6-1-2019

Maine Women's Lobby open letter on Title IX rule changes (2019)

Maine Women's Lobby Staff
Maine Women's Lobby

January 29, 2019

Submitted via www.regulations.gov

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

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

Dear Mr. Marcus,

I am writing on behalf of the Maine Women's Lobby in response to the Department of Education's (the Department) Notice of Proposed Rulemaking ("NPRM" or "proposed rules") to express our strong opposition to the Department's proposal to amend rules implementing Title IX of the Education Amendment Act of 1972 (Title IX) as published in the Federal Register on November 29, 2018.

My name is Whitney Parrish, and I am the Director of Policy and Program for the Maine Women's Lobby, which has advocated on issues affecting the lives of 678,000 Maine women and girls for the past 40 years. The Maine Women's Lobby works on behalf of all Maine women to create a future that is free from violence, free from discrimination, with access to health care, and real economic security. We are deeply troubled by the proposed rules that would fundamentally undermine the purpose of Title IX. We feel that the proposed rule changes would not keep students safe from sexual, domestic, and power-based personal violence in its many forms. We also fear that the changes would jeopardize any viable pathway provided by the Title IX process to achieve safety and an adequate educational experience for any survivor of sexual, domestic, or power-based personal balance. The changes to these rules explicitly undermine our mission to help create a future free from violence and discrimination, and we strongly oppose them for the below reasons.

I. The proposed rules fail to respond to the realities of sexual harassment in schools.

The proposed rules ignore the devastating impact of sexual violence in schools. Instead of effectuating Title IX's purpose of keeping students safe from sexual abuse and other forms of sexual harassment↓that is, from unlawful sex discrimination↓they make it harder for students to report abuse, allow (and sometimes require) schools to ignore reports when they are made, and unfairly tilt the investigation process in favor of respondents to the direct detriment of survivors. For the reasons discussed at length in this comment, the Maine Women's Lobby unequivocally opposes the Department's proposed rule.

a. Sexual harassment is far too common in our schools.

Far too many students experience sexual harassment:

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

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

- 56% of girls ages 14-18 who are pregnant or parenting are kissed or touched without their consent.
- More than half of LGBTQ students ages 13-21 are sexually harassed at school.
- Nearly 1 in 4 transgender and gender-nonconforming students are sexually assaulted during college.
- Students with disabilities are 2.9 times more likely than their peers to be sexually assaulted.

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

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

b. Survivors generally underreport instances of sexual harassment and assault.

Reporting sexual harassment is always hard, and the proposed rules would further discourage students from coming forward to ask their schools for help. Already, only 12% of college survivors and 2% of girls ages 14-18 report sexual assault to their schools or the police. Students often choose not to report for fear of reprisal, because they believe their abuse was not important enough, or because they think the no one would do anything to help. Some students—especially students of color, undocumented students, LGBTQ students, and students with disabilities—are less likely than their peers to report sexual assault to the police due to increased risk of being subjected to police violence and/or deportation. Survivors of color may not want to report to the police and add to the criminalization of men and boys of color. For these students, schools are often the only avenue for relief.

When schools fail to provide effective responses, the impact of sexual harassment can be devastating. Too many survivors end up dropping out of school because they do not feel safe on campus; some are even expelled for lower grades in the wake of their trauma. For example, 34% of college survivors drop out of college.

II. <u>The proposed rules would hobble Title IX enforcement, discourage reporting of sexual harassment, and prioritize protecting schools over protecting survivors.</u>

For the better part of two decades, the Department has used one consistent standard to determine if a school violated Title IX by failing to adequately address sexual harassment and assault. The Department's 2001 Guidance, which went through public notice-and-comment and has been enforced in both Democratic and Republican administrations, defines sexual harassment as "unwelcome conduct of a sexual nature." The 2001 Guidance requires schools to address student-on-student harassment if *any employee* "knew, or in the exercise of reasonable care should have known" about the harassment. In the context of employee-on-student harassment, the Guidance requires schools to address harassment

"whether or not the [school] has 'notice' of the harassment." Under the 2001 Guidance, schools that do not "take immediate and effective corrective action" would violate Title IX. These standards have appropriately guided OCR's enforcement activities, effectuating Title IX's nondiscrimination mandate by requiring schools to quickly and effectively respond to serious instances of harassment and fulfilling OCR's purpose of ensuring equal access to education and enforcing students' civil rights.

