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Network for Victim Recovery of DC

January 28, 2019

Submitted via www.regulations.gov as a searchable PDF.

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

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

Dear Secretary DeVos and Assistant Secretary Marcus,

My name is Bridgette Stumpf, and I am the co-founder and Executive Director of the Network for Victim Recovery of DC (NVRDC). On behalf of NVRDC, I wish to express our strong opposition to the Department of Education's Notice of Proposed Rulemaking published in the Federal Register on November 29, 2018.

Founded in May 2012, NVRDC has provided holistic services to over 3,400 victims of crime in our nation's capital. Nearly, 80% of our clients are survivors of sexual assault and over 50% of them were college or university students at the time they sought services with NVRDC. Our services include free legal representation, advocacy, and case management in Title IX, crime victims' rights enforcement, and civil protection order cases. In addition to wraparound services, NVRDC also runs the advocacy portion of the District of Columbia's 24-hour sexual assault crisis response program for adults seeking a forensic medical exam ("rape kit") following a sexual assault in DC. Very few providers across the country provide legal representation to survivors during campus Title IX proceedings; even fewer have the

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reach out. rise up.

expertise to also assist survivors with related representation in civil matters and criminal prosecutions. Based on NVRDC's unique direct-service experience, which includes assisting over 200 student-survivors with Title IX issues at DC's colleges, universities, and high-schools, and our unique understanding of Title IX's interaction with other laws, we submit the following comments for the Department's consideration.

I. Definition of "Sexual Harassment."

In the proposed regulations, the Department of Education, Office of Civil Rights ("the Department") defines "sexual harassment" to mean:

a) An employee of the [school][1] conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; or

b) unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or

c) sexual assault as defined in 34 CFR 668.46(a), implementing the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act).[2]

The second prong of the proposed definition – "unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity" – represents a higher and narrower standard when compared with the definition previously articulated by the Department. For the reasons described below, NVRDC believes that limiting this prong of the sexual harassment definition to conduct that is "severe, pervasive, and objectively offensive" is ill-conceived and highly problematic.

[1] The Department uses the terms, "recipient" and "school" interchangeably throughout its proposed rule to reference schools that are recipients of federal funding and are covered by Title IX. Proposed Regulations at 61462. This comment will use the term, "school" in place of "recipient."

[2] *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61462, 61466 (November 29, 2018) (hereinafter "Proposed Regulations").

A. The Proposed Definition Eliminates the Distinction Between the Analysis Establishing "Hostile Environments" and "Sexual Harassment."

The Department has previously defined "sexual harassment" to include "unwelcome conduct of a sexual nature," including "unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature."[3] The question of whether particular conduct constituted "sexual harassment" was separate and apart from the question of whether that harassment created a "hostile environment." Pursuant to the Department's prior guidance, a university could be found to be in violation of Title IX if:

a) a student was sexually harassed and the harassing conduct was sufficiently serious to deny or limit the student's ability to participate in or benefit from the program (i.e., the harassment creates a hostile environment);

b) the university knew or reasonably should have known about the harassment; and

c) the university failed to take immediate effective action to eliminate the hostile environment, prevent its recurrence, and address its effects.[4]

In order to determine whether harassing conduct created a "hostile environment," the Department has previously considered whether that conduct that was sufficiently "severe *or* pervasive" to deny or limit a student's ability to participate in or benefit from the school's program based on sex.[5]

In the proposed regulations, the Department has obliterated the distinction between what constitutes "sexual harassment" and what constitutes a "hostile environment," and has, in fact, gone a step further by making the definition of "sexual harassment" even narrower than the prior understanding of what constituted a "hostile

[3] *See, e.g.* Dear Colleague Letter: Sexual Violence, p. 3 (April 4, 2011).

[4] *See, e.g.* DOJ Case No. DJ 169-44-9, OCR Case No. 10126001, p. 4 (May 9, 2013).

[5] *See, e.g.* DOJ Case No. DJ 169-44-9, OCR Case No. 10126001, p. 4 (May 9, 2013).

environment" by requiring that the conduct in question be "severe *and* pervasive *and* objectively offensive" rather than "severe *or* pervasive."

The Department justifies its proposed changes to the definition of "sexual harassment" by explaining that it believes that "the administrative standards governing schools' responses to sexual harassment should be generally aligned with the standards developed by the Supreme Court in cases assessing liability under Title IX for money damages in private litigation."[6] This view is in reference to the Supreme Court's decisions in *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274 (1998) and *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999). In *Gebser*, the Court held that, with respect to private actions under Title IX based on sexual harassment, money damages may only be recovered when a school official with authority to institute corrective measures has actual notice of the harassment but is deliberately indifferent to it. In *Davis*, the Court held that a school can likewise be liable under Title IX as a result of sexual harassment by one student against another student, but only if "the recipient is deliberately indifferent to known acts of student-on-student sexual harassment," "the harasser is under the school's disciplinary authority," and "the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect."[7]

By adopting the "severe, pervasive, and objectively offensive" standard articulated in *Davis* as the definition for "sexual harassment" in its proposed regulations, the Department takes the Court's language in *Davis* out of context. As the Department explained in its 2001 Guidance, the Court was explicit in both *Gebser* and

[6] Proposed Regulations at 61466.

[7] *Davis*, 526 U.S. at 647, 652.

Davis that the liability standards established in those cases were limited to private actions for monetary damages.[8] By contrast, the Court acknowledged the Department's authority to "promulgate and enforce requirements that effectuate [Title IX's] nondiscrimination mandate" even in circumstances that would not give rise to a claim for money damages.[9]

B. Narrowing the definition of "sexual harassment" dissuades students from reporting unwanted conduct.

In this respect, the Department itself has previously made clear that requiring conduct to be "sufficiently severe *or* pervasive" before it constitutes "sexual harassment" sends the wrong message to students. In its 2013 letter concerning the University of Montana's compliance with its Title IX obligations, the Department explained that defining "sexual harassment" in this manner "leaves unclear when students should report unwelcome conduct of a sexual nature and risks having students wait to report to the University until such conduct becomes severe or pervasive or both."[10] The Department explained that such a narrow definition was also contrary to the University's interest in "encourag[ing] students to report sexual harassment early, before such conduct becomes severe or pervasive, so that [the University] can take steps to prevent the harassment from creating a hostile environment."[11]

The concerns expressed by the Department in its 2013 letter are no less applicable today, particularly because the proposed definition of "sexual harassment" would require that the conduct at issue be "severe, pervasive, *and* objectively

[8] *See Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, Preamble at ii *(January 19, 2001) ("2001 Guidance")*, citing *Gebser*, 524 U.S. at 283 and *Davis*, 526 U.S. at 639.

[9] *Gebser*, 524 U.S. at 292.

[10] *See* DOJ Case No. DJ 169-44-9, OCR Case No. 10126001, p. 8 (May 9, 2013).

