January 30, 2019

The Honorable Betsy DeVos  
Secretary, U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, D.C. 20202

Re: Docket ID ED-2018-OCR-0064-0001

Dear Secretary DeVos,

I write to provide my comment in response to the Notice of Proposed Rulemaking ("NPRM") published by the Department of Education ("the Department") on November 29th, 2018, regarding sexual harassment and assault under Title IX of the Education Amendments Act of 1972 ("Title IX"). The Department of Education's new proposed rule for Title IX of the Education Amendments Act of 1972 (Title IX) is alarming and threatens the civil rights, safety and well-being of countless college students. I urge you to withdraw this rule immediately.

Instead of seeking to protect students from sexual harassment and assault and create safer places to learn, this proposal seems intended to make college campuses safer spaces to commit these crimes. Despite the progress we've made to protect victims of campus sexual assault, there is still an epidemic of sexual harassment and violence in our schools and on college campuses that threatens students' rights to pursue their education. The Department of Education should be making every effort to further our hard-won progress. Instead, proposals such as this will lead to fewer survivors reporting their assaults, seeking justice, and pursuing the equal access to education to which they are legally entitled. These proposed policy changes should be immediately withdrawn.

The proposed rule is based on the false assumption that respondents in Title IX claims and other instances of 'overreach' in sub-regulatory guidance issued under previous administrations lack due process protections. Not only is this assumption contradicted by the facts, it also does not justify the troubling provisions that will prevent many victims of sexual harassment and assault from continuing their education in a safe and secure learning community. This is a violation of the basic premise of Title IX of the Educational Amendments Act of 1972: that no person shall be discriminated against on the basis of sex in the provision of educational programs or activities receiving federal assistance. Federal courts and the Department have long recognized that an educational institution that fails to adequately respond to instances of sexual assault and harassment can be found guilty of Title IX sex discrimination. This response must include redress for victims of sexual assault and harassment and consequences for the perpetrators of such acts.
Instances of sexual harassment and assault are rising in our elementary and secondary schools and institutions of higher education. Instead of trying to reverse the trend by taking action to reduce harassment and assault, the Department is trying to limit the number of investigations of sexual assault and harassment by increasing legal and procedural thresholds needed to bring a case forward. The Department is in effect attempting to define these acts out of existence\(^1\) and sweep these problems under the rug. This is cruel, wrong and a dereliction of duty that would leave a permanent stain, not only on the Department’s history, but on our country’s history as well.

Below is a list of specific problems with the proposed rule:

- **Heightened standards for sexual harassment threaten to excuse unacceptable behaviors.** The proposed rule would change the definition of sexual harassment to, “\(u\)\[n\]welcome conduct on the basis of sex that is **so severe, pervasive and objectively offensive** that it effectively denies a person equal access to the school’s education program or activity.”\(^2\) This proposed change abandons a definition in effect at the Department since at least since 2001, with no suggestion that a new definition will improve the reporting, response, or management of incidents of sexual harassment in schools or on campuses. By requiring that an action be sufficiently severe, pervasive, and objectively offensive, and that such action result in a complete denial of access to the school’s education program or activity, the proposed rule sets an arbitrary and unnecessarily high threshold for which actions would even constitute harassment. Schools will have the leeway to ignore a multitude of objectionable actions without incurring liability under Title IX, in contravention of statutory intent. This change of definition alone will result in a host of incidents that most reasonable people would consider to be sexual harassment to continue unabated in schools and on campuses.

- **The proposed knowledge standard is set unreasonably high.** The Department proposes to hold an institution liable under Title IX only if it has actual knowledge of harassment or allegations of harassment.\(^3\) Institutions of higher education would be considered to have actual knowledge only if the action is reported to “an official with authority to take corrective action.”\(^4\) This standard would be a reversal of longstanding Departmental policy that reasonably triggers institutional liability under Title IX upon direct or general knowledge (when an institution reasonably should have known about an incident of harassment). The Department proposes this unreasonably high standard while offering no evidence that adoption of such standard will improve the reporting or resolution of sexual assault cases. In recent years there have been multiple high-profile cases in which students and/or school faculty/staff were aware of allegations of sexual harassment and assault in violation of Title IX, but about which no action was taken until claims were made known

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\(^{1}\) National Women’s Law Center, *DeVos’ Proposed Changes to Title IX, Explained* (November 30, 2018), https://nwlc.org/resources/devos-proposed-changes-to-title-ix-explained/.

\(^{2}\) Title IX NPRM, 83 Fed. Reg. 61462.

\(^{3}\) Title IX NPRM, 83 Fed. Reg. 61467, 61496.

\(^{4}\) *Id.* Under the proposed rule in elementary and secondary school settings, actual knowledge can come from notice to any teacher, but does not come from other classes of school employees a student may be more comfortable reporting to (e.g., paraprofessionals).
through the media. The Department’s arbitrary proposal to limit institutional liability to instances of direct knowledge will undermine the safety of students.