This standard appropriately differs from the higher bar erected by the Supreme Court in the very specific and narrow context of a Title IX lawsuit seeking monetary damages against a school because of sexual harassment. To recover monetary damages, a plaintiff must show that their school was deliberately indifferent to known sexual harassment that was severe and pervasive and deprived a student of access to educational opportunities and benefits. But in establishing that standard the Court recognized that it was *specific* to private suits seeking monetary damages, not to administrative enforcement. It specifically noted that the standard it announced did not affect agency action: the Department was still permitted to administratively enforce rules addressing a broader range of conduct to fulfill Congress's direction to effectuate Title IX's nondiscrimination mandate. It drew a distinction between "defin[ing] the scope of behavior that Title IX proscribes" and identifying the narrower circumstances in which a school's failure to respond to harassment supports a claim for monetary damages. The 2001 Guidance directly addressed this, concluding that it was inappropriate for the Department to limit its enforcement activities to the narrower damages standard and that the Department would continue to enforce the broad protections provided under Title IX. Indeed, in the current proposed regulations, the Department acknowledges that it is "not required to adopt the liability standards applied by the Supreme Court in private suits for money damages." As set out in further detail below, the Supreme Court's notice requirement, definition of harassment, and deliberate indifference standard, designed to account for the unique circumstances that present themselves when determining monetary liability, have no place in the far different context of administrative enforcement with its iterative process and focus on voluntary corrective action by schools. By choosing to import those liability standards, the Department confuses its enforcement mechanisms with court processes than have no place in administrative proceedings, threatening devastating effects on students.

a. The proposed rules' notice and deliberate indifference standards and definition of sexual harassment create inconsistent rules for students versus employees.

Under Title VII, the federal law that addresses workplace harassment, a school is potentially liable for harassment of an employee if the harassment is "sufficiently severe *or* pervasive to *alter* the conditions of the victim's employment" (emphasis added). If the employee is harassed by a coworker or other third party, the school is liable if (1) it "knew or should have known of the misconduct" and (2) failed to take immediate and appropriate corrective action. If the employee is harassed by a supervisor, the school is automatically liable if the harassment resulted in a tangible employment action such as firing or demotion, and otherwise unless the school can prove that the employee unreasonably failed to take advantage of opportunities offered by the school to address harassment. However, under the proposed rules, a school would only be liable for harassment against a student if it is (1) deliberately indifferent to (2) sexual harassment that is so severe, pervasive, *and* objectively offensive that it *denied* the student access to the school's program or activity; (3) the harassment occurred within the school's program or activity; and (4) a school employee with "the authority to institute corrective measures" had "actual knowledge" of the harassment. In other words, under the proposed rules, schools would be held to a far lesser standard in addressing the harassment of students—including minors—under its care than addressing harassment of adult employees.

Moreover, in contrast to the Title VII approach, which recognizes employer responsibility for harassment enabled by supervisory authority, and in contrast to the 2001 Guidance, the proposed rule

does not recognize any higher obligation by schools to address harassment of students by school employees who are exercising authority over students. The 2001 Guidance imposed liability when an employee "is acting (or . . . reasonably appears to be acting) in the context of carrying out these responsibilities over students" and engages in sexual harassment. By jettisoning this standard, the Department would free schools from liability in many instances even when their employees use the authority they exercise as school employees to harass students. Under the proposed rules, for example, serial abusers like Larry Nassar, who assaulted hundreds of students in his role as a school doctor, would not be held responsible for harassment that survivors were too embarrassed or afraid to report.

The drastic differences between Title VII and the proposed rules would mean that in many instances schools are *prohibited* from taking the same steps to protect children in schools that they are *required* to take to protect adults in the workplace, as set out further below. And when they are not affirmatively prohibited from taking action, the proposed rules still create a more demanding standard for children in schools than for adults in the workplace to get help in ending sexual harassment.

b. The proposed notice requirement undermines Title IX's discrimination protections by making it harder to report sexual harassment and assault. (§§ 106.44(a) & 106.30)

