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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 Assistant Secretary Marcus:

I write on behalf of Know Your IX, in response to the Department of Education’s Notice of Proposed Rulemaking (“NPRM”), to express our concerns regarding the Department’s current proposal to amend rules implementing Title IX of the Education Amendment Act of 1972.

Know Your IX is a survivor- and youth-led project of Advocates for Youth that aims to empower students to end sexual and dating violence in their schools. Know Your IX accomplishes our mission through educating college and high school students in the United States about their legal rights to safe educations free from gender-based harms; training, organizing, and supporting student survivor activists in challenging their educational institutions to address violence and discrimination; and advocating for policy change at the campus, state, and federal levels to ensure meaningful systemic action to end gender violence.

In response to widespread violations of survivors’ civil rights, Know Your IX has called upon the Department of Education to strongly enforce Title IX. In the summer of 2013, Know Your IX organized student survivors from all across the country in protesting the Department’s lack of transparency and presenting a petition with over 100,000 signatures demanding improved federal enforcement of civil rights law. Due to Know Your IX’s efforts, the Office for Civil Rights (“OCR”) published, for the first time in history, a list of colleges and universities currently under investigation for sexual violence-related Title IX violations. And in the single year following Know Your IX’s action, the number of higher education institutions under investigation for sexual violence-related Title IX violations tripled, from 55 institutions to over 150. Further, OCR issued formal findings of noncompliance against several institutions — a turning point in federal Title IX enforcement.

At the same time, Know Your IX has vigorously supported strong procedural protections for survivors and respondents. As we have repeatedly emphasized throughout our organization’s work, disruptions in education can have lasting consequences for both survivors who are forced out of school due to sexual violence and students facing discipline for allegedly perpetrating

violence. In 2015, Know Your IX published an open letter to university presidents across the country calling for colleges and universities to adopt key procedural protections for complainants and respondents.¹ Know Your IX also reiterated our commitment to fair procedures for complainants and respondents in our 2017 State Policy Playbook, which outlined a series of procedural protections for both parties.² And as we have written in our online Fair Process resource, “Know Your IX is committed to fighting for robust procedural protections for students on both sides of school sexual violence cases, because we believe fair process serves all parties and we seek to create a world where no student is ever unfairly denied the opportunity to learn.”³ Know Your IX rejects the Department’s efforts to afford respondents special procedural rights at survivors’ expense.

As this Comment will describe, the Department’s proposed regulation, if promulgated, would jeopardize the gains that students have achieved over the past five years. In order to shield schools from liability for violations of survivors’ civil rights, the Department of Education has adopted interpretations of Title IX that contravene the statute’s text and distort leading Supreme Court precedent. At the same time, the agency exceeds its statutory authority when it affords respondents special rights at the direct expense of victims of sex discrimination and when it permits recipients to treat sexual harassment claims differently than other disciplinary violations. The Department’s regulation would also increase the length of Title IX investigations, invite law enforcement interference in school investigations, and allow schools to use harmful mediation procedures to resolve cases of sexual assault and domestic violence. All of these proposals would subvert Title IX’s aims of protecting individual students against sex-based harassment and eliminating sex discrimination in federally-funded programs.

¹ *Letter to University Presidents on Fair Process*, KNOW YOUR IX, <https://www.knowyourix.org/letter-university-presidents-fair-process/> (last visited Jan. 28, 2019).

² ALYSSA PETERSON & SEJAL SINGH, KNOW YOUR IX, STATE POLICY PLAYBOOK FOR ENDING CAMPUS SEXUAL ASSAULT 48-59 (2017), https://advocatesforyouth.org/wp-content/uploads/2018/10/Know_Your_IX_State_Policy_Playbook.pdf.

³ *Fair Process in Campus Discipline*, KNOW YOUR IX, <https://www.knowyourix.org/issues/fair-process-campus-discipline/> (last visited Jan. 28, 2019).

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I. The Proposed Actual Notice and Deliberative Indifference Standard Contravenes Title IX’s Text and Increases the Likelihood of Unpredictable Outcomes

The Department of Education proposes a new regulation, § 106.44(a), which would alter the standard for administrative liability under Title IX to state that “a recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States must respond in a manner that is not deliberately indifferent.”⁴ The Department defines “actual knowledge” as “notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to a teacher in the elementary and secondary context with regard to student-on-student harassment.”⁵ The regulation would also state that “a recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.”⁶

Though the Department of Education acknowledges that it is “not required to adopt the liability standards applied by the Supreme Court in private suits for money damages,”⁷ it states that it is “persuaded by the Court’s policy rationales.”⁸ In support of its proposal, the Department points to 1) the text of Title IX; 2) the contractual nature of the obligations that Title IX imposes pursuant to Congress’s Spending Clause authority; and 3) a desire for a standard that “allows schools predictably to evaluate their response to sexual harassment for purposes of both civil litigation and administrative enforcement by the Department based on a consistent standard.”⁹ We address the serious flaws in these arguments below.

A. The Department’s Proposal Contradicts the Text of Title IX

The text of Title IX provides that recipients may violate Title IX in the absence of actual notice and deliberate indifference. Pursuant to 20 U.S.C. §1682, which governs “Federal Administrative Enforcement,” the Department is empowered to enforce Title IX by 1) terminating or refusing to grant assistance to recipients and 2) “by any other means authorized by law.” Congress further specified that “no such action shall be taken until the department or agency concerned has advised the appropriate person or persons *of the failure to comply with the requirement* and has determined that compliance cannot be secured by voluntary means.”¹⁰ In interpreting this provision, the Supreme Court has stated that “a central purpose of requiring notice of the violation ‘to the appropriate person’ and an opportunity for voluntary compliance before administrative enforcement proceedings can commence is to avoid diverting education funding from beneficial uses where a recipient was unaware of discrimination in its programs and is willing to institute prompt corrective measures.” *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 289 (1998). Similarly, the Court also noted that, “the administrative enforcement

⁴ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462, 61466 (proposed Nov. 29, 2018) (to be codified as 34 C.F.R. pt. 106).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 61469.

⁸ *Id.* at 61462.

⁹ 83 Fed. Reg. at 61469.

¹⁰ 20 U.S.C. §1682 (emphasis added).

scheme presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance.” *Id.* at 290 (analogizing to the deliberate indifference standard). The statute’s text clearly indicates that recipients of federal funds may violate Title IX even when they do not receive actual notice of their violations or act with deliberate indifference to the violations.¹¹ Congress, in enacting §1682, provided for limitations on the efforts that the government can take to remedy violations when a recipient lacks notice or does not display deliberate indifference.

The statute’s text and the Court’s interpretation of §1682 unambiguously bar the Department of Education from adopting its proposed definition of a Title IX violation. The statute provides that the Department cannot act against a recipient until the entity is informed of the Title IX violation, which presupposes that a recipient can contravene Title IX without receiving notice. Moreover, as the Supreme Court has articulated, Congress enacted §1682 to avoid the loss of federal funding when the institution was unaware of the discrimination and was willing to remedy its effects. *Gebser*, 524 U.S. at 289. The Department’s proposal conflates the nature of a Title IX violation with Title IX’s textual limitations on the Department’s ability to remedy the violation. In this vein, the proposed regulation would render §1682’s requirements superfluous, as a recipient would be unable to violate Title IX in the first instance without notice and a demonstration of their unwillingness to institute corrective measures in a prompt fashion. Although the Department of Education retains discretion to outline standards for administrative enforcement, it must adopt standards, such as constructive notice and negligence, that align with the statutory scheme of §1682 and recognize that violations may occur in the absence of actual notice and deliberate indifference. The Department’s proposed regulation constitutes unlawful agency action, in “excess of statutory jurisdiction, authority, or limitations.”¹²

Further, the Department’s claims regarding Title IX’s contractual nature as well as its invocations of *Gebser* and *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), are inapposite insofar as these legal principles apply when determining the appropriate remedy to a violation of Title IX, as opposed to defining the nature of the violation itself. As the Supreme Court notes in *Pennhurst v. Halderman*, for “legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State.” 451 U.S. 1, 28-29 (1981). Similarly, in *Gebser*, the Court noted that when Congress “attaches conditions to the award of federal funds under its spending power,” the Court will “examine closely the propriety of private actions holding the recipient liable in monetary damages for noncompliance with the condition. 524 U.S. at 288. The Department’s proposal collapses this critical distinction between violations and remedies by stating that a school does not violate Title IX unless its non-compliance would also render it eligible for damages or the withdrawal of all federal funds. This interpretation is clearly at odds with the statutory text, as well as *Pennhurst*, *Gebser*, and *Davis*.

¹¹ This view was echoed by Senator Bayh on the Senate floor prior to the passage of the Title IX Amendment, when he stated that the “[f]ailure to comply with the regulations may result in the termination of funding. However, termination must be preceded by notice and opportunity for a hearing, as well as a determination that voluntary compliance cannot be secured.” 118 Cong. Rec. 5807 (1972) (emphasis added).

¹² 5 U.S.C. §706(2)(c).

B. The Department Incorrectly Applies *Gebser* and *Davis* to its Equitable Actions

The Department’s proposed rule quotes *Gebser* and *Davis* at length on numerous occasions without noting that the Court’s opinions in those cases are addressed only to the question of monetary damages. Indeed, *Gebser* cautions against the Department’s conflation of monetary damages and injunctive relief, as the holding explicitly relied on Justice White’s opinion in *Guardians Assn v. Civil Serv. Comm’n of New York City*, which stated that individuals may seek equitable relief even when alleging unintentional discrimination. 465 U.S. 624, 598 (1983) (noting that there is a *Pennhurst* “presumption that only limited injunctive relief should be granted as a remedy for unintended violations of statutes passed pursuant to the spending power”). As discussed subsequently in this Comment, the Department’s decision to apply actual notice and deliberate indifference standards in the administrative context is arbitrary and capricious, as it threatens to create significant asymmetries between equitable remedies pursued through administrative means and the courts.

The Department’s invocations of *Gebser* and *Davis* are particularly amiss in light of the fact that the relief offered by the Department of Education through its administrative enforcement is equitable in nature. See *Gebser*, 524 U.S. at 288 (recognizing that the Department of Education’s administrative efforts to “condition continued funding on providing equitable relief to the victim” were distinct from payment of monetary damages) (citing *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 518 (1981)). For example, in its 2015 Resolution Agreement with Michigan State University, the Department pursued prospective relief and negotiated changes to university policies, which included agreements that the university revise its notice of nondiscrimination along with its grievance procedures.¹³ These forms of relief are programmatic in nature and resemble equitable remedies that a court may impose. See *Guardians Assn*, 465 U.S. at 605 (noting that an order “requiring consultation to ensure that future examinations will not have discriminatory effects constitutes permissible injunctive relief”).¹⁴ Moreover, as the Department’s notice of proposed rulemaking would bar the Department from seeking damages from recipients,¹⁵ all of the relief secured by the Department would necessarily be equitable going forward.

C. The Department’s Approach Would Foster Inconsistency Between Actions in Equity

¹³ U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, DOCKET NOS. 15-11-2098 & 15-14-2113, RESOLUTION AGREEMENT: MICHIGAN STATE UNIVERSITY 2-3 (2015), <https://www2.ed.gov/documents/press-releases/michigan-state-agreement.pdf>.

¹⁴ In addition, the Michigan State Agreement also included reimbursement for complainants, “as appropriate, to address any emotional, academic, or other issues they faced as a result of the University’s delay in processing their complaint allegations.” This reimbursement is also an equitable remedy, as opposed to damages. As the Court noted in *School Committee of Town of Burlington, Mass v. Department of Educ. of Mass*, reimbursement for expenses that the entity should have paid had it complied with the law and would have borne in the first instance constitutes an equitable remedy, as opposed to damages. 471 U.S. 359, 370 (1985). See also *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630 FN9 (1984) (noting that a majority of the [*Guardians Ass’n*] Court agreed that “retroactive relief is available to private plaintiffs for all discrimination, whether intentional or unintentional, that is actionable under Title VI.”)

¹⁵ The Department’s NPRM states that “[w]e propose modifying the language to apply to any violation of part 106 and adding language to § 106.3(a) stating that the remedial action deemed necessary by the Assistant Secretary shall not include assessment of damages.” 83 Fed. Reg. 61480.

The Department admits in its notice of proposed rulemaking that it is not legally obligated to apply a standard for monetary damages to its administrative enforcement regime. Instead, the Department argues that adopting such an approach would result in more predictable outcomes for recipients of federal funds. This claim is demonstrably untrue, as the agency’s proposal would result in less predictable outcomes for schools.

The *Gebser* and *Davis* decisions sought to correct what the Court viewed as an asymmetry in the Title IX enforcement scheme, where courts and the Department of Education could require entities to forfeit federal funds under different standards. Indeed, as *Gebser* noted, “[i]t would be unsound, we think, for a statute’s express system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance” while courts permitted “substantial liability without regard to the recipient’s knowledge or its corrective actions upon receiving notice.” 524 U.S. at 289. The Court also reasoned that a deliberate indifference standard was appropriate given that, “the administrative enforcement scheme presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance . . . That framework finds a rough parallel in the standard of deliberate indifference.” *Id.* at 290. Accordingly, the Court’s decision sought to harmonize the standards in instances where private plaintiffs pursued monetary damages and when the government withdrew federal funds for violations of the statute.

The Department’s proposal would upend the balance struck by the Court. Although the Department claims that its proposal would create predictability by aligning actions for damages with the Department’s standard for administrative enforcement, it would instead create irrational asymmetries between injunctive relief provided by the Department through administrative enforcement and injunctive relief pursued by victims in the courts. It is well-established that victims of Title IX violations may seek injunctive relief in civil litigation. *See Gebser*, 524 U.S. at 287 (noting that the Court’s decision in *Cannon* that established a private right of action “referred to injunctive or equitable relief in a private action . . . but not to a damages remedy”). *See also Guardians Assn*, 463 U.S. at 604 (“[I]njunctive relief is permissible even if it means that the defendants, in order to shape their conduct to the mandate of the court’s decree, will have to spend more money “than if they had been left free to pursue their previous course of conduct”). Moreover, courts may apply different standards to Title IX actions in equity, as the Court explicitly cabined its holdings in *Gebser* and *Davis* to actions involving damages. *See Palmer ex rel Palmer v. Santa Rosa County School Bd.*, No. 3:05CV218/MCR, 2005 WL 3338724, at *5 FN 10 (N.D. Fla. 2005 Dec. 8, 2005) (“It may be that claims for injunctive relief are not governed by the standards set out in *Gebser* and *Davis*, both of which cases involved monetary liability and a legal rationale which seems largely dependent on the negative impact of monetary damage awards upon educational institutions”); *Frederick v. Simpson College*, 160 F. Supp. 2d. 1033, 1034 (S.D. Iowa 2001) (“after *Gebser*, it is . . . not clear what liability standard would apply to a Title IX harassment claim against an institution seeking only injunctive or declaratory relief”).¹⁶

¹⁶ The United States has also taken such a position in its amicus briefs. *See* Brief of the United States as Amicus Curiae Supporting Petitioner at 24, *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) (No. 97-843) (reasoning that “[a] plaintiff in a private enforcement action should likewise be entitled to equitable relief without a showing of deliberate indifference”).

Furthermore, in interpreting Title IX’s standards for injunctive relief, courts will look to the standards articulated under Title VI, Title II of the Americans with Disabilities Act, and §504 of the Rehabilitation Act, as courts have established that the same liability standards apply.¹⁷ Courts have routinely applied different standards for actions in equity and actions for damages pursuant to §504 of the Rehabilitation Act, a statute that is also contractual in nature, and Title II of the Americans with Disabilities Act. *See Crane v. Lifemark Hospitals, Inc.*, 898 F.3d 1130, 1134 (11th Cir. 2018) (“[P]roving the failure to provide a means of effective communication, on its own, permits only injunctive relief. To recover monetary damages, a disabled person must further show that the hospital was deliberately indifferent to her federally protected right.”); *P.P. v. Compton Unified School Dist.*, 135 F.Supp.3d 1098, 1114 (C.D. Cal. 2015) (“Plaintiffs here are not seeking damages, and the Court is satisfied that a showing of ‘deliberate indifference’ is not necessary.”); *Manuel v. City of Bangor*, No. 09–CV–339–B–W, 2009 WL 3398489, at *3 (D. Me. Oct. 21, 2009) (“A claim under Title II for injunctive relief does not require proof of discriminatory intent.”). Accordingly, under the Department’s proposed framework, a plaintiff would be able to access equitable relief to remedy unintentional discrimination through a court order but the Department of Education would not attempt to secure a remedy on the same facts.

Finally, the Department of Education’s proposed approach would result in less predictable outcomes for schools. If the Department of Education applies a standard for monetary damages to its administrative enforcement scheme, plaintiffs will ask the courts to play the role that the Department abdicated. Individuals that would have normally filed administrative complaints with the Department will instead file actions for equitable relief against recipients of federal funds. In these instances, schools would have less of an opportunity to comply voluntarily. Such a system would be both less efficient and far slower than the status quo, because the costs of litigation would dwarf the costs of negotiating a voluntary resolution agreement and recipients of federal funds would be unable to engage in informal negotiations with the court over the extent of the remedy. Moreover, if the Department adopts the same standards as the Court adopted for monetary damages, students with viable claims will likely bypass the Department altogether, undercutting the Department’s efforts to promote systemic reforms that would benefit individuals without the means to engage in litigation.

In sum, under the Department’s proposal, it will be much easier for schools to use their federal funding for discriminatory purposes, which contravenes the purpose of Title IX.

II. The Proposed Regulation Impermissibly Deviates from Title IX’s Requirement That Recipients to Address Hostile Environments in Their Educational Programs, Regardless of Where the Harassment That Gives Rise to the Hostile Environment Occurs

¹⁷ In *Cannon v. University of Chicago*, the Supreme Court explained that “the drafters of Title IX explicitly assumed that it would be interpreted and enforced in the same manner as Title VI.” 441 U.S. 677, 696 (1979). Courts have also noted that “Title II directs that its remedies, procedures, and rights shall be the same as those set forth in the Rehabilitation Act. In turn, the Rehabilitation Act points to the remedies, procedures, and rights set forth in Title VI.” *Manuel v. City of Bangor*, No. 09–CV–339–B–W, 2009 WL 3398489, at *3 (D. Me. Oct. 21, 2009) (internal citations omitted).

The Department of Education proposes adding a new regulation, § 106.44(a), which would specify that a recipient with actual knowledge of harassment “in an educational program or activity of the recipient” must not be deliberately indifferent.¹⁸ The Department elaborates that, under its proposed rule, a recipient would be “only responsible for responding to conduct that occurs within its ‘education program or activity,’” which is defined to include academic, extracurricular, or occupational training.¹⁹ The Department’s proposed rule then proposes a narrow set of factors relevant to whether a sexual harassment incident meets this threshold question, including whether the harassment occurred on property owned by the school; at an event funded, sponsored, or promoted by the school; or during an activity over which the school exercised oversight.²⁰ The Department’s proposed rule would excuse schools from responding to many instances of sexual harassment (including rape) of their students by school employees or other students, simply because the harassment happened to occur outside the school’s program.

The proposed rule would adopt a narrower definition of school’s obligations than the Supreme Court adopted in *Davis*, which, if promulgated, would expose schools to litigation. As lower courts interpreting *Davis* have made plain, recipients have a clear obligation under Title IX to address harassment that creates a hostile educational environment in an education program or activity—even when the underlying conduct, which creates the hostile environment, occurs off campus. The continuing effects of sexual harassment and rape, including a student’s constant fear of seeing their assailant in classes, libraries, extracurricular programs, and other educational programs and activities, can make their educational environment hostile. Contrary to the Department’s proposed rule, Title IX’s prohibition on discrimination “under any education program or activity”²¹ has long been understood to encompass a school’s failure to address such a hostile environment, even if the conduct that originally gave rise to the hostile environment did not itself occur in an educational program. Thus, the Department’s proposed § 106.44(a) is not a permissible construction of the Title IX statute.

A. Sexual Violence that Occurs Off-Campus Often Impacts Survivors’ Ability to Participate in Schools’ Educational Programs and Activities

Courts have repeatedly clarified that when students’ educational opportunities are compromised by a hostile environment in their educational programs or activities, they experience gender-based discrimination actionable under Title IX. *See, e.g., Hayut v. State Univ. of New York*, 352 F.3d 733, 750 (2d Cir. 2003) (holding that discrimination for purposes of Title IX liability encompasses hostile educational environment sexual harassment); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 540 (1st Cir. 1995) (“Title VII, and thus Title IX, ‘strike at the entire spectrum of disparate treatment of men and women,’ including conduct having the purpose or effect of unreasonably interfering with an individual’s performance or creating an intimidating, hostile or offensive environment.”); *Tackett v. Univ. of Kansas*, 234 F. Supp. 3d 1100, 1107 (D. Kan. 2017) (holding that plaintiff stated a claim for deliberate indifference to hostile educational environment in violation of Title IX).

¹⁸ 83 Fed. Reg. at 61466.

¹⁹ 83 Fed. Reg. at 61468.

²⁰ 83 Fed. Reg. at 61468.

²¹ 20 U.S.C. § 1681(a).

Students that experience sexual violence off-campus often experience actionable hostile environments in schools' education programs and activities as a result of the assault. For example, Sage Carson, a Know Your IX Manager who was raped in her sophomore year of college, wrote that she was sexually assaulted at an off-campus apartment after a private party.²² The rape itself did not occur within the university's educational programs or on its property—but that did nothing to prevent the rape from creating a hostile environment in her educational program, especially because Carson and her rapist “were part of the same small department, meaning [she] was forced to see him every time [she] went to class.”²³ She experienced regular panic attacks simply trying to walk across the campus shared with her rapist, making it “impossible” for her to complete her schoolwork; she skipped “most of [her] classes.”²⁴ Carson's story illustrates how harassment that does not occur in the context of educational program does still frequently create a hostile environment denies survivors “the benefits of . . . [an] education program or activity” in violation of the Title IX statute.²⁵ Carson's educational environment was no less hostile and no less damaging merely because her rape occurred at an off-campus apartment, rather than an on-campus dorm.

Carson would be one of many students left who would be left behind by the Department's proposed rule. Among 18 to 24 year old female students, merely four percent of rapes and sexual assault victimizations occur at schools, according to the Bureau of Justice Statistics.²⁶ By contrast, the Bureau found that about 70% of rape and sexual assaults experienced by the same group occurred either at the victim's home or the home of another known person (such as a friend or the perpetrator).²⁷ Under the Department's proposed rule, schools would be free to ignore many of these assaults and the hostile environments they create on campus. Moreover, schools may interpret the Department's proposed rule as allowing them to do little in response to the growing threat of online harassment. In 2011, more than one-third of girls and nearly a quarter of boys in grades 7-12 were sexually harassed online (such as via text or Facebook).²⁸ In 2017, 48.7% of LGBTQ students reported experiencing electronic harassment over the course of a year, with 13.5% reporting that they experienced it frequently.²⁹ The conduct may not occur within the strict confines of an educational program—but the Department has not and cannot present evidence that sexual assaults that occur off campus do not have the effect of subsequently denying students access to a recipient's educational programs and activities.

