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January 30, 2019

Via Federal eRulemaking Portal

The Honorable Elisabeth DeVos
Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Brittany Bull
U.S. Department of Education
400 Maryland Avenue, SW
Room 6E310
Washington, DC 20202

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

Dear Secretary DeVos and Ms. Bull:

I write to strongly oppose the proposed rule regarding Title IX of the Education Amendments of 1972 ("Title IX") published by the Department of Education (the "Department") and to request its withdrawal. The Department's proposal amounts to an attack on the civil rights of young people in schools across Massachusetts and the country. At a time when our nation is finally awakening to the realities of sexual harassment and assault, the Department assails the strides that survivors and their allies have bravely made. And while the Department's proposed rule is misguided, impractical, and beyond the scope of the Department's authority in myriad respects, this letter focuses on particular changes that would hamper sexual harassment and assault survivors' access to Title IX processes and supports. These changes would prevent survivors from accessing educational opportunities and harm the very students that Title IX is intended to help.

I. Background

Originally adopted in 1972, Title IX protects students from sex discrimination in their educational institutions, whether elementary, secondary, or higher education. Specifically, under Title IX, students in schools receiving federal financial assistance may not be excluded from or denied the benefits of any education program or activity on the basis of sex.[1] It has long been recognized that sexual harassment, including sexual assault, [2] is a form of sex discrimination and that schools have an obligation to address sexual harassment under Title IX.[3]

Since the adoption of the law in 1972 and its implementing regulations in 1975, the Department has issued several guidance documents to assist schools in their application of Title IX rules and standards. The most recent formal guidance document, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties,* has been in place since 2001 (the "2001 Guidance").[4] Since then, the Department has issued additional supporting materials, including a *Dear Colleague Letter* in 2011 and *Questions and Answers on Title IX and Sexual Violence* (the "2014 Q&A") in 2014.[5] In 2017, the Department rescinded the 2011 *Dear Colleague Letter* and the 2014 Q&A. At the same time, it issued an interim document, *Q&A on Campus Sexual Misconduct*,[6] pending the promulgation of new regulations.

The proposed rule comes in the midst of a national discussion and reckoning about how we as a society and in government address sexual harassment and the harms it causes, particularly in schools. Research shows that 43.6 percent of women and 24.8 percent of men have experienced some form of contact sexual violence.[7] One out of every five women has been the victim of an attempted or completed rape.[8] For women in college, one in five experiences sexual assault.[9] A 2011-12 survey found that 48 percent of students (56 percent of girls and 40 percent of boys) in seventh to twelfth grades experienced sexual harassment during that school

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[1] 20 U.S.C. §1681(a).
[2] Use of the term "sexual harassment" in this letter includes sexual assault unless otherwise noted.
[3] *See* U.S. Department of Education, Office for Civil Rights, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html (1997) ("1997 Guidance").
[4] *See* U.S. Department of Education, Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf (Jan. 2001) ("2001 Guidance").
[5] *See* U.S. Department of Education, Office for Civil Rights, *Dear Colleague Letter: Sexual Violence*, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf (Apr. 4, 2011) ("2011 Dear Colleague Letter") at 3; U.S. Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf (Apr. 29, 2014) ("2014 Q&A).
[6] *See* U.S. Department of Education, Office for Civil Rights, *Q&A on Campus Sexual Misconduct*, https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf (Sept. 2017) ("2017 Q&A).
[7] Sharon G. Smith, et al., *National Intimate Partner and Sexual Violence Survey: 2015 Data Brief—Updated Release* (November 2018), https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf at 2-3.
[8] *Id.*at 2.
[9] *See e.g.*, Claude A. Mellins , et al., *Sexual assault incidents among college undergraduates: Prevalence and factors associated with risk* (Nov. 8, 2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5695602/; *see also* David Cantor, et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* (Sept. 21, 2015), https://www.aau.edu/key-issues/aau-climate-survey-sexual-assault-and-sexual-misconduct-2015.

year.[10] Sexual violence can lead to serious consequences for students, including depression and dropping out of school. Even less dire consequences, like dropping a class, can impact a student's educational opportunities and life trajectory in damaging ways. The Department's proposed rules are particularly concerning given these weighty impacts and the broad-based recognition that our society must do more to address sexual harassment and assault as well as the harms that they cause.