Under the proposed rules, schools would only be responsible for addressing sexual harassment when one of a small subset of school employees actually knew about the harassment. Schools would not be required to address sexual harassment unless there was "actual knowledge" of the harassment by (i) a Title IX coordinator, (ii) a K-12 teacher (but only for student-on-student harassment, *not* employee-on-student harassment); or (iii) an official who has "the authority to institute corrective measures." This is a dramatic change, as the Department has long required schools to address *student-on-student* sexual harassment if almost any school employee either knows about it or should reasonably have known about it. This standard takes into account the reality that many students disclose sexual abuse to employees who do not have the authority to institute corrective measures, both because students seeking help turn to the adults they trust the most and because students are not informed about which employees have authority to address the harassment. The 2001 Guidance also requires schools to address all employee-on-student sexual harassment, "whether or not the [school] has 'notice' of the harassment." The 2001 Guidance recognized the particular harms of students being preyed on by adults and students' vulnerability to pressure from adults to remain silent and accordingly acknowledged schools' heightened responsibilities to address harassment by their employees.

Under the proposed rules, in contrast, if a K-12 student told a non-teacher school employee they trust—such as a guidance counselor, teacher aide, or athletics coach—that they had been sexually assaulted by another student, the school would have no obligation to help the student. If a K-12 student told a teacher that she had been sexually assaulted by another teacher or other school employee, the school would have no obligation to help her. Perversely, the proposed rules thus provide a more limited duty for K-12 schools to respond to a student's allegations of sexual harassment by a school employee than by a student. And if a college student told their professor or RA that they had been raped by another student, by a professor, or by another employee at the university, the school would have no obligation to help them.

Sexual assault is already very difficult to talk about. Sections 106.44(a) and 106.30 would mean even when students find the courage to talk to the adult school employees they trust, schools would frequently have no obligation to respond. For example, if the proposed rules had been in place, colleges like Michigan State and Penn State would have had no responsibility to stop Larry Nassar and Jerry Sandusky—just because their victims reported their experiences to school employees like athletic trainers and coaches, who are not considered to be school officials who have the "authority to institute corrective

measures." These proposed provisions would absolve some of the worst Title IX offenders of legal liability.

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

The proposed rule defines sexual harassment as "unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the [school's] education program or activity" and mandates dismissal of complaints of harassment that do not meet this standard. Under this definition, even if a student reports sexual harassment to the "right person," their school would still be *required* to ignore the student's Title IX complaint if the harassment hasn't yet advanced to a point that it is actively harming a student's education. A school would be required to dismiss such a complaint even if it involved harassment of a minor student by a teacher or other school employee. The Department's proposed definition is out of line with Title IX purposes and precedent, discourages reporting, and excludes many forms of sexual harassment that interfere with access to educational opportunities.

The Department does not provide a persuasive justification to change the definition of sexual harassment from that in the 2001 Guidance, which defines sexual harassment as "unwelcome conduct of a sexual nature." The current definition rightly charges schools with responding to harassment before it escalates to a point that students suffer severe harm. But under the Department's proposed, narrower definition of harassment, students would be forced to endure repeated and escalating levels of abuse, from a student or teacher, before their schools would be required to investigate and stop the harassment. If a student is turned away by their school after reporting sexual harassment, the student is extremely unlikely to report a second time when the harassment escalates.

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

d. Proposed rules §§ 106.30 and 106.45(b)(3) would *require* schools to ignore harassment that occurs outside of a school activity, even when it creates a hostile educational environment.

The proposed rules would *require* schools to ignore all complaints of off-campus or online sexual harassment that happen outside of a school-sponsored program—even if the student is forced to see their harasser on campus every day and the harassment directly impacts their education as a result. To understand why it is crucial to maintain Title IX protections for off-campus activity, one only need to look at the Department's own recent decision to cut off partial funding to the Chicago Public Schools for failing to address two reports of off-campus sexual assault, which the Department described as "serious and pervasive violations under Title IX." In one case, a 10th grade student was forced to perform oral sex in an abandoned building by a group of 13 boys, 8 of which she recognized from school. In the other case, another 10th grade student was given alcohol and sexually abused by a teacher in his car. If the proposed rule becomes final, school districts would be required to dismiss similarly egregious complaints simply because they occurred off-campus, even if they result in a hostile educational environment.