In fact, OCR has itself repeatedly recognized that harassing conduct that occurs outside of an educational program can give rise to a hostile environment on campus. For example, in a November 2017 letter to the State University of New York's Buffalo State University, the Office

²² Sage Carson, *I Was Raped at College. Here's How DeVos's New Rules Harm Survivors Like Me*, BROADLY, Nov. 16, 2018, https://broadly.vice.com/en_us/article/d3b7gq/title-ix-betsy-devos-college-rape-sexual-assault.

²³ *Id.*

²⁴ *Id.*

²⁵ 20 U.S.C. 1687.

²⁶ SOFI SINOZICH & LYNN LANGTON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995–2013 6 (2014).

²⁷ *Id.*

²⁸ CATHERINE HILL & HOLLY KEARL, AMERICAN ASS'N OF UNIV. WOMEN, CROSSING THE LINE: SEXUAL HARASSMENT AT SCHOOL 2 (2013), <https://www.aauw.org/research/crossing-the-line/>.

²⁹ JOSEPH G. KOSCIW, GLSEN, THE 2017 NATIONAL SCHOOL CLIMATE SURVEY 26 (2018), <https://www.glsen.org/sites/default/files/GLSEN%202017%20National%20School%20Climate%20Survey%20%28NSCS%29%20-%20Full%20Report.pdf>.

for Civil Rights determined that the school discriminated against a female student who reported that she was sexually assaulted off campus.³⁰ Because she was afraid to see the perpetrator, she was forced to drop a course that the perpetrator was also enrolled in and ultimately withdrew from school.³¹ OCR found that the school’s Title IX coordinator “lacked a clear understanding of the College’s obligations pursuant to Title IX,” because “Title IX Coordinator . . . asserted that an investigation was not necessary because the alleged sexual assault took place off-campus.”³² Instead, OCR’s letter explains, the College “failed to promptly and equitably” respond to the report of off-campus assault because the College “not only failed to investigate the complainant’s allegation of sexual assault, the College failed to conduct any assessment of whether the complainant was subjected to, or continued to be subjected to, a hostile environment.”³³ In another 2017 letter detailing an investigation into a Palo Alto high school failure to address a hostile environment created by sexual and dating violence, OCR explained that:

A recipient must consider the effects of off-campus misconduct when evaluating whether there is a hostile environment on campus or in an off-campus education program or activity. This includes a review of misconduct that did not occur in the context of an education program or activity but may have had such an impact.³⁴

The Department has offered no explanation for why its position has changed.

B. The Department’s Proposal Would Expose Schools to Liability Under *Davis*

The effects of experiencing sexual violence off-campus may subject individuals to “discrimination under any education program or activity.”³⁵ Congress’s use of the term “discrimination” in the Title IX statute pertains to the conduct of the recipient in failing to rectify hostile environments in their education programs and activities, as opposed to the actions of individual perpetrators, as Title IX was enacted pursuant to Congress’s Spending Clause authority. The Department recognizes this reading in its NPRM, where it states that it is a “recipient’s own misconduct—not the actions of employees, students, or other third parties—that subjects the recipient to liability under Title IX.”³⁶ However, the Department also states that it intends to propose regulations that would limit schools’ responsibilities to “conduct that occurs within its ‘education program or activity.’”³⁷ The Department’s reasoning misrepresents the Title IX statute, which extends to all discrimination in education programs or activity—including hostile environments—and ignores Title IX’s remedial purpose. The mere fact that harassing conduct occurs off campus does not preclude a resulting discriminatory hostile environment within a recipient’s programs. *See, e.g., Gregory v. Daly*, 243 F.3d 687, 693 (2d Cir. 2001)

³⁰ Letter from Timothy Blanchard, N.Y. Office Director, U.S. Dep’t of Educ. Office for Civil Rights, to Katherine S. Conway-Turner, President, Buffalo State Univ. of N.Y. (Nov. 2, 2017), https://www.insidehighered.com/sites/default/server_files/media/OCR-SUNY-Buffalo-State.pdf.

³¹ *Id.* at 11.

³² *Id.* at 14.

³³ *Id.* at 13.

³⁴ Letter from Laura Faer, Regional Director, U.S. Dep’t of Educ. Office for Civil Rights, to Dr. Glenn McGee, Superintendent, Palo Alto Unified School Dist. (Mar. 8, 2017).

³⁵ 20 U.S.C. § 1681(a).

³⁶ 83 Fed. Reg. at 61466.

³⁷ 83 Fed. Reg. 61468.

(specifying that, in evaluating whether an environment is hostile or abusive, courts must look at “the totality of the circumstances rather [than] individual events in isolation.”)

The Department’s interpretation is at odds with the Supreme Court’s decision in *Davis*, where the Court noted that the most important inquiry in determining a recipient’s obligation to respond was whether the recipient exercised “substantial control” over the harasser. 526 U.S. at 646. However, under the Department’s interpretation, schools would be immunized from liability even in instances where they maintained control over the harasser, so long as the harassment did not occur on a school’s property, at events promoted by the school, or at activities where the school exercised oversight. Because the Department’s definition represents a significantly narrower standard than the test articulated by the Court in *Davis*, schools that adopt the Department’s requirements would be at risk of incurring damages liability.

Lower courts have repeatedly interpreted *Davis* to require institutions to remedy the effects of sexual harassment that occurs off-campus when they create a hostile environment in educational programs “sufficiently severe and pervasive to compromise or interfere with educational opportunities normally available to students.” *Morgan v. Town of Lexington*, 823 F.3d 737, 745 (1st Cir. 2016) (citing *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 65 (1st Cir. 2002)). Survivors go to great lengths to avoid their perpetrators: skipping shared classes,³⁸ avoiding libraries or dining halls,³⁹ or withdrawing from campus life.⁴⁰ Thus, the hostile environment that stems from a sexual assault can threaten a survivor’s access to education long after the sexual harassment or rape occurs, “particularly if the victim and abuser retain the same or similar roles in an educational institution.” *Wills v. Brown Univ.*, 184 F.3d 20, 37 (1st Cir. 1999) (citing *Davis*) (noting that “the continuing presence of the harasser may so alter the terms and conditions of education that the victim of harassment may be able to establish a claim for sex discrimination”). Courts have further recognized that sexual harassment, including rape, frequently creates this hostile environment whether or not the original harassment occurs within the educational program or not. *See, e.g., Doe ex rel. Doe v. Derby Bd. Of Educ.*, 451 F. Supp. 2d 438, 444 (D. Conn. 2006) (“Thus, even absent actual post-assault harassment by [an off-campus rapist], the fact that he and plaintiff attended school together can be found to constitute . . . harassment”); *Kelly v. Yale Univ.*, No. Civ.A. 3:01-CV-1591, 2003 WL 1563424, at *3 (D. Conn. Mar. 26, 2003) (finding that even the *potential* for an encounter, between a student raped off campus and her attacker “could create an environment sufficiently hostile to deprive the victim of access to educational opportunities provided by a university.”).

Courts have also clarified that because the harmful effects of sexual harassment that does not occur within the context of an educational program can still create a hostile environment on campus, reports of such harassment trigger a duty under Title IX to investigate and respond, so long as there is “some nexus between the out-of-school conduct and the school.” *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1121 n.1 (10th Cir. 2008). Schools

³⁸ See REBECCA MARIE LOYA, ECONOMIC CONSEQUENCES OF SEXUAL VIOLENCE FOR SURVIVORS: IMPLICATIONS FOR SOCIAL POLICY AND SOCIAL CHANGE 96 (June 2012) (unpublished Ph.D. dissertation, Brandeis University) (on file with Know Your IX).

³⁹ THE WHITE HOUSE COUNCIL ON WOMEN & GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION 2 (2014), https://www.knowyourix.org/wp-content/uploads/2017/01/sexual_assault_report_1-21-14.pdf.

⁴⁰ Carly Parnitzke Smith & Jennifer J. Freyd, *Institutional Betrayal*, 69 AM. PSYCHOL. 575, 587-92 (2014).

thus have an obligation to investigate reports of harassing conduct, regardless of where it occurred, to determine if that conduct creates a hostile campus environment.

In *Crandell v. New York Coll. of Osteopathic Med.*, a district court flatly rejected a defendant school's contention that several incidents of sexual harassment committed by current and former faculty should be excluded from consideration because they occurred off-campus and outside the recipient's educational programs. 87 F. Supp. 2d 304, 316 (S.D.N.Y. 2000). The district court held that, because "plaintiff alleged that the off campus incidents created a hostile environment in the institution," and caused her to miss class, the "allegations [were] relevant to plaintiff's claims of actionable sexual harassment." *Id.* The incidents in question occurred plaintiff's apartment, at a local bar, and in one alleged harasser's private off-campus office, where the plaintiff had gone for a personal medical appointment. *Id.* at 308. Despite the fact that the harassing conduct did not occur within the context of an educational environment, the court recognized that the plaintiff "allege[d] a nexus between the off-campus misconduct and a hostile environment at the institution," and thus fell within Title IX's ambit. *Id.* at 316.

Similarly, in *Doe ex rel. Doe v. Derby Bd. of Educ.*, another district court denied summary judgment to a school in a case regarding a middle-school student who was assaulted during summer recess and off school grounds by a high-school student who attended classes in the same building. 451 F. Supp. 2d 438, 440-41 (D. Conn. 2006). Because the perpetrator "was permitted to continue attending school in the same building as Sally Doe after the assault, leaving open the constant potential for interactions between them," the district court held that a jury could conclude that the school's failure to act created a hostile environment on campus. *Id.* at 444. In many other cases, courts have similarly recognized that harassing conduct outside an educational program can create a hostile educational environment within it. *See, e.g., Spencer v. Univ. of N.M Bd. of Regents*, 15-cv-00141-MCA-SCY (D.N.M. Jan. 11, 2016) (considering a case about an off-campus rape and noting that "[a] single act of severe sexual harassment—particularly rape . . . can support a title IX claim where the claim is premised upon the school's response to the report of the incident."); *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1296 (N.D. Cal. 1993) (considering plaintiffs who were sexually abused as children by a school band teacher years before they attended the school and denying summary judgment to a defendant school because a jury could find the teachers' continued presence at the school created a hostile environment).

Notably, the Eighth Circuit has broken with the weight of the legal authority—but in doing so, it misapplies *Davis*. In *Roe v. St. Louis Univ.*, 746 F.3d 874 (8th Cir. 2014) and *Ostrander v. Duggan*, 341 F.3d 745 (8th Cir. 2003), the Eighth Circuit instead held that to prove Title IX liability, holding that two recipient schools were not liable for hostile environments in their programs and activities that were created by rapes that occurred at private, off-campus apartments, because they had insufficient control over the alleged sexual assaults. Not only is this cramped construction of Title IX at odds with the trend in cases, it misapprehends *Davis*' framework. *Davis* limits damages liability to "circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs," because, as the Supreme Court explained, recipient schools are liable where they "'expose' their students to harassment or 'cause' them to undergo it 'under' the recipient's programs." 526 U.S. at 645. However, when harassing conduct occurs off campus creates a hostile environment on campus, schools exercise "substantial control" over the on-campus

hostile educational environment created the off-campus conduct. *Id.* Thus, while schools do not expose students to harassing conduct that occurs outside school ground and school programs, they do “cause” students to “undergo” the hostile environment sexual harassment ““under” the recipient’s programs.” *Id.* Accordingly, the Department’s proposed § 106.44(a) would expose schools to damages liability in most federal courts.

III. The Department’s Definition of Sexual Harassment is Overly Narrow and Could Result in Irreparable Harm to Survivors’ Educations

The Department’s proposed § 106.30 defines sexual harassment to include quid pro quo sexual harassment, sexual assault, and “[u]nwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.”⁴¹ The Department then elaborates that, in its view, Title IX “prohibits only discrimination that has the effect of denying access to the recipient’s educational programs or activities,” citing *Davis*, and that “Title IX does not prohibit sex-based misconduct that does not rise to that level of severity.”⁴²

Recipients may read proposed § 106.30 narrowly to mean that they have no obligation to intervene in harassing conduct that risks creating a hostile environment until the conduct “effectively denies a person equal access” to their education—that is, until it is already too late to prevent serious harm to a student’s education.⁴³ The proposed regulation thus risks sending a message to schools that they may ignore harassing conduct, allowing it to continue and escalate, before intervening to prevent a hostile environment. The Department’s proposed rule is also inconsistent: at some points, the Department writes that schools must intervene in harassment that “effectively denies a person *equal* access to the recipient’s education program or activity,”⁴⁴ but at other points, the Department omits the critical word “equal” and instead writes that a school’s obligation to address harassment only extends to conduct that has the “effect of denying access to the recipient’s educational program or activities.”⁴⁵

A. The Department’s Proposed Rule Would Place Survivors at Risk of Irreparable Harm to Their Educations

To serve Title IX’s purpose of creating equitable, harassment-free schools, schools should investigate and appropriately respond to reports of unwelcome sex-based conduct before the harassment escalates and becomes so severe and pervasive that a victim is denied access to education. An exhaustive literature review of sexual harassment in academic sciences, engineering, and medicine found that “[s]exually harassing behaviors are not typically isolated incidents; rather, they are a series or pattern of sometimes escalating incidents and behaviors.”⁴⁶ If students experience several isolated incidents of unwelcome sexual conduct, but fear that the incidents will escalate, schools should be responsible for taking appropriate action to ensure the

⁴¹ 83 Fed. Reg. at 6146.

⁴² *Id.* at 61466.

⁴³ *Id.* at 61467.

⁴⁴ *Id.* at 61466.

⁴⁵ *Id.* at 61466.

⁴⁶ FRAZIER F. BENYA ET AL., SEXUAL HARASSMENT OF WOMEN: CLIMATE, CULTURE, AND CONSEQUENCES IN ACADEMIC SCIENCES, ENGINEERING, AND MEDICINE 49 (2018), <https://www.ncbi.nlm.nih.gov/books/NBK519455/>.

harassment doesn't recur (for example, issuing a warning to the harasser, separating the harasser and the victim, providing supportive measures to the victim, or, in appropriate cases, disciplining the harasser for the unwelcome sexual conduct). This policy would help prevent a hostile educational environment from developing, and depriving a student of their access to education, in the first place.

But under the Department's proposed rule, schools would not have a clear obligation to respond to harassment until a victim has already experienced a harm to their educational access. By the time their school would intervene, it might be too late—the student might already be ineligible for an important AP course, disqualified from a dream college, or derailed from graduating altogether. For example, in *Hayut v. State University of New York*, the Second Circuit considered a case in which a professor at the State University of New York (SUNY) New Paltz harassed a student based on her “supposed physical resemblance to Monica Lewinsky . . . who at that time was attaining notoriety for her involvement in a widely covered sex scandal with then-President William J. Clinton.” 352 F.3d 733, 738 (2nd Cir. 2003). Several weeks into the semester, the plaintiff's professor began referring to her as “Monica” at least once per class period. *Id.* The professor continued to refer to her as Monica Lewinsky “even after Hayut requested that he stop,” would attempt to “locate Hayut in the classroom by . . . screaming the name ‘Monica,’ and twice told her in class to “[b]e quiet, Monica. I will give you a cigar later,” in reference to rumors that Lewinsky had performed a lewd act with a cigar. *Id.* at 738-39. Some witnesses testified that “Hayut initially laughed at the nickname, rolled her eyes, or simply shrugged her shoulders, giving no outward indication that the comments troubled her.” But by the middle of the semester, the remarks “upset her to the point that she began crying and walked out during his lecture.” *Id.* at 739. The plaintiff testified that the comments “affected her deeply, humiliating her in front of her peers, causing her to experience difficulty sleeping, and making it difficult for her to concentrate in school and at work.” *Id.* Under the Department's proposed rule, if Hayut had reported the harassing conduct early in the semester, when it hadn't outwardly affected her, the university would have no obligation at all to intervene, though the comments were clearly unwelcome sex-based conduct.⁴⁷ Instead, the University would be free to ignore the conduct until the middle of the semester, when the harassing conduct had already deprived her of equal educational access. At that point, Hayut had lost valuable class hours that she would never be able to get back and other (primarily male) students had begun copying the professor, referring to Hayut as “‘Monica’ in a ridiculing manner outside of class.” *Id.*

Hayut's case illustrates how the Department's proposed rule would allow schools to do nothing about unwelcome sex-based conduct while it escalates, only intervening once the damage had been done. This requirement is manifestly at odds with Title IX's equality mandate, which calls for an end to gender discrimination in schools, not for schools to tacitly permit discriminatory, unwelcome sexual conduct that they are aware of simply because it is not (yet) bad “enough” to intervene.

The proposed rule also risks leaving students who experience severe, pervasive, and objectively offensive sexual harassment without recourse if they are able to continue their education despite the harassment. If a student experiences sexual harassment that is so severe

⁴⁷ *Nb.* Hayut did not in fact report the harassment early in the Fall 1998 semester, but the Second Circuit notes that she “could have done so.” *Id.* at 739.

and pervasive that a reasonable victim would experience a hostile environment, and the student subjectively perceives a hostile environment, but the student is able to persevere and continue their education, a school may determine that the harassment did not “deny” the student access to education within the meaning of the proposed regulation. Thus, the proposed regulation could have the perverse effect of leaving students who are able to continue their education without any protection from the harassment, while only intervening after students have experienced harassment so severe it has done irreparable harm to their education.

The proposed rule also provides no information about what kinds of educational deprivations meet this needlessly high bar. As a result, recipients may be confused about when they are obligated to intervene when, for example, a student skips class to avoid a harasser, has difficulty focusing in class because of harassment, or suffers a decline in their GPA due to harassment. When sex-based misconduct is sufficiently severe that it interferes with a student’s equal access to education, but the student is still able to stay enrolled in their educational programs, a school may not know whether that student has been “den[ied] access to the recipient’s educational programs” such that they are required to intervene.⁴⁸

B. The Department’s Proposed Definition of Hostile Environment Would Create Significant Asymmetries in Recipients’ Liability

The Department’s proposed rule suggests that schools do not have an obligation to respond to reports of unwelcome sexual conduct unless the conduct is a sexual assault, quid pro quo harassment, or “so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipients education program or activity.”⁴⁹ To justify this proposal, the Department merely cites *Davis*, 526 U.S. at 633, which is inapposite. *Davis* holds that in a suit for damages, a victim can only claim damages if harassment is so severe and pervasive that it “effectively bars” a victim’s access to an educational opportunity—it does not require this standard for schools or the Department of Education to intervene in harassment, especially when these interventions are more analogous to injunctive relief. Moreover, as courts will not apply the *Davis* standards to actions for equitable relief, the Department’s proposal for administrative liability would again setup significant asymmetries between suits for injunctive relief and complaints filed with the Department.

The Department’s proposal does not clearly define what harms would “effectively den[y] a person equal access” to education, risking that some schools may read the provision narrowly and conclude they need only address harassment so severe and pervasive that it pushed a survivor to leave school entirely. If schools interpreted the Department’s proposed rule to allow them to ignore other harassing conduct, they would risk violating the standard set by federal courts. For example, the First Circuit has held that students who experience sexual harassment can make an actionable Title IX claim by showing the experienced quid pro quo harassment or “hostile environment harassment, [which] covers acts of sexual harassment sufficiently severe and pervasive to compromise or interfere with educational opportunities normally available to students.” *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 65 (1st Cir. 2002). Notably, the First Circuit’s definition of hostile environment harassment in school requires that the harassment

⁴⁸ 83 Fed. Reg. at 61466.

⁴⁹ *Id.* at 61469.

“compromise” or “interfere” with education opportunities, rather than completely denying them—thus recognizing that schools have a duty to intervene in harassment that leaves limit survivors equal educational access, even if survivors are not pushed out of school entirely. The First Circuit’s definition also consider the severity and pervasiveness of the harassment from an objective perspective. In contrast to the Department’s proposed § 106.30, the First Circuit requires that schools intervene if the harassment is sufficiently severe that it would interfere with opportunities normally available to students — regardless of whether the individual victim has (yet) experienced a significant harm to their educational access.

To achieve Title IX’s promise of equal educational access, protect students from irreparable harm, and address asymmetries in school’s liability, Know Your IX urges the Department to adopt an alternative approach adapted from workplace sexual harassment law. In a landmark Title VII case, the Supreme Court wrote that workplaces must intervene in sexual harassment as long as the unwelcome conduct creates an “environment [which] would reasonably be perceived, and is perceived, as hostile and abusive”—expressly holding that a victim of workplace sexual harassment does not need to “suffer injury,” a tangible adverse job action, or “concrete psychological harm” to violate antidiscrimination law. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993). The Court further explained that, in determining whether a work environment is “hostile” or “abusive” in violation of Title VII, whether the conduct “unreasonably interferes with an employee’s work performance” is just one of many relevant factors. *Id.* at 23. Know Your IX urges the Education Department to adopt this tried and tested formula. The harm done to a survivor’s educational access and performance should be just one factor in determining whether harassing conduct creates an environment which would be reasonably perceived as hostile. No single factor should be dispositive, and whether a hostile environment exists should be determined on the basis of all the circumstances. *Cf. Harris*, 510 U.S. at 22-23 (“This is not, and by its nature cannot be, a mathematically precise test . . . But we can say that whether an environment is “hostile” or “abusive” can be determined only by looking at all the circumstances . . . no single factor is required.”)

