



January 29, 2019

Submitted via www.regulations.gov

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

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

Dear Mr. Marcus,

HealthyWomen is the nation's leading independent, nonprofit health information source for women. For nearly 30 years, millions of women have turned to HealthyWomen for answers to their most personal health care questions. HealthyWomen provides objective, research-based health information, and advocates on behalf of women to ensure that women's health is a primary focus by policy makers and others. Our mission is to educate and inspire women to make informed health choices for themselves and for their families.

HealthyWomen is submitting our comments and insights in response to the Department of Education's Notice of Proposed Rulemaking (NPRM) published in the Federal Register on November 29, 2018, that would change the Federal rules implementing Title IX of the Education Amendment Act of 1972 (Title IX).

We are gravely concerned about the profound health and economic consequences the proposed changes would have for girls, women, their families, their communities and the economy. The NPRM's proposed changes are counterproductive to women's health. We urge you to withdraw the proposed changes.

Sexual harassment and assault are health issues. As such, they need to be approached with cross-functional thinking, analyses and action. Consider the opioid epidemic as an analogy: To confront it requires policies and services addressing physical health, mental health, public health and the judicial system. And, like the opioid epidemic, sexual harassment and related issues affect local, regional and national economic development and job growth.

We strongly believe that potential efforts to change any aspects of how sexual harassment, sexual assaults and gender-based attacks – from bullying to academic discrimination – are reported, investigated or addressed within the context of educational communities, need to be approached with an understanding that those situations have long-lasting, dire consequences for an individual's health and economic productivity. Such acts not only affect harassed or assaulted

individuals directly, but they also harm their families, their communities and our nation's fundamental strength and opportunities for economic growth.

Therefore, through this lens – and given the Department's mission "to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access,"¹ – we have outlined our concerns below, supported with data and explanations, about the NRPM's proposed changes and specific problematic aspects of the NPRM's provisions.

Our expectation is that the Department will withdraw the NPRM's proposed changes rather than receive a grade that fails students, educational institutions, families, and communities.

Women and Girls Are Disproportionately the Victims of Sexual Harassment and Assault

We are concerned about the implications of the NPRM's proposed change because it is common knowledge – and the data clearly demonstrates – women and girls are more likely than men and boys to be victims of sexual harassment and assault. And as we discuss later in this letter, women have a large role in creating and sustaining healthy, productive and economically viable families and communities. However, when girls and women are subjected to sexual harassment and assaults, the less they are able to support and contribute to such communities. This outcome is a long-term violation of their Title IX rights to the extent that they have been disadvantaged, harmed, and their role in society is diminished because of harassments occurring in educational settings.

Below are specific insights about the extent to which sexual harassment and assaults have disproportionately affect girls and women in educational settings.

- "Sexual harassment is common at every stage of education. Verbal and physical harassment begins in elementary school, and 4 out of 5 children experience some form of sexual harassment or bullying. Eight out of 10 will experience this at some point in their school lives, and roughly 25 percent will experience this often. Boys are more likely to physically harass and bully others, or to be physically bullied themselves. Girls are more likely to use, and experience, verbal and psychological harassment and bullying. Six out of 10 students will experience some form of physical sexual harassment."²
- Among students in grades 7 to 12 in 2010 to 2011, 56 percent of girls and 40 percent of boys responded to a survey that they had been sexually harassed, with online sexual harassment targeting 36 percent of girls and 24 percent of boys.³
- Sixty-two percent of female college students and 61 percent of male college students in a 2005 survey responded that they had been sexually harassed at their university, but underreporting is a massive problem with fewer than 10 percent of students who had been sexually harassed telling a college or university employee and an even smaller fraction

¹ <https://www2.ed.gov/about/landing.jhtml>

² <https://www.k12academics.com/education-issues/sexual-harassment/statistics>

³ "Crossing the Line: Sexual Harassment at School," C. Hill, and H. Kearl, 2011, p. 11

officially report them to a Title IX officer.⁴ Specifically, only 12 percent of college survivors and 2 percent of girls ages 14 to 18 report sexual assault to their schools or the police. It is also important to recognize that the degree of underreporting is hard to determine precisely because of reporting bias, so that the actual number (and percentages) of harassment, abuse and assaults events are very likely much higher.