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

The Department's proposed rules ignore the reality that sexual harassment that happens off campus and outside of a school activity is no less traumatic than on-campus harassment. The negative impact on the student's education is typically the same if they are forced to see their harasser regularly at school. Almost 9 in 10 college students live off campus, and much of student life takes place outside of school-sponsored activities. If a student is assaulted off-campus by a professor, his college would be required to ignore his complaints—even if he has to continue taking the professor's class. If a college student is raped at an off-campus party, their college wouldn't need to investigate—even if they see their rapist every day in class, the dining hall, or residential hallways. If schools interpret the proposed rule to prevent them from addressing assault or harassment that occurs off campus in fraternity or sorority houses, this is particularly troubling: students of all genders are more likely to be sexually assaulted if they belong to a fraternity or sorority. Additionally, the proposed rule change would pose particular risks to students at community colleges and vocational schools. Because none of these students live on campus, when they are harassed by faculty or other students it is likely to occur off campus.

e. The Department's proposed "deliberate indifference" standard would allow schools to do virtually nothing in response to complaints of sexual harassment and assault.

The "deliberate indifference" standard adopted by the proposed rules is a much lower standard than that currently required of schools under current guidance, which requires schools to act "reasonably" and "take immediate and effective corrective action" to resolve harassment complaints. Under the proposed rules, by contrast, schools would simply have to not be deliberately indifferent—which means that their response to harassment would be deemed to comply with Title IX as long as it was not *clearly* unreasonable. As long as a school follows various procedural requirements set out in the proposed rules, the school's response to harassment complaints could not be challenged. The practical effects of this proposed rule would shield schools from any accountability under Title IX, even if a school mishandles a complaint, fails to provide effective supports for survivors, and wrongly determines against the weight of the evidence that an accused harasser was not responsible for sexual assault.

Just yesterday (1/28/19), The Bangor Daily News reported on the stories of two rape survivors who attended the University of Maine System and felt that the Title IX process with which they engaged had woefully endangered them due to errors in how their cases were handled. If anything, this speaks to strengthening the process, as well as protections to survivors of violence, not weaken them in the way the rule changes like this propose.

III. The proposed rules impermissibly limit the "supportive measures" available to complainants (§ 106.30).

Under the proposed rules, even if a student suffered harassment that occurred on campus and it was "severe, pervasive, *and* objectively offensive," their school would still be able to deny the student the "supportive measures" they need to stay in school. In particular, the proposed rules allow schools to deny a student's request for effective "supportive measures" on the grounds that the requested measures are "disciplinary," "punitive," or "unreasonably burden[] the other party." For example, a school might feel

constrained from transferring a named harasser to another class or dorm because it would "unreasonably burden" him, thereby forcing a survivor to change all of her own class and housing assignments in order to avoid her harasser. In addition, schools may interpret this propose rule to prohibit issuing a *one-way* no-contact order against an assailant and require a survivor to agree to a *mutual* no-contact order, which implies that the survivor is at least partially responsible for their own assault. This is a departure from longstanding practice under the 2001 Guidance, which instructed schools to "direct[] *the harasser to have no further contact with the harassed student*" but not vice-versa. And groups such as the Association for Student Conduct Administration (ASCA) agrees that "[e]ffective interim measures, including … *actions restricting the accused*, should be offered and used while cases are being resolved, as well as without a formal complaint."

IV. The proposed rules would allow schools to claim "religious" exemptions for violating Title IX with no warning to students or prior notification to the Department.

The current rules allow religious schools to claim religious exemptions by notifying the Department in writing and identifying which Title IX provisions conflict with their religious beliefs. The proposed rules remove that requirement and permit schools to opt out of Title IX without notice or warning to the Department or students. This would allow schools to conceal their intent to discriminate, exposing students to harm, especially women and girls, LGBTQ students, pregnant or parenting students (including those who are unmarried), and students who access or attempt to access birth control or abortion.

Further, the Department's proposed assurances directly conflict with the current and proposed rules requiring that each covered educational institution "notify" all applicants, students, employees, and unions "that it *does not* discriminate on the basis of sex." By requiring a school to tell students that it does not discriminate while simultaneously allowing it to opt out of anti-discrimination provisions whenever it chooses, the Department is creating a system that enables schools to actively mislead students. This bait-and-switch practice demonstrates that the Department is more interested in protecting schools from liability when they discriminate than protecting students from discrimination.