IV. The Department’s Efforts to Provide Special Rights to Respondents Exceed its Statutory Authority Under Title IX

Congress’s delegation of authority to the Department of Education with respect to Title IX was limited to efforts to eliminate sex discrimination in education and rectify its effects. It is well established that, “when Congress directs an agency to consider only certain factors in reaching an administrative decision, the agency is not free to trespass beyond the bounds of its statutory authority by taking other factors into account.” *Lead Industries Ass’n, Inc. v. Environmental Protection Agency*, 647 F.2d 1130, 1150 (D.C. Cir. 1980). *See also Whitman v. American Trucking Associations*, 531 U.S. 457, 468 (2001) (“[T]o prevail in their present challenge, respondents must show a textual commitment of authority to the [agency]”). Accordingly, the Department’s proposed regulation must fall within Title IX’s textual commitment of authority to the agency to “effectuate the provisions of section 1681” through regulations that are “consistent with achievement of the objectives of the statute.”⁵⁰ As the Supreme Court has stated, the objectives of Title IX are two-fold: first, to “avoid the use of federal resources to support

⁵⁰ 20 U.S.C §1682

discriminatory practices” and second, to “provide individual citizens effective protection against those practices.” *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979).⁵¹

Pursuant to §1682 and Supreme Court precedent, the Department of Education is only statutorily authorized to require special procedural rights for respondents accused of sexual violence and harassment if such an action is consistent with the statute’s objectives. Although all individuals are legally entitled to disciplinary proceedings that afford sufficient process to participants and avoid erroneous outcomes, courts have established that violations of these principles are not cognizable under Title IX unless they also constitute a form of sex discrimination. *See, e.g., Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994) (stating that “Title IX bars the imposition of university discipline where gender is a motivating factor in the decision to discipline”). When erroneous discipline is not motivated by the respondent’s gender, the individual may seek relief under the Constitution, contract, and administrative law, depending on the public or private nature of the institution.⁵² These causes of action operate independently from Title IX. By contrast, in the Title IX administrative context, respondents and complainants may file complaints with the Department if they believe that the schools’ disciplinary proceedings were not “prompt and equitable” on the basis of sex.⁵³

The Department of Education under the Obama Administration effectuated Title IX’s statutory objectives when it interpreted “prompt and equitable” to require recipients to apply grievance procedures consistently and provide complainants and respondents with equal procedural rights.⁵⁴ In a resolution agreement with Wesley College, OCR “determined that the College failed to adopt and implement Title IX grievance policies and procedures that fully comply with the requirements of Title IX,” without a finding that its conduct toward the respondent was motivated by sex.⁵⁵ OCR’s statutory authorization for its action to protect the rights of a respondent was rooted in §1682 because ensuring equitable proceedings as a procedural matter does not violate Title IX’s objectives, even without a showing that Wesley College’s treatment of the respondent was motivated by his gender. Similar efforts within this NPRM to afford reciprocal procedural protections to respondents and complainants, such as notice for both parties, are “consistent with achievement of the objectives of the statute.”⁵⁶

⁵¹ In articulating the twin purposes of Title IX, the *Cannon* Court drew upon the statute’s legislative history: “With respect to Title IX, the comments of Representative Mink: ‘Any college or university which has [a] . . . policy which discriminates against women applicants . . . is free to do so under [Title IX] but such institutions should not be asking the taxpayers of this country to pay for this kind of discrimination. Millions of women pay taxes into the Federal treasury and we collectively resent that these funds should be used for the support of institutions to which we are denied equal access,’ 117 Cong.Rec. 39252 (1971), should be compared with the comments of Senator Bayh: ‘[Title IX] is a strong and comprehensive measure which I believe is needed if we are to provide women with solid legal protection as they seek education and training for later careers . . . ’ 118 Cong.Rec. 5806–5807 (1972).”

⁵² Erin E. Buzuvis, *Title IX and Procedural Fairness: Why Disciplined-Student Litigation Does Not Undermine The Role of Title IX in Campus Sexual Assault*, 78 MONT. L. REV. 71, 95 (2017).

⁵³ 34 CFR § 106.8(b) (2018)

⁵⁴ U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE 6 (2011) (rescinded by the Trump Administration), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

⁵⁵ Letter from Beth Gellman-Beer, Supervising Attorney, U.S. Dep’t of Educ. Office for Civil Rights, to Robert E. Clark II, President, Wesley College 2 (Oct. 12, 2016), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03152329-a.pdf>.

⁵⁶ 20 U.S.C §1682.

By contrast, the Department of Education’s proposed regulation operates “in excess of its statutory jurisdiction”⁵⁷ in that it does not seek to effectuate Title IX’s prohibition on sex discrimination in disciplinary proceedings and is inconsistent with the objectives of the statute.⁵⁸ Indeed, the Department’s regulation is marked by its “rape exceptionalism,” defined as a “belief that claims of rape and other forms of gender violence should be treated differently—that is, with greater skepticism and procedural protections—than other charged student disciplinary violations.”⁵⁹ Due to the limitations that Congress placed on the Department of Education’s authority pursuant to §1682, the Department cannot require recipients to administer lopsided disciplinary proceedings favoring respondents over complainants or engage in rape exceptionalism unless it can somehow demonstrate that this approach effectuates Title IX’s sex discrimination mandate. Because the Department cannot make such a showing, it seeks to characterize procedural violations of a respondent’s rights as a form of sex discrimination *ipso facto*,⁶⁰ which would empower the agency to adopt regulations that benefit respondents at complainants’ expense. However, as this Comment describes, this assertion is entirely without legal basis.⁶¹ The Department of Education’s regulation is thus inconsistent with Title IX’s purpose and exceeds its statutory authorization.

A. Erroneous Discipline of Respondents is Not Inherently Sex Discrimination

Although individual respondents may have viable sex discrimination claims under Title IX based on the particular facts of the adjudication, courts have not held that erroneous discipline of respondents is a form of sex discrimination *per se*. Rather, numerous courts of appeals have noted that respondents may pursue “two categories of Title IX claims related to student-disciplinary hearings: ‘erroneous outcome’ claims and ‘selective enforcement’ claims.” *See, e.g., Doe v. Cummins*, 662 Fed. Appx. 437, 451 (6th Cir. 2016) (citing *Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994)). Because these claims arise from Title IX, the respondent must make a showing of sex discrimination, either through demonstrating that the “outcome of [the] University’s disciplinary proceeding was erroneous because of sex bias” or that a “similarly-situated member of the opposite sex was treated more favorably than the plaintiff due to his or her gender.” *Id.* at 452. By contrast, the Department’s proposed rule would presume that sex discrimination has occurred whenever “the recipient does not investigate and adjudicate using fair procedures before imposing discipline.”⁶²

⁵⁷ 5 U.S.C. §706(2)(c).

⁵⁸ For further discussion of this issue, *see* Michael C. Dorf, *The Department of Education’s Title IX Power Grab*, VERDICT: JUSTIA (Nov. 28, 2018), <https://verdict.justia.com/2018/11/28/the-department-of-educations-title-ix-power-grab>.

⁵⁹ Alexandra Brodsky, *A Rising Tide: Learning About Fair Disciplinary Process from Title IX*, 66 J. LEGAL EDUC. 822, 840-841 (2017)

⁶⁰ *See* 83 Fed. Reg. at 61472 (“[A] respondent can be unjustifiably separated from his or her education on the basis of sex, in violation of Title IX, if the recipient does not investigate and adjudicate using fair procedures before imposing discipline.”)

⁶¹ The Department’s proposed regulation also recognizes that due process claims are separate from violations of Title IX by explaining that “[u]nder the system created by the Department’s guidance, hundreds of students have filed complaints with OCR alleging their school failed to provide a prompt or equitable process in response to a report of sexual harassment, and over 200 students have filed lawsuits against colleges and universities alleging their school disciplined them for sexual misconduct without providing due process protections.” 83 Fed. Reg. 61465 (internal citations omitted).

⁶² 83 Fed. Reg. at 61472.

The Department's claim does not reference legal authority because its proposed interpretation of Title IX has been rejected by the courts. *See, e.g., Doe v. Columbia Univ.*, 101 F.Supp.3d 356, 372 (S.D.N.Y. 2015) (noting that discipline due to alleged liability concerns "hardly establishes a plausible inference of discrimination"); *Doe v. University of the South*, 687 F.Supp. 2d 744, 756 (E.D. Tenn. 2009) (allegations that university discipline decision was wrong do not suffice to show motivations of sexual bias). Even in cases where respondents have successfully demonstrated breach of contract or due process violations, courts have refused to presume that wrongfully dismissed students are always victims of sex discrimination. *See, e.g., Brown v. Castleton State College*, 663 F.Supp.2d 392, 403 (D. Vt. 2009) (respondent "alleges sufficient facts to cast doubt on the administrative tribunal's outcome, but the facts do not plausibly suggest discriminatory intent"). In cases where courts have held that respondents have plausibly pled Title IX violations, their decision has been cabined to the case at issue. *See, e.g., Doe v. Baum*, 903 F.3d 575, 587 (noting that "evidence might very well come to show that today's inference is the least plausible of the bunch"). It is improper for the Department to presume that all wrongfully disciplined respondents are victims of sex discrimination in the absence of a showing a recipient's sex bias.

B. Title IX Protects All Victims of Sex Harassment

By contrast, Title IX is unambiguously directed to the protection of victims of sex discrimination, which include survivors of sexual violence. As the *Cannon* Court declared, "Title IX explicitly confers a benefit on persons discriminated against on the basis of sex." 441 U.S. at 694. Similarly, in *Gebser*, the Court noted that, "Title IX is drafted from the perspective of the person discriminated against" and "with an unmistakable focus on the benefited class." 524 U.S. at 296 n.5 (citing *Cannon*, 441 U.S. at 691-693). *See also Davis*, 526 U.S. at 639 (reiterating that Title IX focuses on the benefited class "rather than the perpetrator"). Moreover, in interpreting Title IX, the Supreme Court has established that students who experience sexual harassment from employees or peers experience a form of sex discrimination cognizable under Title IX. *See Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75 (1992) ("[W]hen a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex . . . the same rule should apply when a teacher sexually harasses a student"). *See also Davis*, 526 U.S. at 639 (establishing that Title IX "works to protect students from the discriminatory misconduct of their peers"). Because Title IX protects the rights of victims of sex harassment, the Department of Education is authorized pursuant to 20 U.S.C. §1682 to promulgate rules designed to avoid the use of federal resources to deny victims of sex harassment access to educational benefits and opportunities, *see Davis*, 526 U.S. at 650, and to provide victims of sexual harassment with "effective protection" against discriminatory practices. *Cannon*, 441 U.S. at 704 (1979).

C. The Department's Selective Concern for Respondents Fails to Effectuate Title IX and Exceeds its Statutory Authority

Because the Department of Education cannot plausibly claim that all wrongfully disciplined respondents are victims of sex discrimination, the validity of its action turns on the argument that its regulation aims to "effectuate the objectives of Title IX by creating consistent, fair, objective grievance processes that make the process equitable for both parties and are more likely to

generate reliable outcomes.”⁶³ The Department’s proposals in this vein fall into two primary categories: first, increased procedural rights for respondents and victims of sexual harassment; and second, proposals that are justified solely in terms of the benefits to respondents and/or subordinate the rights of victims of sexual harassment. As stated previously, reforms that benefit both parties equally and aim to promote accuracy in adjudication, such as the Department’s proposal to provide for simultaneous notice of the outcome of a proceeding, are permissible uses of the authority that Congress delegated to the agency, as these efforts could clearly have the effect of protecting both respondents and complainants alike from recipient’s sex discrimination.

However, a number of the Department’s proposals, such as its decision to allow recipients to institute a clear and convincing standard of proof solely for sexual harassment claims, cannot be justified on the ground that they would help effectuate the purpose of Title IX by ensuring more accurate outcomes. Pursuant to *American Trucking Associations*, insofar as the Department’s proposals are designed to protect respondents’ rights but not reduce sex discrimination or ensure accuracy, they exceed Congress’s delegation of authority to the Department under §1682. 531 U.S. at 468.

As an alternative to the Department’s illegal regulation, Know Your IX recommends that the agency outline equitable procedural rights for respondents and complainants. Our organization has developed a series of fair process recommendations that would promote accuracy in adjudication and help to effectuate the purpose of Title IX. We urge the Department to adopt these recommendations, which are attached as “Appendix A,” and fall squarely within the Department’s authority to regulate under §1682.

D. Allowing Recipients to Impose A “Clear and Convincing” Standard Exceeds the Department’s Authority

The Department’s proclivity to discount the interests of individuals protected by Title IX is most apparent in its decision to allow recipients to impose a clear and convincing standard for sexual harassment claims, even when the school applies the preponderance of the evidence standard for other violations of its policy.⁶⁴ The Department would also limit institutions’ ability to apply a preponderance of the evidence standard and would permit a school to use preponderance only “if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction.”⁶⁵ Moreover, a recipient must “apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.”⁶⁶

The agency grounds its justification solely in terms of respondents’ rights, stating that its policy is justified “because of the heightened stigma often associated with a complaint regarding sexual harassment.”⁶⁷ The Department also claims that limitations on the use of the preponderance of the evidence standard are designed “to ensure that recipients do not single out respondents in sexual harassment matters for uniquely unfavorable treatment” and to protect

⁶³ 83 Fed. Reg. at 61472.

⁶⁴ *Id.* at 61477

⁶⁵ *Id.*

⁶⁶ 83 Fed. Reg. at 61472.

⁶⁷ *Id.*

against the “specially disfavored treatment of student respondents in comparison to respondents who are employees such as faculty members.”⁶⁸ Moreover, the agency argues that the preponderance of the evidence standard should be disfavored “in the absence of all of the features of civil litigation that are designed to promote reliability and fairness.”⁶⁹

1. The Department of Education May Not Lawfully Permit Schools to Apply a Clear and Convincing Standard to Title IX Cases

The Department’s proposal regarding the clear and convincing standard falls outside of its regulatory authority, as outlined in §1682, because it is inconsistent with Title IX’s objectives and is not directed to effectuate the statute’s prohibition on sex discrimination. First, the Department’s proposal is only tenuously related to the respondent’s status as a potential victim of sex discrimination, as courts have established that a recipient’s wrongful discipline of a respondent is not a violation of Title IX per se. *See, e.g., Doe v. University of the South*, 687 F.Supp. 2d 744, 756 (E.D. Tenn. 2009). Nor may the agency claim that such an approach would be consistent with Title IX’s objectives by promoting accuracy in adjudication: imposing a clear and convincing standard would increase the risk of wrongful findings of non-responsibility and therefore contribute to a denial of the sex harassment victim’s educational opportunities. And because it is likely that fewer complainants would file formal reports if a recipient adopted a clear and convincing standard, the Department’s proposed regulation, if promulgated, would severely compromise the recipient’s efforts to eliminate sex discrimination from its educational programs. Although the Department may effectuate Title IX’s purpose by requiring procedural protections for both parties to promote accuracy in adjudication, the agency cannot claim that its policy, which would increase inaccuracies in adjudication and subordinate the rights of victims of sex discrimination, would achieve Title IX’s objectives.

Instead of effectuating Title IX’s purpose, the Department of Education’s proposal would promote sex discrimination in education by allowing schools to impose unique procedural hurdles on victims of harassment. The Department’s rape exceptionalism, where it treats sexual violence and harassment survivors differently than victims of other violations, furthers the myth that more procedural protections are required in harassment cases because female victims are more likely to lie. Researchers have found that students already endorse rape myths in overly gendered ways: “among college men, recent data showed that 22% agreed that “*women* lie about rape to get back at men,” and 13% agreed that “a lot of *women* lead men on and then cry rape.”⁷⁰ (emphasis added). Other studies have indicated that the rape myths that received the most endorsement were, “He didn’t mean to” and “She lied.”⁷¹ By allowing schools to question the credibility of harassment victims more than other victims of campus disciplinary offenses, the Department of Education acts to further subordinate the very class of people that Title IX is intended to protect.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Katie Edwards et al., *Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change*, 65 SEX ROLES 761, 767 (2011).

⁷¹ Sarah McMahan, *Rape Myth Beliefs and Bystander Attitudes Among Incoming College Students*, 59 JOURNAL OF AMERICAN COLLEGE HEALTH, 3, 4 (2010).

The Department's decision to impose unique procedural hurdles for survivors of sexual violence is also evocative of historic corroboration requirement and cautionary jury instructions within rape law, which were predicated on the stereotype that female rape victims lie. As Professor Michelle Anderson writes, "the corroboration requirement in rape law meant that a man could not be convicted of rape unless the complainant had corroborative evidence of the assault, such as bruises or ripped clothing that proved a struggle."⁷² The historic corroboration requirement was also linked to jury instructions urging jurors to apply special scrutiny to rape claims: one jurist noted that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho' never so innocent."⁷³ Many of these criminal code provisions were overtly gendered.⁷⁴ Recognizing the sexist origins of the corroboration requirement and the use of cautionary jury instructions only in rape claims, a majority of American jurisdictions have abolished these practices.⁷⁵ However, the Department's proposal would permit schools to adopt policies rooted in discriminatory tropes about female rape victims with renewed vigor.

The Department's proposal is further flawed insofar as it could cause institutions that adopted it to violate Title IX or the Equal Protection Clause. Due to the pervasive myth that women lie about harassment, a court could reasonably find that schools opted to impose unique procedural hurdles on sexual harassment survivors, who are overwhelmingly female, based on an unlawful stereotype. *See, e.g., Williams v. City of Montgomery*, 21 F. Supp. 2d 1360, 1365 (M.D. Ala. 1998) ("If the origin of the alleged policy of disparate treatment of victims of domestic violence ... is intentional discrimination against women, then the policy affects disparate treatment on the basis of gender"); *Smith v. City of Elyria*, 857 F.Supp. 1203, 1212 (N.D. Oh. 1994) (plaintiffs presented evidence police department's differential treatment of domestic violence survivors was intended to "accomplish the collateral goal of keeping women in a stereotypic and predefined place"); *Thurman v. City of Torrington*, 595 F.Supp. 1521, 1527-28 (D. Conn. 1984) (noting that differential treatment of survivors of domestic violence may constitute an equal protection violation, where the treatment is rooted in archaic stereotypes about women). A reviewing court will scrutinize a school's motives when it imposes unique procedural hurdles on a class of individuals often subjected to gendered stereotypes. The Department's policy, which would ensure that survivors of sexual harassment are worse off than similarly situated victims of other campus violations, clearly does not satisfy §1682, as its adoption may cause schools to violate Title IX.

2. The Department's Legal Justification for the Clear and Convincing Standards Rests on Inapposite Authorities

The Department's arguments for requiring recipients to adopt a clear and convincing standard in most instances are based on inapposite comparisons to civil administrative proceedings involving the removal of a license. In its NPRM, the Department argues that "Title IX grievance processes are also analogous to various kinds of civil administrative proceedings,

⁷² Michelle J. Anderson, *Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims*, 13 CRIM. L. REV. 644, 648 (2010),

⁷³ *Id.* at 649.

⁷⁴ *See id.* at 653-55.

⁷⁵ *Id.* at 652.

which often employ a clear and convincing evidence standard.”⁷⁶ However, medical and legal licensure cases are not analogous to Title IX cases because a victim of the professional’s sexual misconduct is not a party to that proceeding. Because victims of sexual harassment could be branded as liars or face other significant reputational harms if a school enters a finding of non-responsibility in a proceeding against the respondent, it is improper for the Department to model Title IX proceedings on licensing revocation procedures that are not formally designed to remedy the effects of misconduct on survivors.

The Department also erroneously concludes that “in student disciplinary cases involving serious accusations like sexual assault where the consequences of a finding of responsibility would be significant, permanent, and far-reaching, a preponderance of the evidence standard is inadequate.”⁷⁷ In this assertion, the Department cites a single unreported case, *Lee v. University of New Mexico*, wherein the respondent was sanctioned and his transcript notated accordingly.⁷⁸ In *Lee*, the court’s ruling that preponderance was “not the proper standard for disciplinary investigations such as the one that lead to Lee’s expulsion,” was also predicated on the fact that the student also alleged that he had not received notice of the possibility of a collateral underage drinking sanction until it was too late to prepare a defense,⁷⁹ which clearly violates Title IX’s guarantee of a prompt and equitable process for both parties.⁸⁰ Accordingly, the Department engages in faulty analogy, using a case of the most extreme sanction (expulsion with transcript notation), accompanied by widespread procedural violations as a proxy for all Title IX cases. The Department has not presented evidence that transcript notation is a widespread practice: only two states require it by law,⁸¹ and survivor-led organizations like Know Your IX strongly oppose it.⁸²

3. The Department Fails to Examine the Effects of its Proposal on Complainants

The Department’s clear and convincing proposal is justified solely on the ground that respondents will benefit but ignores the high rates of stigma faced by complainants. As currently drafted, the proposed regulation grounds its preference for a higher standard of evidence in the idea that “the consequences of a finding of responsibility would be significant, permanent, and far-reaching,” for respondents.⁸³ However, the Department fails to consider the ways in which the consequences of a finding of no responsibility would also be “significant, permanent, and far-reaching” for survivors.⁸⁴ This reasoning clearly manifests the Department’s preoccupation with

⁷⁶ 83 Fed. Reg. at 61477.

⁷⁷ *Id.*

⁷⁸ *Id.* (citing *Lee v. University of New Mexico*, No. 1:17-cv-01230-JB-LF, at *3 (D.N.M. Sept. 20, 2018)).

⁷⁹ *Lee*, No. 1:17-cv-01230-JB-LF, at *3.

⁸⁰ *See, e.g.*, Letter from Beth Gellman-Beer, Supervising Attorney, Dep’t of Educ. Office for Civil Rights, to Robert E. Clark, President, Wesley College (Oct. 12, 2016) (in which the Obama Administration found that Wesley College had violated Title IX’s requirement that a school provide survivors and the accused a prompt and equitable investigation and resolution process, because the school failed to provide sufficient, equitable procedural protections to a student accused of violating the school’s sexual misconduct policy).

⁸¹ ANDREW MORSE ET AL, NAT’L ASS’N OF STUDENT PERS. ADM’RS, STATE LEGISLATIVE DEVELOPMENTS ON CAMPUS SEXUAL VIOLENCE: ISSUES IN THE CONTEXT OF SAFETY 4 (2015), <https://files.eric.ed.gov/fulltext/ED562539.pdf>.

⁸² Know Your IX urges the Department of Education to clarify that that recipients may not adopt transcript notations as a penalty for violations of its sexual misconduct policy.

⁸³ 83 Fed. Reg. at 61477

⁸⁴ *Id.*

the rights of respondents and accompanying disregard for complainants, a lopsided approach that fails to effectuate the purpose of Title IX.

Numerous academic articles document the fact that individuals that file complaints of sexual assault are judged more harshly than individuals accused of perpetrating sexual assault, particularly when cases “deviate from the ‘real rape’ stereotype of a violent attack of a stranger on an unsuspecting victim.”⁸⁵ Moreover, the closer the prior relationship between the parties, the more blame individuals attribute to the alleged victim, as opposed to the alleged perpetrator.⁸⁶ And when victims are intoxicated, the perpetrator is seen as less likely to be culpable.⁸⁷ Research also suggests that individuals who report rape are singled out for unique scrutiny and that perpetrators of robbery may experience higher rates of blame than perpetrators of sexual assault.⁸⁸

The Department also underestimates the high rates of stigma that victims of sexual harassment face when they disclose. In one study of 102 rape victims, almost 41% of victims were called “irresponsible” or told to “get on” with their lives.⁸⁹ These findings are supported within the academic literature: one researcher found that victims “receive significant negative reactions including being blamed and disbelieved when disclosing assault ... these reactions are related to poorer psychological and physical health outcomes.”⁹⁰ Moreover, other researchers have found that sexual assault history is related to low levels of social support. As compared to “nonassaulted persons, people with a history of sexual assault were less likely to be married, reported less frequent contacts with friends and relatives, and reported receiving less emotional support from friends, relatives, and spouse.”⁹¹

At the same time, research indicates that an experience of sexual violence severely impacts survivors’ educational, professional, and financial prospects. Survivors of sexual violence routinely experience downturns in academic performance; students assaulted in high school matriculate to college with lower high school grades and tended to earn lower grades during their freshman year. Students victimized during college also see drops in their GPAs following their

⁸⁵ Mary White Stewart et al., “Real Rapes and “Real Victims””: *The Shared Reliance On Common Cultural Definitions of Rape*, 4 FEMINIST LEGAL STUD. 159, 162-64 (1996).