- The Department of Justice found that in 2015, 20.5 percent of college women had experienced sexual assault since entering college.⁵
- About two-thirds of all sexual harassment and threats – including assaults and rape – of college aged women take place off-campus.⁶

Sexual Harassment, Assaults and Bullying are Health Issues – Particularly Women’s Health Issues

Sexual harassment and assaults have health consequence for girls and women that are often long-term, cumulative and span both physical and psychological health. Those health impairments are a primary reason why women who are survivors of sexual harassment and assault have diminished economic potential and productivity over the course of their lives.

As was summarized in a December 2018 report: “...the consequences of domestic and sexual violence for students in elementary and secondary schools can be devastating.....student survivors often struggle to complete their education, which can have life-long consequences for their economic stability and ability to thrive.”⁷

It is also important to recognize that there are gender differences in the response to stress, which makes sexual harassment and assaults a particularly important issue for women’s health. A recent article summarized these unique effects:

“Research shows that women have higher rates of PTSD than men despite a lower rate of trauma experience. Women’s greater exposure to sexual trauma, sexual coercion and intimate partner violence plays a role, as well as biological, environmental, and coping factors. When families, social groups, government bodies, news media, or organizations disbelieve, disrespect, or minimize girls’ and women’s experiences of sexual trauma, this can cause a great deal of harm to mental health.”⁸

The specific biological processes behind PTSD have been explored to understand why women veterans have higher rates of PTSD and women in general have twice the rate of PTSD than

⁴ “Drawing the Line: Sexual Harassment on Campus,” C. Hill and E. Silva, 2005.

<https://history.aauw.org/files/2013/01/DTLFinal.pdf>

⁵ https://www.bjs.gov/content/pub/pdf/App_E_Sex-Assault-Rape-Battery.pdf

⁶ Fisher, B., Cullen, F., & Turner, M. (2000). *The Sexual Victimization of College Women*. U.S.

Department of Justice. Washington D.C.: National Institute of Justice, p. 20.

⁷ “Ensuring Success in School, Supporting Survivors” Report from the Shriver Center, December 2018, p. 1.

⁸ “Why Women Have Higher Rates of PTSD Than Men: Sexual trauma is particularly toxic to mental health,” *Psychology Today*, September 25, 2018.

men, and those differences have been linked to sex based neuroendocrine responses in the hypothalamic-pituitary-adrenal (HPA) axis.⁹

Other examples of how sexual harassment and assaults result in worse health status for women are summarized below – including some brief descriptions of the fundamental biological pathophysiology (e.g., neurohormonal changes, and epigenetics) involved in this direct connection.

- In the seminal study conducted by the Centers for Disease Control (CDC) and Kaiser Permanente (KP) of more than 17,000 middle class American children, about 21 percent reported sexual abuse. The American Academy of Pediatrics summarized this study as documenting “quite clearly that adverse childhood experiences (ACEs) can contribute significantly to negative adult physical and mental health outcomes and affect more than 60 percent of adults.”¹⁰ The AAP also noted that more recent studies have reaffirmed the CDC’s original conclusions.
- The long-term medical consequences of childhood abuse – including sexual abuse – have been extensively studied and documented.¹¹ And numerous studies have shown the specific long-term health consequences of ACEs – because of the toxic stress from ACEs¹² – include Obesity, Diabetes, Heart Disease, Cancer, Depression, Smoking, and Alcoholism.¹³
- A systemic review of 35 studies published in February 2018 found that ACEs are associated with delays in cognitive development, asthma, infection, somatic complaints, and sleep disruption [and] with alterations of immune and inflammatory response and stress-related accelerated telomere erosion.” This article concluded that “Childhood adversity affects brain development and multiple body systems, and the physiologic manifestations can be detectable in childhood.”¹⁴
- The Substance Abuse and Mental Health Services Administration (SAMHSA, a public health agency within the Federal Department of Health and Human Services) concluded that “ACEs are strongly related to the development and prevalence of a wide range of health problems throughout a person’s lifespan, including those associated with substance misuse. When children are exposed to chronic stressful events, their neurodevelopment can be disrupted. As a result, the child’s cognitive functioning and/or ability to cope with negative or disruptive emotions may be impaired. Over time, and often during adolescence, the child may adopt unhealthy coping mechanisms, such as substance use or

⁹ “PTSD in Women Returning From Combat,” A Report by the Society for Women’s Health Research, July 2009

¹⁰ Adverse Childhood Experiences and the Lifelong Consequences of Trauma,” American Academy of Pediatrics, 2014