V. <u>The grievance procedures required by the proposed rules would impermissibly tilt the process in favor of named harassers, retraumatize complainants, and conflict with Title IX's nondiscrimination mandate.</u>

Current Title IX regulations require schools to "adopt and publish grievance procedures that provide for a prompt and equitable resolution of student and employee complaints" of sexual misconduct. The proposed rules purport to require "equitable" processes as well. However, the proposed rules are also riddled with language that would require schools to conduct their grievance procedures in a fundamentally *inequitable* way that favors respondents.

The Department repeatedly uses the purported need to increase protections of respondents' "due process rights" to justify weakening Title IX protections for complainants and proposes a provision specifying that nothing in the rules would require a school to deprive a person of their due process rights. But the current Title IX regulations already provide more rigorous due process protections than are required under the Constitution. The Supreme Court has held that students facing short-term suspensions from public schools require only "some kind of" "oral or written notice" and "some kind of hearing." The Court has explicitly said that a 10-day suspension does not require "the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident." The Court has also approved at least one circuit court decision holding that expulsion from a public school does not require "a full-dress judicial hearing." Furthermore, the

Department's 2001 Guidance already instructs schools to protect the "due process rights of the accused." Adding § 106.6(d)(2) provides no new or necessary protections and inappropriately pits Title IX's civil rights mandate against the Constitution when no such conflict exists.

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

Under proposed rule § 106.45(b)(1)(iv), schools would be required to presume that the reported harassment did not occur, which would ensure partiality to the respondent. This presumption would also exacerbate rape myths upon which many of the proposed rules are based—namely, the myth that women and girls often lie about sexual assault. The presumption of innocence is a criminal law principle, incorrectly imported into this context; criminal defendants are presumed innocent until proven guilty because their very liberty is at stake—criminal defendants go to prison if they are found guilty. There is no such principle in civil proceedings or civil rights proceedings, and Title IX is a civil rights law that ensures that sexual harassment is never the end to anyone's education.

Section 106.45(b)(1)(iv) would only encourage schools to ignore or punish historically marginalized and underrepresented groups that report sexual harassment for "lying" about it. Schools may be more likely to ignore or punish survivors who are women and girls of color, pregnant and parenting students, and LGBTQ students because of harmful race and sex stereotypes that label them as "promiscuous."

Women and girls of color*:* Women and girls of color already face unfair discipline due to race and sex stereotypes. Schools are also more likely to ignore, blame, and punish women and girls of color who report sexual harassment due to harmful race and sex stereotypes that label them as "promiscuous." For example, Black women and girls are commonly stereotyped as "Jezebels," Latina women and girls as "hotblooded," Asian American and Pacific Islander women and girls as "submissive, and naturally erotic," Native women and girls as "sexually violable as a tool of war and colonization," and multiracial women and girls as "tragic and vulnerable, historically, products of sexual and racial domination" (internal quotations and brackets omitted). Black women and girls are especially likely to be punished by schools. For example, The Department's 2013-14 Civil Rights Data Collection (CRDC) shows that Black girls are five times more likely than white girls to be suspended in K-12, and that while Black girls represented 20% of all preschool enrolled students, they were 54% of preschool students who were suspended. the Department's 2015-16 CRDC again shows that Black girls are more likely to be suspended and expelled than other girls. Schools are also more likely to punish Black women and girls by labeling them as the aggressor when they defend themselves against their harassers or when they respond to trauma because of stereotypes that they are "angry" and "aggressive."

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

LGBTQ students: LGBTQ students are more likely to experience sexual harassment than their peers. For example, more than half of LGBTQ students ages 13-21 are sexually harassed at school, and nearly 1 in 4 transgender and gender-nonconforming students are sexually assaulted during college. However, LGBTQ students are also less likely to report sexual assault to school authorities or the police because they are rightfully concerned about further discrimination or retaliation due to their LGBTQ status. They are also less likely to be believed due to stereotypes that they are more "promiscuous" or bring the "attention" upon themselves.

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

This presumption conflicts with the current Title IX rules and other proposed rules, which require that schools provide "equitable" resolution of complaints. A presumption in favor of one party against the other is not equitable. This proposed presumption is also in significant tension with proposed § 106.45(b)(1)(ii), which states that "credibility determinations may not be based on a person's status as a complainant" or "respondent."

b. The proposed rules would improperly require survivors and witnesses in college and graduate school to submit to live cross-examination by their named harasser's advisor of choice, causing further trauma.

