of complaints will increase the odds that people who actually engage in such misconduct will not receive any sanction. That, in turn, will reduce the amount of specific and general deterrence around such misconduct, and result in an increase in such sexual misconduct.⁵⁵

⁵² Ganga Vijayasiri, *Reporting Sexual Harassment: The Importance of Organizational Culture and Trust*, 25 *Gender Issues* 43, 49 (2008) (19% of employees experiencing sexual harassment did not file a formal complaint because of fear that “their confidentiality would not be protected”).

⁵³ Eliza A. Lehner, *Rape Process Templates: A Hidden Cause of the Underreporting of Rape*, 29 *Yale Journal of Law & Feminism* 207 (2018) (“rape victims avoid or halt the investigatory process” due to fear of “brutal cross-examination”); Michelle J. Anderson, *Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 *Vill. L. Rev.* 907, 932-37 (2001) (decision not to report (or to drop complaints) is influenced by repeated questioning and fear of cross-examination); Gregory Matoesian, *Reproducing Rape: Domination through Talk in the Courtroom* (1993).

⁵⁴ Comment of American Society of Criminology, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-6883> at 17-18.

⁵⁵ John B. Pryor and Louise F. Fitzgerald, *Sexual Harassment Research in the United States*, 79, 86 in *Bullying and Emotional Abuse in the Workplace* (Ståle Einarsen et al. eds. 2003) (“[I]ndividual perceptions of organisational tolerance were significantly related to the incidence of harassment. Perceptions of organizational tolerance were operationalised as beliefs concerning the degree of risk to a female who would report harassment, the likelihood that complaints would be taken seriously, and the degree to which a harasser would be punished.”); Bachman et al., *The Rationality of Sexual Offending: Testing a Deterrence/Rational Choice Conception of Sexual Assault*, 26 *Law & Society Rev.* 343, 360-61 (1992) (in paper survey, students less likely to be deterred if they viewed the likelihood of a complaint to be low).

Thus, the Department must attempt to capture the costs that will arise out the increased number of underlying incidents, and not limited solely to sexual assault but extending to all forms of sexual harassment.⁵⁶

IX. The Department Did Not Assess How These Proposed Regulations Would Interact With Other Civil Rights Statutes Enforced By The Department And The Regulations Enforced By Other Federal Agencies, Contrary To Executive Order 12866 and the Regulatory Flexibility Act

The NPRM proposes significant changes to the Department’s Title IX regulations. But those regulations are part of an intertwined web of non-discrimination obligations involving not only the non-discrimination provisions enforced by the Department, but also involving the Title IX non-discrimination regulations promulgated and enforced by more than two dozen other federal agencies – many of which fund the same educational institutions as the Department.

A. Any Proposed Solution Should Not Treat Claims of Sexual Harassment Differently Than Claims of Racial or Disability Harassment, Absent Strong Reasons That Do Not Appear in the NPRM

The Department’s NPRM solely addresses sex discrimination, including sexual harassment, under Title IX. But the Department previously has interpreted the protections under Title IX, Title VI of the Civil Rights Act (race, color, and national origin), and Section 504 of the Rehabilitation Act (disability) as a piece, regardless of the differences in their regulations.⁵⁷

Whatever dispute there may be about what processes are necessary for determining whether a student accused of sexual assault engaged in that misconduct, there is no reason why an accused rapist should be given more protections by the Department than an accused anti-Semitic harasser, for example.

⁵⁶ National Academies of Sciences, Engineering & Medicine, *Consensus Report: Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* 67-78, 89-90 (2018); Thelma Dhlomo et al., *Sexual Harassment Symptoms: The Effect on Female College Students’ Academic Functioning*, 20(8) IOSR J. of Humanities & Social Sciences 40 (2015); Comment of Anonymous, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-6044> and attachments.

⁵⁷ See, e.g., Office for Civil Rights, Department of Education, *Dear Colleague Letter re: Harassment and Bullying*, at 2-3 (Oct. 26, 2010); Office for Civil Rights, Department of Education, *Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance*, 59 Fed. Reg. 11,448 11,448 n.2 (March 10, 1994) (“Note that in addition to racial incidents/harassment cases, many sexual harassment cases are cited throughout this compendium – because the legal standards and theories applicable to these two different types of discrimination are similar.”).

The Department's Assistant Secretary for Civil Rights Kenneth Marcus recently held, in his appellate role, that Title VI itself requires schools to respond to complaints of racial discrimination and harassment in a way significantly at odds with the obligations in the proposed NPRM.⁵⁸

The Assistant Secretary held that a school's "failure to consider" relevant evidence "when presented" by a student (or, more precisely, when students tried to discuss the evidence "or otherwise present their position") "fall[s] short of an appropriate response to student complaints of harassment." (This is so even though the Department's Title VI regulations do not expressly require the establishment of grievance proceedings at all.)

The Assistant Secretary also concluded that a school's failure to respond appropriately to an act of race or national origin discrimination (in that case, at a single event, charging students who were perceived to be Jewish \$5 to attend a lecture, but waiving the fee for other students) could result in the creation of a hostile environment in violation of Title VI. The Assistant Secretary further held that it was "immaterial" whether the discriminatory activity leading to the potential hostile environment was conducted by "a third party outside group" because the group "would have been arguably accountable to the University in the context of these facts." And the Assistant Secretary, without mentioning the need to find deliberate indifference, remanded the case back for his staff to determine whether a hostile environment on the basis of national origin or race in violation of Title VI "existed" at the University at the time of the event.

Finally, the Assistant Secretary held that a school that is on notice of discriminatory conduct on campus must "take appropriate responsive action" to "eliminate any hostile environment."

It is unclear how those legal standards – which Assistant Secretary Marcus apparently viewed as flowing from the statute itself, since no regulations are cited – are going to interact with the very different standards proposed for Title IX.

Nor is it clear how the standards proposed for Title IX will affect the interpretation of Section 504's parallel requirement that recipients "provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part." 34 C.F.R. § 104.7(b).

⁵⁸ Letter from Kenneth Marcus, Assistant Secretary re: Appeal of OCR Case No. 02-11-2157 (Rutgers University) (Aug. 27, 2018).

This uncertainty confirms that this NPRM is not well-considered. But, as noted above, it appears a student accused of assaulting a student because of their sex is favored over a student accused of assaulting a student because of their race, color, national origin, or disability.

B. Any Changes to the Title IX Regulations Should be Done in Coordination with the More Than 20 Other Federal Agencies That Have Title IX Regulations

The NPRM just focuses on the Department, even though there are 25 other federal agencies with Title IX regulations⁵⁹ and most of those agencies provide financial assistance to the same school districts, colleges, and universities that the Department funds.

More than 20 of those other agencies adopted their identical final Title IX regulations in 2000 based on a common NPRM.⁶⁰ Those twenty-plus final regulations were themselves closely modeled on this Department's regulation, save for modifications necessary to be consistent with statutory changes that were not yet reflected in the Department of Education's regulations. 65 Fed. Reg. at 52,859/1-2. In promulgating those regulations, those federal agencies, led by the Department of Justice, explained that "[u]sing ED's regulations as the basis for this common rule promotes consistency and efficiency not only for agencies but for the recipient community," *id.* at 52,859/1, and thus endeavored "to minimize the extent to which these Title IX regulations differ from the Department of Education's Title IX rule," *id.* at 52,860/2.

And the number of agencies that adopted the common Title IX rule increased by one during this Administration, when the U.S. Department of Agriculture (USDA)

⁵⁹ See Agency for International Development, 22 C.F.R. pt. 229; Corporation for National and Community Service, 45 C.F.R. pt. 2555; Department of Agriculture, 7 C.F.R. pt. 15a; Department of Commerce, 15 C.F.R. pt. 8a; Department of Defense, 32 C.F.R. pt. 196; Department of Energy, 10 C.F.R. pt. 1042; Department of Health and Human Services, 45 C.F.R. pt. 86; Department of Homeland Security, 6 C.F.R. pt. 17; Department of Housing and Urban Development, 24 C.F.R. pt. 3; Department of Interior, 43 C.F.R. pt. 41; Department of Justice, 28 C.F.R. pt. 54; Department of Labor, 29 C.F.R. 36; Department of State, 22 C.F.R. pt. 146; Department of Transportation, 49 C.F.R. pt. 25; Department of Treasury, 31 C.F.R. pt. 28; Department of Veterans Affairs, 38 C.F.R. pt. 23; Environmental Protection Agency, 40 C.F.R. pt. 5; Federal Emergency Management Agency, 44 C.F.R. pt. 19; General Services Administration, 41 C.F.R. pt. 101-4; National Aeronautics and Space Administration, 14 C.F.R. pt. 1253; National Archives and Records Administration, 36 C.F.R. pt. 1211; National Science Foundation, 45 C.F.R. pt. 618; Nuclear Regulatory Commission, 10 C.F.R. 5; Small Business Administration, 13 C.F.R. pt. 113; Tennessee Valley Authority, 18 C.F.R. pt. 1317.

⁶⁰ See 65 Fed. Reg. 52,857 (2000) (final Title IX rules for 21 agencies); 64 Fed. Reg. 58,567 (1999) (NPRM).

adopted it without change. It explained that “[b]y harmonizing the provisions of [its Title IX regulations] with the common rule, USDA brings its regulations up-to-date, complies with Executive Order 13777, ‘Enforcing the Regulatory Reform Agenda,’ dated February 24, 2017, follows current guidance from DOJ, and makes it easier for recipients of USDA financial assistance to understand and comply with Title IX requirements.”⁶¹ This NPRM will do the precise opposite.

The Department acknowledges in the NPRM that the standards and procedures in the proposed regulations around sexual harassment are not legally required and that it “could have chosen to regulate in a somewhat different manner.” 83 Fed. Reg. at 61,466/3 (actual knowledge), 61,468/3 (deliberate indifference). That necessarily means that other federal agencies are free to choose to maintain their existing Title IX regulations and enforce them in a manner consistent with the Department’s earlier interpretations.⁶² If that happens, an educational institution could be subjected to conflicting obligations, particularly when the Department’s proposed regulations appear to prohibit certain investigations under Title IX.

And there is reason to think this conflict is likely to happen. Several other federal agencies have publicly committed to focus on sexual harassment by their college and university grant recipients.⁶³ At least one agency that promulgated the common rule is required by statute to conduct a certain number of Title IX compliance reviews each year,⁶⁴ while other agencies have committed to do so in response to Government Accountability Office audits.⁶⁵ The Department cannot act like a lone ranger; it must work with all the other federal agencies to adopt a common set of standards on this common question.

⁶¹ 82 FR 46,655 (Oct. 6, 2017).

⁶² National Science Foundation, *Title IX Frequently Asked Questions (FAQs)*, https://www.nsf.gov/od/odi/awardee_civil_rights/titleix_faqs.jsp (defining sexual harassment and coverage in manner contrary to proposed regulations).

⁶³ National Academies of Sciences, Engineering & Medicine, *Consensus Report: Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* 111 (2018) (“In response to recent high-profile cases of sexual harassment perpetrated by federally funded researchers, the National Science Foundation (NSF), the National Institutes of Health (NIH), and the National Aeronautics and Space Administration (NASA) issued statements reemphasizing a ‘no-tolerance’ stance on sexual harassment.”); National Science Foundation, *NSF Announces New Measures to Protect Research Community From Harassment*, News Release 18-082 (Sept. 19, 2018), <https://www.nsf.gov/od/odi/harassment.jsp>; National Institutes of Health, Dept. of Health & Human Servs., *Anti-Sexual Harassment* (last updated Oct. 22, 2018), <https://grants.nih.gov/grants/policy/harassment.htm>.

⁶⁴ 51 U.S.C. § 40909 (NASA); *cf.* Pub L. No. 110-69, § 5010, 112 Stat. 572 (2007) (sense of Congress that Department of Energy should conduct at least two compliance reviews annually under Title IX).

⁶⁵ Government Accountability Office, *Women in STEM Research*, GAO-16-14, at 26 n.60, 40-41 (Dec. 2015) (Department of Energy, National Science Foundation, Department of Defense, and Department of Health and Human Services).

Even if the Department were not inclined to consider the other agencies' regulations as a matter of common sense, federal law and Executive Orders require it to do so. The Regulatory Flexibility Act requires the Department to identify and address "all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule." 5 U.S.C. § 603(b)(5). Executive Order 12866 requires the Department to "avoid regulations that are inconsistent, incompatible, or duplicative with ... those of other Federal agencies." § 1(b)(10). And Executive Order 13563 encourages "[g]reater coordination across agencies" to reduce "redundant, inconsistent, or overlapping" regulatory requirements by mandating that a federal agency proposing a rule "attempt to promote such coordination, simplification, and harmonization." § 3. The obligation to coordinate with all the other agencies extends to the issue of whether the information required to be created and maintained by proposed § 106.45(b)(7) "is already being gathered by or is available from any other agency or authority." 20 U.S.C. § 1221e-4.