¹¹ “The long-term medical consequences of childhood trauma,” by Dallam, S. J. (2001) In K. Franey, R. Geffner, & R. Falconer (Eds.), *The cost of child maltreatment: Who pays? We all do.* (pp. 1-14). San Diego, CA

¹² <https://www.aap.org/en-us/advocacy-and-policy/aap-health-initiatives/resilience/Pages/ACEs-and-Toxic-Stress.aspx>

¹³ <https://www.rwjf.org/en/library/collections/aces.html>

¹⁴ “Systematic review of pediatric health outcomes associated with childhood adversity,” BMC Pediatrics (2018) 18:83

self-harm. Eventually, these coping mechanisms can contribute to disease, disability, and social problems, as well as premature mortality.”¹⁵

- The health effects of ACEs are dose dependent. That is, the more ACEs a child is subject to, the more likely they are to have lifelong health consequences.¹⁶ And the CDC/KP study also found that 15 percent of girls were exposed to four or more ACEs, compared to 9 percent of boys.¹⁷
- The health effects of ACEs are multi-generational, which may be due to a combination of epigenetic and environmental factors, i.e., parents subjected to ACEs may have problems as parents leading to health problems in their children. As an August 2018 study in the journal *Pediatrics* concluded: “Parents with greater exposure to ACEs are more likely to have children with behavioral health problems.”¹⁸
- The effects of sexual harassment on children today is likely worse than it was in previous generations. Specifically, 64 percent of adults believe that today’s children are under more stress than compared to when today’s adults were kids, with only 25 percent believing the stress levels are the same, or 11 percent believing they are less.¹⁹

Women are Drivers of Economic Growth

Every instance of sexual harassment against women undermines their potential for long-term economic productivity and, by extension, the productivity of their family, their community, and the United States. Those consequences are critically important because the role of women in the workplace has the potential to be an important driver of economic growth. In addition, as the U.S. population continues to age, and there are fewer active workers compared to retirees, maximizing the opportunities for women to be productive in the workplace through continued educational achievement will be important for the United States’ economic growth and sustainability.

Therefore, we believe it is critically important for the Department to consider in the context of Title IX, the NPRM and in its response to our comments and to those of others, not only the points made previously in this letter, but the following facts related to the role of women in the U.S. workforce and economy, and the reality that survivors of sexual assault and harassment experience lost income and productivity over their lifetimes:

- Women comprise almost 47 percent of the civilian labor force in November 2018.²⁰ However, since 2000, the growth in women’s participation in the workforce has

¹⁵ “The Role of Adverse Childhood Experiences in Substance Misuse and Related Behavioral Health Problems,” SAMHSA, June 2018

¹⁶ Bethell, C, Newacheck, P, Hawes, E, Halfon, N. Adverse childhood experiences: assessing the impact on health and school engagement and the mitigating role of resilience. (2014), *Health Affairs* Dec; 33(12);210-216

¹⁷ CDC/KP study – ACEs Connections Congressional Briefing slides in 2016.

¹⁸ “Parents’ Adverse Childhood Experiences and Their Children’s Behavioral Health Problems,” *PEDIATRICS* Volume 142, number 2, August 2018

¹⁹ C.S. Mott Children’s Hospital National Poll on Children’s Health, in collaboration with the Children’s Hospital Association, 2016.

²⁰ <https://www.bls.gov/news.release/empsit.t01.htm>

stagnated, and a 2017 book from the Hamilton Project found that “barriers to workforce participation for women are stifling the growth of the U.S. economy, and that future economic success hinges on improving career prospects and working environments for all women.”²¹

- However, women still earn less than men, with women earning 81.8 percent of what men earned in 2017, based on the median weekly earnings for full-time wage and salary workers.²²
- The 2016 real median earnings of men and women who worked full-time, year-round was \$51,640 and \$41,554.²³

With this background, we offer the following comments about some problems with specific provisions of the NRPM.

The Proposed Rule Fails to Support Women Who are Harassed, Abused, and Assaulted

The proposed rule fails to recognize the devastating impact sexual harassment in schools has for individuals who are harassed, abused or assaulted. As referenced above, it is critical to realize that harassment of one individual affects not just that individual, but her family and friends who support her in recovery, as well as the broader school community who becomes engaged with the situation.