II. The Proposed Rule Will Hamper Access to Title IX Processes and Hurt the Students That It is Intended to Help.

While the Department asserts that the proposed rule will empower and encourage survivors to turn to their schools for support,[11] it will have the opposite effect in many respects. Specifically, the proposed rule would limit survivors' access to Title IX processes that can provide needed remedies for accessing educational opportunities to which they are entitled.

A. The Department Proposes a Narrow Definition of "Sexual Harassment" That Would Deny the Right to Educational Opportunity for Many Survivors.

If finalized, the proposed rule and its narrow definition of "sexual harassment" would significantly limit the types of incidents that schools must investigate under Title IX. As a result, far fewer survivors would have the right to pursue Title IX investigations and far too many cases of sexual harassment would go unaddressed.

The Department proposes an unduly narrow definition of sexual harassment, which sharply departs from the definition which has guided schools' Title IX responses for many years. Under the 2001 Guidance, schools must investigate complaints that allege "unwelcome conduct of a sexual nature," including "unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature."[12] Under the proposed rule, the Department would significantly narrow the definition to include only *quid pro quo* harassment by a school employee, sexual assault as defined in the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (also known as the Clery Act), and "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 recipient's education program or activity."[13] This definition is out of sync with years of settled guidance and other civil rights laws.[14]

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[10] *See* Catherine Hill and Holly Kearl, *Crossing the Line: Sexual Harassment at School*, American Association of University Women (Nov. 2011), https://files.eric.ed.gov/fulltext/ED525785.pdf at 11.
[11] 83 Fed. Reg. 61462.
[12] 2001 Guidance at 2; *see also* 2011 Dear Colleague Letter at 3.
[13] 83 Fed. Reg. 61496.
[14] *See e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a), and implementing regulations, 29 C.F.R. 1604.11(a); *see also* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 651 (1999) (citing approvingly both to Title VII cases (Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57,67 (1986) (finding that hostile environment claims are cognizable under Title VII), and Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 82 (1998)) and to the 1997 Guidance that determinations under Title IX as to what conduct constitutes hostile environment sexual harassment may continue to rely on Title VII case law).

In proposing this new definition, the Department sets the bar so high that it excludes conduct that would almost certainly interfere with a student's equitable access to educational opportunities. First, in requiring conduct to be both severe and pervasive, the Department ignores that sexual harassment may be one or the other, but not necessarily both. Second, the proposed rule omits conduct that could interfere with a student's access to educational opportunities but is not—or not yet—severe and pervasive. For example, a student who receives several unwelcome emails with sexually aggressive content may have serious concerns about his or her safety at school and make changes to account for it, thereby being denied education benefits. But, given the heightened standards under the proposed rule, such conduct may not be considered severe and pervasive. In fact, a severe instance or even pattern of harassment may not trigger a Title IX remedy if it is not deemed "pervasive." By proposing such a narrow definition, the Department undercuts the premise of Title IX that no school should permit behavior that causes a student's exclusion from education programs and activities on the basis of sex.

For these reasons, the Department should not adopt this unacceptably narrow definition of sexual harassment. If adopted as proposed, this definition would preclude students from accessing Title IX processes and remedies in response to behavior that may very well impede their educational opportunities.

B. The Proposed Rule's "Actual Knowledge" Requirement Would Allow for a Failure to Respond to Some Reports of Sexual Harassment.

The proposed rule would allow schools not to respond to sexual harassment unless a student reports the incident directly to one of a very limited number of school officials. These limitations would unduly burden survivors' ability to seek and receive help.