It is not a sufficient response to these substantial concerns of inconsistency by merely predicting (or even promising) that other agencies will amend their Title IX regulations someday to comport with these proposed regulations. That is what the government said in the common rule when it addressed how it would align the agencies' regulations with the Department's then-expected amended regulation regarding single-sex schools and classes. Specifically, the government stated in promulgating the common rule that "conforming changes will be made in the regulations covered by this notice" after the Department adopted a new regulation. 65 Fed. Reg. at 52,861/3. That never happened.

The new regulation was promulgated by the Department in 2006. In 2008, in response to litigation, the Department assured a district court that the Department of Justice "has initiated the process of discussing a common rule that would reflect the Department of Education's amendment of its Title IX regulations to give schools flexibility to offer single-sex classes that comply with the specified regulatory requirements."⁶⁶ And yet, ten years after the Department made that assurance, there has been no public effort to conform other agencies' regulations with the Department's. We submit the lesson that should be learned from this is: when addressing a topic that is not necessarily limited to a particular type of recipient or stream of funding, such regulatory changes must be done by all agencies at the same time, or many agencies will permanently lag behind.

⁶⁶ Brief for the United States Dept. of Education, *A.N.A v. U.S. Dept. of Educ.*, No. 3:08-CV-00004-CRS-JDM, 2008 WL 11412046 at n.2 (W.D. Ky.) (filed Aug. 1, 2008).

Dissimilarity in Title IX regulations leads to confusion about how different agency Title IX regulations interact. That has been true regarding single-sex schools and classes.⁶⁷ The same has been true for the Department's other significant deviation from the Title IX regulations of other agencies, regarding dress codes. In 1982, the Department removed a provision from its regulations that specifically governed codes of appearance.⁶⁸ But at least one other federal agency still has that specific provision on its books,⁶⁹ and many other agencies that never had that provision have regulations with broad language that could encompass codes of appearance. Courts and recipients have struggled to determine how these different Title IX regulations all interact.⁷⁰

The Department itself might struggle with the inconsistencies first hand because it has entered into delegation agreements with other federal agencies to handle complaints of discrimination under Title IX.⁷¹ If a complaint about sexual harassment was filed with such an agency, it would be referred to the Department under the delegation agreement. But the Department would investigate and resolve the case using the standards articulated in the delegating agency's regulations. Department staff will thus be forced to administer multiple standards to sexual harassment, including sexual violence, complaints.

The risk that other agencies will not align their regulations and enforcement against recipients is heightened even more because of the Department's equivocal view on whether 20 U.S.C. § 1682 is the exclusive statutory authority for its proposed regulations. The formal attribution of authority in the proposed regulations identifies only § 1682. 83 Fed. Reg. at 61,495/3. But the NPRM thrice mentions two other statutes that purportedly give the Department general authority to regulate with regard to discrimination on the basis of sex: 20 U.S.C. § 1221e-3 and § 3474. 83 Fed. Reg. at 61,471/3, 61,480/1 & /3, 61,481/1. If the Department is relying on these Department-specific provisions as well, then it is certainly possible that other agencies would not be able to adopt similar regulations governing educational institutions even if they wanted to.

⁶⁷ See, e.g., Brief for the United States as *Amicus Curiae*, *Doe v. Vermilion Parish Sch. Bd.*, No. 10-30378, at 10 & n.3 (5th Cir.) (filed June 4, 2010); Brief for Wood County Bd. of Education, *Doe v. Wood County Bd. of Educ.*, 2012 WL 13035184 (S.D. W. Va.) (filed Aug. 27, 2012).

⁶⁸ 47 Fed. Reg. 32,526 (1982).

⁶⁹ 45 C.F.R. § 86.31(b)(5) (Department of Health and Human Services).

⁷⁰ *Peltier v. Charter Day Sch., Inc.*, No. 7:16-CV-30-H, 2017 WL 1194460, at *3-4 (E.D.N.C. Mar. 30, 2017).

⁷¹ 52 Fed. Reg. 43,385 (1987) (NASA).

X. The Substantive Proposals In The NPRM Around Sexual Harassment Are Misguided

A. The NPRM Inappropriately Narrows the Coverage of Title IX (§ 106.8(d), § 106.30 (“Formal Complaint”), § 106.44(a), § 106.44(b)(4), § 106.45(b)(3))

Several of the proposed regulations, particularly when viewed together, appear to seek to shrink the coverage of Title IX, despite its capacious language and the Supreme Court’s instruction that “[t]here is no doubt that, if we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language.”⁷²

The NPRM suggests that the sexual harassment must take place “within” an education program or activity (proposed §§ 106.30 (definition of “formal complaint”), 106.44(a), 106.45(b)(3)); that only current students and employees (and possibly those seeking some educational benefit from the recipient) are protected by Title IX (83 Fed. Reg. 61,468/2); and that persons outside the United States have no Title IX protections (proposed §§ 106.8(d), 106.44(a), 106.44(b)(4)). None of those suggestions are correct, none are well reasoned, and none should be adopted.

It is critical to start with the actual language of Title IX: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” It is clear that Title IX has three separate prohibitions on recipients: do not “exclude[]” people from “participation in” any education program or activity; do not “den[y]” people any “benefit[] of” any education program or activity; and do not “subject[] to discrimination” any person “under any education program or activity.”

1. The word “within” is not used in the statute. The NPRM suggests that “within” a recipient’s education program or activity was intended as a synonym for “subjected to discrimination under” the recipient’s education program or activity. 83 Fed. Reg. at 61,468/1. It’s not clear that the two are synonymous. But even if that is a fair substitution, the NPRM offers no substitutions for the other broad words used in the statute: excluded from “participation in” and denied “the benefits of” the education program or activity. For example, if a group of parents

⁷² *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (internal quotations marks and brackets omitted).

of current school children picketed a public sidewalk in front of a school and used harassing words to discourage girls from entering the building, that activity would deny those girls benefits of education, as well as denying them participation in class. Yet the harassment itself did not take place “within” the program, under the hypothetical. It took place outside, by non-students. It is clear that if the school had the power to take any action but did nothing, it would be in violation of Title IX, just as school districts were responsible for responding to the extent they could to anti-racial-integration mobs that tried to stop students from entering school.

2. The NPRM suggests that even if a person is harassed “within” a recipient’s program or activity, and the recipient has actual knowledge of the harassment, the recipient has no Title IX obligation if “the complainant was not participating in, or even attempting to participate in, the education programs or activities provided by that recipient.” 83 Fed. Reg. 61,468/2. That cannot be right.

First, as noted immediately above, Title IX has three separate statutory phrases related to “person” – participation is only in one; denial of benefits is a second; and subjected to discrimination is the third. The second and third phrases are not limited to participants.

Second, this interpretation is inconsistent with the Department’s prior views, without any acknowledgement or reason for the change in position.⁷³

Third, to the extent that *Doe v. Brown University*, 896 F.3d 127 (1st Cir. 2018), suggests that Title IX has a narrower scope, it should not be followed. By relying primarily on the description of Title IX’s coverage drawn from the Supreme Court’s 1982 decision in *North Haven Board of Education v. Bell*, the court of appeals ignored the expansion of the definition of “program or activity” in the Civil Rights Restoration Act of 1987.⁷⁴ Under that definition, “it is well established that the covered education program or activity encompasses *all* of the educational institution’s operations including, but not limited to, ‘traditional educational operations, faculty and student housing, campus shuttle bus service, campus restaurants, the bookstore, and other commercial activities.’”⁷⁵ Because everything a school district or college or university does is governed by Title IX,

⁷³ Office for Civil Rights, U.S. Department of Education, *Title IX Resource Guide*, at 1 (Apr. 2015) (“Title IX protects students, employees, applicants for admission and employment, *and other persons* from all forms of sex discrimination” (emphasis added)).

⁷⁴ Pub. L. No. 100-259 (1988) (codified at 20 U.S.C. § 1687)

⁷⁵ Civil Rights Division, U.S. Department of Justice, *Title IX Legal Manual*, Pt. III.C.1 (2001; updated 2015) (footnote omitted).

every person who is harassed – whether they are a student, parent, family member, employee, contractor, volunteer, applicant, rejected applicant, alumna/us, visitor, or member of an audience watching an interscholastic game – “within” the schools’ operations is protected, even if they do not participate in educational activities.⁷⁶ In fact, recognizing the impracticality of the path it chose, the court of appeals contorted itself to describe essentially everyone as participants in the education program. For example, in language the NPRM quotes with apparent approval (83 Fed. Reg. at 61,468/1), the court of appeals characterized “[m]embers of the public” who “attend ... sporting events” at schools as “taking part ... [in] a funding recipient institution’s educational program or activity.” If watching college sports constitutes participation in a college education program or activity, then there is virtually nothing that cannot be characterized as such.

And to the extent that the use of the phrase “student and employee” in proposed § 106.8(c) can support reading Title IX itself to limit the scope of a recipient’s non-discrimination obligation to students and employees, that language should be struck.

3. Proposed §§ 106.8(d), 106.44(a), and 106.44(b)(4) merely repeat the statutory language that no person “in the United States” may be subjected to discrimination by a recipient. The NPRM, however, appears to treat this phrase as necessarily excluding “a student participating in a study abroad program” or anyone else located “outside the United States” who experiences “harm[.]” 83 Fed. Reg. at 61,468/2.

The NPRM does not acknowledge much less grapple with the Department’s prior application of other civil rights statutes that use the phrase “in the United States” to students abroad.⁷⁷ Nor does it explain how its apparently rigid view aligns with the nuanced views of the Department of Justice on this matter under Title VI.⁷⁸

⁷⁶ *Fox v. Pittsburg State Univ.*, 257 F. Supp. 3d 1112, 1126 (D. Kan. 2017) (rejecting argument that a university employee must show a “‘nexus’ to education in order to qualify for Title IX’s remedies” and further rejecting university’s suggestion that anything “prohibits groundskeepers or maintenance workers from asserting Title IX claims but allows professors or teachers”).

⁷⁷ College of St. Scholastica, Complaint No. 05-92-2095 (Sept. 15, 1992) (Section 504 of Rehabilitation Act); St. Louis University (MO), Complaint No. 07-90-2032 (Dec. 12, 1990) (same); Husson College, Complaint No. 01-05-2005 (Jan. 5, 2005) (same).

⁷⁸ Civil Rights Division, U.S. Department of Justice, *Title VI Legal Manual (Updated)*, § V, at 4 (2016) (“Title VI may apply to discriminatory conduct outside the United States in certain narrow circumstances, depending on how much control the recipient exercises over the overseas operation and how integral the overseas operation is to the recipient’s program in the U.S.”).

And the Department does not cite, must less explain why it disagrees with, the court cases that have rejected the NPRM's view.⁷⁹

Nor does the Department explain its rationale for its interpretation, which is plainly not the only possible one. If a student returns to the United States from a study abroad program and complains that she was harassed by individuals in another country and that harassment denied her the benefit of the study abroad program, the recipient's decision not to act would appear to be discrimination that the recipient engaged in in the United States. The NPRM should make clear that so long as the complaint is made by a person when that person is in the United States, the fact that the underlying misconduct occurred abroad or the injury was experienced abroad does not remove the person from Title IX's protection.

B. The NPRM Reflects a Myopic Focus on Certain Types of Harassment While Ignoring the School Environment and Other Forms of Discrimination (§ 106.8(c), § 106.30 (“Complainant,” “Respondent,” “Sexual Harassment,” “Formal Complaint”), § 106.45(b))

The NPRM appears to assume that sexual harassment is done by one person against one other person and that the effects of the harassment are only felt by those two people. And it has proposed § 106.45 to build an elaborate procedural edifice around that model. But it ignores (1) sexual harassment that can be environmental in nature; and (2) the effects of a hostile environment (including that created by a sexual assault) on a community of students and the need for systemic remedies. The Department's proposal also ignores (3) discrimination by employees that falls outside the proposed sexual harassment definition. Despite claiming to offer clarity, the NPRM provides students and recipients no guidance about what is required of them in such instances.

Students' educational opportunities can be effectively denied on the basis of sex even without a particular individual being identified as a malefactor. For example, the failure of a school to remove extensive objective offensive graffiti from school buildings (or the failure to try and prevent future graffiti) can create a hostile environment for many students regardless of who put up the graffiti and even if it does not target a particular person. Similarly, a particular location on campus may be the site of a series of attempted sexual assaults by one or more unidentified people. The person who put up the graffiti or attempted the assaults might not

⁷⁹ *King v. Bd. of Control of E. Michigan Univ.*, 221 F. Supp. 2d 783 (E.D. Mich. 2002) (Title IX); *see also Bird v. Lewis & Clark Coll.*, 104 F. Supp. 2d 1271 (D. Or. 2000) (Section 504 of Rehabilitation Act), *aff'd on other grounds*, 303 F.3d 1015 (9th Cir. 2002); *Wolff v. S. Colonie Sch. Dist.*, 534 F. Supp. 758 (N.D.N.Y. 1982) (same).

even be subject to the recipient's authority, even though the location where the misconduct takes place is on campus. It is not at all clear how such claims would be raised and processed under the proposed regulations.

