SurvJustice Inc.
1015 15th St. NW, Suite 632
Washington, D.C. 20005
P: 202.869.0699 | F: 202.860.0699

January 30, 2019

Submitted via www.regulations.gov
Kenneth L. Marcus
Assistant Secretary for Civil Rights
U.S. Department of Education
400 Maryland Avenue SW
Washington, D.C. 20202

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

Dear Mr. Marcus:

We are writing on behalf of SurvJustice, Inc. in response to the U.S. Department of Education ("Department")'s Notice of Proposed Rulemaking ("NPRM" or "proposed regulations") to express our strong opposition to the Department's proposal to amend regulations implementing Title IX of the Education Amendment Act of 1972 ("Title IX"), as published in the Federal Register on November 29, 2018.

INTRODUCTION

The Department's proposed Title IX regulations, along with its previous rescission of the 2011 and 2014 guidance documents issued under the Obama administration, make schools unsafe for students. The proposed regulations are dangerous for students and schools alike in that, if implemented, perpetrators of sexual harassment (which includes sexual violence and is how our comment will refer to the umbrella term that includes various types of sexual misconduct) would have the means to inflict widespread harm, avoid accountability, and impose liability for causing such harm onto their schools. The effects of changing applicable Title IX standards by narrowing the definition of sexual harassment, limiting the scope of school responsibility for investigating reports of sexual violence, and reducing the number of school officials who are capable of initiating a Title IX investigation (among other things) will be far-reaching. These proposed regulations will discourage students across the country who experience sexual violence from reporting it to their schools. Even in the case of those students who attempt to report despite the odds being stacked against them, many will find that there is no assistance or remedy available to them, thereby forcing them to choose between continuing their education in a hostile environment, attempting to transfer, or dropping out. Furthermore, the proposed regulations, if implemented, will reinforce the normalization of sexual violence on college campuses and secondary schools alike.

These proposed regulations would fundamentally alter Title IX and undermine its entire purpose. If this administration insists on making such significant changes, the process should at least include the input of survivors, advocates, legal professionals, mental health care providers, and many others who engage in this work on a regular basis. Any new Title IX regulations

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should be centered on creating and maintaining pathways to justice and ensuring access to an equitable and safe education for all survivors—especially those who are most likely to experience sexual violence, which includes students of color, LGBTQIA students, and students with disabilities. However, in their current form, the proposed regulations lack such insight and thus should not be codified because it is clear that the purpose of the NPRM is to serve the interests of accused students and institutions only, as opposed to promoting and protecting civil rights in the education context.

SurvJustice's work as it relates to campus sexual assault

Founded in 2014, SurvJustice is a national nonprofit dedicated to assisting survivors of sexual violence in seeking justice. SurvJustice provides legal assistance, policy advocacy, and institutional trainings across the United States. We prioritize the needs of survivors in all of our work. As a survivor-founded and led organization, we understand that the trauma which results from sexual violence often leaves survivors feeling alone and unsure of what to do next. SurvJustice exists to help survivors learn about their rights and options in order to pursue their own personal means of justice with an attorney by their side every step of the way. Our goal is always to ensure that survivors have all the information they need to make informed decisions about their own cases, thereby helping to restore the sense of control that sexual violence takes away. We are also committed to taking an intersectional and sensitive approach to working with survivors—we know that anyone can experience sexual violence and that it harms people in different ways. By providing high-quality legal services to survivors, we seek to hold perpetrators and enablers of sexual violence accountable.

SurvJustice is the only organization that provides legal assistance in campus proceedings across the nation. Upon accepting a case, we provide assistance remotely from our office in D.C. and travel as needed. We offer discounted services and various payment options to ensure affordability for students, which sets us apart from law firms. The majority of the requests for legal assistance that we receive come from students at institutions of higher education. SurvJustice staff members help sexual violence survivors navigate the campus grievance process, such as by assisting them with reporting the violence and going through any investigation, advising them in campus hearings, coordinating on any appeals or appeal responses, and ensuring access to accommodations and other services. Our staff members frequently serve as "advisors of choice" for college students in institutional disciplinary actions for cases involving allegations of sexual assault, domestic violence, dating violence, stalking, and/or retaliation, as provided for by the Clery Act through amendments from the 2013 Violence Against Women Reauthorization Act, 20 U.S.C. § 1092(f)(8)(B)(iv)(II) ("Clery Act"). Our organization also represents survivors in civil litigation or refers survivors to other qualified lawyers for such representation. Finally, SurvJustice often assists survivors in reporting crimes to law enforcement, advocates for police investigation and prosecution of perpetrators, and serves as media representatives for survivors and their families in high-profile criminal cases.

Our commitment to assisting survivors of sexual violence and protecting the right to an education free of discrimination makes SurvJustice well-poised to comment on the proposed regulations. We have a wealth of firsthand experience with this issue as we directly represent

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survivors every single day. Based on this experience, we vehemently oppose the Department's proposed Title IX regulations.

SurvJustice's comment is offered by Executive Director Katherine W. McGerald[1] and Senior Staff Attorney Carly Mee,[2] both of whom are experienced attorneys in cases involving sexual and intimate partner violence, with invaluable assistance from SurvJustice's legal and policy interns, who are students themselves: Laura Alexander (George Washington University graduate student), Grace Quintana (University of Minnesota law student), Grace Perret (Georgetown University undergraduate student), Nikki Wolfrey (University of Virginia law student), Maria Baez de Hicks (University of Arkansas law student), and Sarah Jurinsky (George Washington University undergraduate student).

The Department's proposed regulations vitiates its stated mission and the purpose of Title IX.

Department officials have repeatedly criticized the protections that Title IX affords to women and other survivors of sexual harassment, including sexual violence. These officials have based much of their criticism on discriminatory stereotypes and unfounded generalizations about female students in general and female victims of sexual violence in particular—despite the fact that Title IX protects *all* victims of discriminatory conduct on the basis of sex. In speaking about the issue of sexual harassment in the education context, and in developing these proposed regulations, Department officials have relied on the longstanding and inaccurate stereotype that women and girls tend to lie about or misunderstand their own experiences of sexual violence and harassment[3]. This practice of relying on such unfounded stereotypes is not limited to Department officials: many others who interact with victims do the same. For example, a recent study published in the Psychology of Violence determined that police routinely rely on rape myths, such as that the victim was lying or had given consent, in judging whether a case should be referred to a prosecutor.[4] However, Department officials have a responsibility to break this harmful pattern and avoid relying on unsupported myths in enforcing Title IX.

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[1] Katherine McGerald has provided legal representation to hundreds of clients and survivors for with a focus on providing holistic legal services to survivors of sexual assault, domestic violence, intimate partner violence, harassment based on gender or gender identity, and stalking. Her areas of expertise include intimate partner violence litigation, sexual assault litigation, family court proceedings, and trial advocacy. She has served as a faculty member for basic lawyering skills training through the Sargent Shriver National Center on Poverty Law, as a presenter at the NYS Bar Association Legal Assistance Partnership Conference, and as a presenter in many Continuing Legal Education classes on trial strategy and technique, stalking and technology, how to admit evidence at trial, family offenses, domestic violence and proving your case, and trial preparation.

[2] Carly Mee is a Virginia-barred attorney who provides direct assistance to survivors in campus, civil, and criminal systems to college and high school students. She assisted with achieving federal court recognition of a new form of privilege that applies between victims and advocates, which was a historic win. She has conducted numerous trainings on Title IX, the Clery Act, and FERPA for attorneys, law enforcement, school officials, and students. Her writing has been featured in *The Washington Post* and she has provided legal commentary in CNN, the Independent, Buzzfeed, NPR, and various other media outlets. She also serves as a liaison to the American Bar Association Commission on Domestic & Sexual Violence.

[3] *See, e.g.*, Benjamin Wermund, *DeVos' Donations Spark Questions About Her Stance On Sexual Assault*, POLITICO (Jan. 9, 2017), https://www.politico.com/story/2017/01/betsy-devos-education-sexual-assault-233376; Erica L. Green & Sheryl Gay Stolberg, *Policies Get a New Look as the Accused Get DeVos's Ear*, N.Y. TIMES (July 13, 2017) (emphasis added), https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html (citing Jackson's statement that "[i]n most investigations . . . there's 'not even an accusation that these accused students overrode the will of a young woman. Rather, the accusations — 90 percent of them — fall into the category of 'we were both drunk,' 'we broke up, and six months later I found myself under a Title IX investigation because *she* just decided that our last sleeping together was not quite right.'").

[4] Romeo Vitelli, *Rape Myths and the Search for True Justice*, PSYCHOLOGY TODAY (Oct. 26, 2017), https://www.psychologytoday.com/us/blog/media-spotlight/201710/rape-myths-and-the-search-true-justice. *See also* ACADEMIC

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Officials within this administration have repeatedly criticized core civil rights achievements, such as legal protections against sexual harassment.[5] In contrast to the Department's proactive solicitation of views from those representing the interests of students accused of sexual harassment or assault, Secretary DeVos agreed to meet with organizations representing the interests of sexual harassment and assault survivors only after repeated, collective requests from those organizations. Such meetings were rare and limited in time, as SurvJustice itself experienced. Moreover, it is clear from the proposed rules that the Department ignored the credible perspectives of SurvJustice and organizations like us. Instead, it relied on the views of individuals arguing that women tend to lie about sexual harassment and assault, even though such individuals spoke primarily about personal, unverified anecdotes without any reliable data to support their position.

Given that the Department has proposed regulations that contradict its stated mission and its responsibility to enforce Title IX, SurvJustice unequivocally opposes the Department's proposed regulations. For the reasons discussed at length in this comment, SurvJustice requests that the Department immediately revoke these misguided proposed regulations and engage in a process that involves meaningful consideration of all parties' perspectives and experiences, including survivors of sexual harassment/assault. If the proposed regulations are implemented, the Department will give colleges and universities free license to shirk their responsibility to provide safe and equitable access to education for all students. Finally, since the Department seeks to fundamentally alter campus disciplinary processes *only with regard to sexual harassment complaints* (but not any other potentially criminal and prosecutable offenses), it must explain and justify why it seeks to create a special standard for only this type of misconduct.

THE NPRM SHOULD NOT BE CODIFIED

I. The proposed regulations fail to properly address the realities of sexual harassment in the education context.

The proposed regulations ignore the devastating impact of sexual violence in schools. Instead of effectuating Title IX's purpose by keeping students safe from sexual violence and other forms of sexual harassment—that is, from unlawful sex discrimination—the proposed regulations make it harder for students to report abuse. They also allow (and in some cases even *require*) schools to

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PRESS, ENCYCLOPEDIA OF MENTAL Health 3 (Howard S. Friedman, ed., 2nd ed. 2015) ("Common rape myths may include: women often lie about rape, a victim's clothing can precipitate a sexual assault, rape is the fault of the victim if she was intoxicated, and when a male pays for a date, the woman is expected to reciprocate with sexual intercourse."); ROUTLEDGE, CRITICAL ISSUES ON VIOLENCE AGAINST WOMEN: INTERNATIONAL PERSPECTIVES AND PROMISING STRATEGIES 96 (Holly Johnson et al. eds., 1st ed. 2014) ("Allegations that women lie about sexual assault are not new. . . . Despite social advancements in the past several decades regarding rape awareness, negative attitudes and belief in 'rape myths' are still pervasive.").

[5] In a book published in 2005, Ms. Jackson stated that laws to combat sexual harassment gloss over "the reality that unwanted sexual advances are difficult to define." CANDICE JACKSON, THEIR LIVES: THE WOMEN TARGETED BY THE CLINTON MACHINE 138 (2005). Ms. Jackson regularly questions the veracity of sexual harassment and assault claims made by women, stating, for example: "[I]t wasn't enough that women are not legally forbidden anymore from getting an education and entering the workforce. Feminists and other leftists thought the problem of workplace sexual harassment needed a legal remedy. Since sexual harassment is such a nebulous experience, defined so subjectively and turning on the perceptions of the people involved, laws banning it are difficult to articulate. But they have tried anyway, with the side result that many men self-censor themselves to avoid being accused of sexual harassment, and institutions remove valid expressions of art and learning to avoid "even the appearance of sexual harassment." *Id.*

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ignore reports and unfairly tilt the investigation process in favor of accused students, to the direct detriment of survivors, under the false guise of "due process." SurvJustice fully supports the constitutional right to due process because it is a fundamental protection of liberty in our society. Furthermore, SurvJustice has every interest in ensuring that accused students receive due process in campus disciplinary proceedings because we do not want our clients to have to suffer through a second process if procedural violations occur and the outcome is subsequently overturned. However, the proposed regulations severely miss the mark on what actually constitutes due process, and instead the Department has gone far beyond what is due in order to give special rights to accused students.

a. Sexual harassment is far too common in our schools, and the proposed regulations would significantly worsen this problem.

Far too many students experience sexual harassment. Consider the following statistics:

- In grades 7–12, 56% of girls and 40% of boys are sexually harassed in any given school year.[6] More than 1 in 5 girls ages 14–18 are kissed or touched without their consent.[7]
- During college, 62% of women and 61% of men experience sexual harassment.[8] More than 1 in 5 women and nearly 1 in 18 men are sexually assaulted in college.[9]
- Men and boys are far more likely to be victims of sexual assault themselves than to be falsely accused of committing such acts.[10]

Historically marginalized and underrepresented groups are more likely to experience sexual harassment than their peers:

- 56% of girls ages 14–18 who are pregnant or parenting are kissed or touched without their consent.[11]
- More than half of LGBTQIA students ages 13–21 are sexually harassed at school.[12]

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[6] Catherine Hill & Holly Kearl, *Crossing the Line: Sexual Harassment at School*, AAUW (2011) [hereinafter *Crossing the Line*], https://www.aauw.org/research/crossing-the-line.

[7] National Women's Law Center, *Let Her Learn: Stopping School Pushout for: Girls Who Have Suffered Harassment and Sexual Violence* 1 (Apr. 2017) [hereinafter *Let Her Learn: Sexual Harassment and Violence*], https://nwlc.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence.

[8] Catherine Hill & Elena Silva, *Drawing the Line: Sexual Harassment on Campus*, AAUW 17, 19 (2005) [hereinafter *Drawing the Line*], https://history.aauw.org/aauw-research/2006-drawing-the-line (noting differences in the types of sexual harassment and reactions to it).

[9] *E.g.*, David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, ASSOCIATION OF AMERICAN UNIVERSITIES 13-14 (Sept. 2015) [hereinafter *AAU Campus Climate Survey*], https://www.aau.edu/key-issues/aau-climate-survey-sexual-assault-and-sexual-misconduct-2015.

[10] *E.g.*, Tyler Kingkade, *Males Are More Likely To Suffer Sexual Assault Than To Be Falsely Accused Of It*, HUFFINGTON POST (Dec. 8, 2014) [last updated Oct. 16, 2015], https://www.huffingtonpost.com/2014/12/08/false-rape-accusations_n_6290380.html.