[11] *See* DOJ Case No. DJ 169-44-9, OCR Case No. 10126001, pp. 8-9 (May 9, 2013).

offensive." Students may reasonably believe based on this definition that they must subject themselves to repeated (and potentially escalating) unwelcome conduct of a sexual nature before it is sufficiently "severe" and "pervasive" to be reported as "sexual harassment." The definition also permits schools to be dismissive of unwelcome conduct that they deem isolated or insufficiently egregious, rather than encouraging schools to take early steps to *prevent* isolated and/or non-egregious conduct from escalating. In essence, the proposed changes permit and excuse a certain level of unwelcome sexual conduct, while sending a message to students that they are expected to tolerate a certain level of such conduct. If adopted, the changes would create an enabling environment for perpetrators where they, and the institutions that they attend, are immunized up until an unreasonably high threshold is met.

The Department's proposed regulations are of particular concern to victims of dating violence, domestic violence, and stalking. These victimizations often consist of seemingly "innocent" or "harmless" conduct, such as "approaching the victim or showing up in places when the victim didn't want them to be there; making unwanted telephone calls; leaving the victim unwanted messages; and watching or following the victim from a distance." [12] The terror inflicted from such menacing conduct is compounded by both its subtle nature and the subsequent inaction on the part of authorities who often fail to recognize the conduct for its true malevolence and are, therefore, dismissive of the severity of the situation. It is this dismissive attitude that enables and even encourages perpetrators to continue and subsequently escalate the

[12] The Nat'l Ctr. of Victims of Crime, Stalking Fact Sheet, STALKING RESOURCE CENTER, http://victimsofcrime.org/docs/default-source/src/stalking-fact-sheet-2015_eng.pdf (last updated Jan. 2015).

relevant conduct. By the time authorities take a victim's report seriously,[13] there may already have been severe damage to the victim's physical, mental, and emotional well-being, in addition to disruptions to the victim's life, work, or study.[14] For this reason, it is of particular importance to reframe the standard to not only encourage reporting, but to also ensure that entire categories of victimizations are not unintentionally excluded.

In relation to the "objectively offensive" element of the proposed definition, the Department found in its 2013 letter that it was improper for the University of Montana's Sexual Harassment Policy to suggest that conduct does not constitute sexual harassment unless it is "objectively offensive."[15] The Department explained that "[w]hether conduct is objectively offensive is a factor used to determine if a hostile environment has been created, but it is not the standard to determine whether conduct was 'unwelcome conduct of a sexual nature' and therefore constitutes 'sexual harassment.'"[16]

Requiring conduct to be "objectively offensive" in order for it to constitute "sexual harassment" makes it possible for someone to be targeted with conduct that his or her abuser knows the victim will find subjectively offensive, even if that behavior is not necessarily "objectively" offensive. This standard could lead to increased

[13] *See* Judith McFarlane et al., *Stalking and Intimate Partner Femicide*, 3 HOMICIDE STUDIES (1999)(54% of femicide victims reporter stalking to police before they were killed by their stalkers).

[14] Eric Blauuw et al., *The Toll of Stalking*, 17 J. OF INTERPERSONAL VIOLENCE, 50-63 (2002)("The prevalence of anxiety, insomnia, social dysfunction, and severe depression is much higher among stalking victims than the general population, especially if the stalking involves being followed or having one's property destroyed."); Cynthia Hess & Alona Del Rosario, *Dreams Deferred: A Survey on the Impact of Intimate Partner Violence on Survivors' Education, Careers and Economic Security*, INSTITUTE FOR WOMEN'S POLICY RESEARCH (2018), https://iwpr.org/wp-content/uploads/2018/10/C474_IWPR-Report-Dreams-Deferred.pdf "([66% of intimate partner violence survivors] said an abusive partner had disrupted their ability to complete education or training through tactics such as not allowing them access to money to pay for school, socially isolating the survivor, controlling or monitoring their mobility, using physical or sexual violence, and damaging or destroying personal property.").

[15] *See* DOJ Case No. DJ 169-44-9, OCR Case No. 10126001, p. 9 (May 9, 2013).

[16] *See* DOJ Case No. DJ 169-44-9, OCR Case No. 10126001, p. 9 (May 9, 2013).

discrimination toward marginalized groups, who may find conduct offensive to their group even if that conduct is not offensive to the rest of the population. Also, the Department provides no guidance regarding *how* schools are supposed to determine whether conduct is "objectively offensive." Again, victims of domestic and dating violence are at particular risk here. Often these victims are tormented by abusers who exploit particular sensitivities based on information they learned in the course of an intimate relationship with the victim. Such subjectively offensive abuse is often more acute because it is tailored to cause harm in a private, intimate, or personal way.

For example, if one student is making unwanted romantic overtures to another student, by repeatedly sending flowers in class, there is likely a difference between when the school would consider that conduct "objectively" offensive in contrast to when the receiving student feels harassed or unable to safely attend class. Under an objective standard, the sending student's culpability would not be altered by the knowledge that the conduct is subjectively harming the receiving student. An inquiry into this conduct would turn into an analysis about whether the receiving student was "reasonable" when feeling harassed, scared, or afraid to attend class. Such a paradigm encourages students to wait before reporting until the conduct is unbearable and gives abusers the freedom to indulge in an ambiguous amount of harassment so long as they are careful to not harass their victim beyond an "objective" level.

C. NVRDC's Recommendations on the Definition of "Sexual Harassment."

For all of the foregoing reasons, NVRDC encourages the Department to retain the current definition of "sexual harassment" – *i.e.,* "unwelcome conduct of a sexual

nature", including "unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature."[17]

If, however, the Department does replace the second prong of the "sexual harassment" definition with the proposed "severe, pervasive, and objectively offensive" standard, then NVRDC would alternatively propose that the Department replace "*and*" with "*or*," so that conduct must meet one of the three elements in order to constitute "sexual harassment".

In the alternative, if the Department rejects the two previous proposals, NVRDC proposes that the Department amend the *third* prong of the "sexual harassment" definition to include not only "sexual assault" as defined in 34 CFR 668.46(a), but also "dating violence," "domestic violence," and "stalking" where based on sex, as defined in the same provision.[18] This is to ensure that a narrower sexual harassment definition does not unintentionally exclude victims of these crimes.

II. Liability Standards: Duty to Investigate & Respond

A. Clarifying the Omission of the Term, "Responsible Employees."

Currently, § 106.8(a) of the Title IX regulations requires schools to designate at least one "responsible employee" to coordinate schools' efforts to comply with and carry out their responsibilities under Title IX.[19] The individual specifically designated for this purpose has historically been referred to as the "Title IX Coordinator." For purposes of placing a school on notice of sexual harassment, however, the Department explained that a school has notice of sexual harassment if a "responsible employee

[17] See, e.g. Dear Colleague Letter: Sexual Violence, p. 3 (April 4, 2011).

[18] The inclusion of these crimes would align with the 2014 amendment made to Section 304 of the Clery Act, which added the requirement for schools to report incidents of domestic violence, dating violence, and stalking.

[19] 34 CFR 106.8(a).

knew, or in the exercise of reasonable care should have known," about the harassment.[20] In *this* context, the Department explained that employees *beyond* the specific individual designated as the "Title IX Coordinator" would constitute "responsible employees." In its 2001 Guidance, the Department explained that for purposes of putting a school on notice of sexual harassment, a "responsible employee" would include any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school official's sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility.[21]

The proposed regulations would modify § 106.8(a) to remove the reference to "responsible employee," and would refer instead to the individual designated to coordinate a school's efforts to comply with Title IX as the "coordinator."[22] The Department failed to provide further discussion on this issue.