Let us not forget that the goal of any government body or organization when it becomes involved with any undesirable action is multi-faceted, including: punishment of perpetrators, prevention of future bad actions (by the perpetrator or anyone else, i.e., deterrence) and treatment and support for the victim.

The proposed rule fails all three of those goals. First, it changes existing standards and processes so that individuals (and schools) may feel less pressure of consequences for committing or permitting sexual harassment, abuse and assaults – which undermines both punishment and prevention. And second, by exposing survivors to additional (and potentially repeated) trauma through the adjudication processes or from the alleged perpetrator (or their friends or allies). Thus, the NPRM’s proposed changes would exacerbate an individual’s trauma, and by extension, makes it less likely that they will report or pursue investigations about harassment, abuse or assaults – which also undermines punishment and prevention.

We recognize that all processes and practices for investigating bad actions are inherently imperfect, and require balancing expectations and acceptance of errors, and that those components vary based upon the actions and the community in which they occur. For example, society at large for civil and criminal actions, and schools and other communities for acceptable norms of behavior. Similarly, companies may have policies that if violated may lead to sanctions

²¹ “The 51%: Driving Growth through Women’s Economic Participation,”

<https://www.brookings.edu/blog/brookings-now/2017/12/05/10-facts-about-american-women-in-the-workforce/>

²² Bureau of Labor Statistics, “[Table 39: Median Weekly Earnings of Full-Time Wage and Salary Workers by Detailed Occupation and Sex](#),” *Current Population Survey* (2018).

²³ <https://www.census.gov/library/publications/2017/demo/p60-259.html>

or loss of employment that do not meet criminal standards – particularly in the U.S. where much employment is “at will.” And within families, social and behavioral norms are not just enforced but also taught.

We believe that the same is true for schools, since part of the educational experience is teaching about acceptable norms of behavior that are age appropriate, for example, sharing of physical objects for young children, and sharing of ideas and concepts for adolescents and young adults. But in no case should individuals or schools imply through rules or procedures that gender-based harassment, abuse or assault is acceptable, allowed or tolerated. The Department’s NPRM sends the wrong message about this role for schools and by extension what is acceptable for society as a whole.

We believe this is the appropriate context for considering changes to Title IX rules because of the role educational institutions have in promoting learning and socialization of students, and ensuring that their faculty and staff serve as positive role models.

Because one of the fundamental purposes of Title IX is keeping students safe from sex discrimination – including sexual abuse and other forms of sexual harassment – the proposed rule makes it harder for students to report abuse, allows (and may require) schools to ignore reports of harassment, and tilts the process for investigating complaints against victims of harassment, abuse or assault.

Therefore, we find that the proposed rule shifts Title IX processes in favor of protecting schools and alleged perpetrators (a.k.a., respondents) to the direct detriment of survivors. For the reasons discussed at length in this letter, HealthyWomen strongly opposes the Department’s proposed rule and encourages the Department to withdraw it from consideration.

The proposed rules would hinder enforcement, discourage reporting, and harm survivors of sexual harassment

As you are aware, since 2001 the Department has had a standard for determining violation of Title IX by a school for failing to adequately address sexual harassment and assault. The 2001 Guidance, defines sexual harassment as “unwelcome conduct of a sexual nature,”²⁴ and 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. Further, the 2001 Guidance, requires schools to “take immediate and effective corrective action” or otherwise they will be considered to have violated Title IX.

By changing those standards, the NRPM weakens the role of Title IX in protecting students, shifts the burden for the process onto those who have experienced harassment, abuse or assault, and would potentially lead to longer-term harm to them, their families and their greater communities. It would also create more abuse-prone and permissive environment for school communities, which would fundamentally undermine the basic goal of Title IX to prevent and punish sex or gender-based discrimination. That is, it would shift the cultural norm for school

²⁴ 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)

communities to one where such discrimination and all forms of harassment are essentially acceptable.

The NPRM creates inconsistent rules for students versus employees by proposing to change the definition of sexual harassment.

We are also concerned that the proposed rule creates a two-tiered system where the standards for harassment or assaults by students against students is different from if an employee of a school perpetrates the same bad action against a student. We recognize that there exists a fundamentally different relationship among students than between students and faculty (or staff), but they all existing in the same learning community. Providing greater protection for students to commit Title IX violations sends the wrong message in both practical and educational contexts about what is acceptable.

The NPRM’s proposed definition of harassment imperils the safe educational environment that schools are tasked with providing.

