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January 28, 2019

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

Submitted online via <http://regulations.gov>

**RE: Comments on Proposed Regulations Titled “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance”
Docket ID No. ED-2018-OCR-0064**

Dear Mr. Marcus:

The California Women’s Law Center (CWLC) appreciates the opportunity to submit comments on the proposed regulations titled “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” issued by the United States Department of Education (Department) on November 29, 2018.

CWLC is a statewide nonprofit law and policy center dedicated to breaking down barriers and advancing the potential of women and girls through impact litigation, advocacy and education. A vital part of CWLC’s mission is fighting for women’s access to equal educational opportunities by ensuring that access to education is not impeded by sex discrimination. CWLC strongly believes that young women and girls deserve the right to an education free from sexual harassment and violence.

CWLC strongly opposes the proposed regulations, which if implemented, would significantly impede access to educational opportunities. The proposed regulations are likely to deter survivors of sexual harassment and violence from coming forward or filing a complaint against their attacker. And, under the proposed regulations, those, who do come forward will be forced into a traumatizing investigative process that is unlikely to yield equitable results. As a result, the proposed regulations will increase the incidents of sexual harassment and violence on school campuses.

I. CWLC opposes the proposed regulations because they fail to effectuate Title IX’s intended purpose of preventing sex discrimination in educational institutions

The proposed regulations will erode Title IX’s core purpose by creating significant barriers to women’s educational opportunities.¹ Title IX of the Education Amendments Act

¹ Peter Baumann, *Deliberate Indifference: How to Fix Title IX Campus Sex-Assault Jurisprudence*, 106 Geo. L.J., 1139 (Apr. 2018) [hereinafter *Deliberate Indifference: How to Fix Title IX*] (citing extensively to the legislative history of the Bill including quotes from the opening debate on the senate floor in 1971 where Senator Bayh “repeatedly referenced access and opportunity when discussing the purpose of the legislation” and “referred to the legislation as ‘attempting to establish access to higher education as a basic Federal right’

of 1972 provides that no person “shall, on the basis of sex... be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”² The purpose of Title IX is to “avoid the use of federal resources to support discriminatory practices and to provide individual citizens effective protection against those practices.”³ If the Secretary’s proposed regulations are adopted, Title IX’s purpose will be vitiated.⁴

The proposed regulations hamper schools’ ability to respond to sexual violence, embolden perpetrators of sexual violence by promoting rape culture on school campuses, and perpetuate entrenched and harmful narratives about the nature of sexual violence. By making it more difficult administratively and psychologically for student survivors to report incidents of sexual violence, the regulations will exacerbate the already persistent problem of underreporting.⁵ Combined with a much narrower definition of what qualifies as sexual harassment, the resulting chilling effect on reporting will drastically reduce the number of sexual violence cases to which schools are able to respond. The regulations will also strengthen the protections afforded to assailants of sexual violence under the guise of affording due process. These alleged protections are not only incompatible with constitutional due process requirements,⁶ but they also communicate to survivors of sexual violence that their voices will be treated with skepticism, antipathy, or even overt aggression. This will lead to less reporting and increased incidents of sexual violence. For the foregoing reasons and those detailed below, CWLC strongly opposes the proposed regulations.

II. The proposed regulations’ severely restricted definition of “sexual harassment” will place female students at risk by allowing schools to dismiss and ignore escalating incidents of sexual harassment and assault

The proposed regulations severely narrow the definition of sexual harassment to include only “unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the [school’s] education program.”⁷ Moreover, the new regulations mandate dismissal of complaints that do not meet this stricter standard. Narrowing the definition of “sexual harassment” departs from nearly two decades of administrative guidance. In 2001, the Department of Education issued a guidance document on the sexual harassment of students by school employees, other students, or third parties, which detailed schools’ obligations to respond to sexual harassment under Title IX.⁸ This guidance defined sexual harassment broadly as “unwelcome conduct of a sexual nature.”⁹ In 2011, the Department issued the Dear Colleague Letter (“DCL”),

and “encouraged his colleagues to ‘insure that no American will be denied access to higher education because of... sex.’”)

² 20 U.S.C. § 1681.

³ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998) (citations omitted).

⁴ Except where otherwise specified, “Sexual harassment and assault” will be collectively referred to as “sexual violence.”

⁵ United Educators, *Facts From United Educators’ Report – Confronting Campus Sexual Assault: An Examination of Higher Education Claims*, https://www.ue.org/sexual_assault_claims_study [hereinafter *United Educators*] (40% of victims of sexual assault delay reporting by an average of 11.3 months); RAINN, *Campus Sexual Violence: Statistics*, <https://www.rainn.org/statistics/campus-sexual-violence> [hereinafter *Campus Sexual Violence*] (four out of five female college-age victims of sexual violence do not report to law enforcement).

⁶ Sara O’Toole, *Campus Sexual Assault Adjudication, Student Due Process, and a Bar on Direct Cross-Examination*, 79 U. Pitt. L. Rev. 511 (2018) [hereinafter *Campus Sexual Assault Adjudication*].

⁷ Proposed Reg. § 106.30.

⁸ U.S. Dep’t of Educ. Office of Civil Rights, *Revise Sexual Harassment Guidance* (Jan. 1, 2001), available at <https://www.nccpsafety.org/resources/library/revise-sexual-harassment-guidance-2001/> [hereinafter 2011 Guidance].

⁹ *Id.*

which again defined sexual harassment as “unwelcome conduct of a sexual nature,”¹⁰ adding that this definition included, but was not limited to, “requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.”¹¹

Women’s rights advocates dedicated to confronting sexual violence in schools have strongly supported this broader definition of sexual harassment.¹² This widespread support is based on a common recognition that when schools turn a blind eye to escalating incidents of sexual harassment, women and girls are negatively affected and the purpose of Title IX is not served.¹³ Despite long-standing support for the more inclusive definition, the Department of Education rescinded these guidance documents in 2017.¹⁴ And on November 16, 2018, the Department issued a drastically narrower new definition of sexual harassment, putting students at risk and negatively impacting their academic careers and opportunities.¹⁵

Sexual harassment can take many forms and has long been a persistent presence in our nation’s schools. In K-12 schools, nearly half of students surveyed during the 2010-11 school year stated that they had experienced some form of sexual harassment.¹⁶ Moreover, these experiences impact students’ ability to learn and access academic opportunities in the future. Of those students who have experienced a form of sexual harassment, a significant majority indicated that the experience had a “huge negative effect on them.”¹⁷ The effects continue as students enter college. Despite the fact that rates of other forms of gender-based violence have decreased since 1994 when the federal Violence Against Women Act was passed, rates of sexual violence on college campuses have remained virtually unchanged.¹⁸ Students’ experiences of sexual harassment span a wide range of behaviors, forums, and

¹⁰ U.S. Dep’t of Educ. Office for Civil Rights, *Dear Colleague Letter: Sexual Violence* (Apr. 4, 2011), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [hereinafter 2011 Guidance].

¹¹ *Id.*

¹² Catherine Hill & Holly Kearl, *Crossing the Line: Sexual Harassment at School*, AAUW (2011), available at <https://www.aauw.org/research/crossing-the-line> [hereinafter *Crossing the Line*] (the American Association of University Women (AAUW) promotes equity and education for women and girls and in a recent survey defined sexual harassment as “unwelcome sexual behavior that takes place in person or electronically.”); UC Office of the President, *Univ. of Cal. Troubled by Proposed Changes to Sexual Harassment Rules* (Nov. 16, 2018) available at <https://www.universityofcalifornia.edu/press-room/university-california-troubled-proposed-changes-sexual-harassment-rules> [hereinafter *Univ. of Cal. Troubled by Proposed Changes*]; Elizabeth Tang, *Three Reasons Why Betsy DeVos’s Proposed Title IX Rules Would Hurt Survivors* (Nov. 16, 2018), available at <https://nwlc.org/blog/three-reasons-why-betsy-devos-draft-title-ix-rules-would-hurt-survivors/>; *Letter in Opposition to Proposed Title IX Changes* (Nov. 1, 2018), available at <https://asuc.org/news/letter-in-opposition-to-proposed-title-ix-changes/> (“By restricting incidents that fall under the umbrella of ‘sexual harassment,’ universities would be ill-equipped to deal with the broad array of cases which, though they do not meet this strict definition, nonetheless have a negative impact on student participation and performance in the academic community.”).

¹³ *Univ. of Cal. Troubled by Proposed Changes* (“Suddenly permitting schools to disregard any sexual misconduct that does not overcome new and unnecessary hurdles is equally confounding. These and other proposed rules by ED will seriously impede students’ abilities to obtain redress from wrongdoing.”).