The Department's proposed omission of the term "responsible employee," makes it difficult to understand their intent. In September 2017, the Department of Education rescinded the 2011 Dear Colleague Letter on Sexual Violence and 2014 Questions and Answers on Title IX Sexual Violence that had previously served as guidance for schools on Title IX matters.[23] It did not rescind the 2001 guidance,[24] which

[20] 2001 Guidance, p. 13.

[21] 2001 Guidance, p. 13.

[22] Proposed Regulations at 61481.

[23] *See* Press Release, U.S. Dep't of Ed., Department of Education Issues New Interim Guidance on Campus Sexual Misconduct (Sept. 22, 2017), https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct; *see also,* proposed Regulations at 61463, 61465.

[24] *See* Press Release, U.S. Dep't of Ed., Department of Education Issues New Interim Guidance on Campus Sexual Misconduct (Sept. 22, 2017), https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct; *see also,* proposed Regulations at 61463, 61465.

explained the role of "responsible employees."[25] Given that the proposed regulations appear to substantially constrain the circumstances in which a school is deemed to be on notice of sexual harassment, it is difficult to discern whether the Department intended to dispose of "responsible employees" as a component of a school's reporting structure all together, or whether the modification was meant to be innocently limited to a change in the preferred terminology. As discussed in more detail below, the absence of clear guidance on modifications to reporting structures is of great concern to NVRDC.

B. The Proposed Definition and Interpretation of "Actual Knowledge" Creates Confusion for Students, Reporters, and Institutions.

Proposed § 106.44(a) provides that a school with "actual knowledge" of sexual harassment "in an education program or activity of the recipient" against a person in the United States must respond in a manner that is not "deliberately indifferent." NVRDC's concerns regarding each prong of this proposed standard are addressed in turn below.[26]

[25] 2001 Guidance, p. 13.

[26] NVRDC shares the concerns of other organizations that provide victim services in regards to the Department's newly proposed interpretation of the "program or activity" requirement and its negative impact on the consideration of sexual violence that occurs on off-campus housing, study abroad programs, etc. We believe this interpretation goes against the Title IX mandate to ensure the safety of students from discrimination on the basis of sex. Sexual harassment by one student against a fellow student, regardless of the location, can serve to create a hostile environment for the sexually harassed student on campus. NVRDC's experience representing survivors supports this conclusion—we have represented complainants sexually assaulted by a fellow student while studying abroad and the student sexually assaulted was at off-campus housing. Despite the location of the assaults, the complainants still attended school with the offenders which meant sharing classes with their assailants, bring ostracized and intimidated by fellow students who know the offender, and having to encounter the offender around campus, whether it be at an event or just walking across the school's quad. The off-campus behavior of the offenders, who attend the same school as the complainants, still created a hostile environment for the complainants. NVRDC believes that the Department should revert to the old interpretation of the "program or activity" requirement or, ideally, extend the requirement to cover students attending the school, no matter where the sexual harassment occurs. The Department's approach is especially vulnerable to the reality that so much of the conduct constituting harassment takes the form of electronic messaging, either directly between students or across commonly accessed social media platforms.

With respect to the first prong of this standard – "actual knowledge" – proposed § 106.30 defines "actual knowledge" to mean "notice of sexual harassment or allegations of sexual harassment to a school's Title IX Coordinator or any official of the school who has authority to institute corrective measures on behalf of the school, or to a teacher in the elementary and secondary context with regard to student-on-student harassment." The proposed regulations explain that imputation of knowledge based solely on *respondeat superior* or constructive notice is insufficient to constitute actual knowledge.

The proposed regulations fail to explain, however, who constitutes an "official of the recipient who has authority to institute corrective measures on behalf of the recipient." The proposed definition of "actual knowledge" states only that the "mere ability or obligation to report sexual harassment does *not* qualify an employee, even if that employee is an official, as one who has authority to institute corrective measures on behalf of the recipient." The Department needs to further explain who *would* qualify as an official with the "authority to institute corrective measures on behalf of the recipient," in order to prevent potential confusion for schools, faculty, staff, and students regarding who needs to receive notice of sexual harassment complaints.

The Department also needs to clarify who *specifically* needs to *report* sexual harassment to the Title IX Coordinator or the person "with authority to institute corrective measures" in order for there to be "actual knowledge." Does a student have to be the one to make the report directly or is it sufficient for a third party to relay the complaint?

What happens, for example, if a student reports to a "responsible employee" as defined in the 2001 Guidance (which has not been expressly rescinded by the

Department)?[27] The proposed regulations make clear that, in and of itself, an obligation to report sexual harassment does *not* qualify an employee as one who has "authority to institute corrective measures on behalf of the recipient." However, the Department leaves no guidance for those who historically are considered "responsible employees" (e.g. most faculty, staff, administrators)—do these employees still have any obligation to report complaints of sexual harassment to someone who *does* have such authority, or has the concept of the "responsible employee" ceased to exist under the proposed regulations?

The obligation to report would be rendered largely meaningless if the school's "knowledge" was easily insulated by a counter-intuitive or opaque reporting system. For example, if those historically considered to be "responsible employees" still have an obligation to report sexual harassment, but schools are not accountable if those "responsible employees" fail to properly report to the Title IX Coordinator or other official with "authority to institute corrective measures on behalf of the recipient," then the obligation to report provides the schools with little incentive to ensure that reports of sexual harassment reach the Title IX Coordinator or equivalent official.

C. The Restructuring of Title IX Notice Requirements Creates Actual, and Potential, Conflicts with the Clery Act.

NVRDC has separate and additional concerns about how the changes to the institutional notice requirements may impact existing reporting structures under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act"). Given that the Clery Act's federal mandate is to provide greater

[27] As discussed above, the Department failed to clarify whether it intended to dispose of the "responsible employee" role when it omitted the term from the proposed regulation. *Supra* p. 12.

transparency around campus crime policy and statistics,[28] it is difficult to reconcile how schools will be expected to approach their duties to report under Title IX and the Clery Act. The Department faces two issues: 1) Employee confusion about reporting requirements; and 2) Discrepancies in the reporting statistics provided by schools.

1. School's will have difficulty instructing and clarifying employee reporting duties under the proposed rule.

The proposed regulations significantly shrink the pool of eligible reporters, the type of conduct considered, and the school's geographical jurisdiction.[29] By contrast, the Clery Act's language has not changed, nor has its reporting requirements, which cover a wider range of reporters ("campus security authorities"[30]), crimes, and geographical locations than the proposed regulations.[31] In order to ensure efficient and effective execution of the Department's proposed regulations, the Department will need to articulate in further detail which reporting requirements are changing, who they are affecting, and how they interact with the Clery Act reporting requirements. Many of the "responsible employees" that had reporting requirements under Title IX

[28] *See Summary of the Jeanne Clery Act: A Compliance and Reporting Overview*, Clery Center (Jan. 23, 2018), https://clerycenter.org/policy-resources/the-clery-act/.

[29] *Supra* Section I.