⁸⁶ *Id.* See also Steffen Bieneck & Barbara Krahné, *Blaming the Victim and Exonerating the Perpetrator in Cases of Rape and Robbery: Is There a Double Standard?*, 26 J. OF INTERPERSONAL VIOLENCE, 1785, 1793-94 (2011).

⁸⁷ *Id.* Cf. Erica L. Green & Sheryl Gay Stolberg, *Campus Rape Policies Get a New Look as the Accused Get DeVos’ Ear*, N.Y. TIMES (July 12, 2017) (quoting from Assistant Secretary of the Office for Civil Rights Candace Jackson, falsely claiming that most reports of sexual violence “fall into the category of ‘we were both drunk,’” and are “not even” as serious as other cases), <https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html>. N.B. Assistant Secretary Jackson, who played a significant early role in the development of the Department’s NPRM, later apologized for her comments. *Id.*

⁸⁸ Steffen Bieneck & Barbara Krahné, *Blaming the Victim and Exonerating the Perpetrator in Cases of Rape and Robbery: Is There a Double Standard?*, 26 J. OF INTERPERSONAL VIOLENCE, 1785, 1798-90 (2011).

⁸⁹ Rebecca Campbell et al., *Social Reactions to Rape Victims: Healing and Hurtful Effects on Psychological and Physical Health Outcomes*, 16 VIOLENCE & VICTIMS 287, 298-99 (2001).

⁹⁰ Rebecca Campbell et al., *Social Reactions to Rape Victims: Healing and Hurtful Effects on Psychological and Physical Health Outcomes*, 16 VIOLENCE & VICTIMS 287, 291-95 (2001).

⁹¹ Jacqueline M. Goldberg, *Sexual Assault History and Social Support: Six General Population Studies*, 15 J. OF TRAUMATIC STRESS 187, 191-93 (2002).

assault.⁹² Moreover, one study showed that more than one-third of all survivors sexually assaulted during college drop out.⁹³ Combined with decreased educational attainment and increased levels of debt that follow assault, the psychological impacts of violence make professional success even more difficult for survivors.⁹⁴ Further, institutional betrayal in the face of sexual violence notably increases the trauma symptoms at the heart of these negative educational and professional outcomes that survivors face.⁹⁵

Because Title IX was enacted to remedy gender-based barriers to education, it is inappropriate for the Department to impose higher burdens on complainants without accounting for the potential effects of its rule on their educations. The Department's inaccurate characterization of the respective stigmas experienced by respondents and complainants serves as further evidence that its rule is not directed to effectuate Title IX's prohibition on sex discrimination.

4. The Department's Claim that its Clear and Convincing Proposal Enhances School Discretion is False

Proposed § 106.45(b)(4)(i) stipulates that "in reaching a determination regarding responsibility, the recipient must apply either the preponderance of the evidence standard or the clear and convincing evidence standard."⁹⁶ This provision purportedly gives schools the "flexibility" and "discretion" to decide what is appropriate "given the unique needs of their community."⁹⁷ But in reality, the Department proposes a series of constraints on the usage of the preponderance of the evidence standard that would disallow its usage where the school uses clear and convincing for other offenses, such as plagiarism, or when faculty have successfully bargained for a clear and convincing standard in their negotiations with their employer.⁹⁸ As a consequence, a recipient will likely apply a clear and convincing standard to sexual violence allegations, rather than forfeit its ability to select a standard with respect to violations of academic honor codes or other victimless offenses, which could result in individuals accused of sexual violence receiving uniquely favorable treatment as compared to other classes of respondents.

A case study of Georgetown University demonstrates how the Department's framework could upend the intentional balance struck by schools in determining the appropriate standard of evidence for particular conduct violations. Georgetown University currently uses "clear and convincing" as the standard for on-campus conduct violations excluding sexual violence.⁹⁹ The

⁹² Carol E. Jordan, Jessica L. Combs, & Gregory T. Smith, *An Exploration of Sexual Victimization and Academic Performance Among College Women*, 15 J. ON TRAUMA, VIOLENCE, AND ABUSE 191, 195-96 (2014).

⁹³ Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18 J. OF COLLEGE STUDENT RETENTION: RES., THEORY & PRAC. 243 (2015).

⁹⁴ *Sexual Violence and the Workplace Research Brief*, National Sexual Violence Resource Center (2013), https://www.nsvrc.org/sites/default/files/publications_nsvrc_research-brief_sexual-violence-workplace.pdf.

⁹⁵ Carly Parnitzke Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 J. OF TRAUMATIC STRESS 119, 122-23 (2013).

⁹⁶ 83 Fed. Reg. at 61479

⁹⁷ *Id.* at 61477.

⁹⁸ *Id.*

⁹⁹ GEORGETOWN UNIV., CODE OF STUDENT CONDUCT 25 (2018), <https://studentconduct.georgetown.edu/code-of-student-conduct>. Georgetown uses preponderance of the evidence for all cases involving sexual violence. *Id.*

university came to this decision following an effort by campus-wide referendum, where over 96% of the undergraduate students who voted indicated a support for the evidentiary change.¹⁰⁰ These students also recognized that in Title IX cases, the prevalence of gender discrimination and rape myths—along with the necessity of balancing each party’s educational rights equally—demands the maintenance of a preponderance standard.¹⁰¹ The Department of Education under the Obama administration also recognized the nuance of this reasoning, identifying racially disproportionate disciplinary practices as both pervasive and problematic¹⁰² while recommending the use of preponderance in adjudicating Title IX claims.¹⁰³

The Georgetown community argued for a clear and convincing standard to apply in cases that did not involve two adversarial student parties. At Georgetown, such violations include drug manufacture, sale, or distribution; falsification of drivers licenses or university ID cards; and three or more instances of propping open external university doors or allowing non-community members into residence halls without proper ID.¹⁰⁴ In these cases, the school brings a case against the respondent student and thus must weigh the potential deprivation of that student’s access to education against the institutional necessity of enforcing its code of student conduct. In this respect, the university’s proceedings more closely resemble licensing revocation procedures, insofar as the university is vindicating its own interests, as opposed to remedying the effects of discrimination on another student. Because an erroneous finding for the respondent does not jeopardize another student’s education in the way that such a finding would compromise survivors’ education and subject them to stigma, the university’s use of the clear and convincing standard is appropriate. The proposed regulations would undermine these community decisions regarding discipline, while also impairing the educational access of sexual violence and harassment survivors.

5. Preponderance of the Evidence is the Appropriate Standard for Title IX Proceedings

There is little legal support for the Department’s proposal that schools be permitted to adopt a clear and convincing standard of evidence for Title IX claims. The Department’s proposal is also improper insofar as it reifies gender stereotypes about harassment victims and would upend schools’ systems for disciplining violations across the board.

In many cases, federal courts have approved of schools’ usage of the preponderance of the evidence standard and upheld sanctions against students found responsible for sexual misconduct under that standard. The Sixth Circuit is the only circuit thus far to consider whether public school’s use of the preponderance standard in sexual misconduct investigations meets Constitutional due process requirements. In *Doe v. Cummins*, the Sixth Circuit considered a §

¹⁰⁰ Sarah Kaplan, *Evidentiary Standards Raised for On-Campus Incidents*, THE HOYA (Georgetown) (Oct. 18, 2012), <http://www.thehoya.com/evidentiary-standard-raised-for-on-campus-incidents/>. The referendum had roughly 46% of students voting.

¹⁰¹ *Id.*

¹⁰² U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE 3-5 (2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf>.

¹⁰³ U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE 10 (2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

¹⁰⁴ GEORGETOWN UNIV., SANCTIONING GUIDELINES 7, 10, 15 (2018), <https://studentconduct.georgetown.edu/sanctioning-guidelines>.

1983 and Title IX claim brought against the University of Cincinnati by male students who were found responsible for sexually assaulting female students by a panel of decision makers applying the preponderance of the evidence standard. 662 Fed.Appx. 437, 441 (6th Cir. 2016). The Sixth Circuit held that the disciplined students both “received sufficient due process under the Fourteenth Amendment” and failed to state a claim under Title IX. *Id.* at 445, 452. *See also Plummer v. Univ. of Houston*, 860 F.3d 767, 771 (5th Cir. 2017), as revised (June 26, 2017) (holding that the state University disciplinary proceedings, in which appeals panels made findings “based on a preponderance of the evidence standard,” did not violate the due process rights of two expelled students). In other cases, federal courts have sanctioned the preponderance of the evidence standard in Title IX suits brought by students disciplined for sexual harassment. *See, e.g., Doe v. University of Massachusetts–Amherst*, No. 14-30143-MGM, 2015 WL 4306521 at *9 (D. Mass July 14, 2015) (holding that student expelled after being found responsible for sexual assault under a preponderance standard failed to state a claim under Title IX); *Bleiler v. Coll. of Holy Cross*, No. CIV.A. 11-11541-DJC, 2013 WL 4714340, at *10 (D. Mass. Aug. 26, 2013) (granting summary to Holy Cross, holding that the school did not violate the Title IX rights of a student who was suspended after being found responsible for sexual assault). As a consequence, the Department of Education’s invocation of *Lee v. University of New Mexico* contradicts the majority of legal authorities on this issue.

Federal courts often apply the preponderance of the evidence standard in examining Title IX claims brought against recipients. *See, e.g., Williams ex rel. Hart v. Paint Valley Local Sch. Dist.*, 400 F.3d 360, 363 (6th Cir. 2005) (“Under Title [IX], the School District may be liable for the sexual abuse of a student if the Plaintiff demonstrates by a preponderance of the evidence each of the [required] elements,” including that plaintiff “was subjected to sexual abuse by the intentional conduct of [the perpetrator]”); *Bostic v. Smyrna Sch. Dist.*, 418 F.3d 355, 360 (3d Cir. 2005) (upholding jury instructions which specified that plaintiff had “the burden of proving by a preponderance of the evidence that a school official with the power to take action to correct the discrimination had actual notice . . . then responded to that notice with deliberate indifference); *Lopez v. Metro. Gov't of Nashville & Davidson Cty.*, 646 F. Supp. 2d 891, 918 (M.D. Tenn. 2009) (“[A] school district can “be liable for acting with deliberate indifference” if a plaintiff “demonstrate[s] by a preponderance of the evidence that the School District had actual knowledge of prior facts to which it responded unreasonably”). As a consequence, the Department’s proposed rule would set up a significant asymmetry, where a school could be held liable under a preponderance of the evidence standard for its violations of Title IX but could only discipline a respondent pursuant to a clear and convincing standard.

Moreover, many other civil rights statutes, including Title VI and Title VII of the Civil Rights Act, are litigated using a preponderance of the evidence standard. Title VII of the Civil Rights Act prohibits discrimination on the basis of sex, including sexual harassment, in employment. Federal courts have long accepted that preponderance is the appropriate standard of proof in Title VII cases. In the landmark sex-discrimination case *Price Waterhouse v. Hopkins*, the Supreme Court explained that “[c]onventional rules of civil litigation apply in Title VII cases and one of these rules is that parties to civil litigation need only prove their case by a preponderance of the evidence.” 490 U.S. 228, 253 (1989). *See also Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003). Federal courts have also applied the preponderance standard specifically to workplace sexual harassment claims under Title VII. For example, the Sixth Circuit has held that in order to establish a prima facie case of hostile work environment, a plaintiff must show

that they were “subjected to unwelcome sexual harassment,” and other required elements by the preponderance of the evidence. *Thornton v. Federal Express Corp.*, 530 F.3d 451, 455 (6th Cir. 2008). By pushing schools to use a clear and convincing standard of evidence, rather than preponderance, the Department’s proposed rule would create a bizarre dichotomy in which students are less protected from sexual harassment than adult employees.

Title IX was “patterned after Title VI of the Civil Rights Act of 1964,” a parallel civil rights statute that prohibits race discrimination in education. *Cannon*, 441 U.S. at 694. The Supreme Court has long made clear that Title IX should be applied with reference to Title VI, noting that “the two statutes use identical language,” and the “drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been.” *Id.* at 695-96. Title VI litigation relies on a preponderance of the evidence standard, suggesting that an appropriate application of the Title IX statute should also rely on preponderance. *See, e.g., Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993) (holding that to establish liability under Title VI’s disparate impact scheme, a plaintiff must “[d]emonstrate by a preponderance of the evidence that facially neutral practice has disproportionate adverse effect” on a protected class); *South Camden Citizens in Action v. New Jersey Dept. of Environmental Protection*, 145 F. Supp. 2d 446, 483 (D.N.J. 2001).

Many other civil rights statutes, like Title IX, Title VII, and Title VI are adjudicated using a preponderance of the evidence standard. *See, e.g., T.W. ex rel. Wilson v. School Bd. of Seminole County, Fla.*, 610 F.3d 588, 603-04 (11th Cir. 2010) (holding that to succeed on a Rehabilitation Act discrimination claim, a plaintiff must prove intentional, disability-based discrimination by a preponderance of the evidence); *Williams ex rel. Hart v. Paint Valley Local Sch. Dist.*, 400 F.3d 360, 365 (6th Cir. 2005) (holding that a school could be liable for sexual abuse of students under § 1983 if they established that a pattern of sexual abuse and other elements existed by a preponderance of the evidence); *Heilweil v. Mount Sinai Hosp.*, 32 F.3d 718, 722 (2nd Cir. 1994) (specifying that to succeed in a disability discrimination case, plaintiff bears the “ultimate burden of proving by preponderance of evidence that she is qualified despite her handicap”). The widespread use of the preponderance standard illustrates that the standard is appropriate in determining whether a civil rights violation (such as sexual harassment in schools) has occurred. The Department has offered no compelling justification for its legal authority to impose uniquely high barriers on students seeking redress for sexual harassment when preponderance is widely used in many other civil rights contexts. Moreover, as this Comment discusses previously, a school’s decision to adopt a clear and convincing standard solely for sexual harassment cases may engender liability, as a court may find that the school’s decision was rooted in the sex stereotype that women lie about harassment.

Finally, the Violence Against Women Act of 1994 (“VAWA”) created a civil rights cause of action for rape and sexual assault as “crimes of violence motivated by gender” and explicitly referred to preponderance of the evidence as the applicable standard for such claims.¹⁰⁵ Although the Supreme Court invalidated VAWA’s civil rights remedy on federalism grounds in 2000, the Court never objected to the use of the preponderance of the evidence standard for adjudicating civil rights claims related to sexual violence.

¹⁰⁵ Amy Chmielewski, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 B.Y.U. Educ. & L.J. 143, 153–54 (2013); 42 U.S.C. § 13981 (2006), invalidated by *United States v. Morrison*, 529 U.S. 598 (2000).

V. The Department’s Cross-Examination Proposal Would Hamper Schools’ Efforts to Create Nondiscriminatory Environments

The Department of Education has also proposed § 106.45(b)(3)(vii), which would require postsecondary institutions to hold live hearings where advisors could directly cross-examine complainants, respondents, and adverse witnesses in all cases.¹⁰⁶ The agency’s position would deter complainants from participating in formal proceedings and is not required by the Due Process Clause or judicial precedent. Moreover, the Department’s decision to apply differential standards to elementary and secondary students and college students contradicts scientific research on the neurobiology of trauma.

In order to afford both parties a safe and meaningful opportunity to test the strength of evidence, Know Your IX recommends that the Department of Education adopt an alternative framework where complainants and respondents would have an equal opportunity to submit written questions to the hearing panel, which would then screen the questions for materiality and appropriateness.¹⁰⁷ Schools would also be required to inform both parties of their right to undergo live questioning in separate physical spaces and to explain that such an accommodation will not be held against them. Once the questions are screened, the panel would then pose questions to each party. This alternative approach, which has been espoused by Yale University,¹⁰⁸ would permit real-time questioning to test the strength of evidence while recognizing schools’ distinct interest in encouraging reporting. Moreover, this practice would also reduce the likelihood that a student’s economic resources and subsequent ability to hire an expensive lawyer as their advisor would foster inequities in discipline. This proposal – which the Department has effectively proposed in the context of elementary and secondary schools – would better balance the due process rights of respondents with schools’ interest in creating safe and fair processes that satisfy their obligations under Title IX.

A. The Department’s Harmful Proposal is Not Required by the Due Process Clause or Principles of “Basic Fairness”

The Department has attempted to impose a one-size-fits-all approach to cross-examination on all institutions of higher education, despite the fact that public and private institutions are subject to different legal requirements. Although all public institutions must adopt procedures that comport with the Due Process Clause, courts have generally held that private institutions’ disciplinary proceedings are governed by a “basic fairness” standard. *See, e.g., Cloud v. Trustees of Boston Univ.*, 720 F.2d 721, 725 (1st Cir. 1983). The Department’s draft regulation fails to

¹⁰⁶ 83 Fed. Reg. at 61498

¹⁰⁷ Appropriateness should be decided through a trauma-informed lens and would preclude sexual history and other tenuously related interrogatories predicated on rape myths or gender, sex, race, or other stereotypes. Screening should also exclude questions pertaining to a complainant’s prior sexual history with persons other than the opposing party, with the exception of specific instances of a complainant’s sexual behavior if offered to prove that someone other than the respondent was the source of semen, injury, or other physical evidence, as well as irrelevant mental health diagnoses and/or treatment. *See* Alyssa Peterson & Sejal Singh, *Fair Disciplinary Procedures*, KNOW YOUR IX, <https://www.knowyourix.org/statepolicy-playbook/fair-disciplinary-procedures/>.

¹⁰⁸ YALE UNIV., UNIVERSITY-WIDE COMMITTEE ON SEXUAL MISCONDUCT 6 (Oct. 26, 2018), <https://uwc.yale.edu/policies-procedures/uwc-procedures>.

account for these critical distinctions between institutions and would impose significant costs on complainants and schools without achieving corresponding gains in accuracy.

With respect to public schools, determining the process that is due to a student respondent requires the balancing of three factors: (1) the private interest of the respondent, (2) the risk of an erroneous deprivation of such interest through use of status quo procedures, discounted by the value of additional procedural safeguards, and (3) the government's interest as well as the public interest, including the fiscal and administrative costs associated with increased safeguards. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). In Title IX campus proceedings, the first *Mathews* factor considers that the respondent has a private interest in “their reputation, career goals, educational advancement, and relationships with faculty and peers.”¹⁰⁹ The risk of erroneous deprivation of these interests, the second *Mathews* factor, is certainly nontrivial. However, the Department has failed to demonstrate that the large costs that its proposal would impose on recipient would mitigate the risk of erroneous deprivation by increasing accuracy. Instead, the Department could adopt a version of Know Your IX's written questions recommendation and achieve gains in accuracy without jeopardizing schools' efforts to address discrimination in their educational programs.

The Department's cross-examination policy is not legally required under the *Mathews* balancing test. The Sixth Circuit has clarified that, where due process demands cross examination, written statements will not suffice. *Doe v. Baum*, 903 F.3d 575, 582 (6th Cir. 2018). Instead, universities “must allow for some form of *live* questioning.” *Id.* at 583. However, such live cross examination need not occur in the form of a direct cross-examination by an advisor. Instead, the Sixth Circuit emphasizes that such questioning must occur “*in front of the fact-finder*” to allow for credibility assessment “*by the university.*” *Id.* at 585, 583. This emphasis on audience rather than actor demonstrates that due process is located in the opportunity of the school to assess credibility, not the opportunity of the respondent (or an advisor of the respondent) to personally or directly question adverse witnesses. Case law plainly requires only that a university have the opportunity to observe the complainant responding to live questioning; the Department's conclusion that an “advisor aligned with [a given] party” must have an opportunity to directly cross examine the complainant and other witnesses,¹¹⁰ is not plainly required by law.¹¹¹

The Department's decision to require cross-examination by parties' advisors even when the outcomes is not dependent on witness testimony is similarly not compelled by precedent. As the Sixth Circuit has established, due process requires cross-examination where credibility is both disputed and material to the outcome of the case. *See Baum*, 903 F.3d at 584. As a result, the presence of documentary evidence such as tapes, messages, or photos may reduce the necessity of cross-examination, as the presence of such evidence reduces the likelihood that the determination of respondent responsibility “turns on the credibility of the accuser, the accused,

¹⁰⁹ Lavinia M. Weizel, *The Process That is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C.L. REV. 1613, 1646 (2012).

¹¹⁰ 83 Fed. Reg. at 61476.

¹¹¹ *Baum* explains that direct cross examination by a respondent of a complainant is unnecessary and could subject the complainant to psychological harm. The ruling in *Baum* allows for, but does not require, cross examination by an “accused student's agent.” 903 F.3d at 583.

or witnesses.” *Id.* at 584. *See also Doe v. University of Cincinnati*, 872 F.3d 393, 402 (6th Cir. 2017). Because the Department attempts to root its cross-examination framework in Sixth Circuit precedent, its proposal should be revised to account for cases where determinations of the parties’ credibility are not material to the outcome.

B. The Department’s Proposal Would Impose Enormous Costs on Institutions and Complainants

The Department’s cross-examination proposal would hamper public schools’ efforts to maintain nondiscriminatory environments. First, as courts have stated, schools have a “‘well recognized’ interest in maintaining a learning environment free of sex-based harassment and discrimination.” *University of Cincinnati*, 872 F.3d at 402. Schools also “have a legitimate interest in avoiding procedures that may subject an alleged victim to further harm” as well as in ensuring survivors of sexual violence have a safe and fair opportunity to present their case to their school. *Doe v. Baum*, 903 F.3d 575, 583 (2018). This aim is supplemented by the public’s interest in addressing sex discrimination in schools and in mitigating trauma, especially that which occurs during childhood and adolescence and which has significant negative implications for society.¹¹² The Department’s proposal should be revised to more fully account for schools’ interests in promoting a nondiscriminatory environment and to reflect the fact that schools could obtain increased accuracy at lower cost through the use of written questions.