Proposed rule § 106.45(b)(3)(vii) requires colleges and graduate schools to conduct a "live hearing," and requires parties and witnesses to submit to cross-examination by the other party's "advisor of choice"↓ often an attorney who is prepared to grill the survivor about the traumatic details of the assault, or possibly an angry parent or a close friend of the named harasser. The adversarial and contentious nature of cross-examination would further traumatize college and graduate school survivors who seek help through Title IX. Being asked detailed, personal, and humiliating questions often rooted in gender stereotypes and rape myths that tend to blame victims for the assault they experienced would understandably discourage many students—parties and witnesses— from participating in a Title IX grievance process, chilling those who have experienced or witnessed harassment from coming forward. Nor would the proposed rules entitle the survivor to the procedural protections that witnesses have during cross-examination in the criminal court proceedings that apparently inspired this requirement; schools would not be required to apply rules of evidence or make a prosecuting attorney available to object or a judge available to rule on objections. The live cross examination requirement would also lead to sharp inequities if one party can afford an attorney and the other cannot.

Neither the Constitution nor any other federal law requires live cross examination in school conduct proceedings. The Supreme Court does not require any form of cross-examination (live or indirect) in disciplinary proceedings in public schools under the Due Process clause. Instead, the Court has explicitly said that a 10-day suspension does not require "the opportunity … to confront and cross-examine witnesses" and has approved at least one circuit court decision holding that expulsion does not require "a full-dress judicial hearing, with the right to cross-examine witnesses."The vast majority of courts that have reached the issue have agreed that live cross-examination is not required in public school disciplinary proceedings, as long as there is a meaningful opportunity to have questions posed by a hearing examiner. The Department itself admits that written questions submitted by students or oral questions asked by a neutral school official are fair and effective ways to discern the truth in K-12 schools, and proposes retaining that method for K-12 proceedings. the Department has not explained why the processes that it considers effective for addressing harassment in proceedings involving 17- or 18-year-old students in high school would be ineffective for 17- or 18-year-old students in college.

Not surprisingly, Title IX and student conduct experts oppose these proposed rules. The Association of Title IX Administrators (ATIXA) announced in October 2018 that it opposes live, adversarial cross-examination, instead stating, "investigators should solicit questions from the parties, and pose those questions the investigators deem appropriate in the investigation interviews." The Association for Student Conduct Administration (ASCA) agrees that schools should "limit[] advisors' participation in

student conduct proceedings." The American Bar Association recommends that schools provide "the opportunity for both parties to ask questions through the hearing chair."

c. The proposed rules would allow schools to pressure survivors into traumatizing mediation procedures with their assailants.

Proposed § 106.45(b)(6) would allow schools to use "any informal resolution process, such as mediation" to resolve a complaint of sexual harassment, as long as the school obtains the students' "voluntary, written consent." Once consent is obtained and the informal process begins, schools may "preclude[] the parties from resuming a formal complaint."

Mediation is a strategy often used in schools to resolve peer conflict, where both sides must take responsibility for their actions and come to a compromise. Mediation is never appropriate for resolving sexual assault or harassment, even on a voluntary basis. Survivors should not be pressured to "work things out" with their assailant (as though they share responsibility for the assault) or exposed to the risk of being retraumatized, coerced, or bullied during the mediation process. As the Department recognized in the 2001 Guidance, students in both K-12 and higher education can be pressured into mediation without informed consent, and even "voluntary" consent to mediation is inappropriate to resolve cases of sexual assault. Experts also agree that mediation is inappropriate for resolving sexual violence. For example, NASPA - Student Affairs Administrators in Higher Education stated in 2018 that it was concerned about students being "pressured into informal resolution against their will." The proposed rule would allow schools to pressure survivors, including minors, into giving "consent" to mediation and other informal processes with their assailants and prevent them from ending an informal process and requesting a formal investigation—even if they change their mind and realize that mediation is too traumatizing to continue.