[11] National Women's Law Center, *Let Her Learn: Stopping School Pushout for Girls Who Are Pregnant or Parenting* 12 (2017) [hereinafter *Let Her Learn: Pregnant or Parenting Students*], https://nwlc.org/resources/ stopping-school-pushout-for-girls-who-are-pregnant-or-parenting.

[12] Joseph G. Kosciw et al., *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools*, GLSEN 26 (2018) [hereinafter *2017 National School Climate Survey*], https://www.glsen.org/article/2017-national-school-climate-survey-1.

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- Nearly 1 in 4 transgender and gender-nonconforming students are sexually assaulted during college.[13]
- Students with disabilities are 2.9 times more likely than their peers to be sexually assaulted.[14]

Sexual harassment occurs both on-campus and in off-campus spaces closely associated with school:

- Nearly 9 in 10 college students live off campus.[15]
- 41% of college sexual assaults involve off-campus parties.[16] Students are far more likely to experience sexual assault if they are in a sorority (nearly 1.5 times more likely) or fraternity (nearly 3 times more likely).[17]
- Only 8% of all sexual assaults occur on school property.[18]

b. Incidents of sexual harassment and sexual violence are already underreported due to the poor treatment that survivors face in seeking justice.

It is already extremely difficult for victims to report sexual harassment and violence as doing so takes a significant toll on them. Survivors who do report face disbelief, shaming, guilt, and many other inappropriate reactions from officials within the various justice systems and even from their own loved ones. They also fear retaliation by perpetrators and their associates. The proposed regulations would worsen this problem by further discouraging students from coming forward. Already, only 12% of college survivors[19] and 2% of girls ages 14-18[20] report sexual assault to their schools or the police. Survivors do not report for a number of reasons, including fear of reprisal. Often, they have also been made to believe that their abuse was not important enough or that no one would do anything to help—rightfully so, given the low prosecution rate of perpetrators who commit sexual violence and the even lower rate of meaningful consequences even for perpetrators who are charged and convicted.[21] Some students—especially students of color, undocumented students,[22] LGBTQIA students,[23] and students with disabilities—are even

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[13] *AAU Campus Climate Survey*, *supra* note 9 at 13-14.
[14] National Women's Law Center, *Let Her Learn: Stopping School Pushout for: Girls With Disabilities* 7 (2017) [hereinafter *Let Her Learn: Girls with Disabilities*], https://nwlc.org/resources/stopping-school-pushout-for-girls-with-disabilities.
[15] Rochelle Sharpe, *How Much Does Living Off-Campus Cost? Who Knows?*, NEW YORK TIMES (Aug. 5, 2016), https://www.nytimes.com/2016/08/07/education/edlife/how-much-does-living-off-campus-cost-who-knows.html (87%).
[16] United Educators, *Facts From United Educators' Report - Confronting Campus Sexual Assault: An Examination of Higher Education Claims*, https://www.ue.org/sexual_assault_claims_study.
[17] Jennifer J. Freyd, *The UO Sexual Violence and Institutional Betrayal Surveys: 2014, 2015, and 2015-2016* (Oct. 16, 2014), https://www.uwire.com/2014/10/16/sexual-assault-more-prevalent-in-fraternities-and-sororities-study-finds (finding that 48.1% of females and 23.6% of males in Fraternity and Sorority Life have experienced non-consensual sexual contact, compared with 33.1% of females and 7.9% of males not in FSL).
[18] RAINN, *Scope of the Problem: Statistics*, https://www.rainn.org/statistics/scope-problem.
[19] *Poll: One in 5 women say they have been sexually assaulted in college*, WASHINGTON POST (June 12, 2015), https://www.washingtonpost.com/graphics/local/sexual-assault-poll.
[20] *Let Her Learn: Sexual Harassment and Violence*, *supra* note 7 at 1.
[21] RAINN, *Campus Sexual Violence: Statistics*, https://www.rainn.org/statistics/campus-sexual-violence.
[22] *See, e.g.,* Jennifer Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation*, N.Y. TIMES (April 30, 2017), https://www.nytimes.com/2017/04/30/us/immigrants-deportation-sexual-abuse.html?mcubz=3.
[23] National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey: Executive Summary* 12 (Dec. 2016) [hereinafter *2015 U.S. Transgender Survey*], *available at* https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf.

less likely than their peers to report sexual violence to the police as they face an increased risk of being subjected to police violence and/or deportation. In addition, survivors of color are often silenced as they face pressure to not go to the police because doing so could be seen as contributing to the criminalization of men and boys of color. For all of these reasons, schools are often the only avenue for relief for survivors. Furthermore, even for those who may report to the police, the criminal justice system does not afford them protections that enable them to continue pursuing an education. Comparatively, schools have the ability to provide meaningful accommodations (such as excused absences and extensions on assignments, free counseling, dormitory reassignments, and No Contact Orders) that may be necessary to remain in school.

When schools fail to provide effective responses to reports of sexual harassment, the impact of these incidents can be that much more devastating.[24] Far too many survivors are effectively forced out of school because they do not feel safe on campus, with 34% of college survivors dropping out. Many schools have even expelled survivors when their grades suffer as a result of trauma.[25]

II. The proposed regulations would hinder Title IX enforcement, discourage reports of sexual harassment, and allow schools to avoid accountability instead of protecting students who experience sex discrimination.

For the better part of two decades, the Department has used one consistent standard to determine if a school violated Title IX by failing to adequately address sexual harassment. The Department's 2001 Guidance, which went through public notice-and-comment procedures and has been enforced by both Democratic and Republican administrations,[26] defines sexual harassment as "unwelcome conduct of a sexual nature."[27] The 2001 Guidance requires schools to address student-on-student harassment if *any employee* "knew, or in the exercise of reasonable care should have known" about the harassment. In the context of employee-on-student harassment, the 2001 Guidance requires schools to address harassment "whether or not the [school] has 'notice' of the harassment."[28] Schools that do not "take immediate and effective

[24] *See, e.g.*, Audrey Chu, *I Dropped Out of College Because I Couldn't Bear to See My Rapist on Campus*, VICE (Sept. 26, 2017), https://broadly.vice.com/en_us/article/qvjzpd/i-dropped-out-of-college-because-i-couldnt-bear-to-see-my-rapist-on-campus.
[25] *See*, *e.g.*, Alexandra Brodsky, *How much does sexual assault cost college students every year?*, WASHINGTON POST (Nov. 18, 2014), https://www.washingtonpost.com/posteverything/wp/2014/11/18/how-much-does-sexual-assault-cost-students-every-year. *See also* Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18(2) J.C. Student Retention: Res., Theory & Prac. 234, 244 (2015), *available at* https://doi.org/10.1177/1521025115584750.
[26] These standards have been reaffirmed time and time again: in 2006 by the Bush Administration, in 2010, 2011, and 2014 in guidance documents issued by the Obama Administration, and even in the 2017 guidance document issued by the current Administration. U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter: Sexual Harassment* (Jan. 25, 2006) [hereinafter 2006 Guidance], *available at* https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html; *see also* U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter: Harassment and Bullying* (Oct. 26, 2010) [hereinafter 2010 Guidance], *available at* https://ww2ed.gov/about/offices/ list/ocr/letters/colleague-201104.pdf; *see also* U.S. Dep't of Educ. Office of Civil Rights, *Dear Colleague Letter: Sexual Violence* at 4, 6, 9, &16 (Apr. 4, 2011) [hereinafter 2011 Guidance], *available at* https://ww2ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf; *see also* U.S. Dep't of Educ. Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* 1-2 (Apr. 29, 2014) [hereinafter 2014 Guidance], *available at* https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf ; *see also* U.S. Dep't of Educ. *Office for Civil Rights, Questions and Answers on Campus Sexual Misconduct* (Sept. 2017) [hereinafter 2017 Guidance], *available at* https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf.
[27] U.S. Department of Educ., Office for Civil Rights*, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001) [hereinafter 2001 Guidance], *available at* https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html.
[28] *Id.*

corrective action" are in violation of Title IX. These standards have appropriately guided OCR's enforcement activities, effectuating Title IX's nondiscrimination mandate by requiring schools to promptly and effectively respond to instances of sexual harassment, and in turn fulfilling OCR's purpose of enforcing students' civil rights.

This standard appropriately differs from the higher bar erected by the U.S. Supreme Court in the very specific and narrow context of a civil Title IX lawsuit seeking monetary damages against a school due to its response (or lack thereof) upon receiving actual notice of sexual harassment. To recover monetary damages, a plaintiff must show that the defendant school was deliberately indifferent to known sexual harassment that was severe and pervasive and that deprived a student of access to educational opportunities and benefits.[29] However, in establishing that standard, the Court recognized that it was appropriately limited to civil lawsuits seeking monetary damages and would not apply in the context of administrative enforcement. The Court specifically noted that this standard did not affect agency action; rather, the Department was still permitted to administratively enforce rules addressing a broader range of conduct to fulfill Congress's direction to effectuate Title IX's nondiscrimination mandate.[30] The Court drew a distinction between "defin[ing] the scope of behavior that Title IX proscribes" and identifying the narrower circumstances in which a school's failure to respond to harassment supports a civil claim for monetary damages.[31] The 2001 Guidance also directly addressed this precedent, concluding that it was inappropriate for the Department to limit its enforcement activities by applying the more stringent standard and stating that the Department would continue to enforce the broader protections provided under Title IX. Indeed, in the current proposed regulations, the Department itself acknowledges that it is "not required to adopt the liability standards applied by the Supreme Court in private suits for money damages."[32] As set out in further detail below, the Supreme Court's notice requirement, harassment definition, and deliberate-indifference standard are all designed to account for the unique circumstances involved when determining monetary liability in a civil case proceeding under Title IX's private right of action. These holdings have no place in the vastly different context of administrative enforcement with its iterative process and focus on voluntary corrective action by schools. By choosing to import these civil liability standards, the Department confuses its enforcement mechanisms with court processes that have no place in administrative proceedings, which would certainly have devastating effects on students who remain without recourse.

a. The Department's proposed regulations use inconsistent standards for students and employees regarding what constitutes notice, deliberate indifference, and sexual harassment.

Under Title VII, a federal law that addresses workplace harassment, a school is potentially liable for harassment of an employee if the harassment is "sufficiently severe *or* pervasive to *alter* the conditions of the victim's employment (emphasis added).[33] When an

[29] *Gebser v. Lago Vista Indep. School Dist.*, 524 U.S. 274, 290 (1998) (detailing standard for employee-on-student harassment); *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999) (detailing standard for student-on-student harassment).
[30] *Gebser*, 524 U.S. at 291-92 (citing 20 U.S.C. § 1682).
[31] *Davis*, 526 U.S. at 639.
[32] 83 Fed. Reg. 61468, 61469.
[33] https://www.eeoc.gov/laws/statutes/titlevii.cfm Did you mean to cite Title VII here as the statute instead of the link to the website with it? Not sure.

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employee is harassed by a coworker or other third party, the school is liable if it: (1) "knew or should have known of the misconduct," and (2) failed to take immediate and appropriate corrective action.[34] If a supervisor harasses an employee, the school is automatically liable if such harassment resulted in a tangible employment action (such as firing or demotion) unless it can prove that the employee unreasonably failed to take advantage of opportunities offered by the school to address the harassment. [35] However, under the Department's proposed regulations, a school would only be liable for harassment against a student if (1) it is deliberately indifferent to sexual harassment that is so severe, pervasive, *and* objectively offensive that it *denied* the student access to the school's program or activity; (2) the harassment occurred within the school's program or activity; and (3) a school employee with "the authority to institute corrective measures" had "actual knowledge" of the harassment. In other words, schools would be held to a far more lenient standard when addressing the harassment of students under its care—including minors—than when addressing the harassment of its adult employees.

Moreover, in contrast to Title VII, which recognizes employer responsibility for harassment enabled by supervisory authority, and in contrast to the 2001 Guidance, the proposed regulations fail to recognize any meaningful obligation by schools to address harassment of students by school employees who are exercising authority over students. The 2001 Guidance imposed administrative responsibility when an employee "is acting (or . . . reasonably appears to be acting) in the context of carrying out these responsibilities over students" and engages in sexual harassment.[36] By jettisoning this standard, the Department would free schools from accountability in many instances, even when their employees use the authority they exercise as school employees to harass students. For example, under the proposed regulations, schools may not have to hold serial abusers such as Larry Nassar (who assaulted hundreds of students in his role as a school doctor at Michigan State University) responsible if survivors are too uncomfortable or afraid to report to the school official who meets this narrow definition.

This drastic difference between Title VII and the proposed Title IX regulations would mean that, in many instances, schools are actually *prohibited* from taking the same steps to protect students that they are *required* to take to protect employees in the workplace, as set out further below. Even in instances in which schools may not be prohibited from taking action, the proposed regulations would still apply a more demanding standard to students in schools (many of whom are children) than for adults in the workplace when they seek assistance regarding sexual harassment and violence.

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[34] *Meritor Savings Bank v. Vinson*, 477 US 57, 476-477 (1986) (internal quotations and brackets omitted); Equal Employment Opportunity Commission, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 18, 1999) [*hereinafter* EEOC Guidance], *available at* https://www.eeoc.gov/policy/docs/harassment.html ((an employer is automatically liable for harassment by "a supervisor with immediate (or successively higher) authority over the employee").

[35] *Meritor,* 477 U.S. at 477 (citing *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2270 (1998); *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2293 (1998)).

[36] 2001 Guidance, *supra* note 25. ("[I]f an employee who is acting (or who reasonably appears to be acting) in the context of carrying out these responsibilities over students engages in sexual harassment – generally this means harassment that is carried out during an employee's performance of his or her responsibilities in relation to students, including teaching, counseling, supervising, advising, and transporting students – and the harassment denies or limits a student's ability to participate in or benefit from a school program on the basis of sex, the recipient is responsible for the discriminatory conduct.").

SurvJustice Inc.
1015 15th St. NW, Suite 632
Washington, D.C. 20005
P: 202.869.0699 | F: 202.860.0699

b. The Department's proposed notice requirement undermines Title IX's discrimination protections by making it harder for individuals to report sexual harassment and violence.