Under Title IX, schools must take immediate corrective action to address sexual harassment when they receive notice. According to current guidance, a school is deemed to have notice of sexual harassment or allegations thereof if a "responsible employee" knew or should have known about the harassment or allegations.[15] "A responsible employee would include any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility."[16] Schools must ensure that "responsible employees know that they are obligated to report harassment to appropriate school officials."[17] In addition to providing clarity for schools on when Title IX obligates a response, this requirement increases the likelihood that allegations of sexual harassment will be addressed appropriately.

The Department now proposes to significantly limit the personnel who could be deemed to receive notice of sexual harassment under Title IX. Under the proposed rule, schools are responsible for responding only to sexual harassment or allegations of sexual harassment of which they have "actual knowledge," defined as notice to the Title IX Coordinator or "any official . . . who has authority to institute corrective measures on behalf of the [school]," or to a

[15] 2001 Guidance at 22.
[16] *Id.*
[17] *Id.*

teacher in an elementary or secondary school with regard to student-on-student harassment.[18] Particularly with respect to college campuses, such personnel are limited in number and presence, especially when compared to the broader definition of "responsible employee" under current Department guidance.

With its narrow definition of "actual knowledge," the Department substantially limits the likelihood that reports of sexual harassment will reach school personnel in a position to investigate them. Currently, many schools consider a wide range of – or all – employees to be "responsible employees" for Title IX purposes, and they train employees to ensure that reports get to the appropriate personnel. These schools have determined that a broad definition of "responsible employee" helps them create a culture that takes sexual harassment seriously. It also ensures that reports of sexual harassment reach the personnel best trained to handle them. By essentially limiting the employees responsible for facilitating reports of sexual harassment, the Department shuts down a critical reporting pipeline.[19]

Survivors of sexual harassment are more likely to disclose the harassment to someone with whom they have a trusting relationship. If survivors know that they must disclose the incident to a dean or disciplinarian, Title IX coordinator, or some other official with whom they have no preexisting relationship in order for their school to address it, fewer survivors are likely to come forward to access Title IX remedies. Even in the elementary and secondary school context, where students may report student-on-student harassment to teachers, the Department sets unnecessary and harmful limits. For example, a student's reporting of harassment to a trusted coach or school nurse would not be deemed to have put the school on notice.

The Department's reliance on *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), and *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), to support its "actual knowledge" standard is misplaced. Under these cases, a school can be liable for monetary damages in private litigation where there is actual notice to a school official with the authority to address the alleged discrimination and take corrective action. This standard, which applies narrowly to monetary damages in private litigation, is not controlling or appropriate in determining whether a school has an obligation to respond under Title IX. In fact, in 2001 the Department issued guidance acknowledging that "[t]he concept of a 'responsible employee'…is broader [than that offered by the Court in *Gebser* and *Davis*]. That is, even if a responsible employee does not have the authority to address the discrimination and take corrective action, he or she does have the obligation to report it to appropriate school officials."[20]

For these reasons, the Department should not adopt an "actual knowledge" definition and standard. Instead, regulations should make clear that schools should require a broad range of personnel to receive notice of sexual harassment and make a report through proper channels.

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[18] 83 Fed. Reg. 61496.

[19] Also troubling is the Department's proposed "deliberate indifference standard," providing that schools with "actual knowledge of sexual harassment…must respond in a manner that is not deliberately indifferent" and that a school is "deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances." This shift from the long-standing "reasonableness" standard would allow schools to act unreasonably in response to sexual harassment, a change that is inconsistent with other anti-discrimination laws and with the purpose of Title IX.

[20] 2001 Guidance at n74.

This standard will ensure that sexual harassment survivors have avenues through which to make reports that feel safe and accessible to them. It will also allow schools to capture unacceptable conduct and address it expeditiously in the best interest of their school communities.

C. The Department's Narrow Interpretation of School "Programs or Activities" Unduly Limits Title IX's Reach and Sexual Harassment Survivors' Right to Access Educational Opportunities.