[30] While there is a list of job categories referenced in the Clery Act, the Department of Education sought not to provide a list of "specific job titles" given that responsibilities and titles vary on campuses. However, the Department *did* provide examples of individuals who meet the criteria for campus security authorities. Some examples include: all athletic coaches, a faculty advisor to a student group, a student resident advisor, a coordinator of Greek affairs, a director of campus health or counseling center, victim advocates, and a campus police department. U.S. DEP'T OF EDUC., OFFICE OF POSTSECONDARY EDUC., THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING (2016 ED.).

[31] For example, the Department fails to acknowledge that a recipient's "campus security authorities" *still* have the duty to report crimes that occur on-campus, in addition to reporting crimes on public property within or immediately adjacent to campus, and crimes in or on non-campus buildings or property that the school owns or controls. 34 CFR § 668.46(a). This is a much wider jurisdictional range than the Department's limitation to conduct that occurs within a recipient's "program or activity." While, under the proposed regulations, off-campus housing that has no relationship to a recipient's programs or activities may fall outside of Title IX reporting requirements, but may still fall within the Clery Act if the housing is adjacent to campus.

are still "campus security authorities" required to report conduct for the collection of a school's crime statistics under the Clery Act. Without guidance, these employees are left to decipher whether they still have any reporting duties left,[32] who they should report to, what they should report, and what the reports are used for.[33] This confusion could very well lead to fines against the school under Clery if they decide to err on the less restrictive side of what is required under Title IX.

2. Schools will have statistical discrepancies in their Title IX and Clery reporting numbers.

It is extremely likely the proposed changes will result in the number of cases reported under Title IX being incongruous with those produced by third parties reviewing a campus's security report under the Clery Act. This scenario is very likely due to the fact that the proposed regulations' narrower definition of "sexual harassment" will inevitably lead to a lower number of cases reported to or investigated by schools under Title IX than under the Clery Act.[34] The Department's failure to both incorporate the Clery Act's reporting requirements and to provide meaningful guidance for how schools should reconcile these disparities will expose schools to criticism that

[32] One of the claims made by Penn State officials after the Jerry Sandusky child sexual abuse scandal was that officials did not know that anyone but the campus police had the obligation under the Clery Act to compile information on crime and warn the campus community about potential threats. Richard Pérez-Peña, *In Report, Failures Throughout Penn State*, Washington Post, 2012, https://www.nytimes.com/2012/07/13/sports/ncaafootball/in-freeh-report-on-sandusky-failures-throughout-penn-state.html.

[33] For example, consider a situation where a college student wants to confide in a professor about domestic violence that they have experienced. The student does not know whether she wants to move forward with a formal complaint, and asks the professor if the professor has a duty to report. The professor in this circumstance would have to discern whether the domestic violence falls within Title IX, and whether to report the conduct to a Title IX coordinator. The professor would have to also consider, regardless of the previous answer, whether there is an obligation to report the domestic violence under the Clery Act. If there are different answers, the professor would need to be able to explain to the student that a report under the Clery Act would have different consequences than a report to a Title IX Coordinator.

[34] NVRDC believes that the proposed sexual harassment definition, which is significantly narrower than in prior guidance and which may possibly exclude enumerated Clery Act crimes (such as stalking, domestic violence and dating violence), will be the driving factor in statistical differences and potential confusion in reporting requirements.

their Title IX cases cannot be reconciled with the number of crimes reported on campus. For these reasons, NVRDC believes it is crucial for the Department to provide further clarity and guidance to schools on how to reconcile the newly proposed standards with the aspects of the Clery Act that are likely to result in reporting disparities. This should include additional language that allows for a clear identification of individuals with reporting duties, describe the responsibilities of such individuals, and explain how those responsibilities may interact with other federal laws.

NVRDC has serious concerns that the aforementioned issues undermine the mechanisms that are meant to ensure school transparency and accountability in Title IX cases. Without revisiting these changes, Title IX will provide little to no guidance as to how students, and schools, are meant to evaluate the safety of their campuses.

D. The "Deliberate Indifference" Standard is Insufficient to Maintain School Accountability.

As noted above, the Department has previously considered a school to be on notice of sexual harassment "if a responsible employee knew, or in the exercise of reasonable care should have known" about the harassment.[35] The Department made clear that pursuant to this standard, a school could receive notice of sexual harassment in an indirect manner, such as through social networking sites or the media.[36] Furthermore, the Department explained that if a school would have found out about sexual harassment had it made a proper inquiry, knowledge of the sexual harassment would be imputed to the school *even if* the school failed to make an inquiry.[37] A school's failure to take prompt and effective corrective action in such cases would violate the

[35] 2001 Guidance, p. 13.

[36] 2014 Q and As, at p. 2.

[37] 2014 Q and As, at p. 2.

current iteration of Title IX even if the student did not use the school's grievance procedures or otherwise inform the school of the sexual violence.[38]

The Department's proposed adoption of a "deliberate indifference" standard marks a radical departure from the standard that the Department has applied for more than twenty years, which imputes knowledge of sexual harassment to a school based on the failure of any "responsible employee" to exercise "reasonable care."[39] NVRDC has significant concerns about the incentives that flow from the proposed "deliberate indifference" standard. For example, because a school could ultimately be held liable if a "responsible employee" fails to properly relay a complaint of sexual harassment under the current standard, a school is incentivized to properly train all faculty and staff about the need to relay any and all complaints of sexual harassment to an appropriate official. By contrast, under the proposed "deliberate indifference" standard, if the report is not relayed to the school's Title IX Coordinator or an official "who has authority to institute corrective measures on behalf of the recipient," then the school *cannot* be found to have notice of the harassment and *cannot* be held liable if it fails to take corrective action. Therefore, schools will not just lack incentive but will essentially be *discouraged* from training faculty, staff, and other "responsible employees" on how to properly relay reports of sexual harassment. The Department of Education cannot hope to fulfill its mandate of protecting students' safety if it creates a system that discourages institutional accountability.

III. Procedural Changes to Title IX Investigations & Hearings

A. Notice to Parties

[38] 2014 Q and As, at p. 2.

[39] *See* Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Federal Register 12034, 12042 (March 13, 1997) ("1997 guidance").

Proposed § 106.45(b)(2) states that upon receipt of a formal complaint, a school must provide written notice to the parties of the allegations constituting a potential violation of the school's code of conduct, including "sufficient details known at the time and with sufficient time to prepare a response before any initial interview."[40] The proposed regulations provide that "sufficient details" include "the identities of the parties involved in the incident, if known, the specific section of the school's code of conduct allegedly violated, the conduct allegedly constituting sexual harassment under this part and under the school's code of conduct, and the date and location of the alleged incident, if known."[41]

NVRDC agrees with the Department that adequate notice to the parties is important and that the respondent[42] must be made aware of the general nature of a complainant's allegations; however NVRDC is concerned that the "sufficient details" contemplated in the proposed regulations could go too far. In particular, NVRDC believes that it is important for the Department to clarify that it is *not* suggesting that a school should turn over a complainant's "formal complaint" to the respondent so that the respondent is able to specifically tailor his or her responses in a subsequent interview to address all of the details in a complaint.