Under the proposed regulations, schools would be responsible for addressing sexual harassment only when one of a small subset of school employees actually knew about the harassment. Specifically, schools would not be required to address sexual harassment unless there was "actual knowledge" of the harassment by (i) a Title IX coordinator, (ii) a K-12 teacher (but only for student-on-student harassment, *not* employee-on-student harassment); or (iii) an official who has "the authority to institute corrective measures."[37] This is a drastic change: The Department has long required schools to address student-on-student sexual harassment if almost *any* school employee[38] either knew about it or should reasonably have known about it.[39] This well-established standard, which encompasses more employees, takes into account the reality that many students disclose incidents of sexual harassment to employees who do not have the authority to institute corrective measures but can speak to a higher-up official who does. Students seeking help first turn to adults whom they trust and feel comfortable around, which is typically not a higher-up official with whom they have never interacted; instead, it would be someone such as a teacher, a resident advisor, an athletic coach, or someone else with whom they interact on a regular basis. Moreover, most students do not know which employees have the authority to address the harassment and would not even know whom to seek out. The longstanding "should have known" standard ensured that employees would be held accountable for purposely turning their backs on students who seek to report sexual harassment, as several employees did at Michigan State University when they failed to take any action after students disclosed Larry Nassar's abuse to them

The 2001 Guidance also properly requires schools to address all employee-on-student sexual harassment "whether or not the [school] has 'notice' of the harassment."[40] This requirement was an explicit acknowledgment of the particular harm suffered by students when adult employees prey upon them and the pressure that adult employees can exert over students to ensure their silence. This heightened responsibility for instances of harassment by their own employees also served to recognize that schools have control over their own employees.

By contrast, under the proposed regulations, if a K-12 student were to report to a trusted non-teacher school employee—such as a guidance counselor or teacher's aide—that she or he had been sexually assaulted, the school would have no obligation to respond and assist.[41] If a K-12 student reported to a teacher that she or he had been sexually assaulted by a school employee, the school would have no obligation to respond and assist.[42] Perversely, then, the proposed regulations provide a more limited duty for K-12 schools to respond to a student's report of

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[37] Proposed rule § 106.30.
[38] This duty applies to "any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility." 2001 Guidance, *supra* note 27 at 13.
[39] *Id.* at 14.
[40] *Id.* at 10.
[41] *See* proposed rule § 106.30 (83 Fed. Reg. 61496) (for K-12, limiting notice to "a teacher in the elementary and secondary context with regard to student-on-student harassment).
[42] *See id.*

sexual harassment when the perpetrator is a school employee than when the perpetrator is a student. Similarly, if a college student told their professor or RA that a fellow student, a faculty member, or a school employee had raped them, the school would have no obligation to respond and assist. As detailed above, a multitude of factors combine to make it notoriously difficult for survivors to report sexual violence. Sections 106.44(a) and 106.30 would further discourage reporting. Further, even if a student were to find the courage to report to a trusted school employee, the school would frequently have no obligation to respond and assist. If the proposed regulations had been in effect a few years ago, colleges such as Michigan State and Penn State would not have been required to stop Larry Nassar and Jerry Sandusky, enabling them to abuse even more students—just because the students who bravely came forward reported the sexual abuse to athletic trainers and coaches, who lack the "authority to institute corrective measures." These proposed provisions would absolve some of the worst Title IX offenders of responsibility. There should be no "wrong" employee to approach to report sexual violence, and students should not have to go from person to person just to get their school to intervene. All school employees should be committed to ensuring student safety. In fact, school officials themselves object to this new limitation, with the AASA stating that it is "opposed to any scenario in which the district could somehow disregard the information a child presents to those without the authority to institute corrective action simply because of their technical status within the regulation. It also underestimates the care we entrust all our employees to put towards students' safety."[43]

The following real-life examples demonstrate how these proposed regulations could harm students if implemented:

1. In April 2017, a high school student in Alachua, Florida was assaulted by another student off-campus, which **she reported to the high school guidance counselor (a non-teacher school employee) the next day**. The student's mother sued the school for failing to investigate the case and hold the perpetrator for his actions through disciplinary action. The perpetrator had allegedly assaulted two other students and school staff members allegedly knew about both incidents at the time of the survivor's report. If the proposed regulations are implemented, survivors such as the student in this case will have no method to hold K-12 schools accountable for failing to protect them and for effectively forcing them to continue attending classes with perpetrators of assault.[44]

2. In September 2018, a non-verbal high school student with autism was assaulted and sexually abused by a teacher's aide in Rutherford, Tennessee. **A custodian witnessed the abuse firsthand** and reported the assault to the school principal. The student's parents are suing the school for failing to protect the student, failing to hold the aide accountable, and for failing to conduct thorough background checks. The school would have not been liable under the proposed regulations had the custodian not reported what they had seen.[45] This example also demonstrates how the proposed regulations make students with

[43] AASA letter at 2.
[44] CBS4 Gainesville, "Mother of Santa Fe High student says police, school officials didn't report sexual assault," *CBS4 News Gainesville*, Aug. 31, 2018, https://mycbs4.com/news/local/mother-of-santa-fe-high-student-says-police-school-officials-didnt-report-sexual-assault.
[45] Brinley Hineman, "Family of special needs student sues Rutherford County school board over sexual assault," *Murfreesboro Daily News Journal*, Jan. 23, 2019, https://www.dnj.com/story/news/2019/01/23/rutherford-county-schools-lawsuit-autism-sexual-abuse/2643521002/.

disabilities particularly vulnerable; not only are students with disabilities more vulnerable to sexual abuse than their peers, they are also less likely to have access to the "correct" responsible employees (as defined through the proposed regulations) and are less likely to report experiences of abuse.[46]

3. In 2017, a first-year student at the University of North Texas **told her resident assistant** that she had been raped by three members of the basketball team. Two of the alleged perpetrators later called the student and suggested she join their "escort service," a call to which the RA listened as well. The University of North Texas allegedly pressured the student not to report to local police, preferring to investigate the allegations through University processes. The student alleges that UNT officials refused to investigate any broader situation within the basketball team, though the perpetrators were not allowed on campus during the investigation and were eventually removed from the basketball team. None of the perpetrators faced charges of sexual assault in court. Under the proposed regulations, the school could not have been liable for reports made to an RA, even if the RA themselves had witnessed or heard direct evidence of the complainant's allegations (as in this example).

4. Seo-Young Chu alleges that she was raped and repeatedly sexually harassed by her Stanford professor and dissertation advisor, Jay Fiegelman, while she attended Stanford in the 1990s. **Chu reported the misconduct to another professor,** Herbert Lindenberger, who reported to the **Chair of the English Department**, while another graduate student reported to the **Dean's Office**. Chu alleges other professors enabled and protected Fiegelman's behavior. Stanford suspended the professor for two years, but he eventually resumed teaching. Under the proposed regulations, Stanford would not have been responsible for investigating Fiegelman, despite the fact that multiple professors knew of and attempted to report the assault.[47]

c. The new proposed definition of harassment improperly prevents schools from providing students with a safe learning environment.

The proposed regulations define sexual harassment as "unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the [school's] education program or activity"[48] and mandate dismissal of complaints that do not meet this burdensome standard. Under this definition, even if a student reports sexual harassment to the "right person," the school would still be *required* to ignore the student's complaint if the harassment has not yet advanced to a certain level of severity. A school would have to dismiss such a complaint even if it involved harassment of a minor student by a teacher or other school employee, despite having an interest in investigating and terminating that employee to prevent further abuse. In this way, the Department's proposed definition fails to

[46] David Cantor, Bonnie Fisher, et al., "Report on the AAU Climate Survey on Sexual Assault and Sexual Misconduct," *American Association of Universities*, Oct. 20, 2017, https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf.
[47] Vanessa Rancaño, "Former Grad Students: Our Professors Raped Us," *KQED*, Dec. 7, 2017, https://www.kqed.org/news/11633019/years-later-women-find-their-voice-to-speak-out-against-sexual-misconduct-by-professors.
[48] Proposed rule § 106.30.

align with Title IX's purpose and precedent. It also discourages reporting and excludes many forms of sexual harassment that still interfere with access to educational opportunities.

Moreover, the Department fails to provide a persuasive justification for changing the definition of sexual harassment from the 2001 Guidance, which defines sexual harassment as "unwelcome conduct of a sexual nature."[49] This broader definition rightly requires schools to respond to harassment before it escalates to a point that students suffer even further or more severe harm. Instead of intervening early on, schools would have to wait until harassment escalates even further, thereby severely jeopardizing students' safety and even putting their lives at risk. For example, a student who reports verbal sexual harassment could be turned away without any institutional intervention, at which point the abuse could quickly escalate to sexual assault. Students would be forced to endure repeated and escalating levels of abuse, whether from a peer or a school employee, before their schools would be required to investigate and intervene. This poses a risk that more students will be raped or even killed by perpetrators who are not stopped earlier on but instead feel empowered to escalate their abuse as a result of the lack of school intervention. Furthermore, if a school turns away a student who reports sexual harassment, that student is extremely unlikely to then report a second time when the harassment escalates.

The Department repeatedly attempts to justify its proposed definition by citing "academic freedom and free speech."[50] However, harassment is not protected speech if it creates a "hostile environment,"[51] i.e., if the harassment limits a student's ability to participate in or benefit from a school program or activity.[52] Furthermore, schools have the authority to regulate harassing speech: the U.S. Supreme Court held in *Tinker v. Des Moines* that school officials can regulate student speech if they reasonably forecast "substantial disruption of or material interference with school activities" or if the speech involves "invasion of the rights of others."[53] There is thus no conflict between the First Amendment and Title IX's regulation of sexually harassing speech.

The following examples demonstrate how the proposed definition of sexual harassment could harm students if implemented:

1. If the proposed regulations were implemented, schools may be able to dismiss cases in which sexual harassment takes place online as "insufficiently severe." The proposed definition disregards the considerable psychological trauma inflicted through online harassment and could absolve schools from responsibility for not stepping in earlier, especially if online harassment transitions into physical harassment and/or violence. Courts have held that online harassment constitutes sufficient basis for schools to act against harassers, as in *Feminists Majority Foundation v. University of Mary Washington*,

[49] 2001 Guidance, *supra* note 25.
[50] 83 Fed. Reg. 61464, 61484. *See also* § 106.6(d)(1), which states that nothing in Title IX requires a school to "[r]estrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution."
[51] *See* Joanna L. Grossman & Deborah L. Brake, *A Sharp Backward Turn: Department of Education Proposes to Protect Schools, Not Students, in Cases of Sexual Violence*, VERDICT (Nov. 29, 2018) [hereinafter *A Sharp Backward Turn*], *available at* https://verdict.justia.com/2018/11/29/a-sharp-backward-turn-department-of-education-proposes-to-protect-schools-not-students-in-cases-of-sexual-violence. ("There is no legitimate First Amendment or academic freedom protection afforded to unwelcome sexual conduct that creates a hostile educational environment.").
[52] 2001 Guidance, *supra* note 25.
[53] 393 U.S. 503, 513-514 (1969).

in which the majority opinion stated that "the offenders could have been disciplined or prosecuted without infringing on the First Amendment." [54]However, these new rules create a grey area in which online harassment could be subject to discipline at significantly lower rates. This would discourage survivors from reporting additional instances of harassment or assault if their initial report was dismissed as "insufficiently severe," exposing survivors to repeated and increasingly intense abuse.

2. The proposed definition of harassment also allows schools to ignore cases which they have determined are not so "severe, pervasive, and objectively offensive" as to "effectively [deny the student] equal access to the recipient's education program or activity." In 2014, a student referred to by the pseudonym "Deena" began to receive significantly lower grades after she was assaulted, including a "D" and an "F." Her GPA dropped to a 2.0 and her concerns were dismissed by her academic dean, who allegedly told her that "Lots of students graduate with a 2.0." [55]While Deena's academic prospects were significantly impaired by her assault (and could have eventually driven her to drop out), under the proposed definition of harassment, cases like hers would not be considered grounds to hold schools liable for protecting survivors' access to education.

Stalking, Intimate Partner Violence, and Dating Violence under the Proposed Regulations

The Department's proposed definition of sexual harassment is particularly problematic when considered in the context of stalking allegations. It is unclear from the proposed regulations whether stalking complaints would have to meet the stringent "so severe, pervasive, and objectively offensive" standard to avoid being dismissed. The current standard that schools rely upon from the 2001 guidance defines sexual harassment as unwelcome conduct of a sexual nature. This definition appropriately charges schools with responding to harassment before it escalates to the point that a student suffers severe harm. Stalking presents a particularly unique risk to the health and safety of college students because there is a significant connection between stalking and intimate partner homicide.[56]

Stalking is very common on college campuses and within the college population. Persons aged 18 to 24 (which is the average age of most college students) experience the highest rates of stalking victimization.[57] Research also shows that there are even higher rates of stalking victimization among college-aged women than among the general population. The *National College Women Sexual Victimization Study* found that over 13 percent of college women had

[54] Lauren Camera, *Court rules schools must investigate threats – anonymous, online, or otherwise*, U.S. NEWS AND WORLD REPORT (Dec. 20, 2018), https://www.usnews.com/news/education-news/articles/2018-12-20/court-rules-schools-must-investigate-threats-anonymous-online-or-otherwise.
[55] Cari Simon, *On top of everything else, sexual assault hurts the survivors' grades*, WASHINGTON POST (Aug. 6, 2014), https://www.washingtonpost.com/posteverything/wp/2014/08/06/after-a-sexual-assault-survivors-gpas-plummet-this-is-a-bigger-problem-than-you-think/?utm_term=.f6fd59aa8475.
[56] *Judith McFarlane et al., "Stalking and Intimate Partner Femicide," Homicide Studies 3, no. 4 (1999).*
[57] Katrina Baum, Shannan Catalano, Michael Rand, and Kristina Rose, "Stalking Victimization in the United States" (Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, 2009).

experienced stalking in the academic year prior to the study.[58] It is important to note that stalking often occurs in the context of both dating violence and sexual violence. In one study, researchers found that 43 percent of victims were stalked by a current or former boyfriend, and in 10 percent of incidents, the victim reported that the stalker committed or attempted forced sexual contact.[59] Other research about sexual assault on college campuses found that the perpetrators of these assaults were premeditating, repeat offenders who employed classic stalking strategies (such as surveillance and information-gathering) to select and ensure the vulnerability of their victims.[60]

In any new regulations, the Department should adopt the standard that harassing conduct creates a hostile environment "if the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program." This definition, which comes from the Department's 2001 "Dear Colleague Letter,"[61] appropriately recognizes that schools should never permit violence and harassment to interfere with a student's education. Yet the proposed regulations improperly depart from earlier Department guidance by stating that schools do not have to investigate complaints involving "unwelcome conduct of a sexual nature" that "limit[s]" but does not "deny" a students' ability to learn. However, the Department has erred in adopting this for its proposed regulations because, as stated above, the U.S. Supreme Court limited this narrow definition of sexual harassment solely to "private suit[s] for money damages" brought by students against schools.[62] At the campus level, schools should investigate *all* allegations of sexual harassment and it is crucial that the definition of sexual harassment encompass stalking in order to ensure student safety.

SurvJustice therefore proposes that the Department incorporate the definition of sexual harassment contained within the 2001 Guidance in any forthcoming regulations instead of the improper language currently contained in the proposed regulations. In the alternative, we propose that the Department revise prong (3) to read "Sexual assault, Dating violence, Domestic violence, and stalking where based on sex, as defined in 34 CFR 668.46(a)." This would sufficiently protect victims of stalking, intimate partner violence, and dating violence by including those types of misconduct within the definition.