Further, consider a situation where the cumulative effects of the actions of a group of people create a hostile environment. Could a formal complaint be filed against each individual in the group, even though not all of them personally engaged in behavior that, standing alone, would have created a hostile environment? Or would this have to be pursued as a non-formal complaint, in which case none of the individuals will be held accountable through discipline?

Proposed § 106.8(c) appears to anticipate that each recipient will have two "prompt and equitable" procedures: one for "formal complaints" alleging sexual harassment and a second for "complaints alleging any action that would be prohibited by this part" including non-formal complaints of sexual harassment.

It is unclear whether the formal complaint process was intended to be used for environmental harassment or harassment tied to a particular site, rather than a particular person. Under the proposed definitions, formal complaints can only be filed by an individual "who has reported being the victim of conduct that could constitute sexual harassment" or by the Title IX coordinator on behalf of 3 such individuals). The formal complaint can only be filed "against a respondent," who is defined as an "individual who has been reported as the perpetrator of conduct." But it appears a formal complaint can proceed even in the absence of an identified individual perpetrator because, for example, proposed § 106.45(b)(2)'s notice requirement only applies "to the parties who are known." If after engaging in the investigation and live hearing required by proposed § 106.45(b)(3), the recipient's decision-maker makes a determination under proposed § 106.45(b)(4)(i) that the recipient's code of conduct was violated, then and only then may the decision-maker award "any remedies ... to the complainant designed to restore or preserve access to the recipient's education program or activity." § 106.45(b)(4)(ii)(E). The complainant may appeal "on the ground that the remedies are not designed to restore or preserve the complainant's access to the recipient's education program or activity." § 106.45(b)(5). This seems an elaborate process to go through when there is no risk of punishment for any individual.

For complaints about sexual discrimination that are not about sexual harassment, as defined, the proposed regulations give no guidance about who may file a complaint or what should happen to it. The proposed definition of "complainant" is limited to individuals who have "reported being the victim of conduct that could constitute sexual harassment," so it is extremely unclear how an individual filing a non-formal complaint about something other than sexual harassment is to be

treated. Thus, for example, complaints of a teacher’s intentional disparate discipline against boys (or non-stereotypical girls) or intentional discrimination against girls’ teams by the athletics administrator have no clear path through the mandatory grievance process. It is also unclear whether students or employees must be permitted to file a complaint if they cannot personally claim to be “victims.” That is, can an employee complain that girls are not getting equal athletic support? And is it relevant to the process if a claim of intentional discrimination names a particular person, rather than challenging a recipient’s policy?

There is also no guidance about what a recipient must do in order to provide a prompt and equitable process to a non-formal complaint involving sexual discrimination. All we know is that the response to the non-formal complaint cannot be “clearly unreasonable in light of known circumstances.” § 106.44(a). That is not particularly helpful guidance to students, employees, or recipients.

For both the formal and informal complaints, the regulations anticipate the remedies to be individualized to the complainant alone. For formal complaints, the recipient need only provide a remedy to that individual complainant.

§§ 106.45(b)(4)(ii)(E), 106.45(b)(5). No systemic remedy appears to ever be required – there is no express requirement that the recipient to end any harassment, eliminate any hostile environment, and prevent any harassment from occurring again. Indeed, at least in higher education, a recipient will always be in compliance if, in response to a non-formal complaint of sexual harassment, it “offers and implements supportive measures designed to preserve the complainant’s access to the recipient’s education or activity.” § 106.44(b)(3). By contrast, according to Assistant Secretary Marcus held that a school that is on notice of discriminatory conduct on campus must “take appropriate responsive action” to “eliminate any hostile environment.”⁸⁰

⁸⁰ Letter from Kenneth Marcus, Assistant Secretary re: Appeal of OCR Case No. 02-11-2157 (Rutgers University) (Aug. 27, 2018).

C. The NPRM’s “Actual Knowledge” Limitations Are Not Realistic, Particularly for Children and Youth in Elementary and Secondary School and Are Inconsistent with ESSA (§ 106.30)

Proposed § 106.30 imposes unrealistic limits on who must have knowledge of harassment in order for the recipient to be found to have “actual knowledge.”

1. Although it is mildly better than the provision governing higher education, the proposed regulation’s definition of “actual knowledge” at the elementary and secondary level is still much too narrow. For example, even under that broader rule, telling one teacher about another teacher’s misconduct would not be enough to give the school actual knowledge unless the first teacher “has the authority to institute corrective measures on behalf of the recipient,” which seems unlikely. To require a student to know that going to a teacher is not sufficient to obligate the school to respond to another teacher’s misconduct is impractical and unjust.

2. But more significantly, students (particularly younger students) are not going to distinguish among the adults in the educational environment at all. One study suggests that students have reported their experiences to school employees as diverse as athletic coaches, school resource officers, and school counselors,⁸¹ while another study found that 8% of students who were bullied told teachers, but 5% told “the Office” or a school counselor.⁸²

School bus drivers are another important group of adults who interact with children on a daily basis and observe sexual harassment but would not appear to have the necessary authority under the proposed definition of “actual knowledge.” 10% of rural school students, 4% of suburban school students, and 2% of urban school students reported being bullied on a school bus.⁸³ School bus drivers, in turn, report regularly seeing sexual harassment on the bus but being ignored by school officials when they try to bring it to their attention.⁸⁴ These proposed regulations would remove any incentive school officials have to take these reports seriously.

⁸¹ Beverly Ocampo et al., *Latino Teens Talk About Help Seeking and Help Giving in Relation to Dating Violence*, 13(2) *Violence Against Women*, 172, 182 (2007).

⁸² Noemi E. Olsen, *Bullying Trends and Reporting Preferences Among an Urban, Suburban, and Rural School* at 37 tbl. 6 (2010) (All Theses and Dissertations. 2418).

⁸³ Noemi E. Olsen, *Bullying Trends and Reporting Preferences Among an Urban, Suburban, and Rural School* at 41 tbl. 10 (2010) (All Theses and Dissertations. 2418).

⁸⁴ Melissa Allen et al., *Sexual Harassment on the School Bus*, 2:4 *Journal of School Violence* 101 (2003); Ellen Delara, *Bullying and Aggression on the School Bus: School Bus Drivers’ Observations and Suggestions*, 7 *Journal of School Violence* 48 (2008).

In 1997, during the notice-and-comment process for its first peer Sexual Harassment Guidance, the Department specifically rejected the view that it should interpret Title IX to attribute knowledge to the school district only through certain employees. The Department explained that “young students ... may reasonably believe that an adult, such as a teacher *or the school nurse*, is a person they can and should tell about incidents of sexual harassment.”⁸⁵ While the Department openly acknowledges that it is rejecting the known-or-should-have-known standard adopted in 1997 and reiterated in 2001, it nowhere explains why its judgment about what should be expected of a reasonable student has changed. Research shows that students select adults to confide in based on the adults’ personality, not their job title.⁸⁶ As the AASA explained in its comment, “[w]e know young children can form bonds with a host of school personnel whether it be a cafeteria worker, coach, bus driver, janitor or paraprofessional.”⁸⁷

Indeed, the possibility for reasonable confusion about who has authority to institute corrective measures “on behalf of the recipient” by a student is likely even higher now than it was twenty years ago. Many schools now use contractors to serve functions such as security guard, cafeteria worker, or bus driver. School resource officers (SROs) may not have authority to act “on behalf of the recipient” – they have authority to act on behalf of the police. These adults are exactly the type of individuals that students would be expected (and in some cases encouraged) to report sexual misconduct. Indeed, their presence at school greatly increases the chances that the police will be informed of misconduct when the incidents are reported.⁸⁸

3. Proposed § 106.30 also states that the obligation of an individual to report sexual harassment to more senior officials of the recipient does not qualify an employee as someone whose “actual knowledge” can be attributable to the recipient. But the rationale of that exclusion is unclear. The NPRM cites two cases, 83 Fed. Reg. at 61,467/2-3, but neither explains why, as a matter of policy, expecting employees to meet their obligation to pass knowledge up the chain

⁸⁵ Office for Civil Rights, U.S. Department of Education, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034, 12,037/1 (March 13, 1997) (emphasis added).

⁸⁶ Cynthia Ross Lindsey & John Kalafat, *Adolescents’ Views of Preferred Helper Characteristics and Barriers to Seeking Help from School-Based Adults*, 9 J. of Educational & Psychological Consultation 171 (1998).

⁸⁷ <https://www.regulations.gov/document?D=ED-2018-OCR-0064-7411>.

⁸⁸ Adam Watkins & Michael Maume, *School Victims and Crime Reporting*. 9(4) Youth Violence and Juvenile Justice 333, 346 (2011).

unfairly attributes knowledge to the recipient. If the recipient (or a state or local legislature) decides that certain recipient employees must report the sexual harassment reports they receive, why should the Department second-guess that judgment and require that those same employees also have the ability to institute a corrective action in order for the school to have responsibilities under federal law?

4. The actual knowledge requirement also is in tension with the provision of the 2015 Every Student Succeeds Act that prohibits school districts (and all its employees, contractors and agents) from assisting a school employee in obtaining a new job if the school district “knows, *or has probable cause to believe*, that such school employee ... engaged in sexual misconduct regarding a minor or student in violation of the law.”²⁰ U.S.C. § 7926(a). Combining that prohibition with the proposed regulation, a school district that had probable cause to believe a teacher engaged in sexual misconduct would not have to take any action to address the teacher’s sexual misconduct (absent a formal complaint), but it would be prohibited in helping that same teacher get a new job. It seems unlikely Congress intended that disparity.

D. The NPRM Offers No Reasoned Explanation Why The Definition of “Sexual Harassment” Does Not Include Quid Pro Quo Harassment by Any of a Recipient’s Agents (§ 106.30)

Proposed § 106.30’s definition of “sexual harassment” includes “an employee of the recipient” condition a benefit of the recipient on an individual’s participation in unwelcome sexual conduct. The NPRM offers no reason why this provision is limited to employees and excludes other adults whom the recipient vests authority to give or withhold benefits but who are not employees. Such adults can include student teachers, contractors, resident advisors, and volunteers.

E. The NPRM Offers No Reasoned Explanation Why Supportive Measures Are Incentivized But Not Required for Higher Education Recipients And Are Neither Incentivized Nor Required For Elementary and Secondary School Recipients (§ 106.44(b)(3))

Proposed § 106.44(b)(3) creates a safe harbor: if there is no formal complaint filed and if the recipient offers and implements supportive measures for individuals who report being the victim of conduct that could constitute sexual harassment to the Title IX coordinator, a recipient's response to known sexual harassment cannot violate Title IX. The NPRM claims that this provision is "intended to call recipients' attention to the importance of offering supportive measures to students who may not wish to file a formal complaint that would initiate a grievance procedure." 83 Fed. Reg. at 61,470/2. This, in turn, is because "for a variety of reasons," not all complainants want to file a formal complaint. *Id.*

Proposed § 106.44(b)(3) does not extend the same safe harbor to elementary and secondary schools. The only reason given for this differentiation is that "college and university students are generally adults capable of deciding whether supportive measures alone suffice to protect their educational access." 83 Fed. Reg. at 61,470/2. That rationale doesn't explain the difference. At both types of educational institutions, someone (student or parent) will need to decide whether to report, whether to accept supportive services, and whether to submit a formal complaint. There is no reason why the Department should not also "call [elementary and secondary school] recipients' attention to the importance of offering supportive measures" by incentivizing the provision of supportive services.

More generally, the NPRM does not explain why it does not simply mandate appropriate supportive measures for all individuals who report, as the Department did in its 2014 guidance. If, as the NPRM declares, supportive measures can be beneficial to those who experience sexual harassment, and that many who report sexual harassment would prefer (at least at first) to only receive supportive services, the Department should require such services be made available by every educational institution. Given the breadth of authority the Department views itself as having in this policy space, mandatory provision of supportive services would be much better policy.

F. The NPRM's Requirement That Training Materials May Not Rely on Sex Stereotypes Provides Little Guidance and Is in Tension With an Existing Title IX Regulation (§ 106.45(b)(1)(iii))

Proposed § 106.45(b)(1)(iii) provides that “[a]ny materials used to train [a recipient’s] coordinators, investigators, or decision-makers may not rely on sex stereotypes.” This prohibition has merit in the abstract, but the proposed regulation is too narrow in its current scope and too unclear for purposes of enforcement.

In promulgating 34 C.F.R. § 106.42 more than 40 years ago, the Department refused to prohibit reliance on sex stereotypes in curricular materials used by recipients because it found “no evidence in the legislative history that the proscription in title IX against sex discrimination should be interpreted as requiring, prohibiting or limiting the use of any such materials.” This was so even though the Department “recognize[d] that sex stereotyping in textbooks and curricular materials is a serious matter.” In making this decision, the Department relied heavily on the view that “to follow another interpretation might place the Department in a position of limiting free expression in violation of the First Amendment.”⁸⁹

These new proposed regulations emphasize the importance of the First Amendment in several places, but apparently see no tension between the First Amendment and prohibiting or limiting the use of training materials by schools and universities based on whether the training materials rely on stereotypes. If the First Amendment is no longer perceived as a barrier to the federal government prohibiting the use of materials that rely on sex stereotypes, the Department should repeal 34 C.F.R. § 106.42 and replace it with a prohibition on reliance on sex stereotyping that extends to *all* training or educational materials used by a recipient for any purpose.