The Department refers repeatedly in the proposed regulations to the need for adequate due process protections for respondents,[43] but NVRDC notes in a federal civil lawsuit, the defendant would not be given the plaintiff's entire statement in the initial

[40] Proposed § 106.45(b)(2)(i)(B).

[41] Proposed § 106.45(b)(2)(i)(B).

[42] The term "complainant" denotes the complaining student in a Title IX proceeding. The term "respondent" refers to the party against whom the complaint is made.

[43] *See, e.g.* Proposed Regulations at 61464, 61472.

complaint.[44] There is no reason that a respondent in a sexual harassment grievance proceeding should be entitled to substantially more detail concerning a sexual harassment complaint prior to any initial interview.

B. Exchange of Evidence

The proposed regulations provide that when investigating a formal complaint, a school must provide equal opportunity for the parties to present witnesses and "other inculpatory and exculpatory evidence," and must not restrict the ability of either party to "gather and present relevant evidence."[45]

At the same time, however, the proposed regulations provide that the burden is *on the school* to gather evidence "sufficient to reach a determination regarding responsibility."[46] In relation to evidence obtained as part of the investigation, the proposed regulations state that a school must provide the parties with equal opportunity to inspect and review any evidence "that is directly related to the allegations raised in a formal complaint, including the evidence upon which the school does not intend to rely in reaching a determination regarding responsibility."[47] The school must send the evidence subject to the parties' inspection and review "in an electronic format, such as a file sharing platform, that restricts the parties and advisors from downloading or copying the evidence."[48] The parties must have "equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination."[49]

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[44] Fed. R. Civ. P. 8(a)(2)(requiring a "short and plain statement of the claim showing that the pleader is entitled to relief").

[45] Proposed § 106.45(b)(2)(i)(B).

[46] Proposed § 106.45(b)(3)(i).

[47] Proposed § 106.45(b)(3)(viii).

[48] Proposed § 106.45(b)(3)(viii).

[49] Proposed § 106.45(b)(3)(viii).

NVRDC is of the view that significantly more detail is required in relation to the discovery provisions in the proposed regulations. For example, the proposed regulations do not define "inculpatory" and "exculpatory," both which are legal terms of art used in criminal cases.[50] NVRDC notes that despite federal case law, such as *Brady v. Maryland*, 373 U.S. 83 (1963), and ethics rules specific to prosecutors,[51] different jurisdictions have different standards in criminal proceedings for what constitutes "inculpatory" and "exculpatory" evidence. The use of these terms in the proposed regulations, absent additional explanation concerning the Department's understanding of their scope, creates a significant risk that schools will be ill-equipped to interpret the Department's requirements and implement proceedings that meet those requirements.

NVRDC also notes that the Department's attempted mirroring of discovery rules in a criminal case is inappropriate given the innate difference in the characteristics of the parties in a Title IX case.[52] Criminal cases are balanced to protect defendants against the overwhelming power and resources of the government. In Title IX, like civil cases, the parties are equally situated. The focus of the exchange of information in a

[50] While the conduct subject to claims under Title IX may constitute a crime in some cases, this does not justify the conflation of the Title IX regulations with the rules and consequences of the criminal justice system. A survivors' choice to report conduct under Title IX signals a desire for remedies available for civil rights violations—and not more severe criminal penalties, such as incarceration. Victims make such decisions frequently throughout the legal system, including when individuals choose to pursue civil litigation rather than criminal penalties in relation to conduct that could constitute a crime, such as a physical assault. There is no suggestion that a litigant should face a higher burden of proof when pursuing a civil claim in relation to underlying conduct that conduct could constitute a crime. As a society, we recognize that the nature of the claims is different, as are the potential consequences. For this same reason, it is illogical to conflate a school administrative process with a criminal proceeding when a victim has clearly chosen one over the other.

[51] *E.g.*, Model Rules of Prof'l Conduct R. 3.8 (2018).

[52] *See* Katharine Larson, *Discovery: Criminal and Civil? There's a Difference*, AMERICAN BAR ASSOCIATION (Aug. 9, 2017), https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/criminal-law/discovery_criminal_and_civil_theres_difference/.

Title IX case should be on maintaining parity between them in terms of access of information and procedures.[53]

The Department should omit the inclusion of such terminology,[54] or in the alternative, provide sufficient guidance to ensure consistent interpretation among Title IX offices across the country.

Furthermore, the proposed regulations do not make clear who has the responsibility to produce "exculpatory" evidence. If the burden is on the school to gather evidence "sufficient to reach a determination regarding responsibility,"[55] what are the limitations on the schools' obligation to search for all available "inculpatory" and "exculpatory" evidence? For example, are schools expected to search student e-mail accounts for such evidence? What degree of diligence is required in their collection of this evidence? In addition to our concern regarding the interpretation of these terms, NVRDC believes that this will impose a time and labor intensive requirement on schools that may result in additional delays to Title IX cases.

C. Parties' Access to Evidence

In relation to the restrictions regarding "downloading and copying the evidence," what exactly does "copying" mean? Presumably, screenshots would not be permitted, but what about hand-copying the material? What about taking notes? Further detail is needed to understand the intent behind the proposed restrictions. Without additional information, several negative consequences could occur; schools

[53] *Id.*

[54] NVRDC also notes that the Department's attempted mirroring of discovery rules in a criminal case is inappropriate given the innate difference in the characteristics of the parties in a Title IX case. Criminal cases are balanced to protect defendants against the overwhelming power and resources of the government. In Title IX, like civil cases, the parties are equally situated. The focus of the exchange of information in a Title IX case should be on maintaining parity between them in terms of access of information and procedures.

[55] Proposed § 106.45(b)(3)(i).

may unfairly restrict access to case materials, thereby resulting in unequitable processes or insufficient notice, or students may even gain an unfair advantage by using cellphones to photograph evidence when a Title IX staff member leaves the evidence with an unattended student.

Additionally, the limitations on "downloading and copying the evidence" suggest a desire to limit access to case materials—yet the Department has explicitly prohibited schools from "restrict[ing] the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence."[56] Further clarification from the Department will help schools to decipher whether the Department intends to allow for more or less open access and communication surrounding Title IX proceedings than previously permitted.

D. Evidentiary Standard

Instead of mandating the use of a "preponderance of the evidence" standard, the proposed regulations allow schools to choose whether to use a "preponderance" standard or a "clear and convincing" standard when making determinations regarding responsibility in Title IX proceedings.[57] Additionally, a school may only choose to use the "preponderance" standard if that same standard is also used for conduct code violations not involving sexual harassment that carry the same maximum disciplinary sanction.[58] On the other hand, the proposed regulations permit schools to choose a "clear and convincing" standard for sexual harassment claims, *even if* they use a "preponderance" standard for other conduct code violations that do not involve sexual harassment.

[56] Proposed § 106.45(b)(3)(iii).

[57] Proposed § 106.45(b)(4)(i).

[58] Proposed § 106.45(b)(4)(i).