The definitions from 34 CFR 668.46(a) are as follows:

Stalking[63]
(i) Engaging in a course of conduct directed at a specific person that would cause a reasonable person to -
(A) Fear for the person's safety or the safety of others; or
(B) Suffer substantial emotional distress.
(ii) For the purposes of this definition -

[58] Bonnie S. Fisher, Francis T. Cullen, and Michael G. Turner, "Sexual Victimization of College Women" (Washington, DC: U.S. Department of Justice, National Institute of Justice, 2000).
[59] *Id.*
[60] David Lisak and Paul Miller, "Repeat Rape and Multiple Offending Among Undetected Rapists," *Violence and Victims* vol. 17, no.1 (February 2002).
[61] https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf
[62] *See Davis v. Monroe County Board of Education*, 526 US 629 (1999).
[63] 34 CFR 668.46(a)

(A) ***Course of conduct*** means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
(B) ***Reasonable person*** means a reasonable person under similar circumstances[64] and with similar identities to the victim. [65]
(C) ***Substantial emotional distress*** means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

Dating Violence[66]
Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
(i) The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.
(ii) For the purposes of this definition -
(A) Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
(B) Dating violence does not include acts covered under the definition of domestic violence.

Domestic Violence[67]
(i) A felony or misdemeanor crime of violence committed -
(A) By a current or former spouse or intimate partner of the victim;
(B) By a person with whom the victim shares a child in common;
(C) By a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;
(D) By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred, or
(E) By any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.

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[64] New York case law highlights the importance of why past experiences of the complainant are relevant to the allegations of defendant's intention to place the complainant in reasonable fear of physical injury. People v. Payton, 161 Misc. 2d 170, 175, 612 N.Y.S.2d 815, 818 (Crim. Ct. 1994). *See also* People v. Goetz 68 N.Y.2d 96 at 114, 506 N.Y.S.2d 18, 497 N.E.2d 41. In order to constitute a 'true threat' which will support a conviction for aggravated harassment, it must be shown that under the circumstances, an ordinary, reasonable recipient familiar with the context of the communication would interpret it as a true threat of injury, whether or not the defendant subjectively intended the communication to convey a true threat. Put this in the context of something that seems benign- the classic example of sending flowers to the victim. Most reasonable people would view this as a thoughtful or kind gesture. But what if the abuser told the victim that he would send her flowers on the day he was going to kill her?

[65] In its first decision interpreting the statute, the Court of Appeals emphasized that the statutory requirement of intent was appropriately limited to an intent to engage in a course of conduct targeted at a specific person and did not include an additional intent to cause a specific result, such as fear. The statute thus focuses on what the offenders do, not what they mean by it or what they intend as their ultimate goal. In this manner, the law could properly reach those "delusional stalkers who believe either that their victims are in love with them or that they can win their victims' love by pursuing them.". If the Legislature had required that the stalker intend to frighten or harm the victim, the statute would be debilitated and a great many victims endangered. People v. Stuart, 100 N.Y.2d 412, 427, 765 N.Y.S.2d 1, 797 N.E.2d 28 (2003).

[66] Id.

[67] Id.

SurvJustice Inc.
1015 15th St. NW, Suite 632
Washington, D.C. 20005
P: 202.869.0699 | F: 202.860.0699

If the proposed Title IX regulations do not include stalking within the definition of sexual harassment, student safety will be greatly at risk.[68] In addition, Title IX regulations will not satisfy the civil rights law's stated purpose of promoting and protecting civil rights in education. The exclusion of stalking would exclude dangerous behaviors—many of which we have seen committed against our clients—from Title IX's coverage. Some examples of these types of behaviors include: (1) following a student to their classes, workplace, or home; (2) repeatedly contacting a student despite frequent requests to cease communication; (3) threats of self-harm if a student does not stay in a relationship with a perpetrator or otherwise comply with their requests; (4) isolation from friends and family; and (5) endangerment of safety through behavior such as reckless driving, to name just a few. Although this conduct would likely be covered under the Clery Act (and thereby entitle victims to pursue the school disciplinary process and trigger other victim rights), simultaneous exclusion from Title IX would cause unnecessary confusion for students and staff.

d. Proposed rules §§ 106.30 and 106.45(b)(3) would require schools to ignore sexual harassment that occurs outside of a school activity or program, even when it results in the creation of a hostile environment on campus.

The proposed regulations would *require* schools to ignore all complaints involving off-campus or online sexual harassment (including sexual violence) that occur outside of a school-sponsored program—even if, for example, the student is forced to see the perpetrator on campus every day and therefore creates a hostile environment on campus. To understand why it is crucial to maintain Title IX protections for off-campus activities, one need only look at the Department's own recent decision to cut off partial funding to the Chicago Public Schools for failing to address two reports of off-campus sexual assault, which the Department described as "serious and pervasive violations under Title IX."[69] In one case, a tenth grade student was forced to perform oral sex in an abandoned building by a group of 13 boys, 8 of whom she recognized from school. In the other case, another tenth-grade student was given alcohol and sexually abused by a teacher in his car. If the proposed regulations are codified, school districts would be required to dismiss similarly egregious complaints simply because of the location.

This proposal directly conflicts with Title IX's statutory language, which does not depend on where the *underlying conduct* occurred but instead prohibits discrimination that "exclude[s a person] from participation in . . . denie[s a person] the benefits of, or . . . subject[s a person] to discrimination under any education program or activity[.]"[70] For almost two decades, the Department's guidance documents have held schools responsible for addressing sexual harassment if it is "sufficiently serious to deny or limit a student's ability to participate in or benefit from the education program,"[71] regardless of where it occurs.[72]

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[68] *See, e.g.*, Model Campus Stalking Policy, https://www.futureswithoutviolence.org/model-campus-stalking-policy/ (last visited Jan. 30, 2019).

[69] *See* David Jackson et al., *Federal officials withhold grant money from Chicago Public Schools, citing failure to protect students from sexual abuse*, CHICAGO TRIBUNE (Sept. 28, 2018), https://www.chicagotribune.com/news/local/breaking/ct-met-cps-civil-rights-20180925-story.html.

[70] 20 U.S.C. § 1681(a).

[71] 2001 Guidance, *supra* note 27.

[72] 2017 Guidance, *supra* note 26 at 1 n.3 (("Schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities."); 2014 Guidance, *supra* note 26 ("a school must process all complaints of sexual violence, regardless of where the conduct occurred"); 2011 Guidance, *supra* note 26 ("Schools may have an obligation to respond

SurvJustice Inc.
1015 15th St. NW, Suite 632
Washington, D.C. 20005
P: 202.869.0699 | F: 202.860.0699

The Department's proposed regulations ignore the reality that sexual harassment often occurs off campus and outside of a school program or activity, yet such incidents are no less traumatic than on-campus harassment as the effects transfer back to the campus.[73] For example, there is still a severely negative impact on a student's education if s/he is forced to see the harasser regularly at school. Furthermore, a great deal of school life occurs off-campus—and in turn, a great deal of sexual harassment. Notably, almost 9 in 10 college students live off campus[74] and much of student life takes place outside of school-sponsored activities. If a professor invites a student to his house under the guise of professional mentorship and then rapes the student, the college would be required to ignore the student's complaint—even if he has to continue taking the professor's class. If a student rapes another student at an off-campus party, the college would not need to investigate—even if she sees the rapist every day in class, the dining hall, or residential hallways. Furthermore, if schools interpret the proposed regulations to prevent them from addressing harassment that occurs off-campus at fraternity and sorority houses,[75] it would be particularly problematic as students of all genders are more likely to be sexually assaulted if they belong to a fraternity or sorority.[76] The reality is that this proposal would make it so that perpetrators receive a free pass as long as they commit abuse in the right location. Repeat offenders will be able to systematically target victims, knowing they can get away with it. The majority of students who seek legal assistance from SurvJustice have experienced sexual violence at an off-campus location, such as a party at someone's house. It is rare for sexual violence to occur on campus in a dorm room. Pursuant to the proposed regulations, then, the vast majority of survivors would be left without any recourse.

The proposed regulations would also pose unique risks to students at community colleges and vocational schools. Students at these institutions do not live on campus, meaning that any harassment committed against them by faculty or other students is especially likely to occur off campus. The proposed regulations would leave these students completely unprotected.

e. The Department's proposed incorporation of the civil deliberate indifference standard would allow schools to take virtually no action in response to complaints of sexual harassment.

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to student-on-student sexual harassment that initially occurred off school grounds, outside a school's education program or activity."); 2010 Guidance, *supra* note 26 at 2 (finding Title IX violation where "conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school," regardless of the location of the harassment).

[73] The Department itself admitted in the previous leaked draft of the NPRM that 41% of college sexual assaults occur off campus. *See* Letter from Anne C. Agnew to Paula Stannard et al., *HHS Review: Department of Education Regulation – Noon September 10*, U.S. DEP'T OF HEALTH & HUMAN SERVICES 79 n.21 (Sept. 5, 2018) [*hereinafter* Draft NPRM], *available at* https://atixa.org/wordpress/wp-content/uploads/2018/09/Draft-OCR-regulations-September-2018.pdf.

[74] Sharpe, *How Much Does Living Off-Campus Cost?*, *supra* note 15.

[75] Although the preamble mentions one case where a Kansas State college fraternity was considered an "education program or activity" for the purposes of Title IX, the Department emphasizes that there are many "factors" and that the determination would be specific to each incident. For example, it would depend on whether the school "owned the premises; exercised oversight, supervision, or discipline; or funded, sponsored, promoted, or endorsed the event or circumstance" (83 Fed. Reg. 61468). This multi-factor test is not only unnecessarily unclear and confusing but also is not included in the proposed regulatory language, making it difficult for students and schools to understand their rights and obligations under Title IX. Schools might certainly conclude that § 106.30 and § 106.45(b)(3) mandates dismissal of complaints from all students who are sexually assaulted at unrecognized fraternities, sororities, and other unrecognized social clubs; at unaffiliated local bars and clubs; in non-residential housing; and through online channels in many instances.

[76] Freyd, *supra* note 17.

SurvJustice Inc.
1015 15th St. NW, Suite 632
Washington, D.C. 20005
P: 202.869.0699 | F: 202.860.0699

The deliberate indifference standard adopted by the Department in the proposed regulations is a much lower standard than what is required of schools under current guidance, which requires schools to act "reasonably" and "take immediate and effective corrective action" to resolve harassment complaints.[77] This change would mean that schools merely have to avoid acting in a manner that is clearly unreasonable. This is the civil standard that applies in civil lawsuits brought against institutions to obtain monetary damages, and therefore, the Department is again seeking to apply a standard that remains inappropriately burdensome for evaluating *campus* complaints. The practical effects of this proposed rule would shield schools from any administrative accountability under Title IX, even they mishandle complaints, fail to provide effective support for survivors, wrongly determine against the weight of the evidence that an accused harasser was not responsible for sexual assault, or commit other violations that may not rise quite to the level of deliberate indifference.

Examples of how the proposed "deliberate indifference" standard would harm survivors include, but are not limited to:

1. In Tuscaloosa, AL, a student killed herself after the University of Alabama allegedly failed to appropriately handle her sexual assault case. The student's parents sued the school, alleging that the University failed to support their daughter by connecting her to resources or helping her stay in school after the assault. Under the "deliberate indifference" standard in the proposed regulations, the University would not have been liable under Title IX for failing to actively support this student because they could claim their actions in the situation were "not clearly unreasonable," and that they could not have known that their lack of support would drive her to commit suicide.[78]

2. Under the proposed "deliberate indifference" standard, UC Berkeley would have been allowed to ignore allegedly mishandled sexual misconduct cases. A February 2018 report by the Office of Civil Rights found that UC Berkeley received 401 oral and written complaints of sexual harassment or violence, the majority of which were settled through informal processes, and that investigations of sexual assault could take up to three years, an unreasonable period of time given that most undergraduate programs last four years. Under the proposed regulations, UC Berkeley would have only needed to claim each individual response was "not clearly unreasonable" given the circumstances, despite a clear pattern of indifference towards survivors of assault.[79]

III. The proposed regulations impermissibly limit the "supportive measures" available to those who report sexual harassment, § 106.30.

Under the proposed regulations, even if a student suffered harassment that occurred on campus *and* it was "severe, pervasive, and objectively offensive," the school would still be able

[77] 2001 Guidance, *supra* note 27.
[78] CBS/AP, "Parents of alleged rape victim sue University of Alabama over her suicide," *CBS News,* 4 July 2017. https://www.cbsnews.com/news/megan-rondini-suicide-parents-sue-university-of-alabama-alleged-rape/
[79] Anjali Shrivastava, "UC Berkeley mishandled 8 Title IX cases, federal investigators say," *The Daily Californian,* 1 March 2018. http://www.dailycal.org/2018/03/01/uc-berkeley-mishandled-eight-title-ix-cases-federal-investigators-say/

to deny the "supportive measures" that student needed to continue pursuing an education. In particular, the proposed regulations allow schools to deny a student's request for effective "supportive measures" on the grounds that the requested measures are "disciplinary," "punitive," or that they "unreasonably burden[] the other party." For example, a school might feel constrained from transferring a reported harasser to another class or dorm because it would place an "unreasonabl[e] burden," thereby forcing the survivor to change all of her own class and housing assignments in order to avoid seeing the harasser. Groups such as the Association for Student Conduct Administration (ASCA) agrees that "[e]ffective interim measures, including … *actions restricting the accused*, should be offered and used while cases are being resolved, as well as without a formal complaint."[80] In addition, schools may interpret this propose regulation to prohibit issuing a unilateral no-contact order against an assailant and instead require a survivor to agree to a *mutual* no-contact order, which imposes burdens on the survivor solely for reporting sexual harassment and arguably constitutes retaliation by the school.[81] This is a departure from longstanding practice under the 2001 Guidance, which instructed schools to "direct[] *the harasser to have no further contact with the harassed student*" but not vice-versa.[82] Our concern is *not* that survivors should be able to contact perpetrators; in fact, our significant experience in this work has shown us that no survivor has any interest in contacting the person who harassed them and against whom they sought a no-contact order. The problem lies in that mutual no-contact orders unfairly limit survivors from freely moving about campus simply because they filed a report. Even more alarmingly, mutual no-contact orders serve as a mechanism for accused students to file retaliatory complaints against survivors by falsely alleging violations of the mutual no-contact order. SurvJustice has seen firsthand that accused students repeatedly use this tactic (such as by claiming that a survivor-complainant was in the dining hall at the wrong time, for example, or walked by them in a campus building hallway) in order to retaliate. The survivor is then forced to endure an investigation into the falsely alleged violation, which takes a severe toll.

Prior to the 2017 rescission of Title IX guidance, SurvJustice often advocated for schools to provide accommodations to our clients, including during the pendency of an investigation, so that they could continue to safely pursue their education. SurvJustice often requested unilateral no-contact orders on our clients' behalf but opposed mutual no-contact orders because of our aforementioned view that they are retaliatory. SurvJustice has observed schools issuing mutual no contact orders on a regular basis and that these mutual no-contact orders are forms of retaliation when there is no basis to place the order against our clients other than the fact that they made a Title IX complaint. In such instances, schools limit victims' access to educational opportunities and benefits as a direct result of the victims' assertion of their federal rights and utilization of the Title IX grievance process.