¹⁴ *Betsy DeVos Reverses Obama-era Policy on Campus Sexual Assault Investigations*, THE NEW YORK TIMES (Sept. 22, 2017), available at <https://www.nytimes.com/2017/09/22/us/devos-colleges-sex-assault.html>.

¹⁵ U.S. Department of Education, *Secretary DeVos: Proposed Title IX Rule Provides Clarity for Schools, Support for Survivors, and Due Process Rights for All*, (Nov. 16, 2018), available at <https://www.ed.gov/news/press-releases/secretary-devos-proposed-title-ix-rule-provides-clarity-schools-support-survivors-and-due-process-rights-all>.

¹⁶ *Crossing the Line* (48% of students); See also National Women’s Law Center, *Let Her Learn: Stopping School Pushout for: Girls Who Have Suffered Harassment and Sexual Violence* (Apr. 2017), available at <https://nwlc.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence>.

¹⁷ *Let Her Learn* (87% of students).

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

media.¹⁹ However, across all ages and grades, young girls and women remain more likely than boys to experience sexual harassment²⁰ and less likely to report their experiences,²¹ even without the problematic narrowing of the definition of harassment.²²

Young women bear the brunt of the negative effects of sexual harassment. They are more likely to miss school because they feel unsafe²³ and in some instances are forced to drop out of school altogether to avoid encounters with their assailant.²⁴ Those who do stay in school often have trouble focusing and maintaining their grades,²⁵ making it more difficult for them to access important opportunities like college, graduate school, and more lucrative careers. Women in college face additional financial hurdles, including being forced to pay out of pocket for off-campus housing and support services like private counseling to help them work through the emotional trauma of their experiences.²⁶ Physical health also is affected, including common issues with sleeping and higher blood pressure brought on by stress and anxiety,²⁷ compounding the mental and academic effects already discussed.

the United States of Women, YOUTUBE (Sept. 19, 2014), available at <http://www.youtube.com/watch?v=1MyXFYINQsA> (at approximately minute 27:00); see also The White House, *President Obama Speaks at the Launch of the “It’s ON Us” Campaign*, YOUTUBE (Sept. 19, 2014), available at <http://www.youtube.com/watch?v=VWzicOS0PqI>. See generally Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (containing Title IV, also known as the Violence Against Women Act).

¹⁹ *Crossing the Line*; See also Kelly Wallace, *After Weinstein, Don’t Forget About Online Sexual Harassment*, CNN (Oct. 26, 2017), available at <https://www.cnn.com/2017/10/26/health/harvey-weinstein-online-sexual-harassment/index.html>.

²⁰ California Women’s Law Center, *Teen Dating Violence Presentation (2017)*, available at <https://www.cwlc.org/download/webinar-teen-dating-violence-2017/?wpdmdl=4996&ind=VN2ktSTD-P3-SahOO25wFDmfAK3osANBhPVGZvNI82qTZ4kJ79ICnbptxhOvngmaTJvAKSC2fWuxTOu5B9TJmg> [hereinafter *Teen Dating Violence*] (“Females sustain significantly more sexual violence than males.”); *Crossing the Line* (“Girls were more likely than boys to be sexually harassed both in person (52 percent versus 35 percent) and via text, e-mail, Facebook, or other electronic means (36 percent versus 24 percent)”; *United Educators, Facts From United Educators’ Report – Confronting Campus Sexual Assault: An Examination of Higher Education Claims*, available at https://www.ue.org/sexual_assault_claims_study (“94% of victims were female”).

²¹ United Educators, *Facts From United Educators’ Report – Confronting Campus Sexual Assault: An Examination of Higher Education Claims*, https://www.ue.org/sexual_assault_claims_study (40% of victims of sexual assault delay reporting by an average of 11.3 months); *Campus Sexual Violence*.

²² Under the Obama administration, despite this proclivity for underreporting, “the number of sexual violence complaints at the elementary and secondary school level filed with the Office of Civil Rights increased over 600% from 11 to 83.” *Let Her Learn* (citing U.S. Department of Education, Office of Civil Rights, *Achieving Simple Justice: Highlights of Activities*, Office for Civil Rights 2009-16 (2016), 10, available at <https://www2.3d.gov/about/reports/annual/ocr/achieving-simple-justice.pdf>).

²³ *Let Her Learn* (30% of survivors of sexual violence versus 14% of girls overall “have been absent from school because [they] felt unsafe at school or on their way to school”).

²⁴ E.g., Audrey Chu, *I Dropped Out of College Because I Couldn’t Bear to See My Rapist on Campus*, VICE (Sept. 26, 2017) [hereinafter *I Dropped Out of College Because I Couldn’t Bear to See My Rapist on Campus*], available at https://broadly.vice.com/en_us/article/qvjzpd/i-dropped-out-of-college-because-i-couldnt-bear-to-see-my-rapist-on-campus.

²⁵ *Id.*

²⁶ *Violence Victimization on a College Campus* (“Not surprisingly, girls who suffer these forms of trauma are more likely to have serious behavioral, emotional and health problems.”) (citing Yael Dvir, Julian Ford, Michael Hill and Jean Frazier, *Childhood Maltreatment, Emotional Dysregulations, and Psychiatric Commodities*, *Harvard Rev. Psychiatry* 22 (2014), 149-161, available at <http://ncbi.nlm.nih.gov/pmc/articles/PMC4091823/>); Kathryn J. Holland, Lilia M. Cortina, *The Evolving Landscape of Title IX: Predicting Mandatory Reporters’ Responses to Sexual Assault Disclosures*, 41 *Law & Hum. Behav.* 429 (2017) [hereinafter *The Evolving Landscape of Title IX*] (“There can be devastating psychological and educational consequences of sexual assault, including depression, posttraumatic stress, suicidality, performance decline, and school withdrawal”) (citing, e.g., Chang et al., 2015; Frazier et al., 2009; Kaltman, Krupnick, Stockton, Hooper & Green, 2005; Mengo & Black, 2016)).

²⁷ Caitlyn Bahrenburg, *Sexual Harassment Increases Blood Pressure and Poor Sleep in Women*, MD Magazine (Oct. 03, 2018), available at <https://www.mdmag.com/medical-news/sexual-harassment-increases-blood-pressure-poor-sleep-women>.

Harassment affects all genders, but girls experience sexual harassment at higher rates and are more likely “to say that they have been negatively affected” by their experience.²⁸ Young girls and women are also more likely to have suffered the negative effects of sexual harassment for longer.²⁹ College-age women are more likely to express “feeling upset by sexual harassment and [more likely] to feel embarrassed, angry, less confident, afraid, worried about whether they could have a happy relationship, confused or conflicted about who they are, or disappointed in their college experience.”³⁰

a. The proposed narrowing of the definition of sexual harassment will lead to more underreporting, allowing incidents of sexual harassment to escalate and creating “hostile environments”

Many common incidents of sexual harassment will not qualify under the proposed definition, simply because the incidents are not yet considered “severe” enough. But young girls and women should not be forced to endure escalating forms of sexual harassment and abuse in their schools without recourse. Verbal harassment, including unwelcome sexual comments, jokes, or gestures, is among the most common forms of sexual harassment on both K-12 and college campuses.³¹ However, despite being one of the most common forms of sexual harassment,³² verbal sexual harassment is also the most likely to fall outside the newly-proposed definition.³³ In addition to withstanding the harmful effects of ongoing verbal harassment,³⁴ this cycle places students at increased risk for other forms of sexual harassment because verbal abuse is a common precursor to physical violence.³⁵

Under Title IX, schools are required to respond when discrimination on the basis of sex creates a “hostile environment” that “den[ies] or limit[s] a student’s ability to participate in or benefit from the school’s programs or activities.”³⁶ Allowing schools to ignore the most common forms of sexual harassment forces students to endure protracted and reoccurring incidents. The harmful psychological,

²⁸ *Crossing the Line*.

²⁹ *Id.* (“Not only were girls more likely than boys to say sexual harassment caused them to have trouble sleeping (22 percent of girls versus 14 percent of boys), not want to go to school (37 percent of girls versus 25 percent of boys), or change the way they went to or home from school (10 percent of girls versus 6 percent of boys), girls were more likely in every case to say they felt that way for ‘quite a while’ compared with boys”).

³⁰ Catherine Hill & Elena Silva, *Drawing the Line: Sexual Harassment on Campus*, AAUW (2005) available at <https://history.aauw.org/files/2013/01/DTLFinal.pdf>.