The Department's proposed regulations represent a marked departure from its 2011 guidance, in which the Department explained that a preponderance of the evidence standard is the *only* appropriate standard for investigating allegations of sexual harassment or violence.[59] In this respect, the Department explained that the United States Supreme Court has applied a preponderance standard in civil litigation involving discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq,* which also prohibits discrimination on the basis of sex.[60] The Department also noted that its Office for Civil Rights (OCR) uses a preponderance standard when it resolves complaints against schools.[61] For these reasons, the Department stated that in order for a school's grievance procedures to be consistent with Title IX standards, the school must use a "preponderance" standard.[62] The Department explained that grievance procedures that use a "clear and convincing" standard are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX.[63]

1. The Department is disregarding federal jurisprudence for state-level case law that has no bearing on a federal civil rights statute.

The Department's proposed regulations justify the departure from the "preponderance" standard by analogizing Title IX grievance procedures to state-level civil administrative proceedings that use the "clear and convincing" standard.[64] While

[59] 2011 Dear Colleague Letter, pp. 10-11.

[60] 2011 Dear Colleague Letter, pp. 10-11.

[61] 2011 Dear Colleague Letter, p. 11.

[62] 2011 Dear Colleague Letter, p. 11.

[63] 2011 Dear Colleague Letter, p. 11.

[64] Proposed Regulations at 61477 (*citing* Nguyen v. Washington Dept. of Health, 144 Wash. 2d 516 (2001)(requiring clear and convincing evidence in sexual misconduct case in a professional disciplinary proceeding for a medical doctor as a way of protecting due process); *Disciplinary Counsel v. Bunstine,* 136 Ohio St. 3d 276 (2013)(clear and convincing evidence applied in sexual harassment case

these cases may seem factually-similar, they are legally irrelevant in the interpretation of a federal civil rights statute. It is difficult to understand why the Department would choose to ignore laws within the same categorization as Title IX, or even disregard *federal* laws and cases, in favor of state laws that were created by *different* political entities, for significantly *different* purposes, that have *absolutely no bearing on the way federal law is interpreted*. The closest comparison to a Title IX claim will always be other federal civil rights claims, such as Title VII. It is for this reason that the Department, and federal courts, have previously looked to the standards employed in those cases and why it should continue to do so.

The Department seems to purposefully dismiss established and relevant legal precedent in favor of case law that justifies its unilateral concerns for respondents in Title IX claims. As stated by sexual violence organizations time and time again, the Department's singular focus on the risks posed to the rights of the respondents undermines the Department's credibility in its calls for fair and equitable processes. While there is no contention that the risk of expulsion or suspension has a great impact on a student's academic career, and life thereafter, the risk to the safety and well-being of the victim cannot be ignored.

> The decision by the victim/survivor of sexual assault to leave the institution or to remain likely turns on what happens to the accused student. Many victims of sexual assault will not feel safe attending classes on campus where the person that victimized them is able to move about freely and attend the same classes and participate in the same activities. Even if they did remain at the institution, it would be very difficult to be the most successful they could be as they often will not feel safe.[65]

involving lawyer); *Lee v. University of New Mexico*, No. 1:17-cv-01230-JB-LF (D. N.M. Sept. 20, 2018)).

[65] CHRIS LOSCHIAVO & JENNIFER L. WALLER, THE PREPONDERANCE OF THE EVIDENCE STANDARD, Association for Student Conduct Administration, https://www.theasca.org/files/The%20Preponderance%20of%20Evidence%20Standard.pdf; *see also* Ross Macmillan, *Adolescent Victimization and Income Deficits in Adulthood: Rethinking the Costs of Criminal Violence from a Life-Course Perspective*, 38 CRIMINOLOGY 553-588 (2000)(Calculating the expected lifetime income losses for adolescent victims of sexual violence as $36,000 in 2000 dollars, equating to $52,242 in 2017).

NVRDC shares the Department's desire to ensure that Title IX proceedings reflect the principles of fairness and due process; however, neither can be accomplished by neglecting the correct legal framework or by dismissing the rights of either party. The safety and continued access of all students to education should be the primary focus of the Department, as should the case law that governs other federal civil rights.

2. All violations of student codes of conduct should employ the same evidentiary standard.

In the alternative, if the Department chooses to allow schools the discretion in choosing a standard of evidence, the Department should mandate schools to employ the chosen standard uniformly to all student code violations. If schools are permitted to choose between a "preponderance" standard and a "clear and convincing" standard, but may only choose the "preponderance" standard if that same standard is also used for other conduct code violations that carry the same maximum disciplinary sanction, then NVRDC believes that the same must also be true for the "clear and convincing" standard. Schools should not be permitted to choose a "clear and convincing" standard for sexual harassment claims unless that same standard is also used for other conduct code violations that carry the same maximum disciplinary sanction. The lack of symmetry in the proposed regulations on this point is not defended by the Department, and in NVRDC's view, it is not defensible. If a school uses a "preponderance" standard for conduct code violations not involving sexual harassment that carry the same maximum disciplinary sanction, then there is no reasonable basis for a school to choose the higher "clear and convincing" standard for sexual harassment claims.[66]

[66] Furthermore, making the "clear and convincing" standard available to schools will not only allow for confusing and differing standards throughout the country, but also presents a difficulty in interpretation. The "clear and convincing" standard is perhaps the most elusive or difficult to define within the law. Many courts have varying interpretations of the standard, thereby making it highly likely

E. Hearing Models

Pursuant to the current regulations, schools have the option of choosing an "investigator-only" model or a hearing model. The current regulations do not set requirements regarding hearing procedures such as how a school must conduct a hearing, who adjudicates over the hearing, how evidence is to be presented at a hearing, and, if permitted, how cross-examination is to be conducted. The proposed regulations, however, set out numerous requirements regarding hearing procedures. For the reasons discussed below, NVRDC is concerned that many of the proposed changes impose significant burdens on schools throughout the country, both in terms of the time and resources necessary to conduct proper and ethical Title IX proceedings.

1. Prohibition of investigator-only models

The proposed regulations foreclose the option of employing an "investigator-only" model, and for institutions of higher education, require live hearings that permit cross-examination.[67] NVRDC is concerned that removing the option of an investigator-only model will be extremely burdensome for schools and can negatively impact both complainants and respondents; specifically, in NVRDC's experience, schools with hearing models often take far longer to address and resolve sexual harassment complaints. For this reason, many schools in the District of Columbia changed from hearing panel models to single-investigator models, thereby significantly reducing the time for processing complaints and mitigating any case backlog. As discussed in more

that school administrators (who do not require a legal background) will struggle even more. How will federal courts be equipped to analyze whether schools were "deliberately indifferent" when each school has a different standard, and has a different way of interpreting that standard? The lack of uniformity will make accountability less likely, for there is no articulated standard by which federal agencies and courts can hold schools accountable.

[67] Proposed § 106.45(b)(3)(vii).

detail below, NVRDC is concerned that this problem is likely to be exacerbated by the Department's proposal to move away from its prior guidance that grievance processes should be resolved within 60 days. This delay in processing will be detrimental to students, schools, and all other affected parties on campus that benefit from having a prompt resolution of these claims.[68]

2. Requirements for cross-examination during hearings.[69]

The current regulations allow for students to be accompanied by an "advisor of their choice," and detail that, while the schools may not limit the students' choice of advisors, schools "may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties."[70] However, schools are not required to provide students with advisors. The proposed regulations maintain that students are entitled to the "advisor" of their choice;[71] however, if a party does not have an advisor present at the hearing, the school must provide that party an advisor aligned with that party to conduct cross-examination.[72] The regulations make clear that a party's "advisor" may be, but is not required to be, an attorney.[73]

[68] NVRDC understands that not all parties, or schools, prefer the investigator-model. For this reason, an alternative solution could be to permit schools to continue to choose their preferred model, but allow for the parties in a Title IX case to consent to the alternative grievance procedure. For example, in a school that employs the hearing model, parties could consent to having their case adjudicated by a single-investigator.