There is nothing in the NPRM that explains why this provision would be appropriate with regard to a narrow set of investigations and adjudications, but not the broader universe of materials relied on by recipients for all kinds of operations where sex stereotypes might influence content. Indeed, there is nothing at all in the NPRM that gives examples of the problem that proposed § 106.45(b)(1)(iii) is trying to address. Although the NPRM does not give any examples, one comment suggests that trainings that explain that inconsistency in a complainant’s account

⁸⁹ All the quotations in this paragraph are from 40 Fed. Reg. 24,127, 24,135/1 (July 25, 1975) (discussing 34 C.F.R. § 106.42).

could be the result of trauma relies on sex stereotypes⁹⁰ If that is an example of what proposed § 106.45(b)(1)(iii) is intended to target, it is not clear what sex stereotype is being relied on, as this explanation would apply to both men and women who claimed to experience a traumatic event, such as sexual assault.⁹¹

Moreover, a recent article in peer-reviewed journal stated that there is evidence that, for example, “victims of one-off traumas typically recall only three to five ‘hotspots’ (vivid details) from their ordeal and relatively undetailed memories are thus to be expected” and “in extreme cases of negative emotions, such as rape trauma, memories may be impaired with amnesia or amnesic gaps, distorted and contain false details along with vivid intrusive details.”⁹² This would seem useful information when training people to assess the veracity of a person complaining of rape.

If the Department is intending to prohibit reliance on such information, it is important for the Department to make clear how it has determined that reliance on this information constitutes reliance on sex stereotypes. Specific examples would be necessary so that recipients and students understand what training materials can be used as they are trained prior to any formal complaint being filed. Or, if the Department intends, instead of looking for sex stereotypes, to decide generally what science is sufficiently reliable that it can be relied on in trainings (and what is not), it should articulate clear standards it intends to use in that judgment. And it should explain how it will be making those determinations consistent with its own obligations under the Information Quality Act.

G. The NPRM’s Authorization for Delay of Sexual Harassment Proceedings for Language Assistance or Accommodation of Disabilities Permits Recipients to Avoid Their Current Obligation to be Prepared to Provide Such Assistance or Accommodations (§ 106.45(b)(1)(v))

Proposed § 106.45(b)(1)(v) permits recipients to give limited extension of time frames for good cause, which “may include ... the need for language assistance or accommodation of disabilities.” But as the NPRM acknowledges (83 Fed. Reg. at 61,473/3), recipients already have statutory duties under Title VI of the Civil

⁹⁰ Comment of 3 Lawyers and a History Professor, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-6244> at 19 & n.92.

⁹¹ Comment of former OCR Career Employees, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-8911> at 3-4, 10.

⁹² Katrin Hohl & Martin Conway, *Memory as Evidence: How Normal Features of Victim Memory Lead to the Attrition of Rape Complaints*, 17(3) *Criminology & Criminal Justice* 248 (2017) (citation omitted).

Rights Act, Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act to provide “timely” language assistance and accommodation of disabilities. The Equal Educational Opportunities Act, not mentioned in the NPRM, also imposes language assistance responsibilities on school districts.⁹³

Recipients should not wait until the need arises to plan for providing these services. They should have plans in place so that such assistance and accommodations are available when the need arises. It would be unfair to complainants and respondents if the status of one party (or a witness) as an English learner or individual with a disability leads to delay of the proceedings because the recipient was not prepared to meet its obligations. Indeed, this provision might signal recipients that they can wait until the need arises before they must do anything in this area. That is the wrong signal to send and wrong as a matter of law.

H. The NPRM Ignores the Significant Risk of Retaliation against Complainants and Witnesses (§ 106.45(b)(2)(i)(B))

Proposed § 106.45(b)(2)(i)(B) provides that the recipient in receipt of a formal complaint must in the first notice notify both parties “of any provision in the recipient’s code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.” The Department explained that this provision would “incentivize honest, candid” statements. 83 Fed. Reg. at 61,474/1. But the proposed regulations do not require a warning that it is misconduct to retaliate, or to cause others to engage in retaliation, against a party or any potential witnesses. It does not identify the types of retaliation that are prohibited, including threats of civil litigation against the complainant for defamation. The fear of retaliation by the accused or by peers (including the accused’s friends) is a major barrier for people to complain about sexual harassment, including sexual assault, that the NPRM simply ignores.⁹⁴

Nor do the regulations tell a complainant whether retaliatory harassment is something that will be processed through the general “prompt and equitable”

⁹³ 20 U.S.C. § 1703(f); Office for Civil Rights, U.S. Department of Education, *Dear Colleague Letter re: English Learner Students and Limited English Proficient Parents* (2015).

⁹⁴ Shelley Hymel & Susan M. Swearer: *Four Decades of Research on School Bullying: An Introduction*, 70 *American Psychologist* 293, 295 (May-June 2015) (“youth are reluctant to report bullying, given legitimate fears of negative repercussions”); Ganga Vijayasiri, *Reporting Sexual Harassment: The Importance of Organizational Culture and Trust*, 25 *Gender Issues* 43, 53-54, 56 (2008) (“fear of adverse career consequences, or being blamed for the incident are a major deterrent to reporting” and this includes peer mistreatment or disapproval).

grievance procedure, or whether it will be processed through the specially prescribed policies for sexual harassment. If, as the NPRM suggests, the reason for these targeted regulations is the “heightened stigma often associated with a complaint regarding sexual harassment,” 83 Fed. Reg. at 61,477/3, it would seem that a complaint for retaliating against someone for filing a complaint about sexual harassment would be too far removed from the stigma described in the NPRM. If retaliatory harassment is folded into this procedural morass, then deterrence of retaliation will also be reduced.

I. The NPRM’s Requirement That All Parties and Witnesses Be Cross-Examined Will Not Achieve More Reliable Outcomes, Will Deter and Injure Complaints, and Will Lead to More Sexual Harassment (§ 106.45(b)(3)(vi) & (vii))

We support reforming the process used by recipients in imposing school discipline; in many places, it could use serious reform. Nor do we question the wisdom of requiring that complainants and respondents be treated the same when it comes to procedural rights such as cross-examination. Such a requirement does not insert the Department into how the hearing is run, so long as it is run evenhanded. So if a recipient prohibits cross-examination of both parties, or permits cross-examination of both parties, or requires both parties to submit their questions to the decision-maker for preview, or permits only the decision-maker to ask question, that will reflect the institution’s judgment about the value they see in cross-examination for achieving a reliable outcome. But it is intrusive and myopic to layer multiple additional proposed procedures on a single type of misconduct – sexual harassment – in a way that tilts the system against those who have experienced sexual harassment.

The NPRM proposes, at the elementary and secondary level, that the decision-maker “must . . . ask each party or any witnesses any relevant questions and follow-up questions, including those challenging credibility, that a party wants asked of any party or witness.” For institutions of higher education, the decision-maker “must permit” such “cross-examination” by the party’s advisor of choice; and the decision-maker “must not rely on any statement” of a person who “does not submit to cross-examination.” In either educational setting, the decision-maker must explain “any decision to exclude questions as not relevant.”

1. Cross-examination is not effective means of identifying inaccurate testimony

The NPRM simply assumes that cross-examination will always (or usually) improve the reliability of the decision-makers' determinations of responsibility and allow them to discern "the truth." 83 Fed. Reg. at 61,476/1. It offers no evidence to support that assumption; it just cites a case that relies on John Wigmore's evidence treatise. But the reality is much more complicated.

First, cross-examination can be and is used as a weapon against an opposing party or witness, not just a tool for discovering facts. And second, cross-examination is often not an effective means of getting at "the truth," particularly for children and youth. For both reasons, a rigid nationwide rule is not appropriate.

a. As Justice Byron White candidly explained five years before Title IX was enacted, cross-examination "in many instances has little, if any, relation to the search for the truth." Instead, at least in criminal cases, it is accepted that defense counsel's job is "to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth" and to "cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth."⁹⁵

This can be particularly true in cases involving sexual misconduct. One defense attorney recently explained: "Especially when the defense is fabrication or consent – as it often is in adult rape cases – you have to go *at* the witness. There is no way around this fact. Effective cross-examination means exploiting every uncertainty, inconsistency, and implausibility. More, it means attacking the witness's very character."⁹⁶ We would be surprised if respondents' advisors of choice would be any less zealous, or if decision-makers would be any better than judges at stopping them.⁹⁷

An article focusing on legal ethics of brutal cross-examinations likewise paints an ugly picture of cross-examination in rape cases, even with rape shield laws in place.

⁹⁵ *United States v. Wade*, 388 U.S. 218, 257-58 (1967) (White, J., dissenting in part and concurring in part).

⁹⁶ Abbe Smith, *Representing Rapists: The Cruelty of Cross Examination and Other Challenges for A Feminist Criminal Defense Lawyer*, 53 Am. Crim. L. Rev. 255, 290 (2016).

⁹⁷ Louise Ellison, *The Mosaic Art: Cross-Examination and the Vulnerable Witness*, 21 Legal Studies 353, 366, 368-369, 373-375 (2001); John Spencer, *Conclusions*, in *Children and Cross-Examination: Time to Change the Rules?* 171, at 189 (John Spencer & Michael Lamb eds. 2012); Comment of Title IX Coordinator, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-8240> at 9-10, 11-13, 19-20.

[T]he cross-examination cannot hope to succeed unless the advocate brims with the indignation appropriate to questioning an irresponsible, lying accuser. The lawyer must grill the victim about the details of her behavior, attitudes and attire on the night of the attack-feigning regret, perhaps, that circumstances compel the lawyer to be so graphic. The lawyer must characterize every detail vividly from the most salacious point of view attainable and present it all with maximum innuendo. Had she been drinking? Had she told the defendant some dirty jokes before they left the bar? Was she wearing a sexy tank top? Had she brushed her hand against the defendant's, or allowed him to kiss her? Did she resist when he lifted her skirt? Did she respond while the defendant was inside her?

To make it seem plausible that the victim consented and then turned around and charged rape, the lawyer must play to the jurors' deeply rooted cultural fantasies about feminine sexual voracity and vengeance. All the while, without seeming like a bully, the advocate must humiliate and browbeat the prosecutrix, knowing that if she blows up she will seem less sympathetic, while if she pulls inside herself emotionally she loses credibility as a victim. Let us abbreviate all of this simply as "brutal cross-examination."⁹⁸

These situations may be one reason why Wigmore explained that "in more than one sense" did cross-examination "take the place in our system which torture occupied in the medieval system of the civilians."⁹⁹

b. Empirical studies show that adults give significantly more inaccurate responses when questioned using questions that involve the features typical of cross-examination.¹⁰⁰ When we discuss cross-examination, we understand it to mean more than merely asking a question. Cross-examination is a method of questioning that relies on leading questions, compound or complex questions, rapid-fire questions, closed (i.e., yes or no) questions, questions that jump around from topic

⁹⁸ David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 Colum. L. Rev. 1004, 1027–28 (1990) (paragraph break added).

⁹⁹ 5 John Henry Wigmore, *Evidence in Trials at Common Law*, § 1367 (James H. Chabourn ed., Little Brown 1974). The term "civilians" here refers to countries that followed the civil, as opposed to the common law, tradition.

¹⁰⁰ Emily Henderson, *Bigger Fish to Fry: Should the Reform of Cross-Examination Be Expanded Beyond Vulnerable Witnesses*, 19(2) International J. of Evidence and Proof 83, 84–85 (2015) (collecting studies of adults).

to topic, questions with double negatives, and questions containing complex syntax or complex vocabulary, and tag questions.¹⁰¹

Tag questions – a statement with a question tagged on at the end that encourages the witness’s agreement with the tag (for example, “It wasn’t him, was it?”) – “are the weapons of choice in cross-examination” because they “are one of the most powerfully suggestive forms of speech that we have in the English language” and “because in effect they allow the questioner to do the testifying.”¹⁰² One scholar has categorized some of the other types of questions used in cross-examination.

- “[n]egative tagging” (for example, “Now this happened on a Friday, [did] it not?”) and the “[n]egative rhetorical” question (for example, “Now you had a bruise, did you not, near one of your breasts, do you remember this?”) – statements with a negative that creates a question;
- the “[m]ulti-faceted question” – a question that contains more than one proposition so that it is not clear which question should be answered (for example, “[D]id he take hold of you and make you do anything? Did he grab hold of your hand or do anything with your hand?”);
- a question that “[lacks a] grammatical and/or semantic connection” (for example, “At any stage while you were in the bathroom did he ever enter the bathroom that previous week?”);
- the “[j]uxtaposition of topics” – “[t]opics of unequal significance” or “with no obvious sequential ties” are “placed alongside one another.” Although meanings between topics are not connected, topic changes, parenthetical statements or repetitions of the witness’s answers are all “made to appear of equal importance and what sometimes emerges as a list of unrelated details serves to create a ‘linguistic fog.’”¹⁰³

These common types of cross-examination questions are likely to confuse adult witnesses and result in inaccurate or misleading answers.