The Department takes a limited view of the scope of a school's Title IX authority to address incidents that occur outside of school property, school-sponsored events, or other similar settings and circumstances. The Department's approach would have schools dismiss complaints related to incidents that occur in locations not closely enough related to the school, even if they may have a very real impact on a student's ability to participate in school programs or activities. If implemented accordingly, the proposed rule would deny sexual harassment survivors access to the Title IX process and undermine Title IX's purpose of ensuring equitable access to educational opportunities. It would also tie the hands of schools in determining what conduct impacts their education programs and activities for purposes of Title IX.

The proposed rule requires schools to respond only to conduct "in an education program or activity…" and instructs schools to drop an investigation of a formal complaint if it is determined that the conduct "did not occur within [a school's] program or activity."[21] The Department's discussion about school "programs and activities" emphasizes the strength of the connection between a school and the location of the conduct (e.g., ownership of the premises, sponsorship of the event or circumstance).[22] The Department gives no indication that conduct occurring even just off-campus, for instance in off-campus housing, might be subject to Title IX jurisdiction. This absence is particularly notable, given the less prescriptive approach taken in current and prior Department guidance.

The Department's approach ignores the realities of school life, the notion of a hostile environment, and the protective purpose of Title IX. Students and school personnel interact in a variety of venues and scenarios. At many colleges and universities, high percentages of students live off-campus. In fact, many schools do not have capacity to house all their students on-campus, so students have no choice but to live in off-campus housing. Moreover, students and professors might meet off campus to discuss a project or for an end-of-semester celebration. Likewise, elementary students may participate in after school programming not officially under the school district's authority but operating in close connection with particular schools, and students of various ages may meet for a study group in a local coffee shop. To suggest that Title IX does not reach conduct that occurs in venues and circumstances with a looser connection – but a connection, nonetheless – to the school community ignores the realities of day-to-day life in a school setting. The Department's discussion also ignores that Title IX includes protections against a hostile educational environment, which may very well exist because of conduct that occurs off-campus. With this concerning approach, the Department fails to account for Title IX's principal objective to ensure access to equal educational opportunity. If a student is raped off-campus but must face his or her perpetrator every day at school, the survivor's interaction with

[21] 83 Fed. Reg. at 61497 and 61498.
[22] *Id.* at 61468.

the perpetrator continues on campus, and he or she suffers harm and is denied equitable access to educational opportunity there. Likewise, a school may feel just as obligated to address off-campus conduct to ensure survivors' access to educational opportunities. The Department's approach unduly denies students the protection of Title IX and denies their schools – in the best position to assess the circumstances – the ability to offer it.

Current and prior Department guidance better aligns with Title IX's purpose of ensuring students' equitable access to educational opportunities. In the 2001 Guidance, the Department affirms that "Title IX protects students in connection with all of the academic, educational, extra-curricular, athletic, and other programs of the school, whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere."[23] Recent Department materials, under which many schools in Massachusetts and nationwide are operating, confirm that "[u]nder Title IX, a school must process all complaints of sexual violence, regardless of where the conduct occurred, to determine whether the conduct occurred in the context of an education program or activity or had continuing effects on campus or in an off-campus education program or activity."[24] These guidance documents recognize the complexity that surrounds sexual harassment and the protective nature of Title IX, and they properly guide schools in addressing conduct that may impact educational opportunity.

The Department should not limit Title IX responses to on-campus activity, school-sponsored programs, or other similar settings and circumstances. This approach ignores that an incident that occurs outside of narrow jurisdictional bounds may still have serious repercussions for educational opportunities, leaving students without access to the Title IX process and the remedies that are required and deserved.

D. <u>The Live Hearing and Cross-Examination Requirements May Chill Access to the Title IX Process for Sexual Harassment Survivors, Undermine Fairness, and Prolong the Grievance Process Timeline for All Parties.</u>

By requiring a live hearing and cross-examination in institutions of higher education and by allowing it in elementary and secondary schools, the proposed rule could cause a serious chilling effect for survivors who may choose to forego the Title IX process altogether. Although proposed in the name of fairness, such requirements may deny access and a fair process to sexual harassment survivors. The Department's live hearing and cross-examination proposals would also increase the timeline for resolving sexual harassment complaints, with negative repercussions for complainants, the accused, and schools.