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[80] Association for Student Conduct Administration, *ASCA 2014 White Paper: Student Conduct Administration & Title IX: Gold Standard Practices for Resolution of Allegations of Sexual Misconduct on College Campuses* 2 (2014) [hereinafter *ASCA 2014 White Paper*], https://www.theasca.org/Files/Publications/ASCA%202014%20White%20Paper.pdf.

[81] *See, e.g.*, Joan Zorza, *What Is Wrong with Mutual Orders of Protection?* 4(5) DOMESTIC VIOLENCE REP. 67 (1999). Experts have recognized for decades that *mutual* no-contact orders are harmful to victims, because abusers often manipulate their victims into violating the mutual order.

[82] 2001 Guidance, *supra* note 25, at 16.

As a former prosecutor in the sex crimes and domestic violence units, and a litigator in New York Family Court[83] on cases involving sexual and intimate partner violence, I know that domestic violence and stalking mutual orders of protection (akin to mutual no-contact orders)[84] are very difficult (if not impossible) to enforce.[85] Abusers consistently utilize them to retaliate against former intimate partners, intentionally placing them in fear of facing sanctions.[86]

Although the general sentiment on mutual protective orders indicates that proper issuance of mutual orders must take place within an actual court system[87]—which already has procedures in place to test evidence and determine standards of abuse by all parties—the Department instead argues that in a Title IX setting schools are issuing using mutual protective orders not because evidence has been found to prove complainants pose a risk to their perpetrators or to their perpetrators access to education but because of respondents' claiming "supportive measures" for survivors are "disciplinary" or overly "punitive" or that they "unreasonably burden the other party."

Again, the Department is elevating rights of the accused over the civil rights of the accuser. Title IX is a civil rights remedy to provide equal access to education, but placing sanctions on an accuser for simply reporting sexual harassment may violate the accuser's due process rights.[88]

The proposed regulation suggests that its definition of supportive measures is a neutral stance in the face of allegations prior to an adjudication, but this simply is not true. By prohibiting such measures from ever "unreasonably burdening the other party," the Department strips institutions of the ability to impose unilateral no-contact orders or other safety measures designed to protect the complainant *when it identifies the need to do so*. If implemented, this provision will lead to

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[83] For more information regarding the background of SurvJustice Executive Director Katherine W. McGerald, please visit http://www.survjustice.org/staff.

[84] Elizabeth Topliffe, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders are Not*, 67 *Indiana Law Journal* 951, 1039-1065, (1992). "In general, mutual protective orders are not enforced as well as regular orders. Also, the mutual protection order often prejudices the victim in future proceedings" (1061). Police don't know how to respond, often don't arrest (1061-1062). Abusers use mutual protection orders as weapons against those they abuse in future legal proceedings, including "divorce proceedings, civil proceedings on domestic violence, and criminal proceedings against the abuser . . . husbands will often seek new forms of control when the old (violence) fails" (1062).

[85] *Id.*

[86] *Id.*

[87] *Id.* at 1060 ("Judicial behavior strongly influences the possibility of future violence and issuing a mutual protection order can send a message both to the batterer and to the victim regarding violence"). *Id* at 1061 ("[Batterers] could easily understand a mutual protection order to mean that the court blames the victim as much as the batterer. The implication is that there is no accountability by the batterer."). *Id* ("Furthermore, the victim herself can recognize this implicit message . . . when myths [that the woman either instigates or deserves the abuse] are bolstered by the judicial system's response, the woman feels that there is no place where she will be understood. The woman often finds the court's approach degrading, and the experience reinforces the woman's belief that she is to blame for her abuse").

[88] *See, E.g.* Jane F. Golden, "Mutual Orders of Protection in New York State Family Offense Proceedings: A Denial of 'Liberty' Without Due Process of Law," in *Columbia Human Rights Law Review* 18:2 (Spring 1987), 309. Mutual Orders of Protection in Practice…"create the appearance that both parties were found to be violent" at 319, "may work against the woman in a subsequent divorce action" at 318; "May encourage police not to take action when survivors call about an abusive partner, or may discourage reporting if they believe police may not enforce or may call child protective services to take their children" at 319; "A final problem with mutual orders of protection, identified by the Task Force, is that they perpetuate the myth that battered women are responsible for the violence directed against them" at 319.

complainants alone bearing the burden of making any changes to their housing or academics in order to feel safe. Ironically, the Department repeatedly emphasizes that supportive measures are "designed to restore or preserve access to the recipient's education program or activity." Considering that complainants will be forced to limit participation in education programs or activities due to this definition, this emphasis is clearly not intended to treat parties equitably and will, in fact, harm the civil rights of survivors.

IV. The proposed regulations would allow schools to claim religious exemptions after violating Title IX, with no prior notification to students or the Department that they would seek to claim such an exemption.

The current rules allow schools to claim religious exemptions by notifying the Department in writing of the specific Title IX provisions that conflict with their religious beliefs. The proposed regulations modify this requirement of advance notice by permitting schools to retroactively opt out of the requirement that they adhere to administrative Title IX requirements or face withdrawal of federal funding. Such schools would not be required to notify students, parents, or the Department in advance that they would be seeking such an exemption; instead, schools would be able to seek an exemption after a federal complaint is filed against them. This would allow schools to conceal their intent to discriminate against populations of students that religious institutions often discriminate against on the basis of sex, including LGBTQIA students, pregnant or parenting students (including those who are unmarried and those who have become pregnant as a result of rape), and students who access or attempt to access birth control or abortion.[89]

In particular, this provision will further decrease the disproportionately low reporting rates for LGBTQIA survivors at religious institutions. It is well understood that LGBTQIA students who are not public about their sexuality are already less likely to report intimate partner violence because the decision to report often forces LBGTQIA students to reveal their sexuality, which could be traumatic and even dangerous, especially in the context of religious institutions that go so far as to punish students for not being heterosexual or seek to forcibly "reform" them. Uncertainty regarding whether or not their institution will take their experiences of sexual violence seriously could depress reporting rates even further and effectively prohibit queer survivors from accessing the resources that they may need in the aftermath of abuse.

Many marginalized populations already experience sexual violence at higher rates than other groups. The denial of Title IX protections for religious reasons will only serve to multiply their trauma. According to the National Sexual Violence Resource Center, lesbian, gay, and bisexual students experience sexual violence at significantly higher rates than their heterosexual peers.[90] For transgender students, the risk is even more pronounced: 47% of respondents to the 2015

[89] Transgender students are especially at risk because this proposed change threatens to compound the harms created by (i) the Department's decision in February 2017 to rescind Title IX guidance on the rights of transgender students;[89] (ii) the Department's decision in February 2018 to stop investigating civil rights complaints from transgender students regarding access to sex-segregated facilities; and (iii) HHS's leaked proposal in October 2018 for the Department and other federal agencies to define "sex" to exclude transgender, non-binary, and intersex students. Erica. L. Green et al., *'Transgender' Could Be Defined Out of Existence Under Trump Administration*, NEW YORK TIMES (Oct. 21, 2018), https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html.

[90] National Sexual Violence Resource Center, *Sexual Violence and Individuals Who Identify as LGBTQ,* https://www.nsvrc.org/sites/default/files/Publications_NSVRC_Guides_Sexual-Harassment-Bullying-Youth.pdf.

National Transgender Discrimination Survey had experienced sexual assault at some point during their lives, and 1 in 10 had been sexually assaulted in the past year.[91] Allowing religious schools to effectively deny LGBTQIA students protection under Title IX propagates the extremely damaging myth that LGBTQIA individuals cannot or do not experience sexual assault, which in turn can cause queer survivors to doubt their own experiences of sexual violence and harassment.[92] The Department's previous statements that Title IX does not protect transgender students from discrimination "on the basis of gender identity"[93] further supports the fact that it refuses to protect all students from gender-based discrimination and violence.

Further, the provision regarding religious exemptions directly conflicts with the current[94] and proposed[95] regulations requiring that each covered educational institution "notify" all applicants, students, employees, and unions "that it *does not* discriminate on the basis of sex." By requiring schools to tell students that they do not discriminate while simultaneously allowing them to opt out of anti-discrimination provisions, the Department is enabling schools to actively mislead students. This bait-and-switch practice sends a clear message to students that the Department has no intention of holding schools accountable for discriminating against students. In turn, this sends a message to students that they should not bother filing Title IX complaints with OCR, as there will be no consequences because the Department will likely *never* find that a school is out of compliance with Title IX.

V. The grievance procedures required by the proposed regulations would impermissibly tilt the process in favor of accused students, retraumatize complainants, and conflict with Title IX's nondiscrimination mandate.

Current Title IX regulations and guidance require schools to "adopt and publish grievance procedures that provide for a prompt and equitable resolution of student and employee complaints" of sexual misconduct.[96] The proposed regulations also purport to require "equitable" processes.[97] However, they are simultaneously riddled with language that would require schools to conduct grievance procedures in a fundamentally *inequitable* way that favors accused students and goes far beyond the requirements of due process.

The Department repeatedly uses the purported need to protect accused students' due process rights in order to justify weakening Title IX protections for complainants. It also proposes a provision that specifies that nothing in the rules would require a school to deprive people of their due process rights.[98] However, this language is wholly unnecessary, as schools have *never* been required to deprive anyone of due process rights. In fact, the current Title IX regulations and the rescinded guidance provided more rigorous protections to accused students

[91] National Center for Transgender Equality, *A Report of the National Transgender Discrimination Survey*, https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf.
[92] RAINN, *LGBTQ Survivors of Sexual Violence,* https://www.rainn.org/articles/lgbtq-survivors-sexual-violence
[93] Moriah Balingit, *The Washington Post*, "Education Department no longer investigating transgender bathroom complaints," https://www.washingtonpost.com/news/education/wp/2018/02/12/education-department-will-no-longer-investigate-transgender-bathroom-complaints/?utm_term=.d93a74c4d526.
[94] 34 C.F.R. § 106.9(a).
[95] Proposed rule §106.8(b)(1).
[96] 34 C.F.R. § 106.8(b).
[97] *See* proposed rule § 106.8(c).
[98] Proposed rule § 106.6(d)(2).

than those required under the Constitution. The U.S. Supreme Court has held that students facing short-term suspensions from public schools[99] require only "some kind of" "oral or written notice" and "some kind of hearing."[100] The Court has explicitly said that a 10-day suspension does not require "the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident."[101] The Court has also approved at least one circuit court decision holding that expulsion from a public school does not require "a full-dress judicial hearing."[102] Furthermore, the Department's 2001 Guidance explicitly instructs schools to protect the "due process rights of the accused."[103] The addition of § 106.6(d)(2) provides no new or necessary protections and inappropriately pits Title IX's civil rights mandate against the Constitution when no such conflict actually exists.

The NPRM improperly mandates turning Title IX proceedings into quasi-trials and only for disciplinary matters involving sexual harassment.

The grievance procedures outlined in proposed §160.45 reflect an attempt by the Department to turn disciplinary and grievance processes *only for complaints involving sexual harassment*,[104] but not for any other potentially criminal and prosecutable offenses, into quasi-court like adversarial proceedings—complete with protections analogous to those provided in criminal court for accused students. This undermines the function of Title IX as a statute designed to address historic sex discrimination in the education context: "Title IX is about institutional accountability, a civil rights mechanism to hold institutions accountable for providing equitable education," not a criminal trial with the rights required of criminal court proceedings.[105]

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

Under proposed rule § 106.45(b)(1)(iv), schools would be required to presume that a report of harassment is false, which is biased in favor of accused students and effectively shifts the burden of proof to the complainant. This proposed presumption also conflicts with proposed § 106.45(b)(1)(ii), which states that "credibility determinations may not be based on a person's status as a complainant" or "respondent." This presumption would also exacerbate rape myths upon which many of the proposed regulations are based—namely, the myth that women and girls often lie about sexual assault.[106] *The presumption of innocence is a criminal law principle,*

[99] Constitutional due process requirements do not apply to private institutions.
[100] *Goss v. Lopez*, 419 U.S. 565, 566, 579 (1975).
[101] *Id.* at 583. *See also Gomes v. Univ. of Maine Sys.*, 365 F. Supp. 2d 6, 23 (D. Me. 2005); *B.S. v. Bd. of Sch. Trs.*, 255 F. Supp. 2d 891, 899 (N.D. Ind. 2003); *Coplin v. Conejo Valley Unified Sch. Dist.*, 903 F. Supp. 1377, 1383 (C.D. Cal. 1995); *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 247 (D. Vt. 1994).
[102] *E.g.*, *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 158 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).
[103] 2001 Guidance, *supra* note 27 at 22.
[104] This is referred to as "rape exceptionalism." Naomi Mann, *Taming Title IX Tensions,* 20 J. CONST. L. 631, 666 (2018); Michelle Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform,* 125 YALE L.J. 1940, 2000 (2016).
[105] *Id.*
[106] Indeed, the data shows that men and boys are far more likely to be victims of sexual assault than to be falsely accused of it. *See, e.g.,* Kingkade, *supra* note 10.

incorrectly imported into this context.[107] Criminal defendants are presumed innocent until proven guilty because their very liberty is at stake in that they face imprisonment if they are found guilty. There is no such principle in civil proceedings or civil rights proceedings, and Title IX is a civil rights law that ensures that sexual harassment is never the end to anyone's education, making it most analogous to civil proceedings. It is entirely inappropriate to import criminal procedures and protections into the campus disciplinary process. Notably, this is not what the U.S. Constitution provides and to do so would fly in the face of such a sacred document.

Title IX has always required schools to treat parties equitably. A presumption that one party is lying (and again, a presumption that is *provided only to those accused of sexual harassment under Title IX* but not any other potentially criminally prosecutable offense) fundamentally alters this equitability framework. Instead, institutions would be forced to take a position before any evidence is examined or weighed. The Department's claim that this provision promotes impartiality is a blatant attempt to detract from how it advances only the interests of those accused of sexual harassment and creates a special standard that applies solely for proceedings involving allegations of sexual harassment.

Moreover, § 106.45(b)(1)(iv) would encourage schools to ignore or punish historically marginalized and underrepresented groups for allegedly lying when they report sexual harassment.[108] Schools also may be more likely to ignore or punish survivors who are women and girls of color,[109] pregnant and parenting students,[110] and LGBTQIA students[111] because of harmful race and sex stereotypes that label them as "promiscuous." If all perpetrators are presumed innocent, all survivors are confronted with the parallel assumption that if sexual contact did occur, they (the survivors) must have played some part in initiating or wanting the contact. The effects of the assumption that survivors are somehow to blame for their experiences are intensified for historically marginalized populations already burdened with harmful stereotypes of promiscuity. Please see below for examples:

Women and girls of color*:* Women and girls of color already face unfair discipline due to race and sex stereotypes.[112] Schools are also more likely to ignore, blame, and punish women and girls of color who report sexual harassment due to harmful race and sex stereotypes that

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

[108] *E.g.*, Tyler Kingkade, *When Colleges Threaten To Punish Students Who Report Sexual Violence*, HUFFINGTON POST (Sept. 9, 2015), https://www.huffingtonpost.com/entry/sexual-assault-victims-punishment_us_55ada33de4b0caf721b3b61c.