The NPRM’s proposed definition for sexual harassment is too constricting and would limit the ability of individuals who are actually harassed to pursue or even allege that a bad action has occurred. Specifically, setting the bar for “unwelcome conduct on the basis of sex” at a level that it is “so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the [school’s] education program or activity”²⁵ before a complaint can move forward – and requiring the school to dismiss complaints of harassment that do not meet that standard – creates both an uneven landscape and would promote a culture supportive of harassment, abuse and even assaults.

Educational institutions have a mission far beyond instructing students in matters of fact and knowledge. As a part of broader communities – both locally and nationally – they have a role for promoting responsible and responsive citizens that can contribute to both intellectual and economic growth for the country. By rolling back protections against gender-based harassment, the NRPM would undermine the ability for women and girls to make such contributions. And further, by creating a culture that does not support reporting or recovery, the NRPM would exacerbate long-term health problems, which would also contribute to the historical economic disadvantages faced by women over their lifetimes.

We note that the NRPM would also require schools to ignore a student’s Title IX complaint if the harassment wasn’t actively harming a student’s education. But as is clear, harassment is a progressive situation that can – and often does escalate. (A medical analogy would be to not treat a person’s cancer because it has not progressed far enough to have impaired their functioning.²⁶) And further, determining what is actively harming a student’s education is too restrictive because what may appear to be lesser forms of harassment can adversely affect an individual’s overall

²⁵ Proposed rule part 106.30.

²⁶ We do recognize that there are certain instances where malignancies or pre-malignant states may be appropriately managed with surveillance or watchful waiting, but those decisions are best made between a doctor and her patient, and are not ignored as inconsequential.

education, even if their grades or ability to complete school assignments are not seemingly impaired, since, as we've noted, education encompasses much more than those easily measured factors. Amplifying the importance of this point is the one we made earlier in this letter that multiple doses of Adverse Events have cumulative harm for a person's education, health and ability to economically contribute to society.

Thus, the NPRM's definition is out of line with Title IX purposes and precedent, discourages reporting, excludes many forms of sexual harassment that interfere with access to educational opportunities that occur outside of the classroom, and would lead to lasting and lifetime health impairments for survivors of sexual harassment and assault.

Therefore, we find no justification for changing the definition of sexual harassment from the current standard of "unwelcome conduct of a sexual nature,"²⁷ since that encompassed all levels of inappropriate actions and permits appropriate and early (i.e., preventative) interventions. And further, the current standard helps educational communities – students, faculty, staff, and administrators – develop and maintain an environment and culture that is as free from harassment and abuse as possible, while also promoting open discourse (i.e., education) about these issues. Conversely, the NRPM would encourage hiding incidents of harassment (i.e., discourage reporting), and thus undermine open discussion of these issues, as well as likely skewing any statistics about the occurrence of harassment, abuse, and assault, particularly since if a school declines to investigate a student's first report of sexual harassment, the student is extremely unlikely to report a second incident when the harassment escalates. Fundamentally the NRPM is anti-education, and thus, it is exceptionally unacceptable coming from the Department of Education.

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

The Department's longstanding practice requires that schools use a "preponderance of the evidence" standard – which means "more likely than not" – in Title IX cases to decide whether sexual harassment occurred.²⁸ The proposed rule (in part 106.45(b)(4)(i)) deviates from that practice, and establishes a system where schools could elect to use the more demanding "clear

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).

²⁸ The Department has required schools to use the preponderance standard in Title IX investigations since as early as 1995 and throughout both Republican and Democratic administrations. For example, its April 1995 letter to Evergreen State College concluded that its use of the clear and convincing standard "adhere[d] to a heavier burden of proof than that which is required under Title IX" and that the College was "not in compliance with Title IX." U.S. Dep't of Educ., Office for Civil Rights, *Letter from Gary Jackson, Regional Civil Rights Director, Region X, to Jane Jervis, President, The Evergreen State College* (Apr. 4, 1995), at 8, available at http://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed_ehd_1995.pdf. Similarly, the Department's October 2003 letter to Georgetown University reiterated that "in order for a recipient's sexual harassment grievance procedures to be consistent with Title IX standards, the recipient must ... us[e] a preponderance of the evidence standard." U.S. Dep't of Educ., Office for Civil Rights, *Letter from Howard Kallem, Chief Attorney, D.C. Enforcement Office, to Jane E. Genster, Vice President and General Counsel, Georgetown University* (Oct. 16, 2003), at 1, available at <http://www.ncherp.org/documents/202-GeorgetownUniversity--110302017Genster.pdf>