³¹ *Crossing the Line* (“Verbal harassment (unwelcome sexual comments, jokes, or gesture) made up the bulk of the incidents, but physical harassment was far too common. Facebook, or other electronic means affected nearly one-third (30 percent) of students. Interesting, [sic] many of the students who were sexually harassed through cyber-space were also sexually harassed in person.”).

³² *Id.* (“Physical harassment is less common than verbal harassment, but it tends to have stronger negative effects on students (AAUW, 2001”); National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey: Executive Summary* 12 (Dec. 2016) [hereinafter *2015 U.S. Transgender Survey*], available at <https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf>. (students who were out as transgender or who were perceived as transgender while in K-12 school experienced some form of harassment and the majority of them—54%—experienced verbal harassment).

³³ See 83 Fed. Reg. 61464, 61480 (attempting to justify the proposed regulations by pointing to “free speech” concerns and claiming that the old guidance broader definition contributed to a chilling effect of “free speech” on school campuses).

³⁴ *Supra* notes 23-27.

³⁵ Katherine Schafler, *10 Warning Signs of Physical Abuse*, available at <https://www.katherineschafler.com/blog/10-warning-signs-of-physical-abuse> (Discussing the fact that “verbal abuse is almost always present before someone is physically abusive” in the context of intimate dating relationships); Olatokunbo Olukemi Laniya, *Street Smut: Gender, Media, and the Legal Power Dynamics of Street Harassment, or “Hey Sexy” and Other Verbal Ejaculations*, 14 Colum. J. Gender & L. 91 (describing the escalation from verbal harassment and “harmless flirting” to physical assault.).

³⁶ 2011 Guidance at V-VI.

emotional, physical, and financial effects that come with each incident³⁷ and the justifiable fear of escalation³⁸ inhibit students' ability to succeed academically. Additionally, multiple studies have confirmed that students who suffer sexual harassment at a young age are more vulnerable to repeated assault later.³⁹ Accordingly, the proposed regulations' definition of sexual harassment will contradict Title IX's "hostile environment" standard of compliance and should be rejected.

b. Allowing schools to ignore so-called early forms of sexual harassment will embolden perpetrators and reinforce a culture of complicity and misogyny

In addition to exacerbating and lengthening the painful effects of survivors' experiences of sexual harassment, the proposed regulations will also increase the frequency with which sexual harassment occurs by ensuring the continued entrenchment of "rape culture" in schools.⁴⁰ When students, faculty and staff witness a school's repeated refusal to address sexual harassment, the behavior becomes normalized and legitimate within the school culture.⁴¹ This process of legitimizing sexual harassment and violence perpetuates a deep seated perception that most forms of sexual harassment are simply "no big deal."⁴² This encourages perpetrators to continue engaging in forms of harassment justified as "locker room talk,"⁴³ or "boys being boys."⁴⁴ However, no matter what label is ascribed, such conduct is harassment that should be kept out of our schools.

The normalization of sexual harassment discourages women from seeking help by minimizing their experiences and perpetuating stereotypes about women as being "overly dramatic," "hysterical," or even liars.⁴⁵ Our culture and our laws⁴⁶ evidence a long unfortunate history of mistrusting women who come forward with allegations of sexual harassment and assault. Women and girls are all too aware of the likelihood they will not be believed.⁴⁷ Unsurprisingly, however, the actual data shows that

³⁷ *Supra* note 34.

³⁸ *Supra* note 35.

³⁹ Cindy Long, *The Secret of Sexual Assault in Schools*, NEA TODAY (Dec. 4, 2017) available at <http://neatoday.org/2017/12/04/sexual-assault-in-schools/>; *Teen Dating Violence* (noting that youth who experience teen dating violence are at a significantly higher risk for "future victimization during college and beyond.").

⁴⁰ Sky Jordan, *Rape Culture is Normalized Across College Campuses*, THE STATE PRESS (Feb. 27, 2017) available at <http://www.statepress.com/article/2017/02/spopinion-rape-culture-is-normalized-on-campuses>.

⁴¹ *Crossing the Line* ("Witnessing sexual harassment at school may 'normalize' the behavior for bystanders").

⁴² *Id.* ("Many of the students who admitted to sexually harassing others didn't think of it as a big deal (44 percent), and many were trying to be funny (39 percent). These findings suggest that prevention efforts need to address when humor crosses the line and become sexual harassment.").

⁴³ Pamela B. Paresky, Ph.D., *What's Wrong with Locker Room Talk*, PSYCHOLOGY TODAY, available at <https://www.psychologytoday.com/us/blog/happiness-and-the-pursuit-leadership/201610/whats-wrong-locker-room-talk> (noting that "[w]hen men speak about women using 'locker room talk,' men are priming themselves to think of women as sex objects they can 'grab' and to whom they can 'do anything.'").

⁴⁴ Nsikan Akpan, *In Kavanaugh Debate, 'boys will be boys' is an unscientific excuse for assault*, PBS, available at <https://www.pbs.org/newshour/science/why-boys-will-be-boys-is-an-unscientific-excuse-for-assault>.

⁴⁵ Erica L. Green and Sheryl Gay Stolberg, *Campus Rape Policies Get a New Look as the Accused Get DeVos's Ear*, NEW YORK TIMES, available at https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html?_r=0 ("Fatima Goss Graves, president of the National Women's Law Center... said she was 'worried that the department will turn into apologists for the sort of violence that happens on campus,' and that the Trump administration would 'allow myths about rape to be perpetuated'—including, she said, 'the whole idea that rape is just a drunken encounter gone wrong'").

⁴⁶ Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 Val. U.L. Rev. 133 (2013) [hereinafter *Vicarious Liability in Torts: The Sex Exception*] ("Many courts continue to treat sexual abuse cases as exceptional, echoing the sentiments of old-fashioned (pre-1970s) criminal laws that once approached rape and sexual assault as qualitatively different from other forms of violence and erected special legal barriers to prosecution").

⁴⁷ Anne Vetter, *I Reported My Rapist Today So He Can't Become a Supreme Court Justice Later*, THE WASHINGTON POST (Oct. 4, 2018), available at <https://www.washingtonpost.com/outlook/i-reported-my-rapist-today-so-he-cant-become-a->

rates of sexual violence remain substantially and consistently lower than rates of false reporting.⁴⁸ The proposed narrowed definition of sexual harassment is a step in the wrong direction and will further marginalize victims' experiences by suggesting that only the most "severe"⁴⁹ cases require attention and concern.

III. By requiring that institutions disregard complaints of sexual harassment and assault that occur off-campus and online, the proposed regulations draw an arbitrary and harmful distinction

Federal guidance documents have consistently recognized a school's obligation to respond to incidents that occur off-campus.⁵⁰ The 2011 Dear Colleague Letter stated that "[s]chools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, [and] outside a school's education program or activity,"⁵¹ and the 2014 Dear Colleague Letter stated that "a school must process all complaints of sexual violence, regardless of where the conduct occurred."⁵² Numerous organizations and institutions committed to advancing women's rights have advocated that an institution's response to sexual harassment on campus should include policies that address "high-risk behavior [including]...inappropriate conduct such as bullying and hazing,"⁵³ which frequently occurs off school property and online. In order to be effective, a school's response to sexual misconduct must include "direct prevention efforts to high-profile groups, such as athletes and fraternities,"⁵⁴ many of which have housing and events off-campus. However, the proposed regulations will harm all students by explicitly requiring that schools ignore harassment that occurs off-campus or online.⁵⁵

a. Young girls and women increasingly rely on the internet and social media for access to academic, social, and career opportunities

The internet is ubiquitous in the life of student. Over 90% of teenagers spend time on the internet and many spend "more time using media than doing any other single activity besides sleeping."⁵⁶ Unfortunately, rates of sexual violence and cyber-bullying are nearly as universal as

[supreme-court-justice-later/2018/10/04/09d7bf10-c74d-11e8-b1ed-1d2d65b86d0c_story.html?utm_term=.12bf839051fd](https://www.supreme-court-justice-later.com/2018/10/04/09d7bf10-c74d-11e8-b1ed-1d2d65b86d0c_story.html?utm_term=.12bf839051fd) ("I didn't think reporting to my college would accomplish anything. I'd seen rape cases with much more evidence than mine dismissed").

⁴⁸ Holly Yan & Nicole Chavez, *Trump Says it's a "Scary Time" for Men. Here are the Statistics on Sexual Assault Claims*, CNN (Oct. 3, 2018), available at <https://www.cnn.com/2018/10/03/health/sexual-assault-false-reports/index.html> (citing *False Reporting*, National Sexual Violence Resource Center, available at https://www.nsvrc.org/sites/default/files/2012-03/Publications_NSVRC_Overview_False-Reporting.pdf (noting that the prevalence of false reporting on sexual assault is between 2% and 10%)).