[109] *E.g.*, Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARVARD J.L. & GENDER 1, 16, 24-29 (forthcoming), https://ssrn.com/abstract=3168909; National Women's Law Center, *Let Her Learn: A Toolkit To Stop School Pushout for Girls of Color* 1 (2016) [hereinafter *Let Her Learn: Girls of Color*], https://nwlc.org/resources/let-her-learn-a-toolkit-to-stop-school-push-out-for-girls-of-color.

[110] Chambers & Erausquin, *The Promise of Intersectional Stigma to Understand the Complexities of Adolescent Pregnancy and Motherhood*, JOURNAL OF CHILD ADOLESCENT BEHAVIOR (2015), https://www.omicsonline.org/open-access/the-promise-of-intersectional-stigma-to-understand-the-complexities-ofadolescent-pregnancy-and-motherhood-2375-4494-1000249.pdf.

[111] *See, e.g.*, David Pinsof, et al., *The Effect of the Promiscuity Stereotype on Opposition to Gay Rights* (2017), https://doi.org/10.1371/journal.pone.0178534.

[112] *Let Her Learn: Girls of Color*, *supra* note 109 at 1.

label them as "promiscuous."[113] For example, Black women and girls are commonly stereotyped as "Jezebels," Latina women and girls as "hotblooded," Asian American and Pacific Islander women and girls as "submissive, and naturally erotic," Native women and girls as "sexually violable as a tool of war and colonization," and multiracial women and girls as "tragic and vulnerable, historically, products of sexual and racial domination" (internal quotations and brackets omitted).[114] Black women and girls are especially likely to be punished by schools. For example, the Department's 2013–14 Civil Rights Data Collection (CRDC) shows that Black girls are five times more likely than white girls to be suspended in K-12, and that while Black girls represented 20% of all preschool enrolled students, they were 54% of preschool students who were suspended.[115] The Department's 2015–16 CRDC again shows that Black girls are more likely to be suspended and expelled than other girls.[116] Schools are also more likely to punish Black women and girls by labeling them as the aggressor when they defend themselves against their harassers or when they respond to trauma because of stereotypes that they are "angry" and "aggressive."[117] The effects of many of these harmful trends were extremely evident in a recent incident in Binghamton, New York, in which four Black middle school girls were strip-searched after appearing "hyper and giddy" in the cafeteria. One of the students received an in-school suspension after refusing to remove her clothing.[118] This incident is not only a clear example not only of how Black girls are more likely to be punished in school but also of how they are considered less vulnerable to the trauma induced by violations of bodily autonomy, as is the case in strip-searches and incidents of sexual violence.

Pregnant or parenting students: Women and girls who are pregnant or parenting are more likely to experience sexual harassment than their peers, due in part to the stereotype that they are more "promiscuous" because they have engaged in sexual intercourse in the past. For example, 56% of girls ages 14–18 who are pregnant or parenting are kissed or touched without their consent.[119]

LGBTQIA students: LGBTQIA students are more likely to experience sexual harassment than their peers. For example, more than half of LGBTQIA students ages 13–21 are sexually harassed at school,[120] and nearly 1 in 4 transgender and gender-nonconforming students

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[113] *E.g.*, Cantalupo, *supra* note 109 at 16, 24-29.
[114] *Id.* at 24-25.
[115] U.S. Dep't of Education, Office for Civil Rights, *A First Look: Key Data Highlights on Equity and Opportunity Gaps in Our Nation's Public Schools*, at 3 (June 7, 2016; last updated Oct. 28, 2016), https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf.
[116] U.S. Dep't of Education, Office for Civil Rights, *School Climate and Safety: Data Highlights on School Climate and Safety In Our Nation's Public Schools* (Apr. 2018), https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf.
[117] NAACP Legal Defense and Educational Fund, Inc. & National Women's Law Center, *Unlocking Opportunity for African American Girls: A Call to Action for Educational Equity* 5, 18, 20, 25 (2014), https://nwlc.org/wp-content/uploads/2015/08/unlocking_opportunity_for_african_american_girls_report.pdf. *See also* Sonja C. Tonnesen, *Commentary: "Hit It and Quit It": Responses to Black Girls' Victimization in School*, 28 BERKELEY J. GENDER, L. & JUST. 1 (2013), http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1312&context=bglj.
[118] Carla Herreria, "NY Middle School Faces Scrutiny After Parents Claim 4 Black Girls Were Strip-Searched," *Huffington Post,* 26 January 2019. https://www.huffingtonpost.com/entry/students-strip-searched-new-york_us_5c4d1f70e4b0e1872d4476df.
[119] *Let Her Learn: Pregnant or Parenting Students*, *supra* note 11 at 12.
[120] *2017 National School Climate Survey*, *supra* note 12 at 26.

are sexually assaulted during college.[121] However, LGBTQIA students are also less likely to report sexual assault to school authorities or the police because they are rightfully concerned about further discrimination or retaliation due to their LGBTQIA status.[122] They are also less likely to be believed due to stereotypes that they are more "promiscuous" or bring the "attention" upon themselves.

Students with disabilities: As the Department notes in the preamble,[123] students with disabilities have different experiences, challenges, and needs." But the proposed regulations are especially harmful to students with disabilities, who already face additional barriers to equal access to education and are 2.9 times more likely than their peers to be sexually assaulted.[124] They are also less likely to be believed due to stereotypes about people with disabilities and often have greater difficulty describing the harassment they experience.[125]

In our work representing survivors of sexual violence, we already witness significant issues at the campus level wherein investigators, hearing panels, and Title IX officials rely on gender stereotypes and myths about false allegations as well as engage in victim-blaming techniques. This proposed rule would only further codify, and deem as relevant, such egregious falsehoods, misconceptions, and shoddy investigative techniques—in turn conveying that the Department approves and endorses them.

b. The proposed regulations would improperly require survivors and witnesses in colleges and graduate programs to submit to live cross-examination by their named harasser's advisor of choice without any procedural protections, causing further trauma.

Proposed rule § 106.45(b)(3)(vii) requires colleges and graduate schools to conduct a "live hearing," and states that parties and witnesses must submit to cross-examination by the other party's "advisor of choice." This advisor could be an attorney who verbally attacks the survivor's character instead of engaging in genuine questioning to aid the fact-finding process. It could even be an angry parent or a close friend of the accused student who would lack any training or experience in conducting cross-examination, while also holding a position of severe bias. Furthermore, the adversarial and contentious nature of cross-examination would further traumatize college and graduate-school survivors who seek help through Title IX. Being forced to endure detailed, personal, and humiliating questions (often rooted in gender stereotypes and rape myths that tend to blame victims for incidents of sexual violence)[126] would understandably discourage many students—including both parties and witnesses—from participating in a Title IX grievance process, thereby chilling those who have experienced or witnessed harassment

[121] *AAU Campus Climate Survey*, *supra* note 9 at 13-14 (Sept. 2015), https://www.aau.edu/key-issues/aau-climate-survey-sexual-assault-and-sexual-misconduct-2015.
[122] *2015 U.S. Transgender Survey*, *supra* note 23 at 12.
[123] 83 Fed. Reg. 61483.
[124] *Let Her Learn: Girls with Disabilities*, *supra* note 14 at 7.
[125] *E.g.*, Angela Browne, et al., *Examining Criminal Justice Responses to and Help-Seeking Patterns of Sexual Violence Survivors with Disabilities* 11, 14-15 (2016), https://www.nij.gov/topics/crime/rape-sexual-violence/Pages/challenges-facing-sexual-assault-survivors-with-disabilities.aspx.
[126] Zydervelt, S., Zajac, R., Kaladelfos, A. and Westera, N., *Lawyers' Strategies for Cross-Examining Rape Complainants: Have we Moved Beyond the 1950s?*, BRITISH JOURNAL OF CRIMINOLOGY, 57(3), 551-69 (2016).

from coming forward. Confoundingly, the proposed regulations implement this requirement without guaranteeing any of the procedural protections that parties and witnesses have during cross-examination in the criminal court proceedings that apparently inspired this requirement. Schools would not be required to apply rules of evidence or make a prosecuting attorney available to object or a judge available to rule on objections. The live cross-examination requirement would also lead to sharp inequities if one party can afford an attorney and the other cannot.

Educational institutions are not courtrooms with the prescribed protections of court proceedings. The Department is fundamentally changing the nature of educational disciplinary proceedings into quasi-legal trials by requiring adversarial cross-examination. Showing its lack of expertise in trial work, the Department does not even account for any training that would be required for hearing panelists or others, the limits of these quasi-legal trials, or the protections necessary to prevent complete chaos with its proposals.[127]

The Department's failure to recognize the unique nature of disciplinary processes at educational institutions constitutes willful ignorance with dangerous consequences. Requiring students and their advisors to prepare and conduct cross-examination switches the burden of conducting an investigation from the institution to the students. This could require institutions to provide counsel to all parties. It could make institutions liable for ineffective assistance of counsel. It could force institutions to hire retired judges as hearing chairs. In sum, this would require resources that schools simply do not have. The utter lack of information contained within the NPRM shows the Department's lack of understanding about the ramifications of its proposals; alternatively, it suggests that the Department is *willfully ignorant* of these predictable collateral problems. Regardless of the reason for the deficiencies, the Department's proposal is simply not workable as it stands; in fact, it may not be workable even with additional details, as many institutions would not have the capacity and resources to accommodate this requirement that would involve significant allocations of time, money, resources, and policy revisions.

The proposed rule misstates the law

Neither the Constitution nor any other federal law requires live cross-examination in school conduct proceedings. The U.S. Supreme Court does not require any form of cross-examination (live or indirect) in public school disciplinary proceedings under the Due Process Clause.[128] Instead, the Court has explicitly stated that a 10-day suspension does not require "the opportunity . . . to confront and cross-examine witnesses"[129] and has approved at least one circuit court decision holding that expulsion does not require "a full-dress judicial hearing, with the right to cross-examine witnesses."[130] The vast majority of courts that have reached this issue agree that live cross-examination is not required in public school disciplinary proceedings as

[127] Mann, *supra* note 86, at 657. "Adding [mandatory] counsel would complicate the proceedings by importing outside legal rules based on adversarial systems. Schools and educational institutions would need to learn to navigate and utilize these foreign systems. Critically for students, the use of counsel would shift the burden of investigating and proving allegations from the educational institution to the students. This is a high burden that would disproportionally fall on them."
[128] Of course, private schools are not impacted by Constitutional due process requirements.
[129] *Goss*, 419 U.S. at 583. *See also Coplin*, 903 F. Supp. at 1383; *Fellheimer*, 869 F. Supp. at 247.
[130] *E.g.*, *Dixon*, 294 F.2d at 158, *cert. denied*, 368 U.S. 930 (1961). *See also Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993) (holding no due process violation in expulsion of college student without providing him to right to cross-examination).

SurvJustice Inc.
1015 15th St. NW, Suite 632
Washington, D.C. 20005
P: 202.869.0699 | F: 202.860.0699

long as there is a meaningful opportunity to have questions submitted to and posed by a hearing examiner.[131] The Department itself admits that written questions submitted by students or oral questions asked by a neutral school official are fair and effective ways to discern the truth in K-12 schools,[132] and it therefore proposes retaining that method for K-12 proceedings. The Department has failed to explain why the processes that it considers effective for adjudicating sexual harassment complaints in proceedings involving 17- or 18-year-old students in high school would somehow be ineffective for 17- or 18-year-old students in college.

In a radical shift from prior practice and guidance- and from the Department's stated mission- the Department's misguided and unrelenting advocacy for adversarial cross-examination shows the Department's blatant disregard for victims and support for those accused of sexual harassment or assault. The Department's reasoning for this shift is one-sided, focusing on carefully selected federal cases that have described the need for cross-examination in educational settings while ignoring the split in how courts understand institutional due process obligations to include or exclude adversarial cross-examination.[133] A close examination of federal case law regarding the due process protections required in student disciplinary cases reveals a substantially different landscape from what the Department described in the proposed rules[134] Many federal appellate courts have grappled with this concept and questioned whether there is a procedural due process right to any cross-examination at all or contemplated that any such right would be narrow.[135] Indeed, many courts have recognized that "[f]undamental fairness

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[131] *See A Sharp Backward Turn*, *supra* note 51 (*Baum* "is anomalous.").

[132] 83 Fed. Reg. 61476.