The Department’s proposal would also deter survivors from proceeding formally against a respondent, which would seriously impair schools’ ability to maintain safe and equitable campuses. For example, as one survivor from Washington shared with Know Your IX, “If I could have been cross-examined by a representative of my assailant, I would not have reported my case. Period. It would not have been worth it. I would anticipate that process to be so traumatizing that I would have a total mental-health break down and leave school. I would have just stayed silent. There’s no way I would have subjected myself to that.”¹¹³ Similarly, Sage Carson, a survivor who reported her rape at the University of Delaware, dropped her case because of the fear of live cross-examination. “I started dropping my case because I was so scared of what that would be like. Just hearing his voice made me have panic attacks.”¹¹⁴

Moreover, cross-examination, as described by the Department, would also further traumatize complainants and exacerbate sex-based barriers to education. Survivors who have been subjected to live, direct cross-examination consistently report that the practice exacerbated their trauma symptoms and undermined their ability to access education. A survivor from New York faced serious impacts to her mental health and academic success after undergoing live cross-examination:

¹¹² CTR. FOR DISEASE CONTROL, *ADVERSE CHILDHOOD EXPERIENCES: LOOKING AT HOW ACES AFFECT OUR LIVES & SOCIETIES 1*, https://vetoviolenecdc.gov/apps/phl/resource_center_infographic.html (Last visited Jan. 25, 2019).

¹¹³ Electronic submission received through <https://www.handsoffix.org/share-your-story/> (last accessed Jan. 19, 2019).

¹¹⁴ Casey Quinlan, *Advocates for sexual assault survivors say DeVos’ guidance will keep people from reporting*, THINK PROGRESS (Sept. 26, 2017), <https://thinkprogress.org/campus-sexual-assault-policies-0a92ab831374/>.

My assailant did cross-examine me. I didn't just want to die, I planned to die. I thought about killing myself all of the time. My grades fell, and eventually I sought counseling through the school. That didn't help. I connected with [a] local private therapist. I never got my GPA back up. Triggering moments and repulsive flash backs interrupted my studies in undergrad, as well as in law school.¹¹⁵

Another student survivor described attempting suicide after being cross-examined in the context of pursuing a restraining order:

I was directly cross examined by my rapist when I later filed a restraining order. That action directly led to a suicide attempt, and there is no doubt in my mind that had she, a year prior, been allowed to cross examine me, I would have attempted then too. The entire process was already grueling and my school was doing nothing to prevent rampant retaliation against me. A direct cross examination would have been the final nail in the coffin, so to speak.¹¹⁶

The trauma associated with live cross-examination may directly impact survivors' educational opportunities and employment prospects. Research has documented that "trauma-related GPA declines can contribute to scholarship loss,"¹¹⁷ which can cause survivors to drop out due to an inability to afford tuition. Similarly, academic penalties associated with trauma, such as suspension or expulsion for poor grades, may follow survivors for years, harming their prospects for employment or other higher educational opportunities.¹¹⁸ Rather than effectuating Title IX's purpose, the Department's proposal would instead create sex-based barriers to education and employment.

Finally, the Department's proposed direct live cross examination provision also fails to address the administrative burdens associated with the Department's efforts to "transform [schools'] classrooms into courtrooms." *Jaksa v. Regents of University of Michigan*, 597 F.Supp. 1245, 1250 (E.D. Mich. 1984). The Department's proposed regulation will impose large costs on schools, who will be obligated to provide every student with an advisor and conduct detailed trainings. Schools will also be required to conduct extensive trainings for hearing board members, as administrators will be required to explain, in real time, why they excluded any questions on the basis of relevance. As this Comment previously notes, these costs could be averted without a corresponding loss in accuracy if the Department permitted parties to submit written questions to a hearing panel, a procedure which the Department sanctions in the elementary and secondary school context.

C. The Department's Framework Would Not Reduce the Risk of Erroneous Deprivations

¹¹⁵ Electronic submission received through <https://www.handsoffix.org/share-your-story/> (last accessed Jan. 19, 2019).

¹¹⁶ Electronic submission received through <https://www.handsoffix.org/share-your-story/> (last accessed Jan. 19, 2019).

¹¹⁷ Dana Bolger, *Gender Violence Costs: Schools' Financial Obligations Under Title IX*, YALE L.J. 125, 2116 (2016).

¹¹⁸ *Id.*

The Department of Education assumes that direct cross-examination will increase the accuracy of adjudications, but the practice may in fact reduce the ability of a hearing panel to draw correct conclusions from survivors' demeanors. As noted in *Doe v. Baum*, cross-examination gives fact-finders an opportunity "to assess a witness's demeanor and determine who can be trusted." 903 F.3d 375 at 581. However, cross-examination may not be an effective way to test a survivor's credibility, particularly if the student has developed post-traumatic stress disorder (PTSD). Individuals with PTSD often have difficulty answering questions fully and thoroughly in real time, as questioning about a traumatic experience may trigger a flashback or dissociation. Victims may have to work against trauma responses to place disorganized and fragmented memories together in real time. As Dr. Rebecca Campbell, an expert on the neurobiology of trauma explains, trauma can make recall of events "slow and difficult — because the encoding and the consolidation went down in a fragmented way."¹¹⁹ As a consequence, a victim may seem less credible to a factfinder because he or she appears unable to immediately recall the details of an assault.¹²⁰

Allowing hostile advisors to cross-examine opposing witnesses may also impair a fact-finder's ability to judge credibility, as researchers have found that "a lawyer's demeanor towards the witness can prejudicially affect an observer's conclusions about witness deception."¹²¹ For example, when interviewees "are questioned by suspicious interviewers, subjects tend to view their responses as deceptive even when they are honest, which significantly increases detection errors."¹²² This bias arises from two phenomena: (1) the suspicious interrogation itself warps observers' perceptions, and (2) the interrogation places the interviewee under stress, which then induces behavior likely to be interpreted as deceptive.¹²³ These findings are especially concerning for victims of sexual assault, as the complainant would experience hostile questioning that would trigger stressors related to the traumatic event.

The Department's inability to specify which individuals should serve as advisors may also limit the efficacy of cross-examination.¹²⁴ At present, students may select parents or friends to serve as their advisors in a disciplinary proceeding. Parents who serve as advisors would be afforded "government-sanctioned authority to question their child's accuser or alleged assailant."¹²⁵ In such a scenario, it will likely be impossible for parent-advisors to rein in their hostility against their child's accuser or alleged assailant during live cross-examination. In other cases, students may select other students to perform the role of advisor, which could result in a student cross-examining another student directly.¹²⁶ In these situations, cross-examination may not promote accuracy and would carry a serious risk of retraumatizing the complainant.

¹¹⁹ Dr. Rebecca Campbell, Professor of Psychology, Mich. State Univ., Seminar Address for the National Institute of Justice Research for the Real World Series (Dec. 2012).

¹²⁰ *Id.*

¹²¹ H. Hunter Bruton, *Cross-Examination, College Sexual Assault Adjudications, and the Opportunity for Tuning Up the "Greatest Legal Engine Ever Invented"*, 27 CORNELL J.L. & PUB. POL'Y 145, 158 (2017).

¹²² Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1080 (1991).

¹²³ *Id.*

¹²⁴ The Clery Act states that a student may be accompanied by an "advisor of their choice." 20 U.S.C. §1092.

¹²⁵ Suzanne B. Goldberg, *Keep Cross-Examination Out of College Sexual-Assault Cases*, CHRON. HIGHER EDUC. (Jan. 10, 2019), <https://www.chronicle.com/article/Keep-Cross-Examination-Out-of/245448>.

¹²⁶ *Id.*

D. The Department’s Proposal Would Foster Inequities Based on Socioeconomic Status and Undermine Schools’ Educational Mission

The proposed rule’s emphasis on active advisors in the cross-examination context will create a system that favors wealthier students who can afford high-quality representation.¹²⁷ Although the NPRM requires schools to provide a party with an advisor to conduct cross-examination if the party does not have an advisor at the hearing, a wealthy student would presumably only choose the school-provided adviser if the school-provided adviser was superior to the best lawyer that the wealthy student could afford. Given limitations on school resources, it is unlikely that school-provided advisers would achieve such a standard. Moreover, schools without the resources to hire outside professionals may have to train their own staff or faculty to serve as advisers. Faculty’s role in proceedings would be dramatically transformed: as Suzanne B. Goldberg writes, “it is one thing for a faculty or staff member to inform and support a student, as many currently do, and quite another to adversarially cross-examine a student who is also part of his or her own institution.”¹²⁸ She adds that, “[e]ducators as well as the college, may see this as conflicting with their responsibility to support all students.”¹²⁹

E. The Department Arbitrarily Distinguishes Between K-12 and College Students

Proposed § 106.45(b)(3)(vi) would make it optional for elementary and secondary schools to hold a live hearing as part of their grievance procedures.¹³⁰ In making this distinction, the Department expressly recognizes the harms of cross-examination, and states that, in the K-12 context, “sensitivities associated with age and developmental ability ... may outweigh the benefits of cross-examination at a live hearing.”¹³¹ This reasoning correctly reflects scientific research on the neurobiology of trauma. However, the Department refuses to take the effects of trauma into account for college students because they are “adults,” even though modern neuroscience has established that adolescence, in terms of brain development, extends well beyond the teenage years.

In particular, researchers have found that the prefrontal cortex – the part of the brain primarily responsible for executive functioning – typically does not fully develop until the early twenties or even later, when many students have already graduated from college.¹³² Further, it is “well established that the brain undergoes a ‘rewiring’ process that is not complete until approximately 25 years of age.”¹³³ Brain development is impacted by trauma, and it is exactly those “sensitivities associated with... developmental ability” that the Department seeks to

¹²⁷ Adam Harris, *Betsy DeVos’s Sexual-Assault Rules Would Let the Accused Cross-Examine Accusers*, THE ATLANTIC (Nov. 17, 2018), <https://www.theatlantic.com/education/archive/2018/11/betsy-devos-campus-sexual-assault/576100/>.

¹²⁸ Suzanne B. Goldberg, *Keep Cross-Examination Out of College Sexual-Assault Cases*, CHRON. HIGHER EDUC. (Jan. 10, 2019), <https://www.chronicle.com/article/Keep-Cross-Examination-Out-of/245448>.

¹²⁹ *Id.*

¹³⁰ 83 Fed. Reg. at 61476.

¹³¹ *Id.*

¹³² Heidi Ledford, *Who exactly counts as an adolescent?*, NATURE (Feb. 21, 2018), <https://www.nature.com/articles/d41586-018-02169-w>.

¹³³ Mariam Arain et al., *Maturation of the adolescent brain*, 9 NEUROPSYCHIATRIC DISEASE & TREATMENT 449, 451 (2013).

account for in its decision not to require direct live cross examination at the elementary and secondary levels. Because post-secondary students experience brain development similar to that of K-12 students, the retraumatization that the Department seeks to prevent in the K-12 context is also likely to occur in university contexts. The Department’s distinction between these two groups is unsupported.

VI. The Department’s Decision to Permit Mediation in All Cases of Sexual Assault and Intimate Partner Violence is Dangerous and Inappropriate

Section 106.45(b)(6) of the Department of Education’s proposed regulation would allow a recipient to “facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication provided that the recipient provides to the parties a written notice,”¹³⁴ which includes allegations, procedural requirements (which preclude parties from resuming a formal complaint), and potential sanctions. A recipient must also “obtain the parties’ voluntary, written consent to the informal resolution process.”¹³⁵

The Department’s proposal would constitute a reversal from the Bush and Obama Administrations’ interpretation that recipients should not use mediation to resolve cases of sexual assault. In its 2011 Dear Colleague Letter, the Obama Administration stated that, “it is improper for a student who complains of harassment to be required to work out the problem directly with the alleged perpetrator, and certainly not without appropriate involvement by the school (e.g., participation by a trained counselor, a trained mediator, or, if appropriate, a teacher or administrator).”¹³⁶ The Department also noted that, “in cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis.”¹³⁷ The Obama Administration’s position elaborated on Bush Administration guidance stating that the Office of Civil Rights had frequently advised schools that it was inappropriate for a student reporting sexual harassment and violence to be required to “work out the problem directly with the individual alleged to be harassing him or her.”¹³⁸

A. Allowing Mediation in All Cases of Sexual Violence Creates an Unregulated Process that Jeopardizes Safety and Fair Process Rights for Both Parties

The Department’s proposal lacks appropriate guidance on how recipients should practice mediation, and leaves room for untrained school officials to administer flawed processes that could further traumatize survivors. In contrast to the proposed rule, which does not articulate any training or program requirements, Skidmore’s “Prism Project,” a campus restorative justice initiative, states that if mediation is to be used in any setting regarding cases of sexual violence mediators should “receive 20-40 hours of initial training, followed by a supervised

¹³⁴ 83 Fed. Reg. at 61479.

¹³⁵ *Id.*

¹³⁶ U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE 8 (2011) (rescinded by the Trump Administration), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

¹³⁷ *Id.*

¹³⁸ U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 21 (2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

apprenticeship.”¹³⁹ Mediators should also be trained in how “to assist parties in high conflict and, often, chaotic discourse, which may unfold in unpredictable ways.”¹⁴⁰ The Department of Education mentions training in passing in its proposed rule, acknowledging that, “informal resolution options may lead to more favorable outcomes for everyone involved, depending upon factors such as...the knowledge, skills, and experience level of those facilitating or conducting the informal resolution process; the severity of the misconduct alleged; and likelihood of recurrence of the misconduct.”¹⁴¹ But the Department fails to outline how schools should be training mediators, under what level of severity informal resolutions may be appropriate or inappropriate, and how to screen for recurrence of misconduct.¹⁴²

The Department’s proposed rule also could foster coercion in the informal resolution process. Unlike restorative justice practices, which have established distinctive guidelines and practical strategies to create a non-coercive environment, mediation can create power imbalances for the parties participating. This power imbalance can create a forum for offenders to attempt to victimize survivors through manipulative language,¹⁴³ which was why it was previously barred in cases of sexual assault and intimate partner violence. By contrast, restorative justice practices, such as Skidmore’s Prism Project, suggests allowing survivors to bring in support people who play an active role in the process.¹⁴⁴ These individuals are able to actively support the victim and confront the offender and their conduct, which reduces the risk of intimidation and further traumatization of the victim.¹⁴⁵ Moreover, although the Department would require schools to obtain the parties’ “written consent,”¹⁴⁶ survivors and advocates fear that schools may manipulate or push students into a harmful and unfavorable process. Schools that don’t have survivors’ best interest at heart may favor mediation to their standard investigation process,¹⁴⁷ as mediation is quicker, requires less manpower, and the confidentiality requirements will likely silence survivors who would otherwise publicly criticize their school’s procedures and the outcome of the proceeding.

Moreover, although the Department claims that these significant changes will increase due process for respondents, unregulated informal resolutions can violate the rights of respondents as schools may impose penalties and sanction without formally investigating the case. For example, in 2015 the Department of Education found the University of Virginia to be in violation of Title IX for their informal resolution process, which was not equitable to either party and imposed sanctions on the basis of an admission without an independent and formal investigation.¹⁴⁸ In

¹³⁹ SKIDMORE COLLEGE, CAMPUS PRISM PROJECT BRIEF: DISTINGUISHING CAMPUS RESTORATIVE JUSTICE FROM MEDIATION 2 (2016), <https://www.skidmore.edu/campusrj/documents/RJ-vs-Mediation-Brief.pdf>.

¹⁴⁰ *Id.*

¹⁴¹ 83 Fed. Reg. at 61479.

¹⁴² *Id.*

¹⁴³ See Lois Presser & Cynthia A. Hamilton, *The Micropolitics of Victim-Offender Mediation*, 76 SOC. INQUIRY 316, 317-318 (2006).

¹⁴⁴ SKIDMORE COLLEGE, CAMPUS PRISM PROJECT BRIEF: DISTINGUISHING CAMPUS RESTORATIVE JUSTICE FROM MEDIATION 3 (2016), <https://www.skidmore.edu/campusrj/documents/RJ-vs-Mediation-Brief.pdf>.

¹⁴⁵ *Id.*

¹⁴⁶ 83 Fed. Reg. at 61479.

¹⁴⁷ Grace Watkins, *Sexual Assault Survivor to Betsy DeVos: Mediation Is Not a Viable Resolution*, TIME: MOTTO (Oct. 2, 2017), <http://time.com/4957837/campus-sexual-assault-mediation/>.

¹⁴⁸ Letter from Alice B. Wender, Regional Office Director, U.S. Dep’t of Educ. Office for Civil Rights, to Dr. Teresa Sullivan, President, University of Virginia (Sept. 21, 2015), <https://www2.ed.gov/documents/press-releases/university-virginia-letter.pdf>.

2016, the Department of Education found Minot State University in violation of Title IX for their informal resolution process, where the school could impose sanctions on a respondent without a formal investigation or hearing process.¹⁴⁹ As a consequence, it is clear that unregulated mediation and informal resolutions could harm the fair process rights of both parties.

B. The Department's Mediation Proposal Constitutes a Weak Alternative to Restorative Justice

In addition, the Department may not characterize its unregulated mediation proposal as a form of restorative justice. While many gender violence advocates and activists have been pushing for schools to utilize restorative justice practices¹⁵⁰ that have favorable outcomes for survivors,¹⁵¹ mediation is not restorative justice. Mediation is a “dispute resolution” process that is commonly used on campuses in roommate disagreements.¹⁵² By contrast, restorative justice is a “process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”¹⁵³ This process on campuses and in schools is a “non-adversarial approach to addressing offensive behavior that seeks to identify and repair harm and rebuild trust through facilitated dialogue.”¹⁵⁴ Moreover, “[i]t includes a variety of practices, including prevention circles, response conferences, and reintegration circles, designed to empower harmed parties and strengthen offenders’ social ties and accountability to the community.”¹⁵⁵

Mediation does not require a party to take responsibility for the harm they caused, but Know Your IX strongly believes that a process designed to restore the complainants’ access to education should require offenders to accept responsibility before entering into a face-to-face meeting, as this requirement is essential to prevent a harmful confrontation between both parties. Further, restorative justice can be appropriate in Title IX cases as it focuses on restoring students’ access to education and community safety, while mediation is based in conflict resolution. Schools have an important obligation to keep their community safe and improve campus climate, and these interests clearly align with a restorative justice approach. Through restorative justice, representatives of the institution could address harms to the campus community, communicate the institution's strong disapproval of sexual misconduct, and assess the risk of re-offense to examine how the institution could act to improve the safety of its community.¹⁵⁶ Conversely, these concerns are not central to mediation and do not lead to changes in the campus policy and culture.

¹⁴⁹Letter from Adele Rapport, Regional Director, U.S. Dep’t of Educ. Office for Civil Rights, to Dr. Steven Shirley, President, Minot State University (Jul. 7, 2016), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05142061-a.pdf>.

¹⁵⁰ Katherine Mangan, *Why More Colleges Are Trying Restorative Justice in Sex-Assault Cases*, CHRON. HIGHER EDUC. (Sept. 17, 2018), <https://www.chronicle.com/article/Why-More-Colleges-Are-Trying/244542>.

¹⁵¹ Kerry Cardoza, *Students Push for Restorative Approaches to Campus Sexual Assault*, TRUTH OUT (Jun. 30, 2018), <https://truthout.org/articles/students-push-for-restorative-approaches-to-campus-sexual-assault/>.

¹⁵² Grace Watkins, *Sexual Assault Survivor to Betsy DeVos: Mediation Is Not a Viable Resolution*, TIME: MOTTO (Oct. 2, 2017), <http://time.com/4957837/campus-sexual-assault-mediation/>.

¹⁵³ HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 37 (2002)

¹⁵⁴ DAVID R. KARP ET AL., *CAMPUS PRISM: A REPORT ON PROMOTING RESTORATIVE INITIATIVES FOR SEXUAL MISCONDUCT ON COLLEGE CAMPUSES* 11 (2016).

¹⁵⁵ *Id.*

¹⁵⁶ SKIDMORE COLLEGE, *CAMPUS PRISM PROJECT BRIEF: DISTINGUISHING CAMPUS RESTORATIVE JUSTICE FROM*

C. Mediation is Particularly Inappropriate in Cases of Sexual Assault and Intimate Partner Violence

Mediation is particularly ill-suited to resolve cases of sexual assault and intimate partner violence. Because mediation models are based in conflict resolution, mediators may assume that the abuse in a relationship is because of interpersonal conflict. This assumption is entirely incompatible with the dynamics of an abusive relationship and fails to account for the power and control issues that exist within it.¹⁵⁷ Moreover, as conflict in a healthy relationship doesn't result in fear, mediation can be a safe and appropriate option in those cases. Because abuse and battering are intentional patterns of violence meant to control and harm another person by removing control of their safety and autonomy,¹⁵⁸ mediation is inappropriate as one party has the power and control in the relationship and can utilize that to abuse or manipulate the other party.

Experts have cautioned against the use of the practice in cases of intimate partner violence, as the relationship is defined by a history and culture of abuse. Abusers frequently communicate violence and threats through subtle phrases that have meaning to both parties, but may be missed by a mediator. Moreover, abusers often groom their partners through systematic patterns of control and dominance. Eventually, the scratch of a nose, or sliding of a pen can silence or intimidate a victim because of previous abuse.¹⁵⁹ As one mediator stated, “[i]n the midst of the session the man pushed a pen violently across the table towards the mediators, causing a stunning effect on his partner's composure and demeanor.”¹⁶⁰ Advocate Mary Pat Brygger illustrated her objection to mediation in her testimony before Congress by describing a case of intimate partner violence where mediation was used. Ms. Brygger stated that, “prior to the session, the husband threatened violence if his wife spoke against him and said that throughout the session he would scratch his nose as a signal to remind her of the potential consequences if she disobeyed his order.”¹⁶¹ If a mediator is unaware of these subtle threats, survivors may leave the mediation session with no supportive measures for themselves and have placed themselves in further danger. In fact, intimate partner violence has a higher rate for lethality when the victim leaves their partner, particularly when an abuser is personally confronted with this information.¹⁶² If the mediator is unaware of the intricacies of intimate partner violence, the mediator's actions could place the victim (and mediator) at risk by allowing further threats and intimidation to occur.

MEDIATION 3 (2016), <https://www.skidmore.edu/campusrj/documents/RJ-vs-Mediation-Brief.pdf>.

¹⁵⁷ Karla Fischer, Neil Vidmar & Rene Ellis, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2118 (1993)

¹⁵⁸ *Understanding the Power and Control Wheel*, DOMESTIC ABUSE INTERVENTION PROGRAMS, <https://www.theduluthmodel.org/wheels/> (last visited Jan. 30, 2019).

¹⁵⁹ Karla Fischer, Neil Vidmar & Rene Ellis, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2118 (1993)

¹⁶⁰ *Id.* at 2118-2119.

¹⁶¹ *Id.* at 2118.

¹⁶² Jacquelyn C. Campbell, et al., *Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1095 (2003) (stating that “[i]f a woman confides that she is planning to leave her abuser, it is critical to warn her not to confront him personally with her decision”).