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

The Department's longstanding practice requires that schools use a "preponderance of the evidence" standard↓which means "more likely than not"↓in Title IX cases to decide whether sexual harassment occurred. Proposed rule § 106.45(b)(4)(i) departs from that practice, and establishes a system where schools could elect to use the more demanding "clear and convincing evidence" standard in sexual harassment cases, while allowing all other student misconduct cases to be governed by the preponderance of the evidence standard, even if they carry the same maximum penalties. The Department's decision to allow schools to impose a more burdensome standard in sexual assault cases than in any other student misconduct case appears to rely on the unspoken stereotype and assumption that survivors (who are mostly women) are more likely to lie about sexual assault than students who report physical assault, plagiarism, or other school disciplinary violations. There is no basis for that sexist belief and in fact men and boys are far more likely to be *victims* of sexual assault than to be *falsely accused* of sexual assault.

The preponderance standard is used by courts in all civil rights cases. It is the only standard of proof that treats both sides equally and is consistent with Title IX's requirement that grievance procedures be "equitable." By allowing schools to use a "clear and convincing evidence" standard, the proposed rule would tilt investigations in favor of respondents and against complainants. The Department argues that Title IX investigations may need a more demanding standard because of the "heightened stigma" and the "significant, permanent, and far-reaching" consequences for respondents if they are found responsible for sexual harassment. But the Department ignores the reality that Title IX complainants face "heightened stigma" for reporting sexual harassment as compared to other types of misconduct, and that complainants suffer "significant, permanent, and far-reaching" consequences to their education if their school fails to

meaningfully address the harassment, particularly as 34% of college survivors drop out of college. Both students have an equal interest in obtaining an education. Catering only to the impacts on respondents in designing a grievance process to address harassment is inequitable.

Moreover, Title IX experts support the preponderance standard, which is used to address harassment complaints at over 80% of colleges. The NCHERM Group, whose white paper *Due Process and the Sex Police* was cited by the Department, has promulgated materials that require schools to use the preponderance standard, because "[w]e believe higher education can acquit fairness without higher standards of proof." The white paper by four Harvard professors that is cited by the Department recognizes that schools should use the preponderance standard if "other requirements for equal fairness are met." The Association of Title IX Administrators (ATIXA)'s position is that "any standard higher than preponderance advantages those accused of sexual violence (mostly men) over those alleging sexual violence (mostly women). It makes it harder for women to prove they have been harmed by men. The whole point of Title IX is to create a level playing field for men and women in education, and the preponderance standard does exactly that. *No other evidentiary standard is equitable*." NASPA - Student Affairs Administrators in Higher Education recommends the preponderance standard: "Allowing campuses to single out sexual assault incidents as requiring a higher burden of proof than other campus adjudication processes make it – by definition – harder for one party in a complaint than the other to reach the standard of proof. Rather than leveling the field for survivors and respondents, setting a standard higher than preponderance of the evidence tilts proceedings to unfairly benefit respondents." The Association for Student Conduct Administration (ASCA) agrees that schools should "[u]se the preponderance of evidence (more likely than not) standard to resolve all allegations of sexual misconduct" because "it is the only standard that reflects the integrity of equitable student conduct processes which treat all students with respect and fundamental fairness."

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

The proposed rules require schools to have "reasonably prompt timeframes," but allows them to create a "temporary delay" or "limited extension" of timeframes for "good cause," which includes "concurrent law enforcement activity." In contrast, Title IX guidance issued by the Obama administration recommended that schools finish investigations within 60 days, and prohibited schools from delaying a Title IX investigation just because there was an ongoing criminal investigation.

Under the proposed rules, if there is an ongoing criminal investigation, the school would be allowed to delay its Title IX investigation for an unspecified length of time. While criminal investigations seek to punish an abuser for their conduct, Title IX investigations should seek to ensure that complainants are able to access educational opportunities that become inaccessible due to harassment. Students should not be forced to wait months or years until after a criminal investigation is completed in order to seek resolution from their schools. The Association of Title IX Administrators (ATIXA) agrees that a school that "delay[s] or suspend[s] its investigation" at the request of a prosecutor creates a safety risk to the survivor and to "other students, as well."

f. The proposed rules would require schools to give unequal appeal rights.