[133] Sara O'Toole, "Campus Sexual Assault Adjudication, Student Due Process, and a Bar on Direct Cross Examination," in *University of Pittsburgh Law Review* 79, 511-542 (Spring 2018). (""An examination of the due process case law in educational settings and an application of the analysis from *Mathews v. Eldridge* supports the recommendation against personal cross-examination. A balancing of the *Mathews* factors demonstrates that the limited additional value of personal cross-examination and a university's interest in maintaining an affordable and effective adjudication system weigh against the interest of the student, who is offered a variety of procedural protections aside from personal cross-examination" "*Morrissey v. Brewer:* "It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands")

[134] *Id.* ("An analysis of the requirement of direct cross examination under the *Mathews* balancing factors reveals that it is not mandated by due process in university disciplinary settings…" "The potential harm to a student dismissed from school should not be minimized, but his or her interest is not the same as a criminal defendant or even a civil defendant…"
"Next, a court would consider the risk of erroneous deprivation of the student's interest and the probable value of allowing direct cross-examination during the hearing… – *Goss* held that "requiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action…" "In light of the disputed nature of the facts and the importance of witness credibility in [the] case, due process required that the panel permit the plaintiff to hear all evidence against him and to direct questions to his accuser through the panel.' Therefore, the court found that directing questions through a panel would have provided sufficient due process." Citing: *Donohue v. Baker*, 976 F. Supp. 136, 147 (N.D.N.Y. 1997).
"Distinctive characteristics of sexual assault adjudication may decrease the effectiveness of personal cross-examination. Complaints of sexual assault involve instances of intimate attack that may traumatize survivors physically and emotionally. When survivors of sexual assault are personally cross-examined, it often adds to their trauma and may make it more difficult for them to share their stories…" "Considering the alternative of directing questions through a panel, the added value of allowing personal cross-examination is limited in the university setting. Moreover, the risk of erroneous deprivation is low because universities have established protective processes that provide notice and a hearing to handle disciplinary matters…"

[135] Mann, *supra* note 86, at 658; *See also* Newsome v. Batavia Local School Dist., 842 F.2d 920, 925–26 (6th Cir. 1988) (deciding that there is no right to cross-examine adverse witnesses in expulsion proceedings due to the burden it would place on school employees); Nash v. Auburn Univ., 812 F.2d 655, 664 (11th Cir. 1987) ("Where basic fairness is preserved, we have not required the cross-examination of witnesses . . . ."); Brewer v. Austin Independent School Dist., 779 F.2d 26, 263 (5th Cir. 1985) (rejecting argument that accused had a procedural due process right to cross-examination in a suspension case and stating, "[W]e reject any suggestion that the technicalities of criminal procedure ought to be transported into school suspension cases."); Boykins v. Fairfield Bd. Of Education, 492 F.2d 697, 701 (5th Cir. 1974) (holding that the right to cross-examination is not required in expulsion proceedings); Flaim v. Med. College of Ohio, 418 F.3d 629, 636 (6th Cir. 2005) ("Some circumstances may require the opportunity to cross-examine witnesses, though this right might exist only in the most serious of cases.");

without adversarial cross-examination is satisfied where the accused is provided with the opportunity to know the substance of the evidence against him and has the opportunity to provide evidence and testimony on his behalf."[136] A review of the body of law regarding this issue—as opposed to the one federal appellate decision that the Department cites—makes it clear that there are limits that may be appropriately placed on cross-examination once fundamental fairness has been provided.[137]

Not surprisingly, experts on Title IX and student conduct procedures similarly oppose these proposed regulations. The Association of Title IX Administrators ("ATIXA") announced in October 2018 that it opposes live, adversarial cross-examination, stating that instead "investigators should solicit questions from the parties, and pose those questions the investigators deem appropriate in the investigation interviews."[138] The Association for Student Conduct Administration ("ASCA") agrees that schools should "limit[] advisors' participation in student conduct proceedings."[139] The American Bar Association ("ABA") recommends that schools provide "the opportunity for both parties to ask questions through the hearing chair."[140]

The proposed rule mischaracterizes cross-examination

Cross-examination is an invaluable tool for attorneys—*when done well.*[141] But very few attorneys, let alone parents or friends, would be able to conduct a successful cross-examination. Still, some argue that adversarial questioning is necessary for campus sexual misconduct cases even though it is not used for other student misconduct matters such as drug use, vandalism, and nonsexual assault or harassment. The Department states in its proposed rules that cross-examination "takes aim at credibility like no other procedural device" because it enables the accused to "probe the witness's story to test her memory, intelligence, or possible ulterior

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Gorman v. University of Rhode Island, 837 F.2d 7, 16 (1st Cir. 1988) ("[T]he right to unlimited cross-examination has not been deemed an essential requirement of due process in school disciplinary cases."); Winnick v. Manning, 460 F.2d 545, 549 (2d Cir. 1972) ("The right to cross-examine witnesses generally has not been considered an essential requirement of due process in school disciplinary proceedings."); Dixon v. Alabama State Board of Education, 294 F.2d 150, 159 (5th Cir. 1961).

[136] Mann, *supra* note 86, at 659. *See also* Nash v. Auburn Univ., 812 F.2d 655, 664 (11th Cir. 1987) ("Where basic fairness is preserved, we have not required the cross-examination of witnesses and a full adversary proceeding."); Goss v. Lopez, 419 U.S. 565, 581 (1975); *Flaim*, 418 F.3d at 636, 641 (deciding whether the "accused individual has the right to respond and defend, which will generally include the opportunity to make a statement and present evidence" when the accused had the "opportunity to present his version of events . . .
[and] point out inconsistencies or contradictions in the officer's testimony"); *Winnick*, 460 F.2d at 549 ("The right to cross-examine witnesses generally has not been considered an essential requirement of due process in school disciplinary proceedings."); *Dixon*, 294 F.2d at 158–59.

[137] *See* Mann, *supra* note 86, at 660-61 ("evidence does not need to be questioned in the traditional adversarial context, the content of cross-examination may be limited, the individuals that may be cross-examined may be limited, cross-examination may be denied where not material to the result, cross-examination does not have to be face-to-face, and cross-examination may be performed through a third party. Permissible cross-examination may be oral or written, with some courts holding that there is no right to change the submitted written questions in response to the victim's testimony at a hearing. The cross-examination may be in front of a hearing board or an investigator) (internal citations omitted).

[138] Association of Title IX Administrators, *ATIXA Position Statement on Cross-Examining: The Urge to Transform College Conduct Proceedings into Courtrooms* 1 (Oct. 5, 2018), https://atixa.org/wordpress/wp-content/uploads/2018/10/ATIXA-Position-Statement_Cross-Examination-final.pdf.

[139] *ASCA 2014 White Paper*, *supra* note 80 at 2 (2014).

[140] American Bar Association, *ABA Criminal Justice Section Task Force On College Due Process Rights and Victim Protections: Recommendations for Colleges and Universities in Resolving Allegations of Campus Sexual Misconduct* 8-10 (June 2017).

[141] Michael R. Black, Cross Examination: The Greatest Legal Engine for the Discovery of Truth: A Comparative Analysis of the American and English Rules of Cross-Examination, 15 S.U. L. Rev. 397 (1988)

motives,"[142] but the Department fails to make the case for why there must be adversarial cross-examination. Questions need not be adversarial to assess credibility or any potential bias or to test the facts the witness is alleging. Nearly all courts to consider the issue have found that fairness can be fully achieved through questioning by a neutral college administrator. And although the Department of Education says that its proposal will avoid "any unnecessary trauma" that might result from the parties questioning one another directly, there is nothing concrete in the proposed rules or the Department's history to show that it consulted survivors about this.

This brings us to an important question the Department and those who advocate for adversarial cross-examination must ask—what is the point of the cross-examination? Is it to assess credibility, test bias, or determine the facts of the case—or is to trap, harass, try to confuse, and get out only the facts that are best for your client's case?[143] If it is the former, then there is no reason the questions cannot be asked by a hearing examiner; if the latter, then truth is not really being sought, which decimates the Department's argument of adversarial cross-examination as the greatest engine for the truth.[144] As a litigator, I understand the importance of cross-examination before a fact-finder and how to best "sell" your case; however, in an educational setting where the truth is being sought, an advisor can challenge a complainant's or witnesses' credibility by submitting questions for an impartial hearing examiner to ask in an educational disciplinary hearing. As long as the parties have been able to present their facts and evidence, due process is satisfied. Those arguing that this is not the same as cross-examination have yet to demonstrate how, exactly, this procedure is insufficient.

Many attorneys have never participated in a hearing or trial; this means that many of those most adamantly pressing for cross-examination in campus proceedings lack significant firsthand knowledge about or experience with this topic. As litigators know, "cross-examination, when conducted in the proper manner, can be an invaluable tool to the trial lawyer." However, when conducted in court, there are safeguards fundamental in the process of cross-examination to ensure fairness that are simply not present in an educational disciplinary proceeding. At a minimum, these safeguards require that a neutral judge with experience serving as an arbiter in cross-examination processes (and therefore able to identify situations in which cross-examination is being abused) must be present to ensure that counsel is not misleading the fact-finder. There is nothing in the proposed provisions to safeguard against the abuse of cross-examination by either advisors of the complainant or the respondent, which fundamental fairness requires.

Shockingly, the proposed regulations offer *no guidance, framework, or even advice* for the realities parties and institutions will face if these misguided proposed rules are codified. Numerous questions are not answered by the Department, most notably:

- Who will object during the live, adversarial cross-examination (surely witnesses with no legal training cannot be expected to object while testifying)?
- Who will make any rulings on objections (and what is the legal training of that person making the rulings)?

[142] The Department cites *Doe v. Baum,* Case No. 17-2213, 2018 U.S. App. LEXIS 25404 (6th Cir. Sept. 7, 2018)
[143] *Id* at 403 ("Since a lawyer may make the truth or fact appear as if it were fiction and the untruth appear as if it were fact, the use of cross examination is quite vulnerable to abuse.)
[144] *See E.g.*, The Truth Engine: Cross-Examination Outside the Box, Francis P. Karam, (2017).

- Will schools be required to provide legal counsel to both parties so that the "advisors" conducting the cross-examination have, at a minimum, some legal training?
- Will schools then be open to ineffective assistance of counsel claims?
- When an attorney pushes the envelope and asks a question that he or she knows is not permissible, but does so to shake up the witness or plant an idea in the heads of the fact-finders, will the attorney or school be liable for that overreach?

We could go on. The number of questions and potential scenarios that remain unanswered by the Department are endless. Without these, and other, safeguards and processes in place, the Department is potentially subjecting itself and institutions to significant liability and monetary damages. More importantly, these quasi-legal proceedings could severely harm the very students (both accused and complainants) the Department is charged with protecting.

The NPRM inappropriately places undue burdens and pressures upon survivors of sexual harassment

c. The proposed regulations would improperly allow schools to pressure survivors into participating in traumatizing mediation procedures, even with regard to complaints of sexual violence.

Proposed rule § 106.45(b)(6) would allow schools to use "any informal resolution process, such as mediation" to resolve a complaint of sexual harassment, as long as the school obtains the students' "voluntary, written consent." Even worse, the Department states that, once consent is obtained and the informal process begins, schools may then "preclude[] the parties from resuming a formal complaint," thereby barring survivors from pursuing the formal complaint process. In doing so, the Department fails to recognize the significant potential for re-traumatization when schools rob survivors of the choice to seek justice on their own terms, thereby mimicking the control that was taken from them during an incident of sexual violence.

Even if schools were to permit survivors to re-enter the formal process, mediation is a strategy often used in schools to resolve peer conflicts and involves both sides' taking responsibility for their actions while reaching a compromise. In that light, mediation is *never* appropriate for resolving sexual violence or harassment complaints, even on a voluntary basis—the Department itself recognized this in its 2001 Guidance. Survivors should not be placed into a room with someone who abused them to "work things out" (thereby insinuating that they share responsibility for the assault), nor should they be exposed to the risk of being retraumatized, coerced, or bullied during the mediation process. Experts also agree that mediation is inappropriate for resolving sexual violence. For example, NASPA - Student Affairs Administrators in Higher Education stated in 2018 that it was concerned about students' being "pressured into informal resolution against their will."[145] SurvJustice has the same concerns that mediation will not be *truly* voluntary. It is entirely possible that schools will seek to pressure survivors into participating in mediation given that this is an effective way to resolve matters

[145] NASPA - Student Affairs Administrators in Higher Education, *NASPA Priorities for Title IX: Sexual Violence Prevention & Response* 1-2 [hereinafter *NASPA Title IX Priorities*], https://www.naspa.org/images/uploads/main/NASPA_Priorities_re_Title_IX_Sexual_Assault_FINAL.pdf.

quickly and quietly, in turn protecting institutions' reputations. Furthermore, minors would be particularly vulnerable to such pressure; it is hard to imagine that a child would feel able to advocate for a formal process if an adult employee is suggesting that they go through the mediation process. Then, once a student has "agreed" to meditation, schools could refuse to end the informal process and start a formal investigation—even if the student realizes that mediation is too traumatizing to continue or that it would not result in an outcome that ensures her or his safety. Survivors are very likely to be dissatisfied with the outcome, given that the nature of mediation means that it generally does not result in the imposition of sanctions like a favorable outcome in a formal process would.

It is also concerning that the Department has not stated any training requirements for mediators. It has not documented any requirement that students receive notice about their rights so that they are aware that they do not have to participate in mediation. Overall, this proposal has not been adequately considered or developed, and it will do significant and irreversible damage to those who come forward about sexual harassment.

d. The proposed regulations would force many schools to use a more demanding standard of proof to investigate sexual harassment than used to investigate other types of student misconduct or other civil wrongs.

The Department's longstanding practice requires that schools use a "preponderance of the evidence" standard—meaning "more likely than not"—in Title IX cases to decide whether sexual harassment occurred.[146] Proposed rule § 106.45(b)(4)(i) departs from that practice and instead establishes a system in which schools may elect to use the more burdensome "clear and convincing evidence" standard for sexual harassment cases, while allowing all other student misconduct cases to be governed by the preponderance of the evidence standard, even if the proceedings carry the same potential sanctions.[147] The Department's decision to allow schools to impose a more burdensome standard on those who report sexual violence conveys its reliance on the stereotype and assumption that survivors (who are predominately girls and women) are more likely to lie about sexual violence than students who report physical assault, plagiarism, or other school policy violations. However, this sexist belief is unsupported; in fact, boys and men are far more likely to be *victims* of sexual assault than to be *falsely accused* of sexual assault.[148]

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

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

[148] *E.g.*, Kingkade, *supra* note 10.

The preponderance standard is used by courts in all civil rights cases.[149] It is the only standard of proof that treats both sides fairly, and it is consistent with Title IX's requirement that grievance procedures be "equitable." By allowing schools to use a "clear and convincing evidence" standard, the proposed rule would tilt investigations significantly in favor of respondents and against complainants. Increasing the burden that complainants face to prove that sexual harassment occurred is particularly problematic in light of the fact that it is already difficult to prove that such an incident occurred as a result of the inherent lack of physical evidence and the common yet mistaken belief that testimony does not constitute sufficient evidence to make a finding of responsibility. The Department argues that Title IX investigations may need a more demanding standard because of the "heightened stigma" and the "significant, permanent, and far-reaching" consequences for respondents found responsible for sexual harassment.[150] Yet this ignores the reality that Title IX complainants themselves face heightened stigma for reporting sexual harassment, as compared to other types of misconduct, and that complainants suffer "significant, permanent, and far-reaching" consequences to their education if their schools fail to meaningfully address the harassment. In fact, 34% of college survivors drop out of college after a sexual assault.[151] Both parties therefore have an equal interest in continuing to pursue their education. It is inequitable to cater only to the purportedly more serious impact on accused students in designing a grievance process to address harassment.