¹⁰¹ Emily Henderson, *Bigger Fish to Fry: Should the Reform of Cross-Examination Be Expanded Beyond Vulnerable Witnesses*, 19(2) *International J. of Evidence and Proof* 83, 84-85 (2015) (collecting studies of adults).

¹⁰² Anne Graffam Walker, American Bar Association Center of Children and the Law, *Handbook on Questioning Children – A Linguistic Perspective* 48-49 (2d ed. 1999) (citations omitted).

¹⁰³ Annie Cossins, *Cross-Examination in Child Sexual Assault Trials: Evidentiary Safeguard or Opportunity to Confuse*, 33 *Melbourne L. Rev.* 68, 78-79 (2009) (quoting and summarizing Mark Brennan, *The Discourse of Denial: Cross-Examining Child Victim Witnesses*, 23 *Journal of Pragmatics* 71 (1995)) (all footnotes omitted).

Even “mere” leading questions, prohibited on direct examination but permitted during cross-examination, can result in a suggestive style that has been shown to have a clear detrimental effect on witness accuracy.¹⁰⁴ Cross-examination is even more likely to pose such problems for persons with intellectual disabilities.¹⁰⁵

All these problems are compounded and magnified when these types of questions are targeted at children or youth. “[T]he questioning style used during cross-examination directly contravenes almost every principle established for obtaining reliable and accurate reports from children.”¹⁰⁶ Indeed, there is a large, consistent, and growing body of research that shows that children subject to cross-examination type questioning are more likely to repudiate accurate statements and to reaffirm inaccurate statements.¹⁰⁷ As the leading researchers in this field have

¹⁰⁴ Emily Henderson, *Bigger Fish to Fry: Should the Reform of Cross-Examination Be Expanded Beyond Vulnerable Witnesses*, 19(2) *International J. of Evidence and Proof* 83, 87 (2015) (“A number of studies have specifically examined the impact of suggestive cross-examination-style questions on ordinary adult witnesses, finding that they have ‘a clear detrimental effect’ on accuracy, especially regarding peripheral details or issues about which they were uncertain.” (footnotes omitted)); *id.* (“previously accurate witnesses become substantially less accurate under cross-examination but inaccurate witnesses’ accuracy was not improved”).

¹⁰⁵ Rachel Zajac et al., *Disorder in the Courtroom: Child Witnesses Under Cross-Examination*, 32 *Developmental Rev.* 181, 198 (2012).

¹⁰⁶ 2 *Wiley Encyclopedia of Forensic Science, Cross-Examination: Impact on Testimony* 656 (Allan Jamieson & Andre Moenssens eds. 2009); see also Caroline Bettenay et al., *Cross-examination: The Testimony of Children With and Without Intellectual Disabilities*, 28(2) *Applied Cognitive Psychology* 204 (2014) (“The findings also imply that the cross-examination of young children has a negative and deleterious effect on the reliability of their testimony.”); Joyce Plotnikoff & Richard Woolfson, ‘*Kicking and Screaming*’: *The Slow Road to Best Evidence*, in *Children and Cross-Examination: Time to Change the Rules?* 21, at 28 (John Spencer & Michael Lamb eds. 2012) (“studies have demonstrated the cross-examination techniques used with children are evidentially unsafe”).

¹⁰⁷ Rhiannon Fogliati & Kay Bussey, *The Effects of Cross-Examination on Children’s Coached Reports*, 21 *Psych., Public Policy, & Law* 10 (2015) (cross-examination led children to recant their initial true allegations of witnessing transgressive behavior and significantly reduced children’s testimonial accuracy for neutral events); Saskia Righarts et al., *Young Children’s Responses to Cross-Examination Style Questioning: The Effects of Delay and Subsequent Questioning*, 21(3) *Psych., Crime & Law* 274 (2015) (cross-examination resulted in a “robust negative effect on children’s accuracy”; only 7% of children’s answers improved in accuracy); Fiona Jack & Rachel Zajac, *The Effect of Age and Reminders on Witnesses’ Responses to Cross-Examination-Style Questioning*, 3 *J. of Applied Research in Memory and Cognition* 1 (2014) (“adolescents’ accuracy was also significantly affected” by cross-examination-style questioning); Rhiannon Fogliati & Kay Bussey, *The Effects of Cross-Examination on Children’s Reports of Neutral and Transgressive Events*, 19 *Legal & Crim. Psychol.* 296 (2014) (cross-examination led children to provide significantly less accurate reports for neutral events and actually reduced the number of older children who provided truthful disclosures for transgressive events); Joyce Plotnikoff & Richard Woolfson, ‘*Kicking and Screaming*’: *The Slow Road to Best Evidence*, in *Children and Cross-Examination: Time to Change the Rules?* 21, at 27 (John Spencer & Michael Lamb eds. 2012) (a hostile accusation that a child is lying “can cause a child to give inaccurate answers or to agree with the suggestion that they are lying simply to bring questioning to an end”); Rachel Zajac & Harlene Hayne, *The Negative Effect of Cross-Examination Style Questioning on Children’s Accuracy: Older Children are Not Immune*, 20 *Applied Cognitive Psychology* 3 (2006) (43% of older children changed their originally correct answers to incorrect

(Continued on next page)

explained, “cross-examination is far from a truth serum;” it merely leads youth “to change their responses” regardless of whether the initial response was accurate.¹⁰⁸ Or, as Wigmore warned, “[a] lawyer can do anything with a cross-examination,” including “make the truth appear like falsehood.”¹⁰⁹

This will come as no surprise to members of the bar. Attorneys receive training on how to “induce a mild level of anxiety in the child” witness during cross-examination in the hopes that “the anxiety will combine with the fear of displeasing the attorney to strengthen the likelihood that the child will agree with counsel.” They are told that “some suggestible children can be led to alter their direct testimony through skillful use of suggestive questions during cross” and are urged to “capitalize on the suggestibility.” And they are also advised to “capitalize on a particular child’s tendency toward hyperbole and fantasy” in “the hope that the collateral matter of fantasy will raise doubts about a child’s testimony.”¹¹⁰

These trainings do capture an important point, however: matters unrelated to whether the witness is telling the truth significantly influence the effects of cross-examination on the accuracy of a witness’ testimony. For example, children with low levels of self-esteem, self-confidence, and assertiveness – all of which are characteristics of children who have experienced sexual misconduct – are less likely to provide accurate statements during cross-examination.¹¹¹ And the mere presence of a parent in the room can affect a child’s accuracy: compared to those who testified outside the sight of a parent, children whose parents were present were “less likely to provide inconsistent testimony regarding peripheral details,” “less likely to recant main actions of the perpetrator during defense questioning,”

ones under cross-examination); Rachel Zajac et al., *Asked and Answered: Questioning Children in the Courtroom*, 10 *Psychiatry, Psychology and Law* 199 (2003); Rachel Zajac & Harlene Hayne, *I Don’t Think That’s What Really Happened: The Effect of Cross-Examination on the Accuracy of Children’s Reports*, 9(3) *Journal of Experimental Psychology: Applied* 187 (2003) (“Cross-examination did not increase the accuracy of children who made errors in their original reports. Furthermore, cross-examination actually decreased the accuracy of children whose original reports were highly accurate.”).

¹⁰⁸ Rachel Zajac et al., *The Diagnostic Value of Children’s Responses to Cross-Examination Questioning*, 34 *Behav. Sci. Law* 160, 172 (2016).

¹⁰⁹ 5 John Henry Wigmore, *Evidence in Trials at Common Law*, § 1367 (James H. Chabourn ed., Little Brown 1974).

¹¹⁰ All the quotations in this paragraph are from John E.B. Myers, *The Child Witness: Techniques for Direct Examination, Cross-Examination, and Impeachment*, 18 *Pacific L. Rev.* 801, 882, 886, 887, 890, 891 (1987).

¹¹¹ Rachel Zajac et al., *Disorder in the Courtroom: Child Witnesses Under Cross-Examination*, 32 *Developmental Rev.* 181, 187 (2012).

and were “more likely to be judged credible witnesses.”¹¹² It is unclear why cross-examination, a technique that is so contingent on circumstance for its purported effectiveness, should be required in all cases resulting from a formal complaint at every school nationwide.

2. Cross-examination injures and will deter formal complaints

By their very nature, cross-examination type questions create significant anxiety in youth which, in turn, can adversely affect the accuracy of their answers.¹¹³ For children, the experience of cross-examination can be devastating,¹¹⁴ and this can be particularly true for vulnerable populations.¹¹⁵ This may be one reason why Wigmore explained that “in more than one sense” did cross-examination “take the place in our system which torture occupied in the medieval system of the civilians.”¹¹⁶

These problems cannot be addressed on a question-by-question basis by the presiding official; absent the ability to be an intermediary and question the witness themselves, the official or panel’s intervention will generally be ineffective.¹¹⁷ This would be particularly true under the proposed regulations, where a decision-maker may have difficulty reigning in a party’s advisor of choice when that advisor is an attorney.

¹¹² Gail S. Goodman et al, *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, Monographs of the Society for Research in Child Development, Serial no. 229, Vol. 57, No. 5, at p.85 (1992).

¹¹³ Caroline Bettenay et al., *Changed Responses Under Cross-Examination: The Role of Anxiety and Individual Differences in Child Witnesses*, 29(3) *Applied Cognitive Psychology* 485 (2015).

¹¹⁴ Gail S. Goodman et al, *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, Monographs of the Society for Research in Child Development, Serial no. 229, Vol. 57, No. 5, at p.114 (1992) (“[T]estifying in criminal court ... is associated with negative effects for many, but not all, child sexual assault victims. The negative effects are more evident in the short than the long term. But negative effects, particularly in a subgroup of children, are still present even after the prosecution ends.”).

¹¹⁵ *Id.* at 119 (there are “clear subgroups of children ... who found legal participation to be more upsetting ... : more severely abused children, females, children who had less family support, children whose parents evinced low social adjustment, [and] children from poorer families”).

¹¹⁶ 5 John Henry Wigmore, *Evidence in Trials at Common Law*, § 1367 (James H. Chabourn ed., Little Brown 1974). The term “civilians” here refers to countries that followed the civil, as opposed to the common law, tradition.

¹¹⁷ Louise Ellison, *The Mosaic Art: Cross-Examination and the Vulnerable Witness*, 21 *Legal Studies* 353, 366, 368-369, 373-375 (2001); John Spencer, *Conclusions*, in *Children and Cross-Examination: Time to Change the Rules?* 171, at 189 (John Spencer & Michael Lamb eds. 2012).

People who fear abusive cross-examination often will not file, or will drop the complaint once they learn of the possibility of cross-examination.¹¹⁸ If abusive questioning occurs on a systemic basis – as many suggest it does in sexual harassment and assault cases – groups of people will refuse to complain or cooperate. Without their participation and cooperation, the system cannot remedy and deter wrongdoing.

3. The proposed cross-examination regulations are inartful

The Department has done an extremely poor job in crafting a code of evidence. Under the NPRM, questions must always be allowed if they are “relevant” unless it is about the complainant’s sexual behavior or predisposition (and then subject to certain further exceptions). Similarly, a decision-maker “must not rely on any statement” of a person who “does not submit to cross-examination.”

We are aware of no adjudicative system that follows these rules without exception. Every system balance what it perceives as the value of cross-examination against other important interests. For example, federal courts regularly exclude “relevant evidence” if the decision-maker determines that its “probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evidence 403.¹¹⁹ Are we to assume that decision-makers under these regulations lack the authority to exclude relevant evidence for any of those reasons? For example, if the parties engaged in unsuccessful informal mediation prior to the hearing, may a decision-maker stop questions about statements a party made during those discussions, despite them being relevant? Must a decision-maker require a respondent to answer cross-examination questions about whether and why the party offered to pay for the medical bills of the complainant? These questions might certainly yield evidence relevant to culpability, but they are generally excluded under the Federal Rules of Evidence to support other public policies. And if decision-makers retain the

¹¹⁸ Eliza A. Lehner, *Rape Process Templates: A Hidden Cause of the Underreporting of Rape*, 29 *Yale Journal of Law & Feminism* 207 (2018) (“rape victims avoid or halt the investigatory process” due to fear of “brutal cross-examination”); Michelle J. Anderson, *Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 *Vill. L. Rev.* 907, 932-936-37 (2001) (decision not to report (or to drop complaints) is influenced by repeated questioning and fear of cross-examination); Gregory Matoesian, *Reproducing Rape: Domination through Talk in the Courtroom* (1993).

¹¹⁹ *Cf. Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (“trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant”).

authority to exclude relevant questions, what standard will the Department use to review compliance with these proposed regulations?