⁴⁹ Proposed Reg. § 106.30.

⁵⁰ U.S. Dep't of Educ. Office for Civil Rights, *Questions and Answers on Campus Sexual Misconduct* (Sept. 2017) [hereinafter 2017 Guidance], available at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>. ("School are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities.").

⁵¹ 2011 Guidance.

⁵² U.S. Dep't of Educ. Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence 1-2* (Apr. 29, 2014), available at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [hereinafter 2014 Guidance].

⁵³ *United Educators*.

⁵⁴ *Id.*

⁵⁵ Proposed Regs. §§ 106.30, 106.45(b)(3).

⁵⁶ Pew Research Center, "Online Harassment 2017," available at <http://www.pewinternet.org/2017/07/11/online-harassment-2017/> [hereinafter Pew Research] ("For those who experience online harassment directly, these encounters can have profound real-world consequences, ranging from mental or emotional stress to reputational damage or even fear for one's personal safety.").

internet and social media use.⁵⁷ Often, this abuse occurs in the context of dating relationships and is sometimes referred to as “cyber dating abuse.”⁵⁸ And as in the context of other forms of harassment, girls remain more likely than boys to become victims of online sexual harassment.⁵⁹ However, young women and girls who experience online sexual harassment experience the same harmful psychological and emotional effects as other forms of harassment.⁶⁰

Title IX imposes a duty on schools to respond to incidents of sex discrimination that create a hostile environment on the basis of sex.⁶¹ Its purpose to prevent such sex discrimination from interfering with a students’ academic opportunities. No matter where an incident of harassment takes place, schools have a duty to respond to discrimination.⁶² For example, a young girl who is sexually harassed online may miss school to avoid her harasser⁶³ or may struggle to focus on her assignments in class due to anxiety and lack of sleep.⁶⁴ Despite the fact that the original harassment occurred online, the fear, anxiety, and exhaustion brought on by the harassment remain present on-campus. Schools have a duty under Title IX to address these impediments to a student’s equal access to education on the basis of sex, even if the harassing incident occurred online.

In the specific context of higher education, online spaces have evolved from extra-scholastic, purely recreational forums into vital tools for enhancing the opportunities afforded by college.⁶⁵ Students now use online media for networking opportunities,⁶⁶ to connect with other students and

⁵⁷ *Crossing the Line* (“Between 20 and 40 percent of youth ages 12 to 17 report having experienced some form of cyber-bullying.”).

⁵⁸ *Teen Dating Violence* (citing Rebecca N. Dick et al., *Cyber Dating Abuse Among Teens Using School-Based Health Centers*, Am. Acad. Of Pediatrics, Nov. 2014; Kevin J. Vagi et al., *Teen Dating Violence (Physical and Sexual) Among US High School Students: Findings From the 2013 National Youth Risk Behavior Survey*, 169 J. of the Am. Med. Ass’n Pediatrics, 2015, at 474 (“[t]he 2013 National Youth Risk Behavior Survey found that more than half of high school students who experience sexual or physical abuse by a dating partner have also been bullied electronically.”)).

⁵⁹ Pew Research.

⁶⁰ *Teen Dating Violence* (noting that young women, who experience teen dating violence, which includes cyber dating abuse, are at a significantly higher risk for “depression and/or anxiety, tobacco, alcohol, and drug use or abuse, antisocial behaviors and aggression, suicide, sexual risk behaviors, pregnancy, sexually transmitted infections and future victimization during college and beyond.”) (citing California Adolescent Health Collaborative, *Teen Dating Violence: Keeping California Adolescents Safe in Their Relationships*, The Public Health Institute (2009); D.M. Ackard & D. Neumark-Sztainer, *Date Violence and Date Rape Among Adolescents: Associations with Disordered Eating Behaviors and Psychological Health*, 26 Child Abuse and Neglect, May 2002, at 455; Jay G. Silverman et al., *Dating Violence Against Adolescent Girls and Associated Substance Use, Unhealthy Weight Control, Sexual Risk Behavior, Pregnancy, and Suicidality*, 286 J. of the Am. Med. Ass’n, Aug. 2001, at 572).

⁶¹ 2011 Guidance.

⁶² *Deliberate Indifference: How to Fix Title IX* (arguing that “[i]n theory, then, the focus should shift from the actual assault to whether the school’s response caused the victim to undergo further harassment that is *itself* actionable under Title IX.”) (citing *Kelly*, 2003 WL 1563424, at *4 (“After Yale received notice of the harassing conduct, it had a duty under Title IX to take some action not [sic] prevent the further harassment of [the victim].”); *S.S. v. Alexander*, 177 P.3d 724, 743 (Wash. Ct. App. 2008) (“In so holding, we emphasize that [the victim] may not recover damages for the rape itself but, rather, may only recover based on injury done to her by actions of the university after she reported the rape.”)).

⁶³ *Teen Dating Violence*.

⁶⁴ *Violence Victimization on a College Campus*.

⁶⁵ NACE Center, *The Role of Social Media in the Job Search* (Dec. 11, 2017) available at <https://www.nacweb.org/talent-acquisition/student-attitudes/the-role-of-social-media-in-the-job-search/> [hereinafter *The Role of Social Media in the Job Search*].

⁶⁶ *Id.* (noting that 52% of students use social media in their job search and that one of the most common ways of doing so was “communicating with friends and/or family to discuss job openings and potential employers.”).

faculty performing similar research,⁶⁷ and to secure jobs and internships.⁶⁸ Without the freedom to access valuable research opportunities and to make connections with others in their field of study—free from the fear of sexual harassment and assault—women will have fewer chances of securing positions in prestigious and competitive graduate programs. Universities and colleges recognize these opportunities and often actively promote the use of the internet and social media sites.⁶⁹ However, the proposed regulations would convert these spaces of opportunity into unprotected areas for sex discrimination. As one commentator noted, the very fact that cyber-bullies operate online and lack “specific physical locale may also convince bullies or harassers that they are beyond the school’s legal reach—as they sometimes are.”⁷⁰ Codifying these beliefs into regulations that prohibit schools from reaching these online bullies will encourage their behavior and increase the already alarming rates of online sexual harassment. Contrary to Title IX’s purpose of ensuring equal access to opportunity, allowing online spaces to become safe havens for perpetrators of sexual violence and harassment will cause women to have less access to academic and career opportunities than their male peers.

b. Requiring that schools ignore incidents of sexual harassment and assault that occur off-campus prevents schools from fulfilling their mandate under Title IX to respond to hostile environments created by sex discrimination

Like online sexual harassment, off-campus sexual harassment is an unfortunate yet pervasive part of life, especially in higher education. The overwhelming majority of college students live off-campus.⁷¹ Additionally, fraternity houses, where a disproportionately high number of assaults occur,⁷² are usually located off-campus. Moreover, 41% of sexual assaults involve off-campus parties⁷³ and off-campus college bars, which are also common locations for sexual assault and harassment.⁷⁴ Given all of these contributing factors, it should come as no surprise that nearly forty percent of sexual assaults occur off campus.⁷⁵

⁶⁷ Lee Watanabe, *4 Ways Students Can Use Social Media as a Classroom Research Tool* (Dec. 28, 2017) available at <https://globaldigitalcitizen.org/4-ways-students-use-social-media-research-tool>.

⁶⁸ *The Role of Social Media in the Job Search*.

⁶⁹ See, e.g., Berkeley Univ. of Cal. Career Center, *Using LinkedIn to Develop Your Career*, available at <https://career.berkeley.edu/Info/LinkedIn>; UC San Diego, *Social Media 101*, available at <https://ucpa.ucsd.edu/resources/social/social-101/>.

⁷⁰ *Crossing the Line*.

⁷¹ Rochelle Sharpe, *How Much Does Living Off-Campus Cost? Who Knows?*, NEW YORK TIMES (Aug. 5, 2016), <https://www.nytimes.com/2016/08/07/education/edlife/how-much-does-living-off-campus-cost-who-knows.html> (noting that 87% of higher education students live off-campus).

⁷² Jennifer J. Freyd, *The UO Sexual Violence and Institutional Betrayal Surveys: 2014, 2015, and 2015-2016* (Oct. 16, 2014), available at <https://www.uwire.com/2014/10/16/sexual-assault-more-prevalent-in-fraternities-and-sororities-study-finds> (citing survey of University of Oregon students, which found that “students in fraternities and sororities experience a greater amount of sexual assault than students who are not”).