[69] In addition to the requirements listed below, the proposed regulations require all cross-examination must exclude evidence of the complainant's sexual behavior or predisposition, unless such evidence about the complainant's sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent. Proposed § 106.45(b)(3)(vii).

[70] 34 CFR 668.46(B)(11)(iv)

[71] Proposed § 106.45(b)(3)(vii).

[72] Proposed § 106.45(b)(3)(vii).

[73] Proposed Regulations at 61475.

NVRDC believes that substantially more clarity is necessary in relation to the selection of the parties' advisors. While we are generally supportive of students having access to advisors, it is unclear how schools will find the number of advisors necessary to meet the Department's mandate. It is difficult to imagine that schools will have the capacity to train and provide an advisor for every student participating in a Title IX hearing. Furthermore, schools that turn to off-campus resources find that only a handful of organizations and individuals throughout the country provide Title IX representation services. As a result, this mandate should further clarify whether the Department will provide additional resources or funding to assist schools in meeting this new requirement. The requirement of advisors conducting cross-examination prompts an additional concern relating to economic equality. If one party is able to hire an attorney to act as his or her advisor, then does the school need to appoint an attorney as the advisor for the other party? How will the school pay for such an advisor? Could this result in negatively prejudicing lower-income students? What if the advisor conducting the cross-examination is the opposing party's professor—what sort of environment would that create both in the hearing and in the classroom? Schools may take the position that the most cost-effect measure would be to ask faculty to serve as advisors for one or both students. This solution carries certain appeal, especially where faculty members are attorneys or trained advocates themselves, but also comes with the extreme danger of exacerbating a growing hostile environment. If a faculty member serves as an advisor to respondent in a Title IX contested hearing, the complainant is very likely not comfortable taking classes taught by that member. If, then, the school is relatively small or the faculty member teaches a unique class or serves a prominent role in a particular department – the complainant will have educational their opportunities curtailed by the faculty member's role as an adverse advisor. Thus, the Department

should provide guidance not only concerning who *may* be an advisor, but also as to who *may not*.

(a) Use of technology to facilitate live hearings conducted from separate rooms.

The proposed regulations mandate that, at the request of either party, the school must provide for cross-examination to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party answering questions.[74] NVRDC notes that the Department is seeking comments on the extent to which institutions already have and use technology that would enable the institution to fulfill this requirement without incurring new costs or whether institutions would likely incur new costs associated with this requirement.[75]

In our experience within the District of Columbia, we have found that many local schools have been able to accommodate safety concerns by using technology at live-hearings. The most common way schools integrate technology is by having whichever party is providing testimony physically present before the hearing panel while the other party waits in another room and listens in via telephone conference. When it is the other party's turn to present evidence, they enter the room with the hearing panel, while the other party moves to a separate room to listen in via telephone conference. Schools employ safety measures to ensure that the parties do not run into each other during any transitions. Currently, the following schools use variations of this format: American University, Georgetown University, Georgetown University Law Center, and George Washington University.

F. Timeframe

[74] Proposed § 106.45(b)(3)(vii).

[75] Proposed Regulations at 61483.

The proposed regulations allow schools to employ "reasonably prompt timeframes" for the conclusion of the grievance process, which includes the timeframes for filing and resolving appeals.[76] A school may extend timeframes or temporarily delay the grievance process for "good cause" if the school provides written notice and explanation to the parties.[77] The Department's listed examples of reasons for a delay include "absence of the parties or witnesses, concurrent law enforcement activity, or the need for language assistance or accommodation for disabilities."[78] The Department further embellished on the consideration given to concurrent law enforcement activity:

> [If] a concurrent law enforcement investigation has uncovered evidence that the police plan to release on a specific timeframe and that evidence would likely be material to determining responsibility, a school could reasonably extend the timeframe of the grievance process in order to allow that evidence to be included in the final determination of responsibility.[79]

The previous guidance similarly recommended that schools employ "reasonably prompt time frames" for grievance procedures, but provided additional clarity. The 2011 Dear Colleague Letter explained that "[b]ased on OCR experience, a typical investigation takes approximately 60 calendar days following receipt of the complaint," but that considerations of timeliness may vary depending on the "complexity of the investigation and the severity and extent of the harassment."[80] Furthermore, the guidance also reminded schools that a criminal investigation relating to the same conduct as a Title IX claim "did not relieve the school of its duty…to resolve complaints promptly and equitably."[81]

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[76] Proposed Regulations at 61473.

[77] Proposed Regulations at 61473.

[78] Proposed Regulations at 61473.

[79] Proposed Regulations at 61473.

[80] 2011 Dear Colleague Letter, p. 12.

[81] 2011 Dear Colleague Letter, p. 10.

1. The Department fails to provide sufficient guidance on the interpretation of a "reasonably prompt" timeframe for grievance procedures.

While the 2011 guidance and the Department's proposed regulation both require "reasonably prompt" timeframes, the rescission of the 2011 guidance annulled the only points of clarity for what the Department and OCR will consider to be "timely" in their investigations of complaints to the OCR. The Department's proposed regulations justify the removal of this particular element from the 2011 guidance by citing the pressure felt by schools to resolve the grievance process within 60 days "regardless of the particulars of the situation" resulting in "hurried investigations and adjudications, which sacrificed accuracy and fairness for speed."[82] It is in no one's interest to have hurried investigations. However, it is difficult to understand why the Department would rather give an undefined time period for grievance procedures, rather than extending the recommended time frame to accommodate schools' concerns.[83] If OCR determines the average grievance procedure is longer than 60 days, a new (and longer) time frame could be proposed. This would have a two-fold benefit of providing schools with guidance as to what the best practice should be in Title IX proceedings, and it would empower students with sufficient information to hold their schools accountable for proceedings that last longer than the nationwide average.

Without even an approximate guidepost, there is no marker by which to hold schools accountable. The Department would shift the burden on students to somehow collect enough data to prove that their school's delay was "unreasonable" compared to nationwide standards. For this reason, while NVRDC agrees with the Department's

[82] Proposed Regulations at 61473.

[83] By eliminating any type of recommended timeframe, the Department could also be opening the door for schools to enact grievance procedures that last less than 60 days, thereby increasing the number of investigations that could be considered "hurried" by the Department.

goal to ensure that investigations are not rushed, the Department cannot jeopardize students' ability to hold schools accountable by shying away from its responsibility to provide clear guidance.

2. Permitting delays for concurrent law enforcement investigations will likely conflict with Title IX's mandate for "reasonably prompt" resolutions.