Similarly, the rules of evidence have adopted a complex set of exceptions to the rule against hearsay, both when the declarant is available, Fed. R. Evidence 803, and when the declarant is not, Fed. R. Evidence 804. Do all these exceptions fall to the proposed regulation's requirement that a decision-maker may not "rely" on a person's statement absent cross-examination? And how will the proposed regulations apply to texts, tweets, emails, or Facebook posts between two or more people when one person submits to cross-examination but the others do not?

Finally, the proposed regulations provide that "all such questioning [of the opposing party and witnesses] must exclude evidence of the complainant's sexual behavior or predisposition" or all "cross-examination must exclude evidence of the complainant's sexual behavior or predisposition" (subject to certain further exceptions). These sentences make very little sense as a matter of evidence. Questions are not evidence. They can lead to statements that are evidence. Are these regulations intending to provide that such evidence "is not admissible," as Federal Rule of Evidence 412 does? Or are they just prohibiting questioning the complainant about such matters, while permitting the decision-maker to admit and consider other forms of evidence that show a complainant's sexual behavior?

As we hope these questions demonstrate, the Department has plainly not considered the full consequences of its proposed regulations. Nor should we have expected it to, because it is not an expert in devising an evidentiary code. These detailed proposed regulations should be withdrawn.

J. The NPRM Authorizes the Disclosure of Personal Information to the Parties without Justification (§ 106.45(b)(3)(viii))

Proposed § 106.45(b)(3)(viii) requires that both parties be able to "inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility." Because the proposed regulations identify some situations where the respondent may be able to rely on the complainant's "sexual behavior or predisposition," § 106.45(b)(vi) & (vii), it would seem to follow that everything the investigator learns or hears about the complainant's sexual history, no matter whether or not it is relied on the investigatory report, is "directly related" to the allegations and must be made available to the accused student and their advisor of choice. That appears to mean that accused students and their advisors are entitled learn irrelevant personal information about the complainant (and witnesses) from

medical records, gossip noted by the investigator but never verified, etc. Even if it does not extend to sexual history, accusing students, accused students and their advisors will be able to learn a significant amount of personal information about the other parties and witnesses involved.

Even worse, the “inspect and review” provision poses a significant risk of the widespread disclosure of highly personal, possibly inaccurate, information when combined with proposed § 106.45(b)(3)(iii), which prohibits a recipient from restricting the ability of either party “to discuss the allegations under investigation or to gather and present relevant evidence.” While there is a proposed prohibition on “downloading or copying the evidence” collected by the investigator, § 106.45(b)(3)(viii), there is no proposed prohibition on sharing the information learned from the evidence orally or describing the information by email, text, etc. with others. Indeed, a party might argue that they need to spread such personal information about the opposing party or witness in order to gather relevant evidence of their own. Whether released in order to retaliate or otherwise, creating a system that empowers one party to learn and disseminate personal information about another by word of mouth (or by the word of the internet) would certainly deter many people from filing complaints.¹²⁰

K. The NPRM’s Authorization of Informal Resolution/Mediation Is an Unexplained Departure from Past Policy and Disregards Significant Reasons for Not Permitting Unconstrained Informal Resolutions for Complaints of Sexual Harassment, Including Sexual Assault (§ 106.45(b)(6))

Proposed § 106.45(b)(6) would permit a recipient, any time after the formal complaint was filed but prior to reaching a determination of responsibility, to “facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication.” The NPRM suggests that such informal resolutions could include “arbitration-style processes” where the resolution process could “become binding on the parties” at some point. 83 Fed. Reg. at 61,479/2.

Proposed § 106.45(b)(6) conflicts with at least three positions the Department took in its 2001 Sexual Harassment Guidance that constrained recipients’ use of informal resolution processes, as shown in the table below.

¹²⁰ Ganga Vijayasiri, *Reporting Sexual Harassment: The Importance of Organizational Culture and Trust*, 25 Gender Issues 43, 49 (2008) (19% of employees experiencing sexual harassment did not file a formal complaint because of fear that “their confidentiality would not be protected”).

| 2001 Sexual Harassment Guidance ¹²¹ | Proposed § 106.45(b)(6) |
|---|---|
| “mediation will not be appropriate even on a voluntary basis” in situations “such as alleged sexual assault” | Would permit mediation of alleged sexual assault |
| it is “certainly” “not appropriate for a student who is complaining of harassment to work out the problem directly with the individual alleged to be harassing him or her ... without appropriate involvement by the school (e.g., participation by a counselor, trained mediator, or, if appropriate, a teacher or administrator)” | Would permit informal resolution without any involvement by the school (e.g., no mandated participation by a school official) |
| “the complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process.” | Would permit “arbitration-style processes” where the resolution process could “become binding on the parties” at some point |

The NPRM does not acknowledge these changes in positions and provides no reasoned explanation for them. This is despite the fact that the Department notes elsewhere in the NPRM that the 2001 Guidance is distinctive from the later guidances issued by the Department because it “had been subjected to public notice and comment (though not rulemaking)” and had not been rescinded by the Department in 2017. 83 Fed. Reg. at 61,465/1. Indeed, these three positions were also articulated in the Department’s 1997 Guidance, which also went through a notice-and-comment process and was published in the Federal Register.¹²² And yet the NPRM turns its back on these 20-year-old positions that twice went through notice-and-comment.

The NPRM contends that “informal resolution options may lead to more favorable outcomes for everyone involved” and would merely give an option for the parties, “some of whom may prefer not to go through a formal complaint process.”⁸³ Fed. Reg. at 61,479/2-3. But the prohibition on mediating sexual assault cases is based, in part, on the fact that the two parties are not “everyone involved” when an

¹²¹ Quotations are from Office for Civil Rights, U.S. Department of Education, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* at 21 (January 19, 2001).

¹²² Office for Civil Rights, U.S. Department of Education, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034, 12,045/2 (March 13, 1997).

alleged act of sexual assault occurs. A sexual assault has effects that extend beyond the parties to the entire community. When the alleged conduct is “particularly egregious – cases that would clearly merit permanent separation of the [respondent] from the educational community, if proven” – the interest in separating a respondent from the community, if the respondent in fact engaged in sexual assault, must be deemed the controlling factor, and the interests of the complainant or respondent in a less formal proceeding should not trump it.¹²³ Likewise, because informal resolutions such as mediation cannot result in enforceable sanctions, those respondents who actually engaged in proscribed conduct will not be deterred from sexually assaulting again. In addition, other peers will not hear about the positive outcomes that result in complaining, deterring complainants, and both specific and general deterrence will suffer. The individualized approach followed in most informal systems “treats the sexual harassment as a single occurrence abstracted from institutional considerations, such as deterring others who sexually harass or prompting a reluctant complainant to lodge a complaint by her knowing that another woman is charging the same respondent with sexual harassment.”¹²⁴

Further, the structure of mediation itself can inherently disadvantage complainants in at least two important ways. First, “by focusing on achieving a successful outcome – an agreement – mediation avoids the difficult issue of the violent act or harassing conduct itself, and instead focuses on subsidiary issues.”¹²⁵ Second, the

¹²³ Rajib Chanda, *Mediating University Sexual Assault Cases*, 6 Harv. Negotiation L. Rev. 312-313 & n.212 (2001); see also Mori Irvine, *Mediation: Is it Appropriate for Sexual Harassment Grievances*, 9 Ohio State J. on Dispute Resolution 27 (1993) (“Sexual harassment and the punishment for such conduct should not be subject to compromise or reconciliation.”).

¹²⁴ Jennie Kihnley, *Unraveling the Ivory Fabric: Institutional Obstacles to the Handling of Sexual Harassment Complaints*, 25 Law & Soc. Inquiry 69, 84 (2000); see Laurie Rudman et al., *Suffering in Silence: Procedural Justice versus Gender Socialization in University Sexual Harassment Grievance Procedures*, 17 Basic and Applied Social Psychology 519 (1995) (focus on informal resolution “is problematic because it typically results in unpunished and undeterred offenders”); Mori Irvine, *Mediation: Is it Appropriate for Sexual Harassment Grievances*, 9 Ohio State J. on Dispute Resolution 27 (1993) (“The victim is not the only benefactor from the public discipline of the harasser. How the employer, and ultimately the [decision-maker], treat harassers has a profound impact on female workers.”); Stephanie Riger, *Gender Dilemmas in Sexual Harassment Policies and Procedures*, 46 American Psychologist 497 (1991) (harassers whose claims are mediated “suffer few negative consequences of their actions and may not be deterred from harassing again”).

¹²⁵ Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 Harv. Women’s L.J. 57, 84 (1984); see Jennie Kihnley, *Unraveling the Ivory Fabric: Institutional Obstacles to the Handling of Sexual Harassment Complaints*, 25 Law & Soc. Inquiry 69, 84 (2000) (Mediation’s focus on compromise “shifts the focus of the dispute process from formally concluding if sexual harassment occurred to stressing the needs and interests of the parties involved as they reach their own agreement about how to resolve the conflict. However, the focus on the parties’ ‘working things out’ frames the behavior more as ‘inappropriate’ or as an ‘emotional problem’ than as sex discrimination.”).

predicate assumption in informal resolution processes that the complainant and respondent have equal power in the process of resolving the dispute. But that is often not true. “Parties involved in sexual harassment disputes may not be equal either in the sense of formal position within the organization (e.g., student versus faculty) or status . . . , and position and status characteristics that reflect levels of power do not disappear simply because they are irrelevant to the informal process.”¹²⁶ As one scholar noted: “Only in fact-finding are the parties equal.”¹²⁷

The U.S. Commission for Civil Rights assessed the appropriateness of mediation in the sometimes-analogous context domestic violence disputes. It concluded that mediation “should never be used as an alternative to prosecution in cases involving physical violence.” The reason for its conclusion was that mediation “place[s] the parties on equal footing and asks them to negotiate an agreement for future behavior. Beyond failing to punish assailants for their crimes, this process implies that victims share responsibility for the illegal conduct and requires them to modify their own behavior in exchange for the assailants’ promises not to commit further crimes.”¹²⁸ This rationale applies equally to the inappropriateness of mediation of complaints of sexual assault.

Even if some informal resolutions were appropriate for complaints alleging sexual assault (such as when the respondent accepts responsibility for their action and the only question is how to restore the campus to a non-hostile environment), proposed § 106.45(b)(6) and the NPRM provide little clarity about what the recipient’s role will be in such informal resolution, other than to disburse and collect consent forms. Does the Department envision a recipient enforcing informal resolutions between the parties when they are “binding on the parties,” 83 Fed. Reg. at 61,479/2, or agreeing to provide particular services identified in the resolution? Will a recipient be able to veto resolution if it thinks it is unfair to one of the parties or is not going to address the needs of the community? How will a recipient be able to assess the negotiated resolution effectively without engaging in some investigation of its own? Cf. 83 Fed. Reg. at 61472/3 (“to evaluate what constitutes an appropriate response, the recipient must first reach factual determinations about the allegations at issue”). These unanswered questions further weigh strongly against adopting proposed § 106.45(b)(6).

¹²⁶ Stephanie Riger, *Gender Dilemmas in Sexual Harassment Policies and Procedures*, 46 *American Psychologist* 497 (1991).

¹²⁷ Mori Irvine, *Mediation: Is it Appropriate for Sexual Harassment Grievances*, 9 *Ohio State J. on Dispute Resolution* 27 (1993).

¹²⁸ United States Commission on Civil Rights, *Under the Rule of Thumb: Battered Women and the Administration of Justice* 96 (1982).

XI. The Proposed Changes In The NPRM Not Just Affecting Sexual Harassment Are Also Misguided

A. The NPRM Inappropriately Narrows the Remedies of Title IX by Excluding Damages in All Cases (§ 106.3(a))

The proposed amendment to § 106.3(a) would prohibit the Department from assessing damages against the recipient as part of a remedy. The NPRM states that this amendment was intended to “clarify” the Department’s view about the scope of its remedial authority. 83 Fed. Reg. at 61,480/1.

But in at least one Dear Colleague Letter, the Department stated that after it found a violation it would “determine which remedies, including monetary relief, are appropriate based on the facts presented in each specific case.”¹²⁹ Press accounts at the time noted that this language was referring to money damages, not just equitable monetary relief.¹³⁰ The Department did not acknowledge in the NPRM that it was changing position or provide a reasoned basis for that change.

We submitted a FOIA request for records of any internal policy guidance or other memorandum made available to OCR staff that discusses the authority of OCR to award a complainant compensatory damages, or that describes factors that should be used in deciding when to exercise such authority, or that collects or describes cases in which compensatory damages were awarded by OCR as part of a resolution agreement, docketed as 19-00151-F. We have not yet received any responsive records from OCR, in violation of the timelines established by FOIA. This violation prejudices our ability to further make our argument. After the Department fully responds to this FOIA, the Department should re-open the comment period to allow us and other members of the public with whom we share the responses to submit any additional evidence and arguments.

The Department offers no reason why money damages should *never* be available to the Department as a remedy for deserving complainants who were victims of intentional sex discrimination (or retaliation). Further, the Department’s view that money damages are never an appropriate remedy in agency actions is in stark conflict with the longstanding views expressed by Department of Justice.¹³¹ Given

¹²⁹ Office for Civil Rights, U.S. Department of Education, *Dear Colleague Letter re: Retaliation* (April 24, 2013).