D. Alternatives to the Department’s Mediation Proposal

In lieu of unregulated mediation, Know Your IX recommends that the Department provide guidance to schools on how to best conduct informal resolutions. Specifically, Know Your IX recommends that the Department reinstate the Bush Administration’s and Obama Administration’s bar on mediation in cases of sexual assault and intimate partner violence. As outlined above, sexual assault and intimate partner violence are characterized by clear power imbalances that could lead to re-traumatization during mediation. Additionally, intimate partner violence victims face additional safety concerns that mediation would exacerbate. As a consequence, Know Your IX recommends that the Department only permit mediation in cases of sexual harassment and stalking, where threats of violence have not been made against the victim and where there is not a history of intimate partner violence or sexual assault. School officials should also be afforded the discretion to offer mediation where there are additional safety concerns for stalking or harassment victims. To protect all parties involved, including the mediators, schools should conduct safety and lethality screenings prior to initiating an informal resolution.

At the same time, Know Your IX urges the Department to work with schools and community-based organizations that are currently conducting restorative justice programs for sexual violence cases to create recommendations for best practices on conducting informal resolutions. Further, we ask the Department to require all schools that use informal resolutions to provide formal training to all individuals involved in administering the proceedings. These trainings should be created with restorative justice and mediation specialists, but should be no shorter than 20 hours and should focus on conflict resolution in high conflict and chaotic discourse. Further, we do not believe that expulsion is an appropriate sanction for an informal resolution, and ask that the Department bar schools from expelling students through informal resolutions to ensure a fair process for all.

VII. The Department’s Refusal to Specify Model Investigation Timelines Will Result in Delays that Compromise Students’ Educations

In 2011, the Department of Education adopted the position that Title IX grievance procedures should last “approximately 60 calendar days following receipt of the complaint.”¹⁶³ However, the guidance also recognized that investigation timelines may vary, given “the complexity of the investigation and the severity and extent of the harassment.”¹⁶⁴ Prior to the 2011 Dear Colleague Letter – and Department of Education oversight – schools would frequently force survivors to undergo unnecessarily lengthy and burdensome processes that further traumatized survivors. These long waiting periods led to survivors dropping out of an investigation against their abuser, or out of school entirely. One anonymous survivor who reported prior to the issuance of the 60-day guideline reported to Know Your IX:

¹⁶³ U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE 12 (2011) (rescinded by the Trump Administration), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

¹⁶⁴ *Id.*

A prompt timeline would have allowed me to finish my education. My investigation was taking so long that it made it impossible to go to class. The case was taking over 280 business days, and I couldn't bear to see him on campus any more [sic], so I dropped out.¹⁶⁵

The Department's proposal would remove the accountability measures that ensured prompt investigations, and would instead "require recipients to designate reasonably prompt timeframes for the grievance process."¹⁶⁶ The Department argues that its policy position is justified, as the former regime resulted in "hurried investigations and adjudications, which sacrificed accuracy and fairness for speed."¹⁶⁷ However, the Department has failed to offer data demonstrating that a 60-day guideline compromised accuracy and fairness in adjudications. Moreover, although the Department has claimed in the context of its administrative enforcement that "[j]ustice delayed is justice denied, and justice for many complainants has been denied for too long,"¹⁶⁸ the agency has refused account for similar delays within schools' investigative processes. In fact, as Know Your IX has found, lengthy investigations are the norm in the Title IX context, and these delays often result in harm to the educational prospects of complainants and respondents.

A. Lengthy Delays in Schools' Investigations of Sexual Violence Harm the Educational and Employment Prospects of Complainants and Respondents Alike

By failing to define a "reasonably prompt" timeline, the Department's regulation will exacerbate the long delays that routinely occur in recipients' Title IX processes. For example, as one survivor reports:

It took the University of Cincinnati 519 days to expel the student I endured stalking harassment and dating violence from while I was a student there. My Title IX investigation took so long, that when I reached out to the department to follow up, my email bounced back as undeliverable. The Title IX Coordinator and her assistant had left the University without anyone follow through [sic] on my case.

When the Interim Coordinator was chosen to temporarily fill the position, she had no evidence of my case existing at all; I had to start my case again from square one! All of the witnesses I provided in April 2014 were contacted in June 2016 to recall information from the 2013-2014 years. I am glad I retained all of the threatening voicemails and harassing texts even though seeing them triggered my PTSD because I was forced to relive the experiences all over to provide the University with my official statement because they failed me the first time.

They finally found him responsible, three months after the Hamilton County court system did. My faith in University officials is completely shattered. I still have

¹⁶⁵ Electronic submission received through <https://www.handsoffix.org/share-your-story/> (last accessed Jan. 19, 2019).

¹⁶⁶ 83 Fed. Reg. at 61473.

¹⁶⁷ *Id.*

¹⁶⁸ Andrew Kreighbaum, *Not Looking for Patterns*, INSIDE HIGHER ED (Jun. 16, 2017), <https://www.insidehighered.com/news/2017/06/16/education-department-suggests-less-expansive-approach-ocr-investigations>.

trauma-related nightmares where I am in that abusive situation again and I call police for help, but no one comes. THAT is what my fear are [sic] now. Being harassed and physically assaulted is no longer what I'm afraid of, it's no one helping when I reach out and need it the most. - Megan O (emphasis added).¹⁶⁹

Another survivor from Michigan State University feared running into her abuser and his wife on campus and faced impacts to her employment on account of the university's delays in investigating her complaint:

My experience of sexual harassment took place from 2010 to 2012. I filed my initial report with the MSU Office of Institutional Equity ("OIE") on February 19, 2018. The initial meeting with investigators from Kroll was scheduled for March 13. During that meeting, they set the expectation that the investigation would be completed within 30 to 60 days. I didn't think it would take 30, but I never expected that it would ultimately take 184 days.

The outcome was in my favor, but it definitely had a negative impact on my mental health. The person who harassed me was a big personality in the community, and I always had to wonder if I would run into him or his wife in public settings, which did happen once.

On April 6, I re-sent my witness list to OIE after learning that none of them had been contacted. They responded that the report was to be drafted imminently, but I emailed again on April 25 at which point they said they hoped to send a draft report "in the next two weeks," but that the internal review process was, "out of their hands." I received the final report on August 22 – 184 days after initially contacting OIE – and was notified that the redacted report had been released to the press on October 31." - Elizabeth B¹⁷⁰

Other survivors report that long investigations affected their mental health and exacerbated disability-based barriers to their education. As one anonymous survivor told Know Your IX:

I reported in late July of 2017, the investigation started in early May, and it wrapped up completely in late October 2018. The first extension was because my assailant kept missing meetings and they had a hard time contacting him. The second was because he got a lawyer on the last possible day he could before the hearing and the lawyer had to review the material.

I tell people I feel like the hearing was almost more traumatizing than the rape itself. I know that's crazy but reliving that and having five other people who weren't there talk about my rape with me being able to say so little was terrible. And the fact that it was extended to when midterms were starting was extremely

¹⁶⁹ Electronic submission received through <https://www.handsoffix.org/share-your-story/> (last accessed Jan. 19, 2019).

¹⁷⁰ Electronic submission received through <https://www.handsoffix.org/share-your-story/> (last accessed Jan. 19, 2019).

difficult. I struggled a lot with flashbacks and symptoms of PTSD associated with the many delays. I had to move because I was unable to sleep well due to the flashbacks. I was lucky because my assailant was found responsible, but the hearing being so late into the semester affected my academics because I started missing classes and sometimes wasn't able to study due to a combination of poor mental health and additional meetings associated with the hearing. I also felt a lot of anxiety associated with the extensions because I didn't know what was going on or what was going to happen. - Anonymous¹⁷¹

Moreover, recipients' delays in investigating and resolving cases also have harmful effects on respondents. As one survivor who attended Harvard University reported to Know Your IX, delays in her investigation compromised her job performance and made it difficult for the respondent to find a job in the first place. At the same time, the survivor noted that the respondent in her case was also negatively impacted by the drawn-out timeline. Because the respondent had not technically graduated, the delays in the investigation rendered him unable to get a job during the summer and created uncertainty about whether he would be able to matriculate at graduate school in the fall.¹⁷²

These students' cases lasted between 184 days to 519 days, and these delays directly impacted their educational and employment opportunities. Accordingly, when the Department refuses to define a "reasonably prompt" timeline, recipients – who are already inclined to drag out investigations until the complainant graduates or drops the case – may operate with impunity.

B. The Department's Elimination of the 60-Day Guideline Has Already Increased Delays

Since the Department rescinded its 2011 Dear Colleague Letter and issued its "Interim Guidance" document without a specific recommended timeline, recipients' delays have increased. Know Your IX has conducted interviews with a number of survivors who have filed complaints with their schools in the Fall of 2017, and many students report that their cases are still pending. As one survivor describes:

I reported in February of 2018 and my report hasn't concluded yet [written January 12th, 2019]. I reported in February but an official investigation wasn't started until May 2018 because my mom came down and asked for a meeting with the Title IX office. The Title IX Officer personally knew who I was accusing, which is why she hadn't opened an investigation. The coordinator tried to get me to drop my case and told me if I moved forward she was going to have him file a counter complaint against me. I got a Title IX lawyer over the summer. I kept reporting the Title IX Coordinator for being biased, but no one did anything until I got a lawyer. Anonymous, Atlanta GA¹⁷³

¹⁷¹ Electronic submission received through <https://www.handsoffix.org/share-your-story/> (last accessed Jan. 19, 2019).

¹⁷² Electronic submission received through <https://www.handsoffix.org/share-your-story/> (last accessed Jan. 19, 2019).

¹⁷³ Electronic submission received through <https://www.handsoffix.org/share-your-story/> (last accessed Jan. 19, 2019).

Another survivor with an ongoing case at Michigan State University reported to Know Your IX that the school's delay has interfered with her education:

It's been 9 months since I reported and my case is still not over. It's taking so much out of me and my life. It's made me do poorly in school and decreased my graduate school chances. It's caused friendships to end. It's divided me with family. The fact that it's been so long isn't even shocking to me, first I was shocked. Now I realize these investigators just don't care about me and my well-being. This is almost a year of my life I won't get back. Everyday has me fearful of the outcome. I reported to try to find justice but I realize that will never happen.

I go to Michigan State and you would think they would care about correcting their past mistakes but just today our president resigned over disgusting comment about the Nassar victims. Time and time again, Michigan State has shown survivors are not their priority. This investigation has just made me regret the day I reported. I thought having to go to court with my rapist was the worst day of my life, but yesterday I read the report from the OIE office doing the investigation.

I've lost everything from this case. I know 100% what happened. The rape isn't even the worst part of the process though, it's the investigation. I can heal from the rape but trying to rebuild every aspect of my life and get back what has been taken from me [by the school] will take so much. -Rebecca Rranza, MSU¹⁷⁴

C. The Department Should Define "Reasonably Prompt" as a Sixty-Day Period

Because long delays in schools' investigations create gender and disability-based barriers to students' educations, Know Your IX recommends that the Department define a "reasonably prompt" timeline as sixty days but permit schools to extend the investigation period based on the complexities of the case and the needs of the parties. Adopting such a measure would help ensure a fair process for both complainants and respondents. Furthermore, in order to increase parties' knowledge of standard investigative timelines, Know Your IX also recommends that the NPRM include language to the effect of:

Grievance procedures should specify the time frame within which: (1) the school will conduct a full investigation of the complaint; (2) both parties receive a response regarding the outcome of the complaint; and (3) the parties may file an appeal, if applicable. Both parties should be given periodic status updates. Recipients must designate reasonably prompt timeframes for the grievance process, defined as approximately 60 calendar days following receipt of the complaint. However, schools may extend investigations for good cause and with notice to the parties if merited by the complexity of the investigation and the severity and extent of the discrimination.

¹⁷⁴ Electronic submission received through <https://www.handsoffix.org/share-your-story/> (last accessed Jan. 19, 2019).

VIII. The Department Would Allow Schools to Delay Title IX Processes for Concurrent Law Enforcement Activity with Few Safeguards

The proposed rule would also establish that “concurrent law enforcement activity” is “good cause” for a school to delay a Title IX investigation.¹⁷⁵ The Department’s proposal is extremely broad: a school could delay its investigation whenever law enforcement agencies plan to release evidence on a specific timeline and when the evidence “would likely be material” to a determination of responsibility.¹⁷⁶ Under this malleable standard, a recipient could potentially hold off investigating for long periods in lieu of collecting its own evidence. Moreover, the Department’s rule would render schools’ investigations vulnerable to law enforcement interference or incompetence.

As discussed previously in this Comment, delays in resolutions of Title IX cases significantly compound the effects of sexual violence and may severely harm survivors’ access to education and employment. Recognizing the risks of interminable school delays on account of concurrent law enforcement activity, the Department of Education, in its 2011 Dear Colleague Letter stated that:

[A] school should not delay conducting its own investigation or taking steps to protect the complainant because it wants to see whether the alleged perpetrator will be found guilty of a crime ... Schools should not wait for the conclusion of a criminal investigation or criminal proceeding to begin their own Title IX investigation and, if needed, must take immediate steps to protect the student in the educational setting.¹⁷⁷

To protect against the risks posed by lengthy delays in schools’ investigations, Know Your IX urges the Department to retain the position adopted within the Dear Colleague Letter or, in the alternative, propose a series of safeguards to refine its proposed standard and reduce the risk that schools will suspend their investigations. For example, the Department should clarify that recipients are required to provide survivors with supportive measures while criminal and school investigations are ongoing.

At the same time, the Department’s proposal must be revised because it fails to sufficiently appreciate the fact that Title IX and criminal processes serve separate aims. Title IX is a civil remedy that is intended to redress the impacts on survivors’ education, whereas law enforcement investigations and subsequent prosecutions seek to vindicate the interests of a state against a defendant, with the survivor’s role confined to that of a complaining witness. Accordingly, any proposed regulation should not conflate these systems, and survivors should be permitted to pursue both avenues independently, without being penalized for doing so.

A. The Department’s Proposed Rule Would Penalize Survivors Who File Reports with Schools and Law Enforcement

¹⁷⁵ 83 Fed. Reg. at 61472.

¹⁷⁶ 83 Fed. Reg. at 61473.

¹⁷⁷ U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE 10 (2011) (rescinded by the Trump Administration), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

By allowing schools to pause their investigations for concurrent law enforcement activity with few safeguards, the proposed rule would penalize survivors who opt to pursue claims through Title IX and the criminal system. The Department’s proposal would only exacerbate the lengthy investigative delays that are already the norm in the Title IX context. Know Your IX is also concerned that the Department’s rule, without clarification, will encourage schools to abdicate their obligations to provide survivors with supportive measures while the school and criminal investigations are ongoing, under the misguided view that only law enforcement should handle sexual violence cases. For example, as The Huffington Post reported, “at North Central High School in rural Indiana, the principal told one girl’s family they would wait until the criminal investigation was done ‘to determine our course of action.’”¹⁷⁸ At another school in Bucks County, Pennsylvania, the school refused to issue a no-contact order to the respondent because he had not been criminally convicted, despite the school’s legal obligation to conduct its own investigation.¹⁷⁹ Under the Department’s rule, recipients would be increasingly likely to deprive survivors of the option to pursue cases through their school and law enforcement.

The Department’s proposed “would likely be material” standard is particularly likely to penalize survivors who report to law enforcement and undergo sexual assault forensic exams.¹⁸⁰ As a number of media outlets have documented, the current backlog of rape kits in the United States is estimated at 400,000 cases,¹⁸¹ reflecting a fundamental flaw in law enforcement’s processing of evidence connected to rape cases. Moreover, as the results of a rape kit “would likely be material” to a determination of responsibility, a recipient could delay its investigation for months or even years on account of a law enforcement agency’s rape kit backlog. Had the respondent conducted its own investigation concurrently, it may have identified documentary evidence or relevant witness testimony sufficient to substantiate a finding of responsibility in the absence of the results from the rape kit. By delaying, the school increases the risk that valuable evidence will be destroyed or tampered with, therefore lowering the complainant’s ability to access a remedy in a future disciplinary proceeding conducted by the recipient.

The Department’s proposed rule would also create a high risk of law enforcement interference in schools’ separate Title IX investigations. For example, in the high-profile case of Jameis Winston, a Heisman-trophy winning quarterback at Florida State University (FSU), evidence suggests that the Tallahassee police, acting out of a desire to protect FSU’s football program, failed to pursue obvious leads and did not interview Mr. Winston for two weeks after the survivor identified Mr. Winston as her rapist.¹⁸² At the same time, FSU did not conduct its own prompt investigation and may have provided documents to Mr. Winston’s attorney that

¹⁷⁸ Tyler Kingkade, *High Schools Are Failing Girls Who Report Sexual Assault*, HUFFPO (Mar. 17, 2016, 3:27pm), https://www.huffingtonpost.com/entry/high-schools-sexual-assault-investigations_us_56e05a06e4b065e2e3d45f6f.

¹⁷⁹ Rebecca Grant, *After Reporting Her Rape, a Teen Girl Says She Was Pushed Out of High School*, BROADLY (Nov. 22, 2017, 1:30pm), https://broadly.vice.com/en_us/article/gyj7y7/after-reporting-her-rape-a-teen-girl-says-she-was-pushed-out-of-high-school.

¹⁸⁰ Many recipients encourage survivors to get forensic exams. See, e.g., *How Can I Get Medical Assistance?*, GEORGETOWN UNIV., <https://sexualassault.georgetown.edu/medical-assistance> (last visited Jan. 30, 2019).

¹⁸¹ Jenna McLaughlin, *The Government is Finally Doing Something to End the Rape-Kit Backlog*, MOTHER JONES (Mar. 18, 2015, 6:21pm), <https://www.motherjones.com/politics/2015/03/rape-kit-backlog-federal-funding/>.

¹⁸² Walt Bogdanich, *A Star Player Accused, a Flawed Rape Investigation*, N.Y. TIMES (Apr. 16, 2014), <https://www.nytimes.com/interactive/2014/04/16/sports/errors-in-inquiry-on-rape-allegations-against-fsu-jameis-winston.html>.

enabled him to persuade two critical witnesses to alter their testimony to support Mr. Winston's claims.¹⁸³ FSU's conduct clearly violated the Department of Education's longstanding interpretation of Title IX, as the school clearly failed to conduct a prompt investigation. However, under the Department's new rule, FSU could have relied upon the Tallahassee police investigation to delay its own inquiry, in the full knowledge that the Tallahassee police department was similarly invested in protecting a star athlete's career over a survivor's education.

Due to the prevalence of victim-blaming attitudes among law enforcement, the Department's decision to permit schools to use law enforcement inquiries as an excuse to delay their own investigations does not effectuate Title IX's purpose. As one scholar noted, "believing that many victims falsely claim rape to get attention, or that only those who've been physically injured are telling the truth) persist [in law enforcement] and may account for some officers' unwillingness to make an arrest."¹⁸⁴ Rebecca Campbell also found that, after interacting with law enforcement, 71 percent of survivors reported feeling depressed, 89 percent felt violated, 91 percent felt disappointed, and 80 percent were reluctant to seek further help.¹⁸⁵ As a consequence of these victim-blaming attitudes, many survivors believe that law enforcement will not take their claims seriously. Reporting rates are low, as only 12 percent of college student survivors report assault to police and college authorities.¹⁸⁶

The effects of the Department's rule would be particularly pronounced on survivors in K-12 schools, as these students' reports must be transmitted to law enforcement by virtue of mandatory reporting laws for minors. Younger students that report to their school are thus forced into the criminal system concurrently, which is likely to also result in their school delaying an investigation of their Title IX case.

B. The Proposed Rule Would Make Campuses More Dangerous

The Department's proposal would also make school environments more dangerous by permitting schools to delay investigations, even when a respondent poses a clear threat to the campus community. For example, in the case of Brock Turner, several individuals witnessed the sexual assault Mr. Turner perpetrated on January 18, 2015 and immediately reported the attack to Stanford University. Stanford quickly referred the case to the Santa Clara County District Attorney's Office but conducted its own concurrent investigation that relied on testimony from eyewitnesses and the victim.¹⁸⁷ Recognizing the threat that Mr. Turner posed to the university community, Stanford relied on the evidence it had collected and disciplined Mr. Turner less than

¹⁸³ *Documents: Police, FSU Hampered Jameis Winston Investigation*, FOX SPORTS (Oct. 10, 2014, 4:23pm), <https://www.foxsports.com/college-football/story/jameis-winston-florida-state-tallahassee-police-hindered-investigation-documents-101014>.

¹⁸⁴ WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION 2 (2014)

¹⁸⁵ Rebecca Campbell, *What Really Happened? A Validation Study of Rape Survivors' Help Seeking Experiences with the Legal and Medical Systems*, 20 VIOLENCE & VICTIMS 55, 61 (2005).

¹⁸⁶ *Poll: One in 5 Women Say They Have Been Sexually Assaulted in College*, WASH. POST (Jun. 12, 2015), <https://www.washingtonpost.com/graphics/local/sexual-assault-poll/>.

¹⁸⁷ Alex McDonald, *Stanford University Releases First Statement about Brock Turner Rape Case*, ELITE DAILY (Jun. 8, 2016), <https://www.elitedaily.com/news/stanford-statement-brock-turner-rape/1514811>.

two weeks after the incident had occurred.¹⁸⁸ However, under the Department’s new rule, Stanford would have had the opportunity to halt its investigation to see if law enforcement would uncover other material evidence, even when Stanford clearly had sufficient evidence to find Mr. Turner responsible for sexual assault. Because the criminal proceedings concluded on March 30, 2016, more than a year after the incident had occurred, the survivor in Mr. Turner’s case could have had her matter prolonged as long as a year. If the Department’s rule is promulgated, schools could legally refuse to act, even when the respondent clearly threatens community safety.

IX. Mandating that Recipients Initiate Formal Grievance Procedures Against a Survivor’s Wishes Will Not Make Campuses Safer

Under the proposed regulation, schools are required to initiate Title IX grievance procedures in two situations. The first is where a formal complaint is filed. The second, provided by § 106.44(b)(2), is “[w]hen a recipient has actual knowledge regarding reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment.”¹⁸⁹ Significantly, § 106.44(b)(2) would require the initiation of grievance procedures against a survivor’s will. Further, school compliance with the mandatory reporting requirement would also trigger a safe harbor from claims of deliberate indifference so long as the school also “follows procedures (including implementing any appropriate remedy as required) consistent with section 106.45.”¹⁹⁰

The Department’s proposal will ultimately undermine Title IX’s effectiveness and make campuses less safe. Requiring schools to initiate grievance procedures may discourage reporting, compound a survivor’s psychological trauma, and cause violence against the survivor to escalate. Each of these consequences is tied to decreased access to education, contravening Title IX’s dual purposes of avoiding “the use of federal resources to support discriminatory practices” and providing “individual citizens effective protection against those practices.” *Cannon*, 441 U.S. at 704. Further, the lack of clarity of the proposed section may foster a situation where recipients’ attempts to comply with § 106.44(b)(2) will create what Know Your IX deems “hollow cases,” defined as credible Title IX claims that will fail if the survivor does not participate. Finally, proposed § 106.44(b)(2) would contradict the Department’s stated commitment elsewhere in its regulation to account for the wishes of the parties involved.¹⁹¹ In combination, these factors demonstrate that § 106.44(b)(2) would likely exacerbate the impacts of sexual violence in schools and would reduce educational access in direct contravention of the purpose of Title IX. Moreover, the Department’s contradictory statements regarding the importance of survivor autonomy are arbitrary and capricious.