⁷³ *United Educators*.

⁷⁴ *Drinking “Settings” Tied to College Sexual Assault*, Science Daily (Dec. 12, 2016) available at <https://www.sciencedaily.com/releases/2016/12/161212134631.htm> (noting that “findings, reported in the January 2017 issue of the *Journal of Studies on Alcohol and Drugs*, suggest that ‘drinking setting’—rather than drinking, per se—might be key” to a higher risk of sexual assault); see Emma Brown, et al., *Drinking is Central to College Culture—and to Sexual Assault* (June 14, 2015), available at https://www.washingtonpost.com/local/education/beer-pong-body-shots-keg-stands-alcohol-central-to-college-and-assault/2015/06/14/7430e13c-04bb-11e5-a428-c984eb077d4e_story.html?utm_term=.8dea00e18eb4.

⁷⁵ *United Educators*; But see RAINN, *Scope of the Problem: Statistics*, <https://www.rainn.org/statistics/scope-problem> [hereinafter *Scope of the Problem*] (stating that only 8% of sexual assaults occur on school property) (citing Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Female Victims of Sexual Violence, 1994-2010* (2013)).

The proposed regulations regarding off campus assaults will inevitably lead to absurd and unfair results. For example, a school would be required to respond differently to similarly situated female students who attend the same school, the same classes, and live in the same dormitory, who are both attacked by the same male student if one of the attacks happens to take place at an off-campus party.⁷⁶ This would only further the chilling effect on reporting, by reinforcing the common belief that their school will not take their claim seriously.⁷⁷ Instead of stripping away protections, the Department should be taking active steps to bolster Title IX. By arbitrarily and harmfully taking away protection for off campus harassment and assault, the proposed regulations fail to provide necessary protections for students.

IV. Requiring schools to facilitate live cross-examination and lifting the ban against voluntary mediation will prevent survivors from safely and effectively seeking justice

The proposed regulations would impose a requirement that colleges and graduate schools conduct a “live hearing” in Title IX adjudications, which includes cross-examination of parties and witnesses, including the complainant, by the other party’s advisor of choice.”⁷⁸ The proposed regulations also allow schools to facilitate informal resolution “if all parties voluntarily agree” and if “the school determines that the particular Title IX complaint is appropriate for such process.”⁷⁹ Live cross-examination and voluntary mediation proceedings in the context of sexual harassment investigations have consistently been discouraged because both practices place survivors of sexual violence in unnecessarily vulnerable and potentially re-traumatizing positions. For these reasons, the 2001 Guidance stated clearly that “mediation will not be appropriate even on a voluntary basis” in cases of alleged sexual assault.⁸⁰ Subsequently, the 2011 Dear Colleague Letter specifically discouraged schools from “allowing the parties personally to question or cross-examine each other during the hearing,” recognizing that “[a]llowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.”⁸¹

In response, many universities developed policies still in effect that safely provide a means by which complainants and respondents may submit questions to be asked of the other party without requiring an in-person confrontation.⁸² Moreover, no federal appellate court, including the Supreme

⁷⁶ *Deliberate Indifference: How to Fix Title IX* (describing a situation that occurred at Kansas State University, where the school was not found liable for failing to respond to the complaint of one woman, who was raped at both an off-campus fraternity event and the fraternity house, but then found liable for failing to respond to the complaint of another woman, who was raped by the same fraternity member, but who’s assault occurred at an “off-campus apartment complex ‘close to the KSU campus.’”) (citing *Weckhorst v. Kan. State Univ.*, 241 F. Supp. 3d 1154, 1180-81 (D. Kan. 2017), *appeal filed*, No. 17-3208 (10th Cir. Sept. 26, 2017) (noting also that the apartments where the second alleged assault occurred were equally as close to campus as the fraternity house and off-campus site, where the fraternity event took place.) (*Id.* at 1158-59, 1181).

⁷⁷ A belief that authorities cannot or will not do anything to help is an all too commonly cited reason by survivors for failing to report incidents of sexual harassment and assault. *See, e.g., Campus Sexual Violence* (9% of students who did not report did not do so because they “believed police would not or could not do anything to help” and 26% “believed it was a personal matter”).

⁷⁸ Proposed Reg. § 106.45(b)(3)(vii).

⁷⁹ Proposed Reg. § 106.45(b)(6).

⁸⁰ 2001 Guidance.

⁸¹ 2011 Guidance.

⁸² *Campus Sexual Assault Adjudication* (noting that “[d]isciplinary proceedings typically include a hearing panel that questions all of the parties and relevant witnesses” and that often the “respondent may submit a personal written statement and a list of questions that he or she would like the panel to ask.”) (citing *Student Sexual Misconduct Policy and*

Court, has yet held that “there is an affirmative right to adversarial cross-examination in the educational context.”⁸³ To the contrary, many courts have declined to find a due process violation for a failure to allow live cross-examination in academic settings.⁸⁴ As one court put it, “[t]o recognize such a right would force student disciplinary proceedings into the mold of adversary litigation.”⁸⁵ Both of the newly proposed regulations place survivors at risk for experiencing the debilitating effects of sexual violence by making the investigation process needlessly more cumbersome and frightening for survivors and unjustly more favorable to their assailants.⁸⁶

a. Forcing complainants to undergo live cross-examination by their assailants will discourage survivors from coming forward for fear of suffering further harassment and trauma

Young women and girls already underreport their experiences of sexual violence and assault at alarmingly high rates.⁸⁷ Only 12% of college survivors⁸⁸ and less than 2% of girls ages 14-18 report sexual assault to their parents, schools, or the police.⁸⁹ Female students who do report their experiences are far more likely to report to parents and family members,⁹⁰ reiterating an inherent discomfort in reporting to authority figures.⁹¹ Women of color, undocumented immigrant women, and LGBTQ

Procedures: Duke’s Commitment to Title IX; Stanford Student Title IX Process; University-Wide Committee on Sexual Misconduct Procedures)).

⁸³ Naomi M. Mann, *Taming Title IX Tensions*, 20 U. Pa. J. Const. L. 631 (2018) (see, e.g., *Flaim*, 418 F.3d at 636; *Gorman v. Univ. of R.I.*, 837 F.2d 7 (1st Cir. 1988); *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 924-26 (6th Cir. 1988); *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987); *Brewer v. Austin Indep. Sch. Dist.*, 779 F.2d 260, 263 (8th Cir. 1985); *Boykins v. Fairfield Bd. of Educ.*, 492 F.2d 697, 701-02 (5th Cir. 1974); *Winnick v. Manning*, 460 F.2d 545, 549 (2d Cir. 1972) (“The right to cross-examine witnesses generally has not been considered an essential requirement of due process in school disciplinary proceedings.”); *Dixon*, 294 F.2d at 159).

⁸⁴ *Goss v. Lopez*, 419 U.S. 565, 583 (1975) (holding that for suspensions of less than ten days, students are not entitled ‘to confront and cross-examine witnesses.’); see also *Coplin v. Conejo Valley Unified School Dist.*, 903 F. Supp. 1377, 1383 (C.D. Cal. 1995); *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 158 (5th Cir. 1961), cert. denied, 368 U.S. 930 (1961); *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993) (holding no due process violation in expulsion of college student without providing him to right to cross-examination).

⁸⁵ *Osteen*, 13 F.3d at 225.

⁸⁶ California Women’s Law Center, *Know Your IX’s State Policy Playbook* (2017), available at https://www.cwlc.org/download/know-your-ixs-state-policy-playbook/?wpdmdl=4683&ind=CrSilmknILT8gsdnCjmlV_2it87Mar3GzwfBscAwR9hVILTXj7jDeYErA5urSjtBqYFkJQbdk8rq8S9kMwXosA [hereinafter *Know Your IX’s State Policy Playbook*] (“[W]hen schools fail to foster an environment in which survivors feel safe reporting, survivors are left without the accommodations they need to stay in school, and perpetrators are rarely held accountable.”).

⁸⁷ *Know Your IX’s State Policy Playbook* (“The vast majority of student survivors never report to law enforcement or campus officials.”).

⁸⁸ *Poll: One in 5 Women Say They Have Been Sexually Assaulted in College*, WASHINGTON POST (June 12, 2015), available at <http://www.washingtonpost.com/graphics/local/sexual-assault-poll>.

⁸⁹ *Let Her Learn*.

⁹⁰ *Crossing the Line* (“Girls were more likely than boys to talk with parents and other family members (32 percent versus 20 percent”).