¹³⁰ Sara Lipka, *Federal Warning Against Retaliation Raises Questions for Colleges*, Chronicle of Higher Education (April 29, 2013).

¹³¹ Civil Rights Division, U.S. Department of Justice, *Title VI Legal Manual (Updated)*, § IX.A.3, at 6 (2016) (“Compensatory damages are also an available remedy in agency administrative compliance

(Continued on next page)

its role in coordinating agency enforcement of Title IX under Executive Order 12550, such a manifest deviation from the Department of Justice's position requires a compelling and fulsome explanation. The 25 other federal agencies (many of whom fund the same recipients as the Department) that have Title IX regulations¹³² that do not contain this proposed language barring compensatory damages as remedies are likely to follow the Department of Justice's interpretation. Adopting this proposed amendment would thus lead to a real risk that the remedies available to complainants could depend on which federal agency they file their Title IX complaint with.

The NPRM states that this limitation does not extend to all monetary relief (such as reimbursement or back pay), just money damages. 83 Fed. Reg. at 61,480/2. It is not clear where in Title IX this distinction is rooted or the scope of this distinction. Suppose there was a violation that resulted in "a failure to pay a specific amount for a specific purpose," 83 Fed. Reg. at 61,480/2, but it was not the recipient who was initially responsible for paying, but the recipient's intentional discrimination resulted in a third party not paying. For example, assume that a student is awarded a full-scholarship at a private high school. But student's current public school, because of the student's sex or in retaliation for past complaints, convinces the private school to cancel the scholarship, and the private school awards the scholarship to someone else. The complainant now has to pay to attend the private school because of the recipient's discrimination. Under the Department's rationale, an intentional discriminator would not have to pay the student the money it caused the student to spend because the recipient was not obligated to provide the scholarship in the first place.

activities."); Civil Rights Division, U.S. Department of Justice, *Title IX Legal Manual*, Pt. VIII (2001; updated Oct. 2015) ("agencies are encouraged to identify and seek the full complement of relief for complainants and identified victims, where appropriate, as part of voluntary settlements, including, where appropriate, not only the obvious remedy of back pay for certain employment discrimination cases, but also compensatory damages for violations in a nonemployment context"); Civil Rights Division, U.S. Department of Justice, *Title VI Legal Manual*, § XII, at 101-102 (2001) (same).

¹³² See Agency for International Development, 22 C.F.R. pt. 229; Corporation for National and Community Service, 45 C.F.R. pt. 2555; Department of Agriculture, 7 C.F.R. pt. 15a; Department of Commerce, 15 C.F.R. pt. 8a; Department of Defense, 32 C.F.R. pt. 196; Department of Energy, 10 C.F.R. pt. 1042; Department of Health and Human Services, 45 C.F.R. pt. 86; Department of Homeland Security, 6 C.F.R. pt. 17; Department of Housing and Urban Development, 24 C.F.R. pt. 3; Department of Interior, 43 C.F.R. pt. 41; Department of Justice, 28 C.F.R. pt. 54; Department of Labor, 29 C.F.R. 36; Department of State, 22 C.F.R. pt. 146; Department of Transportation, 49 C.F.R. pt. 25; Department of Treasury, 31 C.F.R. pt. 28; Department of Veterans Affairs, 38 C.F.R. pt. 23; Environmental Protection Agency, 40 C.F.R. pt. 5; Federal Emergency Management Agency, 44 C.F.R. pt. 19; General Services Administration, 41 C.F.R. pt. 101-4; National Aeronautics and Space Administration, 14 C.F.R. pt. 1253; National Archives and Records Administration, 36 C.F.R. pt. 1211; National Science Foundation, 45 C.F.R. pt. 618; Nuclear Regulatory Commission, 10 C.F.R. 5; Small Business Administration, 13 C.F.R. pt. 113; Tennessee Valley Authority, 18 C.F.R. pt. 1317.

The Department suggests those complainants should go to court if they want money damages. That is ironic, given that the Department is incorporating elements of proof (such as actual knowledge and deliberate indifference) from private actions for damages into the administrative process.

The amendment to proposed § 106.3(a) should be withdrawn.

B. The NPRM Inappropriately Seeks to Limit the Advertising Provision of Title IX (§ 106.8(b)(2)(ii))

For more than forty years, the Department’s regulations have prohibited a recipient from using or distributing a publication “*which suggests, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this part.*” 34 C.F.R. § 106.9(b)(2) (emphasis added). Twenty-five other federal agencies have Title IX regulations that use the exact same language.¹³³

Proposed § 106.8(b)(2)(ii) would narrow this language to prohibit recipients from only using or distributing a publication “*stating that the recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this part.*” (emphasis added). The NPRM says the reason for this change is to “remove subjective determination[s],” so that “the requirement would be more clear” for “those enforcing the requirement” as well as “for recipients seeking to comply with the requirement.” 83 Fed. Reg. at 61,482/1-2.

Because the purported rationale for the proposed change was a lack of clarity, we submitted a FOIA request for records of any communication from any member of the public (or any other federal agency) complaining about the subjectivity or lack of clarity of current § 106.9(b)(2), or otherwise seeking technical assistance about compliance with this provision, docketed as 19-00579-F. Further, to see whether

¹³³ See Agency for International Development, 22 C.F.R. pt. 229; Corporation for National and Community Service, 45 C.F.R. pt. 2555; Department of Agriculture, 7 C.F.R. pt. 15a; Department of Commerce, 15 C.F.R. pt. 8a; Department of Defense, 32 C.F.R. pt. 196; Department of Energy, 10 C.F.R. pt. 1042; Department of Health and Human Services, 45 C.F.R. pt. 86; Department of Homeland Security, 6 C.F.R. pt. 17; Department of Housing and Urban Development, 24 C.F.R. pt. 3; Department of Interior, 43 C.F.R. pt. 41; Department of Justice, 28 C.F.R. pt. 54; Department of Labor, 29 C.F.R. 36; Department of State, 22 C.F.R. pt. 146; Department of Transportation, 49 C.F.R. pt. 25; Department of Treasury, 31 C.F.R. pt. 28; Department of Veterans Affairs, 38 C.F.R. pt. 23; Environmental Protection Agency, 40 C.F.R. pt. 5; Federal Emergency Management Agency, 44 C.F.R. pt. 19; General Services Administration, 41 C.F.R. pt. 101-4; National Aeronautics and Space Administration, 14 C.F.R. pt. 1253; National Archives and Records Administration, 36 C.F.R. pt. 1211; National Science Foundation, 45 C.F.R. pt. 618; Nuclear Regulatory Commission, 10 C.F.R. 5; Small Business Administration, 13 C.F.R. pt. 113; Tennessee Valley Authority, 18 C.F.R. pt. 1317.

the Department itself had had trouble enforcing current § 106.9(b)(2) consistently and/or objectively, we asked for any letter to a complainant or recipient that involved applying § 106.9(b)(2) to any particular facts, also docketed as 19-00579-F. We have not yet received any responsive records from OCR, in violation of the timelines established by FOIA. This violation prejudices our ability to further make our argument. After the Department fully responds to this FOIA, the Department should re-open the comment period to allow us and other members of the public with whom we share the responses to submit any additional evidence and arguments.

The only example we could locate of the Department’s precedential application of current § 106.9(b)(2) demonstrates the problems that would result from narrowing the prohibition as proposed in the NPRM. OCR determined that a school handbook that described a club as “open to all boys” violated current § 106.9(b)(2), even though the language did not state that the club was not also open to all girls. This was because, OCR explained, the description “indicat[ed]” that the club was “intended for students of a particular sex.” As a remedy, OCR required the school district to “revise activity ... descriptions so they do not imply they are intended for students of a particular sex.”¹³⁴ If proposed § 106.8(b)(2)(ii) overrules this unremarkable decision, as it appears to do, that would leave a clear avenue for recipients seeking to steering people based on their sex. The NPRM acknowledges as much when it says that under the proposed regulation, it would be permissible for a recipient to use “illustrations in a publication that could be construed to suggest a policy of sex discrimination.” 83 Fed. Reg. at 61,482/1-2.

That the Department proposes to narrow the protections of current § 106.9(b)(2) is even more troubling when one looks at the analogous provisions that Congress itself enacted in laws prohibiting sex discrimination to address the problem of entities attempting to steer a protected group away by indicating they are not welcome without actually stating so. Title VII of the Civil Rights Act prohibits “any notice or advertisement relating to employment ... indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-3(b). Similarly, the Fair Housing Act prohibits “any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.” 42 U.S.C. § 3604(b).

¹³⁴ All quotations are from Office for Civil Rights, U.S. Department of Education, 1 *Digest of Significant Case-Related Memoranda Issued by the Office of Standards, Policy and Research*, No. 2, at 3 (June and July 1979).

Both these statutes use variants of the word “indicate,” which is much closer to the word “suggest” in the current Title IX regulation than the word “state” in proposed § 106.8(b)(2)(ii). It is unclear why the Department would want to create a regime where a recipient could not indicate it did not hire women or rent to women, but could suggest it did not admit women to its education program.

If the primary goal of proposed § 106.8(b)(2)(ii) was to eliminate the word “illustration” from the regulation, that too would also be contrary to the Title IX regulations of 25 other federal agencies (many of whom fund the same recipients as the Department). It would also be in tension with regulations issued by federal agencies under other statutes prohibiting sex discrimination, which regularly extend to non-textual components of communications. For example, to combat sex discrimination in the housing and lending contexts, federal agencies have expressly prohibited advertisements that “contain any words, symbols, models or other forms of communication which express, imply, or suggest a discriminatory preference or policy of exclusion.”¹³⁵ Indeed, some regulations go significantly further in ensuring that illustrations do not suggest that the advertiser has discriminatory policies.¹³⁶ There is no indication, in the NPRM or otherwise, that any of these agencies have had difficulty enforcing these regulations, or that covered entities have sought greater clarity.

The amendments in proposed § 106.8(b)(2)(ii) should be withdrawn.

¹³⁵ 12 C.F.R. § 338.3(b); *see* 12 C.F.R. § 626.6020(a) (“use words, phrases, symbols, directions, forms, or models in such advertising which express, imply or suggest a policy of discrimination or exclusion”); 12 C.F.R. § 701.31(d) (“contain[ing] any words, symbols, models or other forms of communication that suggest a discriminatory preference or policy of exclusion”); 24 C.F.R. § 100.75(c)(1) (“[u]sing words, phrases, photographs, illustrations, symbols or forms which convey that dwellings are available or not available to a particular group of persons”); 12 C.F.R. pt. 1002, Supp. I, § 1002.4, ¶ 4(b)(1)(ii) (“use of words, symbols, models or other forms of communication in advertising that express, imply, or suggest a discriminatory preference or a policy of exclusion”); *see also* 7 C.F.R. § 1901.203(b)(3) (“either directly or through visual representation a preference for applicants of a particular race or ethnic origin”).

¹³⁶ 7 C.F.R. § 1901.203(c)(3)(vi) (“When illustrations or persons are included they shall depict persons of both sexes and of majority and minority groups.”).

C. The NPRM Inappropriately Seeks to Reduce the Amount of Information Available to Parents and Applicants about Whether a Recipient Is Complying With All The Requirements of Title IX (§ 106.8(b))

1. Proposed § 106.8(b)(1) would remove the requirement (currently in § 106.9(a)) that a recipient must notify “parents of elementary and secondary school students” that it does not discriminate on the basis of sex. The NPRM claims that proposed § 106.8(b)(1) “would streamline” the list of who has to be notified about the schools’ non-discrimination policy. 83 Fed. Reg. 61,481/3. But the NPRM doesn’t give any reason why the list needs to be streamlined, or why, if it does, parents of elementary and secondary school students should be the ones deprived of information that they have received for over 40 years. Nor will this amendment will actually reduce burden on school districts, because requirement to notify parents remains in the regulations of 25 other federal agencies,¹³⁷ many of whom (such as the U.S.D.A. through its free and reduced price meals program) provide federal financial assistance to elementary and secondary schools.

2. Proposed § 106.8(b)(2) would remove the requirement (currently in § 106.9(b)) that a recipient include a non-discrimination statement in each “announcement, bulletin, ... or application form,” while newly requiring the inclusion on its “website” and in “handbooks.” The NPRM claims that proposed § 106.8(b)(2) likewise “streamlines” the list of publications that must include the non-discrimination statement “to reduce burden on recipients.” 83 Fed. Reg. 61,482/1. But again the NPRM offers no reason why it needs to be streamlined or why the particular items proposed to be dropped – such as application forms – is the right place to make any such cuts.