and convincing evidence” standard in sexual harassment cases, while allowing all other student misconduct cases to be governed by the preponderance of the evidence standard, even if they carry the same maximum penalties.²⁹ The Department’s decision to allow schools to impose a more burdensome standard in sexual assault cases than in any other student misconduct case appears to rely on the unspoken stereotype and assumption that survivors (who are mostly women) are more likely to lie about sexual assault than students who report physical assault, plagiarism or other school disciplinary violations. There is no basis for that sexist belief and in fact men and boys are far more likely to be victims of sexual assault than to be falsely accused of sexual assault.³⁰

The preponderance standard is used by courts in all civil rights cases.³¹ It is the only standard of proof that treats both sides equally and is consistent with Title IX’s requirement that grievance procedures be “equitable.” By allowing schools to use a “clear and convincing evidence” standard, the proposed rule would tilt investigations in favor of respondents and against complainants. The Department argues that Title IX investigations may need a more demanding standard because of the “heightened stigma” and the “significant, permanent, and far-reaching” consequences for respondents if they are found responsible for sexual harassment.³² But the Department ignores the reality that Title IX complainants face “heightened stigma” for reporting sexual harassment as compared to other types of misconduct, and that complainants suffer “significant, permanent, and far-reaching” consequences to their education if their school fails to meaningfully address the harassment, particularly as 34 percent of college survivors drop out of college.³³ Both students have an equal interest in obtaining an education. Catering only to the impacts on respondents in designing a grievance process to address harassment is inequitable.

The NPRM in appropriately restrains schools from preventing or addressing harassment

The proposed rules (in parts 106.30 and 106.45(b)(3)) would require schools to ignore all complaints of off-campus or online sexual harassment that happen outside of a school-sponsored program. As we noted earlier, a majority of harassment, abuse, and assaults (i.e., ACEs) occur on-line or off-campus, and therefore restricting schools ability to address such bad actions perpetrated upon their students by other members of their educational community would lead to less prevention, more harm, and greater harassment in the future.

²⁹ Proposed rule part 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.

³⁰ 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

³¹ Katharine Baker et al., *Title IX & the Preponderance of the Evidence: A White Paper* (July 18, 2017), available at <http://www.feministlawprofessors.com/wp-content/uploads/2017/07/Title-IX-Preponderance-White-Paper-signed-7.18.17-2.pdf> (signed by 90 law professors).

³² 83 Fed. Reg. 61477.

³³ 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>

The NPRM also 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”³⁴

The NPRM would subject survivors and witnesses in college and graduate school to additional trauma and abuse and potentially limit their options for comprehensive treatment.

The NPRM (in part 106.45(b)(3)(vii)) would require colleges and graduate schools to conduct a “live hearing,” and requires parties and witnesses to submit to cross-examination by the other party’s “advisor of choice” – which could be an attorney who is prepared to grill the survivor about the traumatic details of the assault, or possibly an angry parent or a close friend of the named harasser. The adversarial and contentious nature of cross-examination would further traumatize college and graduate school survivors who seek help through Title IX. Being asked detailed, personal and humiliating questions often rooted in gender stereotypes and rape myths that tend to blame victims for the assault they experienced³⁵ would understandably discourage many students – parties and witnesses – from participating in a Title IX grievance process, chilling those who have experienced or witnessed harassment from coming forward. Nor would the proposed rules entitle the survivor to the procedural protections that 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.

Further, part 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.” But once consent is obtained and the informal process begins, schools may “preclude the parties from resuming a formal complaint.” By restricting student’s opportunities could impair their recovery, and worsen their long-term health outcomes.

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

³⁴ 20 U.S.C. § 1681(a).

³⁵ 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), 551-569 (2016).

Administrators in Higher Education stated in 2018 that it was concerned about students being “pressured into informal resolution against their will.”³⁶ The proposed rule would allow schools to pressure survivors, including minors, into giving “consent” to mediation and other informal processes with their assailants and prevent them from ending an informal process and requesting a formal investigation – even if they change their mind and realize that mediation is too traumatizing to continue.