¹⁸⁸ *Id.*

¹⁸⁹ 83 Fed. Reg. at 61469.

¹⁹⁰ *Id.*

¹⁹¹ Elsewhere in its regulation, the agency states that it intends to “call recipients’ attention to the importance of offering supportive measures to students who may not wish to file a formal complaint that would initiate a grievance process.” 83 Fed. Reg. at 61470.

A. The Department's Proposal Would Undermine Survivor Autonomy and Deter Help-Seeking

Requiring schools to trigger formal grievance procedures when they receive multiple reports of harassment by the same perpetrator will tend to violate survivor autonomy and discourage reporting. Research suggests that survivors are most willing to report when they maintain control over the choice to do so; conversely, the possibility that a formal complaint will be filed against a survivor's will may undercut survivor's agency, thereby replicating the power dynamics of gender-based violence and deterring help seeking entirely.¹⁹² In addition to compounding trauma, a school's decision to proceed against a survivor's wishes will pose very real safety risks, in part because all the survivors who will be affected by this proposal will have been assaulted by perpetrators who already attacked multiple victims. These risks will be particularly severe for survivors of stalking and intimate partner violence. As a consequence, the Department's proposal could deeply undermine Title IX's commitment to ensuring sex discrimination does not inhibit equitable access to education.

The Department's proposal contradicts its earlier statements regarding survivor autonomy and could deter survivors from seeking support. In its proposed regulation, the Department acknowledges "the importance of offering supportive measures to students who may not wish to file a formal complaint."¹⁹³ Know Your IX strongly concurs with this statement, as student survivors consistently report that the aspect of Title IX that most effectively restores their access to education after sexual violence is the provision of supportive measures. However, under the proposed regulation, survivors who require supportive measures in order to fully access their education but who do not wish to file a formal complaint will be forced to weigh their need for supportive measures against the possibility that their school could seek discipline against their perpetrator against the survivors' will. This fear that a complaint will be filed over a survivor's objections may discourage survivors from seeking supportive measures altogether. In the absence of supportive measures, many survivors cannot keep up with the demands of rigorous school work while contending with the impacts of trauma. As a consequence, the mandatory reporting feature proposed in § 106.44(b)(2) will inhibit survivors' educational access in the wake of sexual violence.

The Department's proposal would also exacerbate survivors' feelings of powerlessness. Following sexual violence, survivors frequently experience feelings of shame, and guilt; insensitive, victim-blaming, and otherwise disempowering responses to disclosures of violence exacerbate these feelings and inhibit healing from trauma.¹⁹⁴ Post-violence trauma complicates everyday tasks such as attending class or completing assignments, compounding the impact of sexual violence on a student's access to education.¹⁹⁵ Under Title IX, schools must remedy the ways in which trauma after sexual violence inhibits a survivor's access to education; instead, the mandatory reporting provision of the proposed regulation would contribute to that very trauma. For example, as Sarah Nesbitt, a Georgetown Law student, reported to Know Your IX:

¹⁹² Michael A. Rodriguez, *Mandatory Reporting Does Not Guarantee Safety*, 173 W. J. MED. 225, 225 (2000).

¹⁹³ 83 Fed. Reg. at 61470. Know Your IX strongly concurs with this statement.

¹⁹⁴ Rebecca Campbell, Emily Dworkin & Giannina Cabral, *An Ecological Model of the Impact of Sexual Assault on Women's Mental Health*, 10 TRAUMA, VIOLENCE & ABUSE 225, 234 (2009).

¹⁹⁵ Cecilia Mengo & Beverley M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18 J. C. STUDENT RETENTION 234, 237 (2015).

My abuser raped and assaulted at least three other women, and the school was on notice of at least one of those incidents by the time I sought support. Had proposed § 106.44(b)(2) been in place at that time, my school would have been mandated to initiate grievance procedures upon my requesting accommodations. I was staunchly opposed to filing a complaint at that time -- I could hardly get through the basic motions of any given day, much less think about taking on the person I feared most in the world through the Title IX process. § 106.44(b)(2) would have taken that choice away from me. Had this rule been in place, and had I known about it, I would not have sought the accommodations I needed to stay in school. I would have been crushed and debilitated by my school's betrayal of my wishes. Being in a relationship with someone who makes you feel powerless is already humiliating; having your school do the same is an utter nightmare.¹⁹⁶

As Nesbitt's testimony indicates, requiring schools to override survivors' autonomy replicates the power dynamic that is characteristic of sexual violence, exacerbating trauma symptoms. According to a World Health Organization meta-analysis, many women who have experienced abuse cite concerns about survivor autonomy and safety in their opposition to mandatory reporting provisions.¹⁹⁷ This intuition is backed by research finding that "social disempowerment has been associated with lower levels of social support," which are "commonly associated with more frequent and severe postvictimization outcomes."¹⁹⁸ Even more significantly, institutional betrayal has a particularly negative impact of trauma recovery.¹⁹⁹ In one study, schools' "failure to prevent sexual assault or respond supportively" exacerbated survivors' anxiety and other trauma symptoms.²⁰⁰ Studies of military survivors have yielded similar results, supporting the contention that unsupportive institutional responses exacerbate survivor trauma symptoms.²⁰¹ The Department states that "it has heard from a wide range of stakeholders about the importance of a school taking into account the wishes of the complainant in deciding whether or not a formal investigation and adjudication is warranted."²⁰² But in direct contradiction to this principle, § 106.44(b)(2) compels schools to betray survivors who do not wish to file a complaint. Because the Department's proposed rule undermines survivor autonomy, it compounds the post-violence trauma that inhibits survivors' access to education, contravening the purpose of Title IX.

¹⁹⁶ Electronic submission received through <https://www.handsuffix.org/share-your-story/> (last accessed Jan. 19, 2019).

¹⁹⁷ WORLD HEALTH ORGANIZATION, RESPONDING TO INTIMATE PARTNER VIOLENCE AND SEXUAL VIOLENCE AGAINST WOMEN 41 (2017).

¹⁹⁸ John Briere & Carol E. Jordan, *Violence Against Women: Outcome Complexity and Implications for Assessment and Treatment*, 19 J. INTERPERSONAL VIOLENCE 1252, 1258 (2004).

¹⁹⁹ Jennifer J. Freyd, *When Sexual Assault Victims Speak Out, Their Institutions Often Betray Them*, THE CONVERSATION (Jan. 11, 2018), <https://theconversation.com/when-sexual-assault-victims-speak-out-their-institutions-often-betray-them-87050>.

²⁰⁰ Carly Partnitzke Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 J. TRAUMATIC STRESS 119, 119 (2013).

²⁰¹ Lindsey L. Monteith et al., *Perceptions of Institutional Betrayal Predict Suicidal Self-Directed Violence Among Veterans Exposed to Military Sexual Trauma*, 72 J. CLINICAL PSYCHOL. 743, 750 (2016).

²⁰² 83 Fed. Reg. at 61470.

B. Mandating Formal Grievance Procedures Would Increase Safety Risks, Particularly for Survivors Who Have Experienced Stalking or Intimate Partner Violence

Survivors choose not to report sexual violence to authorities for a multitude of reasons, one of which is a fear that their perpetrator will retaliate or escalate the violence. Fear of retaliation is particularly powerful in deterring female survivors from reporting.²⁰³ The retaliation survivors fear may be social, psychological, or physical. For survivors of intimate partner violence (IPV), the fear of escalated violence in response to reporting is particularly salient; leaving an abusive relationship is the most dangerous time for a survivor. This is because IPV is first and foremost about power and control, and perpetrators interpret leaving and other pro-separation acts as a loss of power and control over the survivor. In response, perpetrators escalate violence as a way to attempt to regain or maintain that control.²⁰⁴ The same dynamics are true of stalking.²⁰⁵ Perpetrators who exert power and control may even escalate to the point of lethality in response to perceptions that they are losing control over the survivor.²⁰⁶ For a survivor who has ended or is still in an abusive relationship, the mandatory reporting provision of the proposed regulation means choosing between accessing supportive measures and facing increased violence at the hands of their perpetrator.

The Department's proposal represents a missed opportunity to embrace approaches that actually do deter future violence and make communities safer. The proposal is the functional equivalent of no-drop prosecution policies, which exploded in popularity in the 1980s but have since fallen out of favor. Though both types of policies purport to publicly communicate an intolerance for sexual violence and IPV, "what these policies gain in symbolism... they may lose in terms of deterring future violence."²⁰⁷ While more research is needed to determine the precise impact of the Department's proposal and no-drop policies, it is clear that the only anti-violence policies "associated with a decrease in incidents" are ones that "embrac[e] the notions of victim empowerment for self-protection by allowing victims to drop criminal charges."²⁰⁸ The Title IX equivalent of this best practice is eliminating requirements that schools initiate formal grievance procedures in the absence of survivor consent.

C. Requiring Recipients to Initiate Formal Grievance Procedures Will Not Result in the Discipline of Serial Perpetrators

When a school initiates a formal proceeding against a survivor's will, its actions may also create "hollow cases," which are unlikely to succeed due to survivor non-participation. These hollow cases will then preclude future successful cases against those respondents, depriving survivors of their right to pursue a meaningful Title IX claim. This proposal, which would require formal resolutions, also contradicts the Department's claimed prioritization of informal

²⁰³ Marjorie R. Sable et. al., *Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students*, 55 J. AMER. C. HEALTH 157, 160 (2006).

²⁰⁴ Ruth E. Fleury et al, *When Ending the Relationship Does Not End the Violence*, 6 VIOLENCE AGAINST WOMEN 1363, 1378 (2000).

²⁰⁵ TK Logan & Robert Walker, *Stalking: A Multidimensional Framework for Assessment and Safety Planning*, 18 TRAUMA, VIOLENCE, & ABUSE 200, 207 (2016).

²⁰⁶ NAT'L INST. JUST., INTIMATE PARTNER HOMICIDE 22 (2003).

²⁰⁷ MICHELLE L. MELOY & SUSAN L. MILLER, THE VICTIMIZATION OF WOMEN: LAW, POLICIES, AND POLITICS 147-48 (2010)

²⁰⁸ *Id.* at 148.

resolution processes. Taken together, the Department's inconsistencies suggest the effect of the rule would be to prevent findings of responsibility and deter survivors from filing reports under the statute.

The proposed regulation would increase the likelihood that serial perpetrators will be found not responsible for perpetrating sexual violence. Because of the nature of sexual violence and IPV, survivors' claims tend to rely either on documentary evidence or survivor testimony to provide the evidence sufficient to determine a respondent's responsibility. But if a school initiates grievance procedures against a survivor's wishes, it likely will have neither. Moreover, the heightened standard of evidence that the NPRM incentivizes schools to employ increases the likelihood that pursuing a complaint without survivor participation precludes a meaningful opportunity to determine respondent responsibility. At the same time, the proposed regulation's requirement that schools permit cross-examination increases the likelihood that survivor non-participation will cause a case to fail without a meaningful opportunity to determine respondent responsibility.

The Department's "safe harbor" proposal will incentivize schools to override survivor autonomy and bring weak cases against serial perpetrators. The proposed regulation provides that when a school's "Title IX Coordinator files a formal complaint" in compliance with the proposed mandatory reporting provision and "follows procedures... consistent with section 106.45... the recipient's response to the reports is not deliberately indifferent." A survivor who chooses not to file a formal complaint when seeking supportive measures but whose school initiates grievance procedures against their objections under §106.44(b)(2) may still later wish to pursue a complaint, but the mandatory initiation of grievance procedures against the survivor's will may preclude the filing of a future claim. Additionally, the blanket safe harbor for schools against claims of deliberate indifference by a survivor who declines to participate releases the school of its obligation to ensure the integrity of the case they file. Accordingly, a school that is impermissibly motivated by sex stereotypes could exploit the Department's rule to engage in discriminatory practices that would otherwise constitute a violation of Title IX.

X. The Proposed Rule Will Especially Harm Students of Color, LGBTQ Students, and Students with Disabilities

Students of color, LGBTQ students, and students with disabilities also face disproportionate rates of sexual violence on campus as well as additional barriers in accessing resources and assistance. As a consequence, the Department's regulation will disproportionately impact marginalized students.

A. The Department's Proposal Would Further Harm LGBT Students

Transgender and gender non-conforming (GNC) students experience sexual violence at extremely high rates. One in four transgender and GNC students experience sexual assault in

college,²⁰⁹ and 78% of GNC youth reported experiencing harassment at school.²¹⁰ One study found that 86% of high school transgender individuals had experienced a form of sexual violence due to their gender identity, often perpetrated by other students.²¹¹ The harassment and abuse for some students was so severe that it led to 15% of students leaving school.²¹² But instead of acting to protect these students from sex discrimination, the Department rescinded critical guidance clarifying Title IX protections for transgender students and now aims to reduce reporting of sexual violence and harassment in schools.

Like transgender students, LGBTQ students experience extremely high rates of sexual violence and harassment. One study found that 73% of LGBTQ college students experience sexual harassment or abuse and more than 6% of LGBTQ college students change their school or major as a result.²¹³ Further, 61% of bisexual women reported higher levels of rape, physical and/or sexual abuse, and stalking by an intimate partner than straight women.²¹⁴ 40% of gay men and 47% of bisexual men are sexually assaulted in their lifetime.²¹⁵ And one out of three lesbians have been sexually assaulted by other women.²¹⁶ These numbers are likely even higher for LGBT students of color, who most report feeling unsafe at school.²¹⁷

The Department's actual notice proposal also permits schools to sweep violence against LGBT students under the rug. Under the proposed rule, schools would only have notice of employee-on-student harassment and be required to respond if a report was made to their Title IX Coordinator or someone able to institute corrective measures.²¹⁸ This provision would be especially harmful for GNC students who reported that 31% of the harassment they experienced in K-12 schools was by a teacher or staff member.²¹⁹ Moreover, as many K-12 students are unaware of the name of their Title IX coordinator, and because the Department's proposal does not define who has the authority to institute corrective measures, students may struggle to report incidents of sex discrimination to their school.

²⁰⁹ Jake New, *The 'Invisible' One in Four*, INSIDE HIGHER ED (Sept. 25, 2015), <https://www.insidehighered.com/news/2015/09/25/1-4-transgender-students-say-they-have-been-sexually-assaulted-survey-finds>.

²¹⁰ JAIME M. GRANT ET AL., NATIONAL CENTER FOR TRANSGENDER EQUALITY & NATIONAL GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 3 (2011).

²¹¹ Rebecca L. Stotzer, *Violence Against Transgender People: A Review of United States Data*, 14 AGGRESSION & VIOLENT BEHAVIOR 170, 172 (2009).

²¹² JAIME M. GRANT ET AL., NATIONAL CENTER FOR TRANSGENDER EQUALITY & NATIONAL GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 3 (2011).

²¹³ SABRINA GENTLEWARRIOR, NAT'L ONLINE RESEARCH CTR. FOR VIOLENCE AGAINST WOMEN, CULTURALLY COMPETENT SERVICE PROVISION TO LESBIAN, GAY, BISEXUAL AND TRANSGENDER SURVIVORS OF SEXUAL VIOLENCE 4 (2016).

²¹⁴ M.L. WALTERS ET AL., NATIONAL CENTER FOR INJURY PREVENTION, CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 FINDINGS ON VICTIMIZATION BY SEXUAL ORIENTATION 1 (2013).

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ E.M. DIAZ & J.G. KOSCIW, GAY, LESBIAN & STRAIGHT EDUCATION NETWORK (GLSEN), SHARED DIFFERENCES: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER STUDENTS OF COLOR IN OUR NATION'S SCHOOLS 18 (2009).

²¹⁸ 83 Fed. Reg. at 61463.

²¹⁹ JAIME M. GRANT ET AL., NATIONAL CENTER FOR TRANSGENDER EQUALITY & NATIONAL GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 33 (2011).

The Department's burdensome definition of harassment would also deter schools from taking proactive steps to reduce or stop gender discrimination and violence in schools. As over half of GNC students who have experienced violence in school have attempted suicide,²²⁰ a school's refusal to address harassment before it effectively denies a student access to their education could have particularly severe consequences for GNC students. Schools' refusals to take proactive steps would also harm transgender students, as trans students who report experiences of discrimination in school were 50% less likely to earn \$50,000+ a year than the general population.²²¹ The Department's proposal could also increase students' risk of homelessness: among students who were verbally harassed, physically or sexually assaulted, or expelled because they were transgender or gender non-conforming, 25% reported having experienced homelessness as compared to 14% of those who did not experience this mistreatment at school.²²²

The Department's proposal to remove Title IX rights from students who are assaulted outside of a school program or activity would also force students to seek support services from outside services who rarely have LGBTQ friendly services. There are about 2,000 domestic violence shelters in the United States, but very few have programs for lesbian survivors of IPV,²²³ and even fewer are available to cis-men or transgender victims of domestic violence.²²⁴

B. The Proposed Rule Would Undermine Educational Opportunities for Women and Girls of Color

The Department's proposal would also disproportionately impact women of color who face high rates of sexual violence, and additional barriers when reporting or seeking support. About 4 in 10 Black women have been victims of intimate partner violence in their lifetime.²²⁵ Of Black women in school, 16.5% reported being raped in high school and 36% were raped in college.²²⁶ And while Black women and girls face high rates of sexual violence, they are less likely to be believed when coming forward. A study found that college students perceived a black victim of sexual assault to be less believable and more responsible for her assault than a white victim.²²⁷ In addition, approximately 7.9% of Latina women will be raped by an intimate partner in their lifetime, and 1 in 3 experience intimate partner violence. 63% of Latina women have

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ C.A. Helfrich & E.K. Simpson, *Lesbian Survivors of Intimate Partner Violence: Provider Perspectives on Barriers to Accessing Services*, 18 J. GAY & LESBIAN SOC. SERVS. 39, 40-41 (2005).

²²⁴ Michelle Davies, *Male Sexual Assault Victims: A Selective Review of the Literature and Implications for Support Services*, 7 AGGRESSION AND VIOLENT BEHAVIOR 203, 204 (2002).

²²⁵ CENTERS FOR DISEASE CONTROL AND PREVENTION, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES PREVALENCE AND CHARACTERISTICS OF SEXUAL VIOLENCE, STALKING, AND INTIMATE PARTNER VIOLENCE VICTIMIZATION - NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY, 2011 (2014).

²²⁶ CAROLYN M. WEST & KALIMAH JOHNSON, VAWNET, NATIONAL RESOURCE CENTER ON DOMESTIC VIOLENCE, SEXUAL VIOLENCE IN THE LIVES OF AFRICAN AMERICAN WOMEN: RISK, RESPONSE, AND RESILIENCE 14 (2013).

²²⁷ Roxanne A. Donovan, *To Blame or Not to Blame: Influences of Target Race and Observer Sex on Rape Blame Attribution*, 22 J. INTERPERSONAL VIOLENCE 722, 723 (2007).

experienced multiple types of sexual violence.²²⁸ And between 21-55% of Asian women report experiencing intimate physical and/or sexual violence in their lifetime.²²⁹

In addition, in 2017 the National Women’s Law Center surveyed 1,003 girls between the ages of 14 and 18, with a focus on Black, Latina, Asian, Native American, and LGBTQ folks. In that survey 31% of respondents said they had survived sexual assault.²³⁰ Further 24% of Latinx girls, 23% of Native American girls, and 22% of black girls reported being touched or kissed without their consent and 67% of all girls reported experiencing symptoms of post-traumatic stress disorder (PTSD).²³¹

As this Comment discusses at length, the Department of Education’s proposed rule is designed to reduce survivors’ willingness to report to their schools, weaken accountability for schools that violate survivors’ rights, and promote inequitable rights for respondents at the direct expense of survivors. Because survivors of color, particularly Black women and girls, are less likely to have their claims taken seriously by schools and law enforcement, the Department’s proposed rule would have particularly devastating impacts on their educational access. The agency’s “actual notice” proposal will have a particularly harmful effect, as schools will likely respond by making it more difficult for survivors to report violence, even though women and girls of color already experience elevated barriers to reporting violence to their schools.

C. The Agency’s Regulation Would Fail to Address the Needs of Survivors with Disabilities

Students with disabilities experience high rates of sexual violence. Among adults with developmental disabilities, as many as 83% of women and 32% of men are victims of sexual assault.²³² 49% of people with developmental disabilities who are victims of sexual violence will experience 10 or more abusive incidents.²³³ In one study, 40% of women with physical disabilities reported being sexually assaulted.²³⁴ 15.2% of children who are sexually abused have disabilities.²³⁵ Despite these high rates of sexual violence against people with disabilities only 3% of sexual abuse cases involving people with developmental disabilities are ever reported.²³⁶

As the Consortium for Citizens with Disabilities (CCD) Education Task Force and other disability advocates have noted, the Department’s proposed rule “fails to address known risk factors for students with disabilities who are survivors and alleged perpetrators of sexual

²²⁸ NATIONAL LATIN@ NETWORK, PREVALENCE & OCCURRENCE OF INTIMATE PARTNER VIOLENCE, <https://nationallatinonetwork.org/learn-more/facts-and-statistics/prevalence-and-occurrence>.

²²⁹ MIEKO YOSHIHAMA & CHIC DABBY, ASIAN PACIFIC INSTITUTE ON GENDER-BASED VIOLENCE, FACTS & STATS REPORT: DOMESTIC VIOLENCE IN ASIAN & PACIFIC ISLANDER HOMES 2 (2014).

²³⁰ KAYLA PATRICK & NEENA CHAUDHRY, NATIONAL WOMEN’S LAW CENTER, STOPPING SCHOOL PUSHOUT FOR: GIRLS WHO HAVE SUFFERED HARASSMENT AND SEXUAL VIOLENCE 3 (2017).

²³¹ *Id.*

²³² Dick Sobsey & Tanis Doe, *Patterns of Sexual Abuse and Assault*, 9 SEXUALITY & DISABILITY 243, 243-44 (1991).

²³³ D. VALENTI-HEIM & L. SCHWARTZ, THE SEXUAL ABUSE INTERVIEW FOR THOSE WITH DEVELOPMENTAL DISABILITIES (1995).

²³⁴ M. E. Young et al., *Prevalence of Abuse of Women with Physical Disabilities*, 78 ARCH. PHYS. MED. & REHAB. s34 (1997).

²³⁵ Michael Louie C. Celis, *Sexual Abuse Among Persons with Development Disabilities*, 2 ASIA-PACIFIC E-J. HEALTH SOC. SCI. 1 (2013).

²³⁶ VALENTI-HEIM & SCHWARTZ, *supra* note 222.

violence.”²³⁷ At the same time, the Department’s harmful definition of sexual harassment could also increase the disabling impacts of sexual violence on students, as survivors with untreated PTSD would be less able to seek out support from their school.