⁹¹ *Let Her Learn* (citing National Child Traumatic Stress Network, *Child Sexual Abuse Fact Sheet* (2009), available at http://nctsn.org/nctsn_assets/pdfs/caring/ChildSexualAbuseFactSheet.pdf & National Women’s Law Center, *Let Her Learn Survey* (“Yet very few girls actually report harassment and violence to an adult, their schools, or the police because they are scared, feel uncomfortable talking about it, do not want to get the perpetrators in trouble, or feel they should be able to handle it on their own.”); Michelle J. Anderson, *Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims*, 13 New Crim. L. Rev. 644 (2010) [hereinafter *Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims*] (“The typical rape does not include a prompt report to the police; many victims never report their most harrowing experiences to any authority figures”) (citing Bonnie S. Fischer, Francis T. Cullen & Michael G. Turner, U.S. Dep’t of Justice, *The Sexual Victimization of College Women*, 17, 23-24 (2000)).

students face additional barriers in reporting.⁹² Subjecting women and girls to the prospect of live cross-examination will only intensify already ingrained fears by adding the unnecessary hurdle of having to face their assailants in person.⁹³ Being in the same room with an assailant is often traumatizing enough that many women would rather forgo reporting altogether. This problem is exacerbated by the fact that many survivors know their assailants and are already struggling to overcome the stigma of reporting someone in their social circle.⁹⁴

Additionally, live cross-examination creates an opportunity for the accused to perpetuate harmful and false stereotypes about women who report by enabling assailants to directly attack the complainant's reputation and credibility.⁹⁵ These attacks are themselves re-traumatizing⁹⁶ and can even impede a survivor's ability to access memory and relay the facts of her assault.⁹⁷ As a result, it is neither fair nor accurate to justify the imposition of live cross-examination as a furtherance of fact-finding. By subjecting survivors to these re-traumatizing experiences, higher education institutions risk further eroding the trust that students place in the institution itself to take their reports seriously.⁹⁸

⁹² See Jennifer Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation*, NY TIMES (Apr. 30, 2017), <https://www.nytimes.com/2017/04/30/us/immigrants-deportation-sexual-abuse.html?mcubz=3>. (“[F]or many undocumented victims, taking [the step to report] has become exceedingly difficult because of fears that the government will detain and deport them if they press charges...”); National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey: Executive Summary* 12 (Dec. 2016), available at <https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf>. (“More than half (57%) of transgender respondents said they would feel uncomfortable asking the police for help if they needed it”).

⁹³ *I Dropped Out of College Because I Couldn't Bear to See My Rapist on Campus* (“After my assault, I found it difficult to breath or think clearly after seeing my rapist in a hallway. I cannot imagine how I might have reacted to sitting in a room with him, where he would have been free to directly question me about my rape. Without basic protections like this in place, other survivors may be discouraged from coming forward at all.”).

⁹⁴ *Campus Sexual Violence* (10% of female students, who did not report, cited that the reason was that they “did not want the perpetrator to get in trouble.”).

⁹⁵ Amelia Gentleman, *Prosecuting Sexual Assault: “Raped All Over Again,”* THE GUARDIAN (Sept. 13, 2013) available at <https://www.theguardian.com/society/2013/apr/13/rape-sexual-assault-frances-andrade-court>.

⁹⁶ *Campus Sexual Assault Adjudication* (“When survivors of sexual assault are personally cross-examined, it often adds to their trauma and may make it more difficult for them to share their stories.”) (citing Sarah Zydevelt et al., *Lawyers’ Strategies for Cross-Examining Rape Complainants: Have We Moved Beyond the 1950s?*, 2016 Brit. J. Crim. 1, 3 (2016) (“It is not uncommon for complainants to report that the suspicion and disbelief that they encounter during cross-examination feels like a repeat of the trauma of being raped—a phenomenon often referred to as ‘secondary victimization’”)); see Amelia Gentleman, *Prosecuting Sexual Assault: “Raped All Over Again,”* THE GUARDIAN (Sept. 13, 2013) available at <https://www.theguardian.com/society/2013/apr/13/rape-sexual-assault-frances-andrade-court> (“Her son, Oliver, told a newspaper how profoundly the cross-examination had affected her. ‘As soon as she came out of the courtroom, she just burst into tears,’ he said. ‘She had tried so hard not to do it in front of the jury. She described it as feeling as if she had been assaulted all over again. All that she could think was that she was being attacked. She found that extremely hard.’”).

⁹⁷ Linda Geddes, *Why Sexual Assault Survivors Forget Details and Four Other Misconceptions About Sexual Violence*, BBC FUTURE (Sept. 26, 2018) available at <http://www.bbc.com/future/story/20180926-myths-about-sexual-assault-and-rape-debunked> (citing Dr. Army Hardy, Kerry Young & Emily A. Holmes, *Does Trauma Memory Play a Role in the Experience of Reporting Sexual Assault during Police Interviews? An Exploratory Study*, *Memory*, 17:8, 783-788 (2009), available at <https://www.tandfonline.com/doi/abs/10.1080/09658210903081835>); *Survivors of Sexual Violence are Let Down by the Criminal Justice System—Here’s What Should Happen Next*, *The Conversation*, available at <https://theconversation.com/survivors-of-sexual-violence-are-let-down-by-the-criminal-justice-system-heres-what-should-happen-next-94138> (“People with PTSD will often try to avoid thoughts and feelings about the trauma. Yet survivors will be forced to address the trauma in excruciating detail in court. PTSD is also associated with exaggerated feelings of blame, overly negative thoughts and assumptions about oneself, and difficulties with memory.”).

⁹⁸ *The Evolving Landscape of Title IX* (“Although institutional betrayal can take many forms, violation of trust is one key component. Inadequate response systems for sexual assault can foster a deep sense of mistrust among community members”) (citing Smith & Freyd, 2014).

b. Permitting mediation will place already vulnerable survivors at an unfair disadvantage in the investigative process

Pressuring survivors to participate in mediation proceedings subjects them to further risk of re-traumatization through unnecessary and unproductive contact with their assailant.⁹⁹ The Obama administration's ban on mediation stemmed from a recognition of this potential for re-traumatization and the fact that the mediation process incorrectly implies that sexual assault is a mere misunderstanding between two individuals of equal power and authority.¹⁰⁰ By allowing mediation, the proposed regulations revert to this false characterization of sexual assault and place survivors in the undesirable position of needing to overcome both a fear of reporting their experience and systemic pressures to simply forgive and move on—even when they are not ready or able to do so.

Moreover, by reframing the ultimate goal of the resolution process as a compromise, mediation downplays the often abusive nature of the assailant's behavior.¹⁰¹ The process further minimizes the seriousness of the assailant's conduct because mediation often fails to “result in punishment, even if the alleged perpetrator admits guilt.”¹⁰² By removing the threat of punishment, the mediation process also removes the main deterrent to recurrent incidents of sexual harassment for the assailant and the school community as a whole.¹⁰³ Finally, the customarily confidential nature of mediation discourages

⁹⁹ Andrew Kreighbaum, *OCR: Colleges Can Use Mediation for Sex Assault*, INSIDE HIGHER ED (Sept. 29, 2017) available at <https://www.insidehighered.com/quicktakes/2017/09/29/ocr-colleges-can-use-mediation-sex-assault> (quoting Laura Dunn, executive director of SurvJustice, who, in speaking of her own experience with campus mediation, stated, ‘I know what campuses can do with mediation... They can intimidate and break down survivors, and they can opt out of even trying to do the right thing.’).

¹⁰⁰ Rebecca Weiant, *Removing Camouflaged Barriers to Equality: Overcoming Systemic Sexual Assault and Harassment at the Military Academies*, 25 Mich. J. Gender & L. 75 (2018) (citing U.S. Dep't of Educ., *Know Your Rights: Title IX Prohibits Sexual Harassment and Sexual Violence Where You Go to School*, at 2, <http://www2.ed.gov/about/offices/list/ocr/docs/title-ix-rights-201104.pdf>; Stephanie Saul & Kate Taylor, *Betsy DeVos Reverses Obama-Era Policy on Campus Sexual Assault Investigations*, NEW YORK TIMES (Sept. 22, 2017) available at <http://www.nytimes.com/2017/09/22/us/devos-colleges-sex-assault.html>.); Grace Watkins, *Sexual Assault Survivor to Betsy DeVos: Mediation is Not a Viable Resolution*, TIME (Oct. 2, 2017) available at <http://time.com/4957837/campus-sexual-assault-mediation/> (“Even worse, mediation perpetuates the myth that sexual assault is simply a misunderstanding between two people, rather than what it really is: a violent abuse of power. Mediation fetishizes compromise, which for survivors often means premature forgiveness of serious harm. It relies on the societal expectation that ‘good girls forgive,’ thereby reifying the same gender stereotypes that Title IX was intended to eliminate.”) (citing *Sexual Violence Myths & Misconceptions*, ARIZONA COALITION TO END SEXUAL & DOMESTIC VIOLENCE (last accessed Jan. 4, 2019) available at <https://www.acesdv.org/about-sexual-domestic-violence/sexual-violence-myths-misconceptions/>; Alexandra Brodsky, *Can Restorative Justice Change the Way Schools Handle Sexual Assault? Students and Schools Are Exploring its Promise and Challenges*, THE NATION (April 14, 2016) available at <https://www.thenation.com/article/what-if-punishment-wasnt-the-only-way-to-handle-campus-sexual-assault/>).