And the NPRM doesn’t explain why it added “handbooks” to the list or how that item overlaps (or not) with the items deleted – such as announcements and

¹³⁷ See Agency for International Development, 22 C.F.R. pt. 229; Corporation for National and Community Service, 45 C.F.R. pt. 2555; Department of Agriculture, 7 C.F.R. pt. 15a; Department of Commerce, 15 C.F.R. pt. 8a; Department of Defense, 32 C.F.R. pt. 196; Department of Energy, 10 C.F.R. pt. 1042; Department of Health and Human Services, 45 C.F.R. pt. 86; Department of Homeland Security, 6 C.F.R. pt. 17; Department of Housing and Urban Development, 24 C.F.R. pt. 3; Department of Interior, 43 C.F.R. pt. 41; Department of Justice, 28 C.F.R. pt. 54; Department of Labor, 29 C.F.R. 36; Department of State, 22 C.F.R. pt. 146; Department of Transportation, 49 C.F.R. pt. 25; Department of Treasury, 31 C.F.R. pt. 28; Department of Veterans Affairs, 38 C.F.R. pt. 23; Environmental Protection Agency, 40 C.F.R. pt. 5; Federal Emergency Management Agency, 44 C.F.R. pt. 19; General Services Administration, 41 C.F.R. pt. 101-4; National Aeronautics and Space Administration, 14 C.F.R. pt. 1253; National Archives and Records Administration, 36 C.F.R. pt. 1211; National Science Foundation, 45 C.F.R. pt. 618; Nuclear Regulatory Commission, 10 C.F.R. 5; Small Business Administration, 13 C.F.R. pt. 113; Tennessee Valley Authority, 18 C.F.R. pt. 1317.

bulletins. If the scope of “handbooks” is no different, then there is no reason for the change. If it is different than “announcements” and “bulletins,” then the practical effect will be to increase the burden on recipients because, as noted above, the requirement to include the non-discrimination statement in announcement, bulletin, and applications remains in the regulations of 25 other federal agencies, many of whom (such as the U.S.D.A. through its free and reduced price meals program) provide federal financial assistance to elementary and secondary schools.

3. The NPRM proposes deleting current § 106.9(c), which requires that a recipient to distribute its publications in a non-discriminatory matter, to apprise its recruiters of its policy of non-discrimination, and to ensure that recruiters adhere to such a policy. Its only explanation for deleting current § 106.9(c) is again to reduce burden, suggesting that the availability of websites will address the issue. 83 Fed. Reg. at. 61,482/1. This explanation makes no sense. Current § 106.9(c) does not require that the publications identified in proposed § 106.8(b)(2) (currently in § 106.9(b)) be distributed. It requires that, if and when they are distributed, they must be distributed *without discrimination on the basis of sex*. That is, for example, a school district could not send school catalogs to parents of girls but ignore parents who have only boys. Nor does the NPRM even mention, much less justify the elimination of, the last portion of current § 106.9(c), which requires a recipient to train its recruiters on its non-discrimination policy and to ensure that its recruiters adhere to the policy. These are important requirements to ensure that a recipient’s non-discrimination policy is not diluted in the field. They should not be deleted.

CONCLUSION

As we have documented throughout our comments, and in our earlier letter of January 17, 2019, seeking an extension of the comment period (see Attachment A), the process used by the Department has left us and other members of the public at a significant disadvantage by failing to allow NCYL and other members of the public timely access to material records in the Department’s possession. At a minimum, such information should be released to the public and a second comment period should be open.

But in general, for all the reasons discussed above, the National Center for Youth Law urges the Department to withdraw this NPRM because it is wrong on the law and wrong as a matter of policy.



Sent via email to Betsy.DeVos@ed.gov
Kenneth.Marcus@ed.gov
Brittany.Bull@ed.gov and
TitleIXNPRM@ed.gov

Secretary Betsy DeVos
Assistant Secretary for Civil Rights Kenneth Marcus
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Re: **Request for Extension of Comment Period** for Proposed Rule Regarding
Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving
Federal Financial Assistance – Docket ID ED-2018-OCR-0064

Dear Secretary DeVos and Assistant Secretary Marcus:

The Department of Education has still not released critical records – either proactively, as required by the Administrative Procedure Act and Executive Order 13563, or in response to multiple Freedom of Information Act requests. Tens of thousands of comments have been submitted to Regulations.gov but have not been made available to the public. And the Office of Advocacy of the Small Business Administration is shut down, and thus cannot perform its critical commenting functions under the Regulatory Flexibility Act and Executive Order 13272. For all these reasons, the National Center for Youth Law and the Center for American Progress respectfully demand that you extend the time for submitting comments responsive to the Notice of Proposed Rulemaking (NPRM) regarding Title IX of the Education Amendments. 83 Fed. Reg. 61,462 (Nov. 29, 2018).

The time to comment on the NPRM should be extended from January 28, 2019, for at least 30 days (1) *after* all existing comments have been posted on Regulations.gov for review by members of the public; (2) *after* the Office of Advocacy of the Small Business Administration is no longer shut down; and (3) *after* the Department has released on Regulations.gov all the data, internal studies, analyses, and reports that it relied on in the NPRM, *whichever is later*.

The Department must wait until people have a meaningful opportunity to review all the comments already filed on Regulations.gov in response to the NPRM. The NPRM said that Regulations.gov was a place “during ... the comment period” where members of the public “may inspect all public comments about these proposed regulations.” Even apart from today’s confusing unavailability of Regulations.gov, there is no way for people to review the more than 50,000 comments that have already been submitted when only a few thousand have been approved for posting on Regulations.gov by the Department. The comment period must be

extended for at least 30 days after the Department has posted all the comments it has already received so that NCYL, CAP, and other members of the public can review and respond to them. Otherwise, the promise of transparency and meaningful opportunity to inspect and respond to comments has been negated.

The Department must wait until the Office of Advocacy of the Small Business Administration has a meaningful opportunity to exercise its rights under the Regulatory Flexibility Act and Executive Order 13272. The inability of the Office of Advocacy of Small Business Administration to submit comments due to the shutdown of the Small Business Administration is an independent reason why the comment period should be extended beyond January 28, 2019.

The NPRM estimates that the overwhelming majority of school districts (more than 99%) are small entities, 83 Fed. Reg. at 61,490/3; and that 68% of all two-year institutions of higher education and 43% of all four-year institutions of higher education are small entities, *id.* at 61,491/2-3.

The Office of the Advocacy is charged with “represent[ing] the views and interests of small businesses [including small government entities] before other Federal agencies.” 15 U.S.C. § 634c(a)(4). The Regulatory Flexibility Act (RFA) and Executive Order 13272 anticipate a significant role for the Office of Advocacy in rulemakings that affect a significant number of small entities. Under the RFA, the Department was required to transmit a copy of its IFRA to the Office of Advocacy when it was published in the Federal Register. 5 U.S.C. § 603(a). If the Office of Advocacy submits comments during the comment period, the Department is required to give “every appropriate consideration” to the Office of Advocacy’s views, Executive Order 13272 § 3(c), and to issue a “detailed statement of any change made to the proposed rule in the final rule as a result” of the Office of Advocacy’s comments, 5 U.S.C. § 604(a)(3).

Unfortunately, the Office of Advocacy is not currently in operation due to a lapse in federal funding for its agency. Thus, it is not able to perform its critical function to provide knowledgeable comments regarding the effects of the proposed regulations on small entities. Until the Office of Advocacy’s agency is funded, the Office of Advocacy cannot engage in these critical tasks assigned by the RFA and the Executive Order. Nor is this a mere hypothetical concern. Less than five months ago, the Office of Advocacy submitted negative comments on another Department NPRM.¹ And, as we note below, there are significant open questions about the Department’s analysis of the costs of the proposed regulations that could warrant the Office of Advocacy’s participation.

The comment period should therefore be extended so that the Office of Advocacy has at least 30 days to submit comments once the shutdown of its agency is over.

The Department has failed to make proactive disclosures required by the Administrative Procedure Act and Executive Order 13563 and has failed to release records under FOIA. In the NPRM, the Department relied on a number of documents and analyses that it did not make available to the public, thus making it impossible for the public to determine whether the agency is drawing improper conclusions from its documents and analyses or to otherwise meaningfully comment. Several of these documents and analyses involve the Department’s Regulatory Impact

¹ Letter from U.S. Small Business Administration’s Office of Advocacy to Sec. Betsy DeVos (Aug. 30, 2018), https://www.sba.gov/sites/default/files/SBA_Advocacy_BD_comment.pdf.

Analysis (RIA), which attempts to assess the costs of the proposed regulations as required by Executive Order 12866 as modified by Executive Order 13563.² Others involve the NPRM's initial regulatory flexibility analysis (IFRA) as required by the Regulatory Flexibility Act (RFA), 5 U.S.C. § 603.³

The failure to make all these documents available to the public on Regulations.gov is a violation of Executive Order 13563. That Executive Order requires agencies to “provide, for both proposed and final rules, *timely online access to the rulemaking docket on regulations.gov*, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded. For proposed rules, *such access shall include*, to the extent feasible and permitted by law, *an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings.*” § 2(b) (emphases added).

The failure to make all these documents available to the public also violates the Administrative Procedure Act (APA). The APA requires federal agencies to reveal “for public evaluation” the “‘technical studies and data’ upon which the agency relies” in rulemaking. “More particularly, ‘[d]isclosure of staff reports allows the parties to focus on the information relied on by the agency and to point out where that information is erroneous or where the agency may be drawing improper conclusions from it.’”⁴ This includes information, data, and studies an agency uses to assess the costs and benefits of the proposed changes (and alternatives) for the RIA required by Executive Order 12866.⁵

Due to these nondisclosure violations, the National Center for Youth Law and its employees have submitted a number of Freedom of Information Act (FOIA) requests to obtain the information that the Department should have released proactively for purposes of the RIA and

² The Department said that in preparing the RIA, it “examined public reports of Title IX reports and investigations at 55 [institutions of higher education] nationwide.” 83 Fed. Reg. at 61,485/2. It also mentioned a “sample of public Title IX documents” reviewed by the Department. *Id.* at 61,487/1. Similarly in the NPRM's RIA, the Department engaged in an analysis spanning 5 pages of the Federal Register to try and determine the current number of Title IX investigations occurring in school districts and institutions of higher education eligible for Title IV federal funding. 83 Fed. Reg. at 61,485-419. It appears to have engaged in nine different simulations of its statistical model, *id.* at 61,489/3, and also generated alternative estimates. *Id.* at 61,485/3 n.18, 61,486/2 n.22, 61,487/1 n.27, 61,487/2 n.28, 61,489/1 n.34.

³ In preparing the IFRA, the Department relied on various calculations or estimates. 83 Fed. Reg. at 61,491-493. Among the studies relied on were “[p]rior analyses” that “show that enrollment and revenue are correlated for proprietary institutions,” *id.* at 61,491/1, and an analysis of “a number of data elements available in IPEDS,” *id.* at 61491/1-2.

⁴ Both quotations in the paragraph are from *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008). The first quotation is, itself, quoting in part *Chamber of Commerce v. SEC*, 443 F.3d 890, 899 (D.C. Cir. 2006). The second quotation is quoting in part *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1121 (D.C. Cir. 1984).

⁵ See *Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 199, 201-202 (D.C. Cir. 2007).

IFRA analyses, as well as other matters relevant to the appropriateness of the proposed regulations. Many of those FOIAs remain outstanding and overdue.⁶

The failure to timely provide all these critical data, studies, and analyses denies our organizations, and other members of the public, the opportunity to assess the accuracy of the Department's claims or otherwise critique the Department's RIA and IFRA models. There are now fewer than 8 business days before the current comment deadline of January 28, 2019. Even if all the materials required to be released under Executive Order 13563 and the APA and FOIA were released immediately, there would not be sufficient time for commenters to review all that information, engage in their own analyses, and provide meaningful comments prior to January 28, 2019. We believe 30 days is necessary for organizations such as ours to sufficiently analyze the currently unreleased information and provide comments on the NPRM, including the RIA and IFRA.

We are aware that many others have requested an extension of time in order to allow students, faculty, and others from educational institutions to have sufficient time to comment. We agree with that rationale as well. But we emphasize that the failure to grant our requested extension would leave uncured violations of statutes and Executive Orders and would significantly interfere with our ability (and the ability of many others) to meaningfully comment on the NPRM.

Sincerely,

/s/

Jesse Hahnel
Executive Director
National Center for Youth Law
JHahnel@youthlaw.org

/s/

Jamila Taylor
Senior Fellow
Center for American Progress

⁶ See FOIA Request 19-00576-F (data sources and spreadsheet used for RIA and IFRA); 18-02832-F (assessments of Civil Rights Data Collection quality); 19-00149-F (specific records regarding Civil Rights Data Collection quality); 19-00577-F (communications between Department and the Advocacy); 19-00151-F (current OCR policy about damages, which the NPRM proposes to eliminate); 19-00579-F (OCR's past application of 34 C.F.R. § 106.9(b)(2), which the NPRM proposes to amend); 19-00578-F (current OCR policy about tribal schools, which will be affected by the proposed amendments); 18-00054-A (current OCR policy about handling sexual violence cases); FOIA 18-02772-F (Department's interpretations of provisions governing rulemaking located in Title IV of the Higher Education Act).