Although Secretary DeVos claims that the proposed rules make "[a]ppeal rights equally available to both parties," they do not in fact provide equal *grounds for appeal* to both parties, as complainants are barred from appealing a school's resolution of a harassment complaint based on inadequate sanctions imposed on a respondent. Allowing only the respondent the right to appeal a sanction decision is both unfair and a violation of the requirement of "equitable" procedures, because survivors are also impacted

by sanction decisions. For example, if their abuser is still allowed to live in the same dorm as the survivor, or if they are still in the same classroom, the survivor may experience further trauma.

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

VI. The Proposed Rules are Inconsistent with the Clery Act.

A number of the Department's proposed rules are inconsistent with the Clery Act, which the Department also enforces, and which also addresses the obligation of colleges and universities to respond to sexual assault and other behaviors that may constitute sexual harassment, including dating violence, domestic violence, and stalking. For example, the proposed rules prohibiting schools from investigating off-campus and online sexual harassment conflict with Clery's reporting requirements. The Clery Act requires colleges and universities to notify all students who report sexual assault, stalking, dating violence, and domestic violence of their rights, regardless of "whether the offense occurred on or off campus." The Clery Act also requires colleges and universities to report all sexual assault, stalking, dating violence, and domestic violence that occur on "Clery geography," which includes all property controlled by a school-recognized student organization (such as an off-campus fraternity); nearby "public property"; and "areas within the patrol jurisdiction of the campus police or the campus security department." The proposed rules would undermine Clery's mandate and create a perverse system in which schools would be required to report instances of sexual assault that occur off-campus to the Department, but would be required by the Department to dismiss these complaints and not investigate them.

Clery also requires that investigations of sexual harassment and assault be "prompt, fair, and impartial." But the proposed rules' unclear timeframe for investigations conflicts with Clery's mandate that investigations be prompt. And the many proposed rules discussed above that tilt investigation procedures in favor of the respondent are anything but fair and impartial.

Although the Department acknowledges that Title IX and the Clery Act's "jurisdictional schemes … may overlap in certain situations," it fails to explain how institutions of higher education should resolve the conflicts between two different sets of rules when addressing sexual harassment. These different sets of rules would likely create widespread confusion for schools.

VII. The proposed rules *requiring* schools to dismiss harassment complaints go beyond Ed's authority to effectuate the nondiscrimination provisions of Title IX and are practically unworkable.

Section 106.45(b)(3) of the proposed rules *requires* schools to dismiss complaints of sexual harassment if they don't meet specific narrow standards. If it's determined that harassment doesn't meet the improperly narrow definition of severe, pervasive, *and* objectively offensive harassment, it *must* be dismissed, per the command of the rule. If severe, pervasive, *and* objectively offensive conduct occurs outside of an educational program or activity, including most off-campus or online harassment, it *must* be dismissed. However, the Department lacks the authority to require schools to dismiss complaints of discrimination. Under Title IX, the Department is only authorized to issue rules "to effectuate the [anti-discrimination] provision of [Title IX]." Title IX does not delegate to the Department the authority to tell

schools *when they cannot* protect students against sex discrimination. By requiring schools to dismiss certain types of complaints of sexual harassment, without regard to whether those forms of harassment deny students educational opportunities on the basis of sex, § 106.45(b)(3) fails to effectuate Title IX's anti-discrimination mandate and would force many schools that already investigate off-campus conduct under their student conduct policies to abandon these anti-discrimination efforts. While the Department is well within its authority to require schools to adopt civil rights protections to effectuate Title IX's mandate against sex discrimination, it is does not have authority to force schools to violate students' and employees' civil rights under Title IX by forcing schools to ignore sexual harassment.

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

The Department's proposed rules import inappropriate legal standards into agency enforcement, rely on sexist stereotypes about survivors of sexual harassment and assault, and impose procedural requirements that force schools to tilt their Title IX investigation processes in favor of named harassers to the detriment of survivors. Instead of effectuating Title IX's prohibition on sex discrimination in schools, these rules serve only to protect schools from liability when they fail to address complaints of sexual harassment and assault. The Maine Women's Lobby calls on the Department of Education to immediately withdraw this NPRM and instead focus its energies on vigorously enforcing the Title IX requirements that the Department has relied on for decades, to ensure that schools promptly and effectively respond to sexual harassment.

Thank you for the opportunity to submit comments on the NPRM. Please do not hesitate to contact me to provide further information.

Whitney Parrish
Director of Policy and Program
Maine Women's Lobby
207.622.0851
wparrish@mainewomen.org