¹⁰¹ Jennie Kihnley, *Unraveling the Ivory Fabric: Institutional Obstacles to the Handling of Sexual Harassment Complaints*, 25 Law and Social Inquiry 69 (2000) (“[E]mphasizing compromise shifts the focus of the dispute process from formally concluding if sexual harassment occurred to stressing the needs and interests of the parties involved as they reach their own agreement about how to resolve the conflict. However, the focus on the parties’ ‘working things out’ frames the behavior more as ‘inappropriate’ or as an ‘emotional problem’ than as sex discrimination.”) (citing Felicia Mitchell, *Keeping It All in the Family: Sexual Harassment Policies and Informal Resolution in Small Colleges*, NWSA Journal [publication of the National Women’s Studies Association] 118-25 (1997)).

¹⁰² *Mediation is Not a Viable Resolution* (citing *How College Campuses Handle Sexual Assaults*, NPR (Dec. 3, 2009) available at <https://www.npr.org/templates/story/story.php?storyId=121057891> (Kristen Lombardi notes that mediation often results in “no punishment” and “no repercussion for anything incriminating that an alleged perpetrator might say.”)).

¹⁰³ *Unraveling the Ivory Fabric* (citing Stephanie Riger, *Gender Dilemmas in Sexual Harassment Policies and Procedures*, 46 American Psychologist 497-505 (1991) (“[T]his focus [also] treats the sexual harassment as a single occurrence abstracted from institutional considerations, such as deterring others who sexually harass or prompting a reluctant complainant to lodge a complaint by her knowing that another woman is charging the same respondent with sexual harassment.”)).

survivors from coming forward publicly with their allegations, “allowing colleges and universities to avoid damage to their reputation,” even when deserved.¹⁰⁴

V. **The rejection of the preponderance of the evidence standard in favor of the higher clear and convincing standard will lead to absurd legal results and make it unnecessarily difficult for survivors to receive protective measures**

In 2011, the Department officially stated that it expected schools to use the preponderance of the evidence standard in evaluating sexual harassment complaints.¹⁰⁵ Notably, in the same guidance document, the Department also noted that its Office of Civil Rights [OCR] uses the preponderance of the evidence standard when resolving complaints against schools and in making a “fund termination” decision in administrative hearings.¹⁰⁶ The proposed regulations do not disturb the use of the preponderance standard by OCR to resolve complaints against schools. Inexplicably, however, they do now all but require schools to forego the preponderance standard in favor of the higher clear and convincing standard. Specifically, the regulations would require that a school employ the clear and convincing standard unless the school uses the preponderance standard “for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction.”¹⁰⁷ This change marks an inappropriate shift away from established standards of proof in anti-discrimination cases and places survivors of sexual violence at an unjustifiable disadvantage in the investigative process.

As the Department noted in 2011, use of the clear and convincing standard of proof is “inconsistent with the standard of proof established for violations of civil rights laws, and [is] thus not equitable under Title IX.”¹⁰⁸ The Department also pointed specifically to the Supreme Court’s use of the preponderance of the evidence standard in civil litigation involving sex discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*¹⁰⁹ The cases decided under

¹⁰⁴ *Mediation is Not a Viable Resolution*.

¹⁰⁵ 2011 Guidance; Joanna L. Grossman & Deborah L. Brake, *A Sharp Backward Turn: Department of Education Proposes to Protect Schools, Not Students, in Cases of Sexual Violence*, VERDICT (Nov. 29, 2018), available at <https://verdict.justia.com/2018/11/29/a-sharp-backward-turn-department-of-education-proposes-to-protect-schools-not-students-in-cases-of-sexual-violence> (“This directive grew out of OCR’s experience investigating Title IX complaints against institutions that used a higher ‘clear and convincing’ (CAC) evidentiary standard in resolving sexual assault allegations to place proof of sexual assault out of reach for complainants, resulting in no accountability and no reason for complainants to trust the process”).

¹⁰⁶ *Id.*

¹⁰⁷ Proposed Reg. § 106.45(b)(4)(i).

¹⁰⁸ *Id.* at 11; see also Katharine Baker et al., *Title IX & the Preponderance of the Evidence: A White Paper* (July 18, 2017), available at <http://www.feministlawprofessors.com/wp-content/uploads/2017/07/Title-IX-Preponderance-White-Paper-signed-7.18.17-2.pdf> (signed by 90 law professors stating that the “preponderance standard is fully consistent with the requirements and spirit of civil rights laws, as well as with OCR’s past enforcement of Title IX, including the 1975 regulations and other Title guidance documents promulgated by OCR after notice and comment”) (citing Letter from Fatima Goss Grave, Vice President of Educ. and Emp’t at the Nat’l Women’s Law Ctr., to Catherine Lhamon, Assistant Sec. for Civil Rights 7-10 (Nov. 21, 2013)).

¹⁰⁹ *Id.* at 10-11 (citing *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003) (noting that under the “conventional rule of civil litigation,” the preponderance of the evidence standard generally applies in cases under Title VII); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-55 (1989) (approving preponderance standard in Title VII sex discrimination case) (plurality opinion; *id.* at 260 (White, J., concurring in the judgment); *id.* at 261 (O’Connor, J., concurring in the judgment)). The 2001 Guidance noted (on page vi) that “[w]hile *Gebser* and *Davis* made clear that Title VII agency principles do not apply in determining liability for money damages under Title IX, the Davis Court also indicated, through its specific references to Title VII caselaw, that Title VII remains relevant in determining what constitutes hostile environment sexual harassment under Title IX.” See also *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) (“We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.”).

Title VII can involve penalties amounting to hundreds of thousands—sometimes millions—of dollars. Moreover, the individuals who are accused in these cases often suffer irreparable damage to their reputations and careers.¹¹⁰ Some even face criminal charges.¹¹¹ This is to say nothing of the millions of dollars that schools stand to lose if their funds are terminated in a hearing that uses the preponderance of the evidence standard. However, despite these very serious consequences, the preponderance of the evidence standard remains the accepted standard of proof in these cases.

By contrast, students accused of sexual violence in the context of Title IX investigations do not face any formal or informal penalties more serious than those described above. In fact, students found responsible in Title IX investigations rarely suffer the most serious consequence available—expulsion from their school.¹¹² The proposed regulations’ departure from the preponderance of the evidence standard improperly reinforces the idea that women and girls who claim they have been sexually assaulted should be treated with an extra measure of mistrust and skepticism.¹¹³ This destructive message¹¹⁴ is further underscored by the fact that the regulations permit schools to use the clear and convincing standard even where the preponderance standard is used to adjudicate other disciplinary hearings that carry the same maximum penalties.¹¹⁵

The proposed regulations’ reinforcement of these messages of mistrust and skepticism of survivors will inevitably lead to a decrease in the number of complaints brought forward. Faced with the knowledge that their schools view their prospective complaints of sexual harassment and assault differently than other grievances, young girls and women will understandably be less likely to report. Moreover, those women who do find the courage to make a complaint will face needless hurdles due to the very nature of sexual violence. The majority of sexual assaults “take place in private, where there are only two witnesses—the victim and the assailant—and little corroborating evidence.”¹¹⁶ However, the higher clear and convincing standard demands such corroborating evidence, placing survivors at an all-too-familiar disadvantage¹¹⁷ in the proceedings. This will erect an additional barrier to accessing necessary protective sanctions.

VI. Imposition of a stricter notice requirement makes it substantially more difficult for young women and girls to report their complaints to the proper authorities

¹¹⁰ Audrey Carlsen, et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women*, NEW YORK TIMES (Oct. 29, 2018) available at <https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html>.