Title IX's implementing regulations set forth a basic but important requirement that schools must "adopt and publish grievance procedures providing for prompt and equitable resolution of…complaints."[25] Properly applied, this requirement ensures that both parties – complainant and respondent – receive a fair process. Requiring an independent fact-finder and prohibiting final determinations by the investigator make good sense in this regard.

[23] 2001 Guidance at 2.
[24] 2014 Q&A at 32.
[25] *See* 34 C.F.R. 106.8(b).

The Department's proposals requiring (in the higher education context) or permitting (for elementary and secondary schools) a live hearing and cross-examination raise concerns about fairness for sexual harassment survivors.[26] As is widely recognized, including in prior Department guidance, forcing a sexual harassment survivor to confront his or her perpetrator can be re-traumatizing and itself perpetuate a hostile environment.[27] In elementary and secondary school contexts, where students are younger and their mental processes and coping mechanisms less developed, a live hearing and cross-examination could cause further trauma or lead more students to forego the process entirely. The Department's requirement that questioning be carried out by a party's advisor – possibly an attorney, for those with the resources to secure one – does not make the process any less daunting. The anticipation of live hearings with cross examinations will cause undue stress and trauma for many survivors and will likely dissuade some students from pursuing a complaint at all. While it is critical that schools have grievance procedures that provide for a fair process in uncovering the truth, schools may determine that other methods (e.g., questioning by a Title IX panel) allow them to achieve that end.

In addition, contrary to the Department's stated goal of "reasonably prompt timeframes for completion of the grievance process,"[28] the prescriptive and elaborate hearings mandated by the Department could lead to extended timelines. Requiring a live hearing with cross-examination, along with permitting students to call witnesses, necessitates the coordination of multiple schedules, including the investigator, the hearing officer or panel, the parties, any witnesses, and their advisors.[29] With school break, exam, and summer schedules, the time available for such a robust process is limited. The Department seems to recognize and compound a longer timeline for the proposed rule, permitting "the temporary delay of the grievance process or the limited extension of timeframes for good cause."[30] This allowance leaves a gaping hole that could lead to significant delays in resolution.

An unnecessarily prolonged timeframe would be a disservice to all parties. A complainant would be forced to wait for Title IX remedies that could be desperately needed for him or her to fully access educational opportunity. The accused would operate in limbo, unsure of his or her fate. And schools would be unable to ensure that they are fully providing educational opportunity for all students while processes drag on. It would also be difficult for schools to focus on other important matters, and time and resources would be strained by prolonged processes. In addition, the fact of these delays may create a chilling effect for students who would otherwise wish to file a report but are dissuaded because of the length of time to pursue it to conclusion.

For these reasons, the Department should not require live hearings and cross-examinations for higher education institutions and should not allow live hearings or cross-examination in the K-12 context. The re-traumatizing effect of a live hearing and cross-examination could unfairly chill access to the Title IX process and resources for students most in

[26] *See* 83 Fed. Reg. at 61498.
[27] *See* 2014 Q&A at 31.
[28] 83 Fed. Reg. at 61472.
[29] *See id.* at 61498.
[30] *Id.* at 61497.

the need of them. Additionally, such processes would harm all parties as well as the schools themselves by prolonging the grievance process and forcing the parties to wait for redress and closure.

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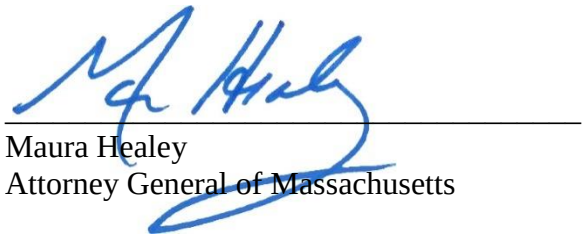
For the reasons set forth above, I strongly oppose the proposed rule and urge the Department to withdraw it.



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