XI. Conclusion

Over the past five years, Know Your IX has worked with countless survivors who had their educations compromised by experiences of sexual violence and harassment. Many of these survivors filed complaints with the Department of Education, in the hopes that the federal government would take their claims seriously and hold their schools accountable for violations of students’ civil rights. Survivors also organized within their school communities and passed state legislation to ensure that their campus communities would be safer and more equitable for future generations of students.

The Department of Education’s proposed regulation is poorly reasoned, ill-supported by existing legal authorities, and would improperly operate to the detriment of the class of students that Title IX is intended to protect. If promulgated, it would return our country to an era where schools swept violence under the rug and abused survivors with impunity. Know Your IX urges the Department to immediately withdraw this proposed regulation and again undertake systemic investigations to ensure that all students can pursue their civil right to an education free from violence and harassment.

Thank you for the opportunity to submit comments on the NPRM.

Sincerely,

Know Your IX

²³⁷ Letter from Consortium for Citizens with Disabilities to the U.S. Department of Education (Jan. 30, 2019), <http://www.c-c-d.org/fichiers/CCD-Title-IX-comments-1.30.19.pdf>.

Appendix A

COMPREHENSIVE ACCOMMODATIONS FOR SURVIVORS

5. FAIR DISCIPLINARY PROCEDURES

As of June 2017, hundreds of schools are under federal investigation for mishandling reports of gender-based misconduct on campus, discouraging survivors from reporting, or failing to appropriately sanction perpetrators. States should establish a Student Survivor's Bill of Rights and common-sense Fair Process requirements to ensure schools hold perpetrators accountable, support survivors, and provide accused students with a fair hearing.

- I. Clear and Consistent Gender-Based Misconduct Policies**
- II. Student Survivor's Bill of Rights
- III. Preponderance of the Evidence
- IV. Prompt and Equitable Disciplinary Procedures
- V. Regular Policy Audits

Although federal law requires all schools to adopt, implement, and publicize a gender-based misconduct policy, many schools have skirted federal requirements by publicizing unclear policies or failing to apply their own policies consistently. Some schools have special (i.e., more lenient) procedures for investigating athletes accused of sexual assault; others fail to take gender-based misconduct seriously when the perpetrator and victim are of the same gender.

All students should be able to turn to their schools for resources, accommodations, and justice after violence. To help students do so, schools should adopt and implement a clear Gender-Based Misconduct policy that applies equally to all community members.

Best Practices

Schools should adopt and implement a comprehensive, clear Gender-Based Misconduct Policy (Policy), which should be distributed to all community members and include plain-language information about:

- Definitions of conduct that constitute gender-based misconduct (including harassment, violence, and discrimination);
- The resources and accommodations the institution can provide or facilitate for survivors;
- The various safe reporting and disciplinary options that survivors can pursue separately or simultaneously, at their discretion;
- The roles and responsibilities of the institution's Title IX Coordinator; and
- Which school officials and employees are considered mandatory reporters and an explanation of their responsibilities.

Every institution's Policy should include an explicit statement that the institution's policies and procedures apply equally to all community members, regardless of race, class, gender, sexual orientation, gender identity, disability, immigration status, national origin, religion, or any other protected status. States should also require that schools respond to all reports of gender-based misconduct in a manner consistent with the publicly distributed school policy.

The Policy should also note that institutional services and protections afforded to reporting individuals are available to all community members and applicable to conduct that has a reasonable connection, or "nexus," to the educational institution. In other words, the policy should apply regardless of whether the violation occurs on campus, off campus, or while studying abroad.

Each institution should post its Policy on its website in a manner easily accessible to the public, and should take reasonable steps to ensure the Policy is widely distributed to and understood by students. Schools should be required to make policies accessible to students with disabilities through measures such as, but not limited to, providing braille copies and audio recordings of policies and procedures.

STUDENT SURVIVOR'S BILL OF RIGHTS

5. FAIR DISCIPLINARY PROCEDURES

- I. Clear and Consistent Gender-Based Misconduct Policies
- II. Student Survivor's Bill of Rights**
- III. Preponderance of the Evidence
- IV. Prompt and Equitable Disciplinary Procedures
- V. Regular Policy Audits

Many schools pressure survivors not to file a report of gender-based violence, sometimes pushing survivors to leave school instead of investigating perpetrators. Others blame survivors for their own assaults, drag investigations out for a semester or longer without a resolution, or even punish them instead of perpetrators. When they fail individual survivors, schools deter reporting, making campuses less safe

Every school should adopt, implement, and publicize a "Student Survivor's Bill of Rights" as part of its misconduct policy to ensure survivors who come forward are treated fairly by their schools.

Best Practices

States should require all schools to adopt, implement, and publicize a “Student Survivor’s Bill of Rights,” which includes, at a minimum, the right to:

1. Receive from the institution reasonable accommodations—including counseling, residential and academic accommodations, no contact orders, and other services reasonably necessary to eliminate a hostile environment, prevent retaliation, and ensure a survivor is not prevented from accessing their education as a result of gender-based violence. Schools should provide these accommodations at no cost to reporting individuals;
2. Choose whether or not to report an incident to school officials, law enforcement, or both; to participate in a campus conduct or criminal justice process free from undue pressure from the institution; and to have a campus conduct process run in the absence of, or concurrently with, a criminal investigation and proceeding;
3. Have reports of gender-based violence investigated and adjudicated in a campus conduct disciplinary proceeding in accordance with college or university policy and in a timely fashion;
4. Be free from the suggestion by any school employee that a survivor is at fault for an incident of gender-based violence, or that a survivor should have acted in a different manner to avoid the incident;
5. Describe the incident to as few individuals as practicable and not be required to unnecessarily repeat a description of the incident;
6. Choose to submit evidence during the fact-finding stage demonstrating the impact of the violation, including but not limited to: medical records, counseling records, and changes to a student’s grades, enrollment status, and other academic performance;
7. Cease to participate in a campus disciplinary proceeding at any time, without penalty;
8. Withdraw a complaint without penalty. If a complainant requests to withdraw their complaint, the institution should cease its investigation, except where the institution is required to continue by law or where circumstances credibly suggest an increased risk of the respondent committing additional acts of sexual, dating, or other violence or harassment;
9. Be protected from retaliation by the institution, and to have the institution take all reasonable steps to prevent retaliation by any student, the accused and/or the respondent, and/or their friends, family, and acquaintances, and/or other community members within the jurisdiction of the institution.

Nothing in this list should be construed to prevent any institution from providing survivors additional rights that are necessary to support survivors, to encourage reporting, and to create a safe school environment.

Resources

- **New York’s ‘Enough is Enough’ law** and **Minnesota’s Postsecondary Education Law (§135A.15)** both require school gender-based violence policies to include a student survivors’ Bill of Rights which includes reporting options, access to resources, and protection from retaliation.

PREPONDERANCE OF THE EVIDENCE

5. FAIR DISCIPLINARY PROCEDURES

- I. Clear and Consistent Gender-Based Misconduct Policies
- II. Student Survivor's Bill of Rights
- III. Preponderance of the Evidence**
- IV. Prompt and Equitable Disciplinary Procedures
- V. Regular Policy Audits

Title IX requires that schools use a preponderance of the evidence standard of proof in sexual harassment cases (i.e., it is “more likely than not” that the respondent committed sexual harassment or violence). While the Department of Education explicitly clarified that preponderance was the appropriate standard for Title IX procedures in 2011, courts have long affirmed that it is the appropriate standard by which to adjudicate cases under civil rights laws, including Title IX, Title VI, and Title VII of the Civil Rights Act of 1964. Beyond civil rights litigation, preponderance of the evidence is the standard employed in most civil actions and the evidentiary standard that equitably balances the educational interests of both a complainant and a respondent. Additionally, schools regularly use this standard in disciplining students for other criminal or harassing code of conduct violations, including physical assault, burglary, hazing, and racial harassment.

As such, state legislators should specify that schools must adopt a “preponderance of the evidence” standard when adjudicating complaints of gender-based harassment and sexual assault.

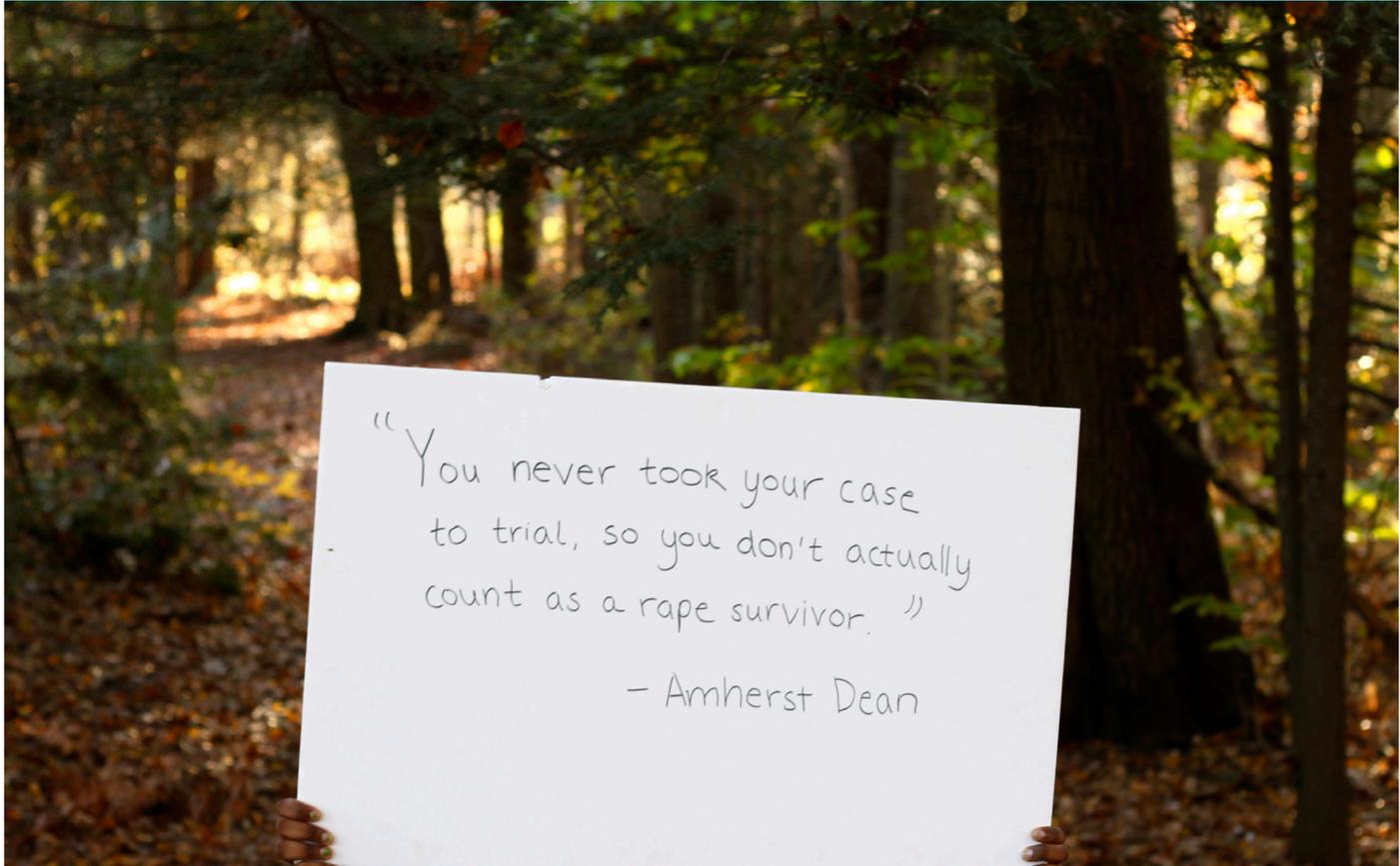
Resources

- Feminist Law Professors, **“Title IX and Preponderance of the Evidence: A White Paper.”**
- Lavinia M. Weizel, 53 B.C.L. Rev. ***The Process That is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*** (2012).
- Amy Chmielewski, 2013 BYU Educ. & L.J. **Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault** (2013).
- **Illinois’ ‘Preventing Sexual Violence in Higher Education’ law** requires campus adjudicators to use a preponderance of the evidence standard.

PROMPT AND EQUITABLE DISCIPLINARY PROCEDURES

5. FAIR DISCIPLINARY PROCEDURES

- I. Clear and Consistent Gender-Based Misconduct Policies
- II. Student Survivor's Bill of Rights
- III. Preponderance of the Evidence
- IV. Prompt and Equitable Disciplinary Procedures**
- V. Regular Policy Audits



"You never took your case
to trial, so you don't actually
count as a rape survivor."
- Amherst Dean

Survivors shining a light on gender-based violence in schools have exposed systematically biased campus disciplinary procedures that sweep campus sexual assault under the rug. As public pressure forces schools to reform, some have raised concerns that student disciplinary procedures are unfair towards accused students. By requiring schools to adopt basic procedural protections for all parties involved in school disciplinary hearings around gender-based violence, states can help ensure that school procedures are fair to both survivors and accused students.

Best Practices

Schools should take all reports of gender-based violence seriously, and investigate all reports in accordance with college or university policy and procedures, as well as federal and state law. Each college and university should ensure that students have, and are informed of, the right to file a campus conduct complaint related to gender-based harassment or violence. Every institution should be required to inform reporting individuals of their rights under this statute and all relevant federal, state, and local laws.

In all student conduct cases in which a respondent is accused of sexual harassment, sexual assault, domestic/dating violence, stalking, or gender-based violence, schools should be required to provide, at a minimum, the following rights to both the complaining and responding party:

- A.** To be treated with dignity, respect, and fairness by all school and law enforcement officials;
- B.** To a timely investigation and disciplinary process that is fair, impartial, respectful, and provides a meaningful opportunity to be heard;
- C.** To timely, clear, and simultaneous (among the parties) written and electronic notice of both parties' rights and responsibilities under school policy and applicable local, state, and federal law; procedural developments; the final determination; and the sanction(s) imposed, if any. The school shall also provide the respondent timely and clear notice of the date, time, location, and factual allegation(s) concerning the violation;
- D.** To receive written or electronic notice of any meeting or hearing the parties are required or are eligible to attend, provided in advance with sufficient time to prepare;
- E.** To have access to counsel, who may assist and advise any party throughout the disciplinary process, including all meetings and hearings related to such process, in compliance with applicable federal and state laws. States can ensure individuals have access to counsel by establishing a state grant program to fund civil legal services for victims of gender-based violence. Alternatively, states may require schools to establish a memorandum of understanding with legal services providers to secure, at minimum, five hours of legal advice with a qualified advisor for those who are unable to independently access legal counsel for financial reasons. Schools should be prohibited from retaliating against legal services providers for zealous advocacy efforts undertaken on behalf of their client;
- F.** To have a personal supporter of their choice (such as a counselor, parent, or friend) who a student may choose to have present either in addition to or in lieu of an attorney in all meetings and hearings related to such process, in compliance with applicable federal and state laws;

- G.** To have a complaint investigated in an impartial, timely, thorough, and trauma-informed manner by investigators who receive annual training in conducting investigations of gender-based violence, the effects of trauma, and other issues related to sexual harassment, sexual assault, domestic violence, dating violence, and stalking;
- H.** To review available evidence in the case file, with adequate time to consider and respond and in the presence of an advisor of their choice;
- I.** To reasonable opportunity, provided equally among the parties, to submit evidence, recommend witnesses, provide testimony at a hearing, and recommend questions for the other party to investigators, hearing panelists, and other decision-makers;
- J.** To choose to exclude one's own prior sexual history with persons other than the opposing party from admittance in the institution's disciplinary stage that determines responsibility, with the exception of specific instances of a complainant's sexual behavior if offered to prove that someone other than the respondent was the source of semen, injury, or other physical evidence. Past sexual violence findings may be admissible in the disciplinary stage that determines sanction;
- K.** To choose to exclude one's own irrelevant mental health diagnoses and/or treatment from admittance in the institution's disciplinary stage that determines responsibility and sanctioning;
- L.** To not be compelled by school authorities to provide self-incriminating testimony if criminal charges are possible or pending. School disciplinary officials may, in appropriate circumstances, draw adverse inference if a student declines to provide relevant information;
- M.** To provide testimony without encountering the opposing party in person and to view testimony provided by the other party. The school may use a range of options to provide for testimony, including videoconferencing or CCTV;
- N.** To ask questions of the decisionmaker and, via the decisionmaker, indirectly request responses from other parties and any other witnesses;
- O.** To have findings of responsibility or non-responsibility for an incident of gender-based violence determined by a panel of three to five (3-5) impartial and regularly and thoroughly trained decision makers using a preponderance of the evidence standard;
- P.** To fair and proportionate sanctions;
- Q.** To appeal to a panel of three to five (3-5) impartial and regularly and thoroughly trained decision-makers where previously unavailable evidence or procedural error could significantly impact a case's outcome, or where a sanction is substantially disproportionate to the findings, or in other appropriate circumstances. The institution must review requests for an appeal in the same manner regardless of which party files the appeal, and the appeals process must be equitable for both parties;
- R.** To a written explanation of any outcomes, including but not limited to a finding of (non-) responsibility, sanction, or granting of an appeal;

- S. To disclose or discuss the outcome of a conduct hearing;
- T. To attend religious services and holidays without unreasonable interference from a student conduct process.

Resources

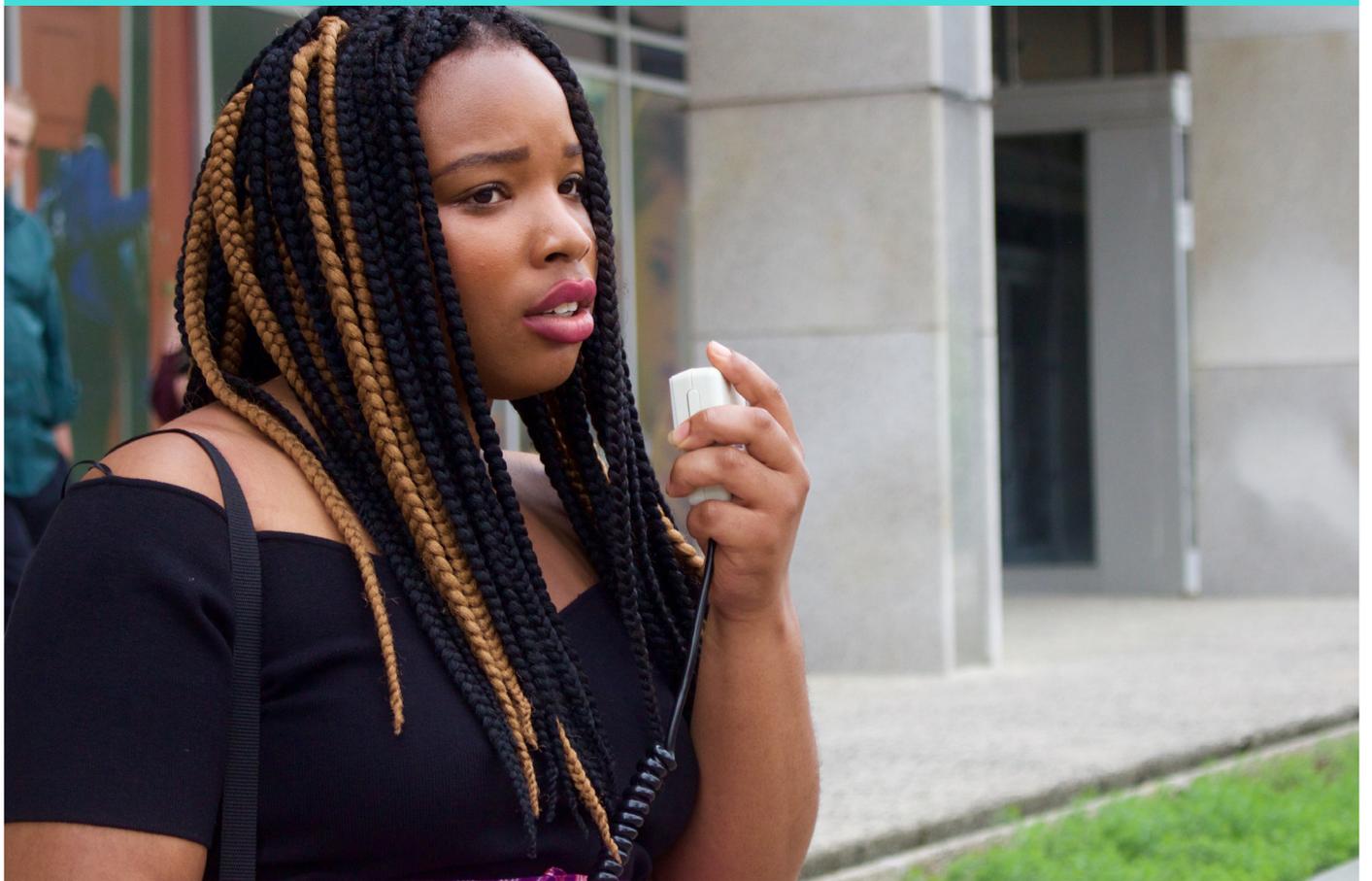
- **Illinois' 'Preventing Sexual Violence in Higher Education' law** affords a number of important fair process protections to complainants and respondents. Among these protections are requirements that schools provide survivors with information about how to access resources, no contact orders, and orders of protection; train campus adjudicators; ensure that complainants and respondents have the ability to present evidence and witnesses; provide simultaneous written notification of the results of the complaint resolution procedure to complainants and respondents; and afford complainants and respondents the right to a timely appeal.



REGULAR POLICY AUDITS

5. FAIR DISCIPLINARY PROCEDURES

- I. Clear and Consistent Gender-Based Misconduct Policies
- II. Student Survivor's Bill of Rights
- III. Preponderance of the Evidence
- IV. Prompt and Equitable Disciplinary Procedures
- V. Regular Policy Audits**



Student survivors should not have to share their personal experiences with the media in order to induce campuses to fix their response to sexual violence. Schools can take simple proactive steps to evaluate and improve their resources, policies, and procedures for responding to gender-based misconduct.

Best Practices

Every two years, schools should be required to audit their gender-based misconduct policies. Audits should include consideration of (1) campus climate survey data; (2) current best practices; and (3) testimonials from students who participated in a disciplinary process and students who sought campus resources but chose not to file a conduct report. Audits should be conducted by an oversight body independent from the institution's Title IX Coordinator(s).

Schools should provide reporting students, responding parties, and witnesses with an optional evaluation form to complete following major steps in the case and after its completion. This form should gather feedback on the students' experiences with the reporting and disciplinary processes, and with accessing resources and reasonable accommodations. Anonymized evaluations should be shared with the oversight body responsible for auditing an institution's gender-based misconduct policy, but in no circumstances should they be shared widely.