¹¹¹ Darran Simon, *Harvey Weinstein Indicted on Charges of Rape, Criminal Sexual Act*, CNN (May 31, 2018) available at <https://www.cnn.com/2018/05/30/us/harvey-weinstein-indictment/index.html>.

¹¹² Morgan Brinlee, *How Do Schools Punish Students Who Violated Title IX? Each University Has Its Own System*, BUSTLE (Sept. 8, 2017) available at <https://www.bustle.com/p/how-do-schools-punish-students-who-violated-title-ix-each-university-has-its-own-system-81503> (citing Tyler Kingkade, *Fewer Than One-Third of Campus Sexual Cases Result in Expulsion*, HUFFPOST (Dec. 6, 2017) available at https://www.huffingtonpost.com/2014/09/29/campus-sexual-assault_n_5888742.html).

¹¹³ *Vicarious Liability in Torts*

¹¹⁴ *Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims* (“Rape law often condemns females who are not chaste and excuses males who act with sexual entitlement”).

¹¹⁵ The proposed regulations require that a school using the preponderance of the evidence standard use the same standard for all other proceedings carrying the same maximum penalty, but does not require this same equity if the school adopts the clear and convincing standard.

¹¹⁶ ERA STAFF, *COMMENT GUIDE: SPEAK OUT AGAINST TITLE IX REGULATIONS* (Dec. 6, 2018), available at <http://www.equalrights.org/comment-guide-proposed-title-ix-regulations/> (citing RAINN, *PERPETRATORS OF SEXUAL VIOLENCE OFTEN KNOW THE VICTIM*, available at <https://www.rainn.org/statistics/perptrators-sexual-violence>).

¹¹⁷ *Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims* (discussing the history of strict statute of limitations and the corroborative evidence requirement in the context of sexual assault cases.).

The 2001 Guidance required schools to address student-on-student harassment if any employee “knew, or in the exercise of reasonable care should have known” about the harassment and required schools to address employee-on-student harassment “whether or not the [school] has ‘notice’ of the harassment.”¹¹⁸ In 2011, the Department made no attempt to disturb these requirements, stating that “[t]he school should undertake these steps promptly once it has notice of a sexual harassment or violence allegation.”¹¹⁹ Moreover, when the Supreme Court laid out a stricter notice requirement for a private right of action under Title IX,¹²⁰ it specifically noted that the private right of action standard was not equivalent to the standard used in the Office of Civil Rights enforcement context.¹²¹ However, despite the Supreme Court’s explicit caveat and the Department of Education’s long-standing guidance, the Secretary’s proposed regulations impose a strict “actual” notice requirement, under which a school would not be required to respond to sexual harassment unless either the Title IX coordinator, a K-12 teacher, or “an official who has the authority to institute corrective measures,” is proven to have had “actual knowledge” of the harassment.¹²²

a. Reducing the number of individuals to whom survivors can report creates a barrier to reporting that disproportionately negatively impacts young women and girls

Young girls and women already underreport their experiences of sexual violence.¹²³ And those who do report are far more likely to report to people who they trust and with whom they already have a close personal relationship.¹²⁴ The proposed regulations would require young women to forego these safer reporting options and force them instead to seek out authority figures who they may never have met. Compounding the inherent logistical difficulties of this requirement is the fact that sexual assaults on college campuses occur more frequently during students’ freshman and sophomore years¹²⁵ and, specifically, “during the first few months of the first and second semesters in college.”¹²⁶ Young women who have only just arrived on campus are less likely to know or understand how to locate the Title IX Coordinator or “an official who has the authority to institute corrective measures,” let alone find the resolve to report one of the most traumatizing experiences of their lives to such an individual. Allowing schools to escape liability exploits the very fears and insecurities that contribute to underreporting in the first place.

b. Placing the onus on survivors to navigate an ever more convoluted system of reporting improperly tips the balance of justice in favor of perpetrators

By placing the responsibility on survivors of sexual violence to navigate an ever more convoluted and intimidating system for reporting, the proposed regulations unjustly favor the accused,

¹¹⁸ 2001 Guidance.

¹¹⁹ 2011 Guidance.

¹²⁰ *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999) (holding that a recipient could only be held liable in a private right of action for monetary damages if the recipient had “actual knowledge” of student-on-student sexual harassment or assault.).

¹²¹ *Id.*; see also, *Deliberate Indifference: How to Fix Title IX* (noting that many courts have subsequently recognized that the “actual notice” requirement itself requires additional flexibility to prove workable even in the context of private suits for monetary relief because “[a]t the outset, it is unclear how an institution could ever ex ante have actual knowledge of a single-instance of sexual assault.”).

¹²² Proposed Reg. §§ 106.44(a), 106.30.

¹²³ *United Educators*.

¹²⁴ *Supra* notes 90-91.

¹²⁵ *Scope of the Problem*.

¹²⁶ *Campus Sexual Violence*; See also, Matthew Kimble, Andrada Neacsiu, et al., *Risk of Unwanted Sex for College Women: Evidence for a Red Zone*, *J. of Am. Coll. Health* (2008)).

who need do nothing more than remain silent and wait for their victims to lose the courage to come forward or fail to access the proper reporting channels. Survivors of sexual violence already shoulder a heavy emotional burden.¹²⁷ The reporting experience can either exacerbate or relieve some of this load and as such is itself critical to the mental health and well-being of survivors.¹²⁸ If forced to share deeply personal stories with unapproachable authority figures in settings that may lead to further traumatization, survivors are less likely to report or be able to follow through with the process due to mental and emotional trauma.¹²⁹ Shifting this heavy burden onto survivors contradicts Title IX's very purpose to remove discriminatory barriers to education and places women and girls' health and safety at risk, while simultaneously allowing offenders and schools to avoid responsibility.

VII. By limiting the complainant's right to appeal sanction awards, the proposed regulations fail to provide survivors with the protections and support necessary

The 2011 Guidance recommended that schools provide an appeals process and stated explicitly that "if a school provides for appeal of the findings *or remedy*, it must do so for both parties" [emphasis added].¹³⁰ While commentators on all sides agree both parties should have the right to appeal sanctions,¹³¹ the proposed regulations inexplicably restrict the grounds on which a complainant may file an appeal of a sanction award when there has been a finding of responsibility.¹³² If the regulations are enacted, survivors will only have the right to appeal on the narrow basis that "the remedies are not designed to restore or preserve the complainant's access to the recipient's education program or activity." Moreover, survivors are explicitly not entitled to "a particular sanction against the respondent."¹³³

These restrictions place survivors at risk for further re-traumatization and assault. For example, under these regulations, a woman who has been raped by her classmate may not have the right to an appeal explicitly seeking the removal of her rapist from classes and activities that they share. Outcomes such as this immediately place the survivor's health, well-being, and academic opportunities at risk. Additionally, these results also send a message to other potential complainants that even if they do go through the entire demanding investigative process and even if their assailant is found guilty, they may still end up with little or no protection against further assault or traumatization. Aside from placing the immediate safety and academic freedom of young girls and women at risk, this message alone will further deter reporting of sexual violence.

For all of the foregoing reasons, the Department should immediately withdraw the proposed rule. Thank you for the opportunity to submit comments. You may contact me anytime at betsy.butler@cwlc.org or (323) 951-1041.

Sincerely,

¹²⁷ *Supra* notes 26-27.

¹²⁸ *The Evolving Landscape of Title IX* ("[S]urvivors who receive positive support following a disclosure report better mental health") (citing, e.g., Campbell, 2008; Orchowski, Untied, & Gidycz, 2013; Ullman, 1996, 1999).

¹²⁹ *Supra* note 96.

¹³⁰ 2011 Guidance.

¹³¹ See Association of Title IX Administrators, *ATIXA Position Statement on Equitable Appeals Best Practices* 1 (Oct. 5, 2018), available at <https://atixa.org/wordpress/wp-content/uploads/2018/10/2018-ATIXA-Position-Statement-Appeals.pdf>; Elizabeth Bartholet, Nancy Gertner, Janet Halley & Jeannie Suk Gersen, *Fairness For All Students Under Title IX* 5 (Aug. 21, 2017), available at <https://dash.harvard.edu/bitstream/handle/1/33789434/Fairness%20for%20All%20Students.pdf> (recognizing that schools should allow "[e]ach party (respondent and complainant) [to] request an impartial appeal.").

¹³² Proposed Reg. 106.45(b)(5).

¹³³ *Id.*

Betsy Butler

A handwritten signature in blue ink that reads "Betsy Butler". The signature is written in a cursive, flowing style.

Executive Director
California Women's Law Center