The NPRM would increase long-term harm by limiting “supportive measures”

Under the proposed rules, (in part 106.30), even if a student suffered harassment that occurred on campus and it was “severe, pervasive, and objectively offensive,” their school would still be able to deny the student the “supportive measures” they need to stay in school. In particular, the proposed rules allow schools to deny a student’s request for effective “supportive measures” on the grounds that the requested measures are “disciplinary,” “punitive,” or “unreasonably burden the other party.” For example, a school might feel constrained from transferring a named harasser to another class or dorm because it would “unreasonably burden” him, thereby forcing a survivor to change all of her own class and housing assignments in order to avoid her harasser. In addition, schools may interpret this proposed rule to prohibit issuing a one-way no-contact order against an assailant and require a survivor to agree to a mutual no-contact order, which implies that the survivor is at least partially responsible for their own assault.³⁷ 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.³⁸ And 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.”³⁹

The NPRM’s proposed “deliberate indifference” standard is very problematic, and would enable unacceptable and harmful delays in investigation

The “deliberate indifference” standard in the NPRM is a much lower standard than that currently required of schools under current guidance, which requires schools to act “reasonably” and “take immediate and effective corrective action” to resolve harassment complaints.⁴⁰ Like for most

³⁶ NASPA - Student Affairs Administrators in Higher Education, *NASPA Priorities for Title IX: Sexual Violence Prevention & Response* 1-2 [hereinafter *NASPA Title IX Priorities*], available at https://www.naspa.org/images/uploads/main/NASPA_Priorities_re_Title_IX_Sexual_Assault_FINAL.pdf.

³⁷ 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. *E.g.*, Joan Zorza, *What Is Wrong with Mutual Orders of Protection?* 4(5) DOMESTIC VIOLENCE REP. 67 (1999), available at <https://www.civresearchinstitute.com/online/article.php?pid=18&iid=1005>

³⁸ 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)

³⁹ 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*], available at <https://www.theasca.org/Files/Publications/ASCA%202014%20White%20Paper.pdf>

⁴⁰ 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)

health issues, rapid treatment is best – not delayed or deferred. Further we note that this conflicts with the general, and broader principle that eliminating the requirements under the current guidance that investigations be conducted quickly, it fails the premise of “justice delayed is justice denied.”

Specifically, the NPRM would require schools to have “reasonably prompt timeframes,” but allows them to create a “temporary delay” or “limited extension” of timeframes for “good cause,” which includes “concurrent law enforcement activity.”⁴¹ Under the proposed rules, if there is an ongoing criminal investigation, the school would be allowed to delay its Title IX investigation for an unspecified length of time. While criminal investigations seek to punish an abuser for their conduct, Title IX investigations should seek to ensure that complainants are able to access educational opportunities that became inaccessible due to harassment. Students should not be forced to wait months or years until after a criminal investigation is completed in order to seek resolution from their schools. The Association of Title IX Administrators (ATIXA) agrees that a school that “delay[s] or suspend[s] its investigation” at the request of a prosecutor creates a safety risk to the survivor and to “other students, as well.”⁴²

The grievance procedures required in the NPRM would increase trauma to complainants

Current Title IX regulations require schools to “adopt and publish grievance procedures that provide for a prompt and equitable resolution of student and employee complaints” of sexual misconduct.⁴³ We do not see how the NRPM improves upon that standard, and believe that it actually promotes more inequitable processes by further victimizing the reporting student, and thus again, inhibiting reporting and creating a culture of harm rather than one of openness, enlightenment and education. Specifically, we note that the current requirements under Title IX provide more rigorous due process protections than are required under the Constitution, and instructs schools to protect the “due process rights of the accused.”⁴⁴

We also note that that the NPRM seems to be putting forward a new – and higher – standard based upon a presumption of innocence, which is a criminal law principle and thus incorrectly applied to the context of harassment under Title IX, which is based upon civil proceedings civil rights law with the goal of ensuring that sexual harassment is never the end to anyone’s education. Thus, the NRPM (in part 106.45(b)(1)(iv)) would permit and potentially encourage schools to ignore or punish individuals that report sexual harassment based upon the false presumption that they are “lying” about it.⁴⁵ And as has been reported, that presumption – and

⁴¹ Proposed rule part 106.45(b)(1)(v)

⁴² Association of Title IX Administrators, *ATIXA Position Statement on the Proposed Legislation Entitled: Promoting Real Opportunity, Success, And Prosperity Through Education Reform (PROSPER) Act (Higher Education Act Reauthorization)* (Jan. 18, 2018), available at <https://atixa.org/wordpress/wp-content/uploads/2015/03/ATIXA-POSITION-STATEMENT-ON-PROSPER-ACT-Final.pdf>

⁴³ 34 C.F.R. § 106.8(b).