- **Limiting the scope of the “educational program or activity” threatens student safety.** Consistent with the Department’s stated goal of limiting actions that would trigger Title IX liability, the proposed rule would informally set arbitrary geographical limits on Title IX liability that fail to acknowledge the reality of student and faculty interactions. On many campuses the lines between on-campus and off-campus, private space and public, official activity and campus tradition, are all blurred. The proposed language would limit the opportunity to expose sexual harassment in these blurred spaces and limit Title IX application to actions perpetrated against a person “in the United States,” thus essentially eliminating liability for study abroad programs, even when sponsored and/or conducted by US institutions receiving federal funds. A student participating in a U.S. school-sponsored program abroad, taught by professors from the U.S. would no longer be protected under Title IX. This proposal sends a message to potential bad actors that they can get away with sexual assault and harassment in a foreign program or those that might have a debatable relation to the official education program or activity (e.g., ski trips, tailgates, off-campus formals). Title IX should be interpreted as protecting any person enrolled or attending an educational institution in the United States, including any program or activity the institution conducts or sponsors abroad. Such construction would align with applicability of other federal civil rights protections, including Title VI of the Civil Rights Act of 1964.\(^5\)

- **Proposed standards seek to limit liability at the expense of student safety.** Under the proposed rule schools will only be held liable in cases of *deliberate indifference*, defined as “clearly unreasonable in light of the known circumstances.”\(^6\) When combined with the Department’s proposed change in the definition of sexual harassment, the Department creates a safe harbor for educational institutions to avoid liability. Thus, a response that conforms to the new regulations would rarely, if ever, be considered “clearly unreasonable.” The rule also requires that Title IX Coordinators who have actual knowledge of reports by multiple complainants of conduct by the same respondent, must file a formal complaint, even against the will of the complainants. This requirement lacks clarity with questions remaining as to how a school will conduct a meaningful investigation of the complaint without the cooperation of the complainant, and if such a required investigation would further victimize a complainant.

- **Formal investigation requirements will chill reporting more than they will ensure fairness.** The Department’s proposed rule requires live hearing and cross examination for proceedings at the postsecondary level, allowing for either party to be cross examined remotely (in another room) via electronic means. School procedures are not deeply rooted in a legal framework which has evolved over centuries, nor are they practiced in these cross examination and investigative procedures. The Department should rethink making live hearings and cross-examinations mandatory parts of the Title IX formal grievance process.

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\(^5\) U.S. Department of Justice, Civil Rights Division, Title VI Legal Manual; §V, Defining Title VI, 5-7, 2016 (“To date, however, the only application of extraterritoriality appears in cases involving schools and study abroad programs. For example, a district court ruled that Title IX protects students who participate in study abroad programs through American universities.”). Available at [https://www.justice.gov/crt/file/896541/download](https://www.justice.gov/crt/file/896541/download).

\(^6\) Title IX NPRM, 83 Fed. Reg. 61468.
• The proposed “choice” of standard of evidence is a false one. When the Department rescinded Obama-era guidance in 2017, it gave schools the choice of using either the preponderance of the evidence standard or the higher “clear and convincing” standard. While the NPRM alleges to provide schools with a choice to apply either the preponderance of the evidence standard or the clear and convincing standard, in practice, accompanying provisions in this section of the rule will force many schools to adopt the higher clear and convincing standard. Additionally, based on the Department’s questionable drafting of these provisions, it is plausible that some schools will be unable to apply any evidentiary standard that complies with the regulation without revising labor contracts or their entire student code of conduct.

• The preference of informal resolution belittles the severity of sexual assault and harassment. The NPRM elevates the use of an informal resolution process, suggesting it can stand in place of formal grievance procedures under Title IX. This not only deemens the serious nature of the offense in question, but also clearly articulates the Department’s misunderstanding of campus climate as it relates to sexual assault and harassment. In cases of sexual harassment involving assault, the mere suggestion that the case be resolved through informal resolution is insulting to the survivor and the serious nature of the act. Schools have obvious incentives to resolve complaints through informal procedures, but those incentives may not always be obvious to, or serve the best interest of, students. And students utilizing an informal resolution process at the behest or suggestion of his or her institution may or may not forfeit his or her right to re-file a formal complaint at a later time.

• The civil rights of students should outweigh the discomfort religious educational institutions may feel when disclosing their discriminatory acts. Educational institutions controlled by religious organizations are not bound by Title IX when compliance would “not be consistent with the religious tenets of such organization.” The NPRM would eliminate the requirement that schools submit a letter to the Department before claiming exemption from Title IX compliance. Additionally, it would allow a school to delay, until the very moment a Title IX investigation is initiated by the Department, public notification of the religious tenets it believes exempts the school from Title IX compliance. Under the Obama administration, written justifications were posted on the Department’s website, providing enrolled and prospective students with transparency to make informed decisions. I urge the Department to return to this practice.

None of the provisions in the proposed rule would aid survivors in seeking redress or preserve the due process protections that existed in the recently rescinded sub-regulatory guidance. Instead, it limits institutional compliance liability AND federal enforcement liability, creating less safe learning environments. If the Department is concerned with issues of due process in Title IX, they could begin by enforcing existing procedural requirements with which many recipients of federal funding fail to comply.

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8 Title IX NPRM, 83 Fed. Reg. 61499.
I vehemently oppose the proposed rule change and urge you to abandon it and instead focus on refining existing guidance to ensure compliance and enforcement of current due process protections, and to protect survivors of sexual assault and harassment in our educational institutions. This proposal must not become a reality.

Sincerely,

[Signature]
CAROLYN B. MALONEY
Member of Congress