Another factor that may contribute to the infringement of students' rights is the ability for schools to delay Title IX proceedings due to concurrent law enforcement activity. Unlike the change in timeframe, the Department did not provide any justification for the drastic change in the consideration of concurrent investigations. Under the previous guidance, schools were not relieved from their mandated duties because of a concurrent criminal investigation.[84] The criminal justice system is different and separate from Title IX grievance procedures, and should therefore have no bearing on a school's statutorily mandated duties to protect its students. The proposed guidelines seemingly suggest that the existence of a concurrent investigation will justify the suspension of a Title IX claim, even with different standards of evidence and different burdens of proof.

The Department's language also presupposes that any law enforcement activity would be sufficiently transparent for a school to determine the materiality of evidence and the duration of the investigation.[85] There is no basis to assume either point, especially since law enforcement has no duty to share such information with an educational institution and will likely guard such information to protect the integrity of

[84] *See* 2011 Dear Colleague Letter, p. 4 ("[A] law enforcement investigation does not relieve the school of its independent Title IX obligation to investigate the conduct.").

[85] *See* Proposed Regulations at 61473 (considering whether "a concurrent law enforcement investigation has uncovered evidence that the police plan to release on a specific timeframe" assumes that a school has access to this type of information).

any potential prosecution. If the Department chooses to stand by its shift in policy, it must provide further guidance for schools on how to best preserve the integrity of *their* Title IX proceedings, when a delay in proceedings heightens the potential of the destruction of evidence, witness memory loss, or the that one party may drop out or graduate and make the matter moot.

Furthermore, the ability to suspend grievance proceedings when there is a concurrent law enforcement investigation contributes to NVRDC's aforementioned concerns relating to the diminished efficiency of Title IX practices. This new timeframe policy, combined with a shift to hearing models, will likely result in a significant backlog of Title IX cases. Criminal investigations often take months, if not years, thereby increasing the changes that any criminal investigation could easily outlive a Title IX case. What, if any, duties do schools have to the students whose education is on hold for an indeterminate amount of time? How will the Department discourage schools from automatically deferring to criminal investigations? What liability will schools have if they accumulate significant case backlogs?

While NVRDC is against the delay of Title IX proceedings for concurrent law enforcement investigations, we propose that if the Department maintains this aspect of the proposed regulation, that it consider possible safety mechanisms for students. For example, in the District of Columbia, if there are related criminal and civil protection order cases (similar to restraining orders), a party can request that the civil protection order case "trail" or await the disposition in the criminal matter. If granted, the victim can receive the benefits of no-contact provisions from the civil protection order case until the criminal matter is resolved. We propose that similarly, upon the request of either party, a school should employ no-contact provisions (and appropriate supportive measures) while the law enforcement investigation is pending.

IV. Mediation

The Department proposes permitting schools to facilitate informal resolution processes, including meditation, for sexual harassment cases.[86] Unlike in previous guidance, the Department has omitted any restrictions on using informal resolution processes in instances of sexual assault.[87]

NVRDC's guiding principle is to empower crime victims to achieve survivor-defined justice. Consequently, we support the Department's proposal to open up informal resolution methods to survivors of sexual assault. Many of our clients express the desire to engage in alternative systems of justice with non-punitive outcomes; this includes framing their path to healing by having a discussion with the respondent or a third-party, coming to an agreement about what parts of campus each party will be able to access, or other possible accommodations that meet the interests of the parties. While this is not a popular position, NVRDC supports this proposal and its ability to empower survivors and allow for different models of justice. Every survivor should be given the opportunity and support to choose their unique pathway to recovery, a path should not be chosen for them.

That is to say, however, NVRDC is only supportive of informal resolution processes so long as appropriate safeguards are implemented by schools to ensure that all parties are participating voluntarily, without institutional or third-party coercion, and that these processes are employed by sufficiently trained personnel. It is imperative that school personnel explaining or describing informal resolution options are trained both regarding the impact of trauma on sexual assault victims, but also, are specifically trained as to advise a victim about this option without unduly suggesting or prompting

[86] Proposed Regulations at 61464, 61479.

[87] 2011 Dear Colleague Letter, p. 8.

the victim down this path. NVRDC is supportive of the Department's requirement of written notice to the parties disclosing the particularities of the informal resolution processes, as well as the requirement of voluntary, written consent.[88] To ensure that neither party feels coerced into participating, NVRDC suggests that the Department provide additional guidance to schools. For example, schools should allow parties to choose whether they feel safe participating in processes within the same room as each other, or whether they prefer the safety accommodations provided in hearing panels (i.e., where each party can participate form a separate room).[89] Parties should also be able to return to a formal complaint process prior to a final determination (i.e. the process should remain non-binding throughout, more akin to mediation-style processes).[90]

V. Religious Exemptions

Currently, schools "controlled by religious organizations"[91] may be exempted from application of the regulation if it is inconsistent with the religious tenants of the relevant organization.[92] However, that school must submit a letter to the Assistant Secretary for Civil Rights articulating this conflict[93] The Department's proposed regulation eliminates the requirement of a written request to the Assistant Secretary,

[88] Proposed Regulations at 61479.

[89] Proposed Regulations at 61475.

[90] Proposed Regulations at 61475 (allowing for schools to determine whether the parties will be precluded from resuming a formal complaint arising from the same allegations).

[91] Proposed Regulations at 61482.

[92] Proposed Regulations at 61482.

[93] Proposed Regulations at 61482.

and permits a school to claim the exemption without ever having consulted with the Department.[94]

To justify the elimination of this formal requirement, the Department claims that this is a "longstanding Department practice" and that it believes the submission of a letter is "unnecessary."[95] Given the significant chance of a prejudicial impact on students' rights, the Department should re-evaluate, or at the very least, provide a justification founded in legal principles rather informal practice. The absence of formal procedures deprives students of any notice of whether their school is privy to a religious exemption—which in turn exempts students from the full protections provided by Title IX. As previously discussed, the mandate of this civil rights law is centered on the student access to education free from discrimination. Requiring schools to submit a letter is neither "confusing" nor "burdensome,"[96] especially where the rights of students are at stake.

Furthermore, this provision is of particular importance for the rights of students belonging to communities that are subject to religious opposition, such as the LGBTQI community.[97] The rights of these students are especially vulnerable to claims of religious conflicts. Because this is a common and important discussion, both in the public and in the court system, it should not be relegated to informal office procedures. Religious exemptions should be subject to formal and public scrutiny to prevent discrimination and ensure the protection of all students' rights.

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[94] Proposed Regulations at 61482.

[95] Proposed Regulations at 61482.

[96] Proposed Regulations at 61482.

[97] Human Rights Campaign, *Hidden Discrimination: Title IX Religious Exemptions Putting LGBT Students at Risk* (2015), https://assets2.hrc.org/files/assets/resources/Title_IX_Exemptions_Report.pdf (Out of the 56 schools surveyed that requested an exemption, 33 schools sought exemptions from the law as it pertained to protecting students on the basis of gender identity, 23 schools sought exemptions relating to the protection of students on the basis of sexual orientation).

VI. Conclusion

For the aforementioned reasons, NVRDC believes amendments must be made to the proposed regulations to ensure equal access to education—and safety—of *all* students on campuses across the country. Thank you for your time and for your consideration of this comment.

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