⁴⁴ 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)

⁴⁵ 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.

punishment – are more likely to harm women and girls of color,⁴⁶ pregnant and parenting students,⁴⁷ and LGBTQ students,⁴⁸ thus not only leading to outcomes that are contrary to the goals of Title IX, but in opposition to basic civil rights.

The NPRM’s proposed narrowing the window for what schools can investigate, and requiring them to dismiss harassment complaints goes beyond the Department’s authority

Part 106.45(b)(3) of the NPRM requires schools to dismiss complaints of sexual harassment if they don’t meet specific narrow standards. If it’s determined that harassment doesn’t meet the improperly narrow definition of severe, pervasive, and objectively offensive harassment, it must be dismissed, per the command of the rule. If severe, pervasive, and objectively offensive conduct occurs outside of an educational program or activity, including most off-campus or online harassment, it must be dismissed. However, the Department lacks the authority to require schools to dismiss complaints of discrimination. Under Title IX, the Department is only authorized to issue rules “to effectuate the [anti-discrimination] provision of [Title IX].” Title IX does not delegate to the Department the authority to tell schools when they cannot protect students against sex discrimination.⁴⁹ 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, part 106.45(b)(3) of the NPRM fails to effectuate Title IX’s anti-discrimination mandate and would force many schools that already investigate off-campus conduct under their student conduct policies to abandon these anti-discrimination efforts. 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 is does not have authority to force schools to violate students’ and employees’ civil rights under Title IX by forcing schools to ignore sexual harassment.

The Department notes that if conduct doesn’t meet the proposed rule’s definition of harassment or occurs off-campus, schools may still process the complaint under a different conduct code, but not Title IX. This “solution” to its required dismissals for Title IX investigations is 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 respondents’ complaints that the school had failed to comply with the requirements set out in the NPRM and thus violated respondents’ rights as described in the NPRM.

⁴⁶ 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), available at <https://ssrn.com/abstract=3168909>; National Women’s Law Center, *Let Her Learn: A Toolkit To Stop School Pushout for Girls of Color* 1 (2016) [hereinafter *Let Her Learn: Girls of Color*], available at <https://nwlc.org/resources/let-her-learn-a-toolkit-to-stop-school-push-out-for-girls-of-color>

⁴⁷ Chambers & Erausquin, *The Promise of Intersectional Stigma to Understand the Complexities of Adolescent Pregnancy and Motherhood*, JOURNAL OF CHILD ADOLESCENT BEHAVIOR (2015), available at <https://www.omicsonline.org/open-access/the-promise-of-intersectional-stigma-to-understand-the-complexities-of-adolescent-pregnancy-and-motherhood-2375-4494-1000249.pdf>

⁴⁸ See e.g., David Pinosof, et al., *The Effect of the Promiscuity Stereotype on Opposition to Gay Rights* (2017), available at <https://doi.org/10.1371/journal.pone.0178534>.

⁴⁹ 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>.

Summary and Conclusion

The NPRM takes a narrow legalistic approach to situations that have important health consequence and proposes changes that would cause more harm to individuals, families, communities and institutions trying to fulfill their educational mission. Instead of supporting schools in their educational mission, and strengthening Title IX's prohibition against sex discrimination in schools, the NPRM would impose procedural requirements and force schools to tilt their Title IX investigation processes in favor of named harassers to the detriment of survivors, families and communities.

Therefore, the Department of Education should immediately withdraw the NPRM and instead focus its efforts on supporting educational institutions in meeting their Title IX requirements that the Department has relied on for decades, to ensure that schools promptly and effectively respond to sexual harassment.

We also strongly recommend that as you approach these issues in the future, you consult closely with health experts in other government agencies, (such as SAMHSA, CDC, and the Administration for Children and Families (ACF) – a division of the Department of Health and Human Services), as well as non-government experts such as the American Academy of Pediatrics and the Society for Adolescent Health and Medicine.

We appreciate your attention to our comments – as well as to those of others – and look forward to your responses, which we strongly believe would best be conducted by first withdrawing the NRPM because of its numerous problems and shortcomings.

Please do not hesitate to contact either of us for further information.

Sincerely,



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