Many Title IX experts support the preponderance standard, which was used to address harassment complaints at more than 80% of colleges even prior to the 2011 Dear Colleague Letter's clarification about the correct standard.[152] The NCHERM Group, whose white paper *Due Process and the Sex Police* was cited by the Department,[153] has promulgated materials that require schools to use the preponderance standard because "[they] believe higher education can acquit fairness without higher standards of proof."[154] A white paper by four Harvard professors that is cited by the Department[155] also recognizes that schools should use the preponderance standard if "other requirements for equal fairness are met."[156] ATIXA's position is that "any standard higher than preponderance advantages those accused of sexual violence (mostly men) over those alleging sexual violence (mostly women). It makes it harder for women to prove they have been harmed by men. The whole point of Title IX is to create a level playing field for men and women in education, and the preponderance standard does exactly that. *No other evidentiary standard is equitable*."[157] NASPA - Student Affairs Administrators in Higher Education

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[149] Katharine Baker et al., *Title IX & the Preponderance of the Evidence: A White Paper* (July 18, 2017), http://www.feministlawprofessors.com/wp-content/uploads/2017/07/Title-IX-Preponderance-White-Paper-signed-7.18.17-2.pdf (signed by 90 law professors).
[150] 83 Fed. Reg. 61477.
[151] Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18(2) J.C. STUDENT RETENTION: RES., THEORY & PRAC. 234, 244 (2015), https://doi.org/10.1177/1521025115584750.
[152] Heather M. Karjane, et al., *Campus Sexual Assault: How America's Institutions of Higher Education Respond* 120 (Oct. 2002), https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf.
[153] 83 Fed. Reg. 61464 n.2.
[154] The NCHERM Group, *Due Process and the Sex Police* 2, 17-18 (Apr. 2017), https://www.ncherm.org/wp-content/uploads/2017/04/TNG-Whitepaper-Final-Electronic-Version.pdf.
[155] 83 Fed. Reg. 61464 n.2.
[156] Elizabeth Bartholet, Nancy Gertner, Janet Halley & Jeannie Suk Gersen, *Fairness For All Students Under Title IX* 5 (Aug. 21, 2017), https://dash.harvard.edu/bitstream/handle/1/33789434/Fairness%20for%20All%20Students.pdf.
[157] Association of Title IX Administrators, *ATIXA Position Statement: Why Colleges Are in the Business of Addressing Sexual Violence* 4 (Feb. 17, 2017), https://atixa.org/wordpress/wp-content/uploads/2017/02/2017February-Final-ATIXA-Position-Statement-on-Colleges-Addressing-Sexual-Violence.pdf.

recommends the preponderance standard: "Allowing campuses to single out sexual assault incidents as requiring a higher burden of proof than other campus adjudication processes make it—by definition—harder for one party in a complaint than the other to reach the standard of proof. Rather than leveling the field for survivors and respondents, setting a standard higher than preponderance of the evidence tilts proceedings to unfairly benefit respondents."[158] ASCA agrees that schools should "[u]se the preponderance of evidence (more likely than not) standard to resolve all allegations of sexual misconduct"[159] because "it is the only standard that reflects the integrity of equitable student conduct processes which treat all students with respect and fundamental fairness."[160]

e. The proposed regulations fail to impose clear timeframes for investigations and allow impermissible delays.

The Department maintains the requirement that schools provide "reasonably prompt timeframes" for resolving complaints but also allows them to create a "temporary delay" or "limited extension" of timeframes for "good cause," which it says would include "concurrent law enforcement activity."[161] In contrast, previous Title IX guidance recommended that schools finish investigations within 60 days and prohibited schools from delaying a Title IX investigation simply because there was an ongoing criminal investigation.

Under the Department's proposal, if there is an ongoing criminal investigation, a school would be permitted to delay even beginning any Title IX investigation for an unspecified length of time. While criminal investigations seek to punish abusers for their conduct, Title IX investigations should seek to ensure that complainants are able to access educational opportunities that become inaccessible due to harassment. Students should not be forced to wait months or even years until after a criminal investigation is completed in order to seek resolution from their schools. ATIXA agrees that a school that "delay[s] or suspend[s] its investigation" at the request of a prosecutor creates a safety risk to the survivor and to other students as well, whom the perpetrator could go on to harm.[162]

One of the most significant ramifications of the September 2017 Interim Guidance issued by this Department of Education is the length of time investigations are taking. Since the interim guidance was released, SurvJustice has not had a single case that was completed in 60 days as the 2017 Q&A guidance recommended. Moreover, the majority of our cases have taken *a full year* to complete. During that timeframe, survivors do not receive any information from the school about the status of their complaint unless they ask, and even then they frequently do not get a response. In addition, we have observed that schools send repeated notices that the process is being delayed without providing any reason for an estimated new date. These open-ended,

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[158] *NASPA Title IX Priorities*, *supra* note 145 at 1-2.
[159] *ASCA 2014 White Paper, supra* note 80.
[160] Chris Loschiavo & Jennifer L. Waller, *The Preponderance of Evidence Standard: Use In Higher Education Campus Conduct Processes*, ASSOCIATION FOR STUDENT CONDUCT ADMIN, https://www.theasca.org/files/The%20Preponderance%20of%20Evidence%20Standard.pdf.
[161] Proposed rule § 106.45(b)(1)(v).
[162] Association of Title IX Administrators, *ATIXA Position Statement on the Proposed Legislation Entitled: Promoting Real Opportunity, Success, And Prosperity Through Education Reform (PROSPER) Act (Higher Education Act Reauthorization)* (Jan. 18, 2018), https://atixa.org/wordpress/wp-content/uploads/2015/03/ATIXA-POSITION-STATEMENT-ON-PROSPER-ACT-Final.pdf.

lengthy investigations convey to other students that there is no point in coming forward as they will simply be strung along while they suffer. Further, the prolonged investigations take a very real toll on survivors and interfere with their access to education. They suffer from severe stress, changes in sleep and appetite, inability to focus, isolation, and many other problems as they are forced to relive their worst nightmare for a year because their school will not conclude the investigation. They are also consistently retraumatized by the repeated interviews, phone calls, and emails from the school. Even for those who ultimately obtain an outcome that restores some measure of safety (such as if the perpetrator is suspended or expelled for sexual violence), the process has tainted their educational experience to the point that they decide to drop out or transfer.

Examples of how the proposed regulations' failure to impose clear timeframes could harm students include, but are not limited to:

1. A February 2018 report by the Office of Civil Rights found that UC–Berkeley received 401 oral and written complaints of sexual harassment or violence, the majority of which were settled through informal processes. The report found that when cases actually were investigated, these investigations could take up to three years, an unreasonable period of time given that most undergraduate programs last four years. The report also found that most cases were closed after complainants graduated or left the program. Under the proposed regulations, these delays would not constitute a violation of Title IX, despite Berkeley's clear failure to provide students with a "prompt and equitable" response to their case.[163]

2. Similarly, a male student at Southern Methodist University dropped out of school after the University "failed to provide a 'prompt and equitable response'" to the assault and "failed to protect the victim from further harassment and embarrassment following the assault." The Department of Education found that the school violated Title IX in prolonging its response, but under the proposed regulations, the school would not have been found responsible. In effect, these proposed rules encourage universities to prolong cases until the survivor drops out or graduates, as was the case in both of these examples. These proposed provisions could discourage survivors from pursuing their cases and effectively removes responsibility from schools to discipline perpetrators while they are still students.[164]

f. The proposed regulations would require schools to grant unequal appeal rights.

Although Secretary DeVos claims that the proposed regulations make "[a]ppeal rights equally available to both parties,"[165] they do not in fact provide equal *grounds for appeal* to both parties, because complainants are barred from appealing a school's resolution of a harassment complaint based on the sanctions' inadequacy. Allowing only the respondent the right to appeal a

[163] Anjali Shrivastava, "UC Berkeley mishandled 8 Title IX cases, federal investigators say," *The Daily Californian,* 1 March 2018. http://www.dailycal.org/2018/03/01/uc-berkeley-mishandled-eight-title-ix-cases-federal-investigators-say/
[164] Jake New, "When the Victim is Male," *Inside Higher Ed,* 12 December 2014, https://www.insidehighered.com/news/2014/12/12/smu-found-violation-title-ix-after-not-investigating-male-students-claim-sexual
[165] DeVos, *supra* note 107.

sanction decision is both unfair and a violation of the requirement that procedures be equitable. Survivors are just as affected by sanction decisions as accused students. For example, if their abusers are still allowed to live in the same dorm as them, or if they are still in the same classroom, survivors may experience further trauma or even have to drop out of school to ensure their safety.

Experts support equal appeal rights. The ABA recommends that the grounds for appeal include "a sanction disproportionate to the findings in the case (that is, too lenient or too severe)."[166] ATIXA announced in October 2018 that it supports equal appeal rights for both parties, "[d]espite indications that OCR will propose regulations that permit inequitable appeals."[167] Even the white paper by four Harvard professors that is cited by the Department (p.9–10 n.2) recognizes that schools should allow "[e]ach party (respondent and complainant) [to] request an impartial appeal."[168]

VI. The proposed regulations are inconsistent with the Clery Act.

A number of the Department's proposed regulations are inconsistent with the Clery Act, which the Department enforces and which also addresses the obligation of colleges and universities to respond to sexual assault, dating violence, domestic violence, and stalking, as noted in the earlier section of this comment on stalking. Further examples include, the proposed regulations prohibiting schools from investigating off-campus and online sexual harassment conflict with the Clery Act's reporting requirements for policy violations that would also constitute sexual harassment under Title IX (such as sexual assault). The Clery Act requires colleges and universities to notify in writing all students who report sexual assault, stalking, dating violence, and domestic violence of their rights regardless of "whether the offense occurred on or off campus."[169] The Clery Act also requires colleges and universities to report all incidents of sexual assault, stalking, dating violence, and domestic violence that occur on "Clery geography," which is defined to include all property controlled by a school-recognized student organization (such as an off-campus fraternity), nearby "public property," and "areas within the patrol jurisdiction of the campus police or the campus security department."[170] The proposed regulations would therefore undermine and conflict with the Clery Act's mandate while creating an upside-down system in which schools would have to publicly disclose instances of sexual assault that occur off-campus but would be required by the Department to dismiss any complaints filed about these same incidents and not investigate them.

The Clery Act also requires that investigations of sexual assault, dating violence, domestic violence, and stalking be "prompt, fair, and impartial."[171] However, as previously noted, the proposed regulations set forth an unclear timeframe for investigations that conflicts with Clery's mandate that investigations be prompt. In addition, the many proposed regulations discussed

[166] American Bar Association, *supra* note140, at 5.
[167] Association of Title IX Administrators, *ATIXA Position Statement on Equitable Appeals Best Practices* 1 (Oct. 5, 2018), https://atixa.org/wordpress/wp-content/uploads/2018/10/2018-ATIXA-Position-Statement-Appeals.pdf.
[168] Bartholet, et al., *supra* note 156.
[169] 20 U.S.C. § 1092(f)(8)(C).
[170] 20 U.S.C. § 1092(f)(6)(iii); 20 U.S.C § 1092(f)(6)(iv)); 34 C.F.R. § 668.46(a)).
[171] 20 U.S.C. § 1092(f)(8)(b)(iv)(I)(aa).

above that tilt investigation procedures in favor of the respondent are anything but fair and impartial.

Although the Department acknowledges that Title IX and the Clery Act's "jurisdictional schemes . . . may overlap in certain situations,"[172] it fails to explain how institutions of higher education should resolve the conflicts between two different laws when addressing sexual assault, dating violence, domestic violence, and stalking. These conflicting rules would create widespread confusion for schools and students.

VII. The proposed regulations requiring schools to dismiss sexual harassment complaints go beyond the Department's authority to effectuate the nondiscrimination provisions of Title IX and are unworkable in practice.

Section 106.45(b)(3) of the proposed regulations actively *requires* schools to dismiss complaints of sexual harassment if such complaints do not meet strict standards. If a school determines that a complaint of sexual harassment does not meet the improperly narrow definition (meaning that the harassment is severe, pervasive, and objectively offensive), the school *must* dismiss it under the proposed rule. Further, even if the harassment is severe, pervasive, and objectively offensive, a school *must* dismiss the complaint if it occurs outside of an educational program or activity, including most off-campus and online harassment. However, the Department lacks the authority to require schools to dismiss complaints of discrimination. Under Title IX, the Department is authorized to issue rules only "to effectuate the [anti-discrimination] provision of [Title IX]." Title IX does not delegate to the Department the authority to dictate when schools *cannot* address sex discrimination.[173] By requiring schools to dismiss certain types of complaints of sexual harassment, without regard to whether those forms of harassment deny students educational opportunities on the basis of sex, § 106.45(b)(3) fails to effectuate Title IX's anti-discrimination mandate. It would also force many schools that already investigate off-campus conduct, pursuant to their existing student conduct policies, to abandon these anti-discrimination efforts and launch a thorough revision of their policies. While the Department is well within its authority to require schools to adopt civil rights protections to effectuate Title IX's mandate against sex discrimination, it lacks the authority to force schools to violate students' and employees' civil rights under Title IX by forcing schools to ignore sexual harassment. Furthermore, in creating this mandate, the Department forces schools to choose between adhering to administrative regulations or facing repeated civil liability in lawsuits brought by students, as courts have often held that schools act with deliberate indifference when they fail to respond to a complaint of sexual harassment *even if it occurred off campus*.[174] Schools should not have to face the catch-22 of facing federal investigations and losing their

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[172] 83 Fed. Reg. 61468.
[173] *See* Michael C. Dorf, *The Department of Education's Title IX Power Grab*, VERDICT (Nov. 28, 2018), https://verdict.justia.com/2018/11/28/the-department-of-educations-title-ix-power-grab.
[174] *See generally* Dana Bolger, *Betsy DeVos's New Harassment Rules Protect Schools, Not Students*, New York Times (Nov. 27, 2018) https://www.nytimes.com/2018/11/27/opinion/betsy-devos-title-ix-schools-students.html last viewed January 30, 2019. DR. EDWARD F. DRAGAN, *Title IX: What Constitutes Actual Notice of Sexual Harassment or Sexual Violence in a School Setting? http://education-expert.com/2017/06/title-ix-constitutes-actual-notice-sexual-harassment-sexual-violence-school-setting/*

federal funding or repeatedly being found civilly responsible and having to pay significant monetary damages.

The Department further notes that, if conduct does not meet the proposed regulation's definition of harassment or if it occurs off-campus, schools may still process the complaint under a different conduct code. However, they may not process it under a conduct code relating to Title IX. This "solution" to the required dismissals for Title IX investigations is both confusing and impractical. The proposed regulations offer no guidance or safe harbor for schools to offer parallel sexual harassment proceedings that do not comply with the detailed and burdensome procedural requirements set out in the proposed rule. Schools that did so would no doubt be forced to contend with accused students' complaints that the school had failed to comply with the requirements set out in the NPRM and thus violated accused students' rights as described in the NPRM.

CONCLUSION

The Department's proposed regulations import inappropriate criminal and civil legal standards into administrative agency enforcement, rely on sexist stereotypes about survivors of sexual harassment, and impose procedural requirements that force schools to provide Title IX procedures that favor accused students to the detriment of survivors and in violation of the equitable process requirement of Title IX. Instead of effectuating Title IX's prohibition on sex discrimination in schools, these proposed regulations serve only to protect schools from liability if they fail to respond to complaints of sexual harassment. SurvJustice calls on the U.S. Department of Education to immediately withdraw this NPRM and instead focus its energies on vigorously enforcing the Title IX requirements that the Department has relied on for decades in order to ensure that schools promptly and effectively respond to sexual harassment, remedy its effects, and prevent its recurrence.

Thank you for the opportunity to submit comments on the NPRM. Please do not hesitate to contact Katherine W. McGerald at Katherine.McGerald@SurvJustice.org to provide further information or facilitate discussion.

Katherine W. McGerald, Esq.
Executive Director
SurvJustice, Inc.
1015 15th Street NW
Suite 632
Washington, D.C. 20005
202-869-0699