

January 30, 2019

Submitted via [www.regulations.gov](http://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 Florida Council Against Sexual Violence (FCASV) 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.

As Florida's sexual assault coalition, we represent the 31 certified sexual assault programs around the state that provide services to survivors, regardless of age, gender, and circumstances of the victimization. Florida's sexual assault programs provide services to victims who have been assaulted on school campuses and by students. Many work with local colleges, universities, and schools to educate students on consent, healthy relationships, and sexual violence. Additionally, FCASV's Legal Assistance to Victims (LAV) department represents student victims in Title IX cases.

As advocates, therapists, attorneys, and service providers, we know that many survivors choose to pursue justice through the school administrative process instead of the criminal justice system because it is currently faster and does not require them to come face-to-face with their rapist, avoiding additional trauma. The proposed rules will weaken protections for survivors thus decreasing the number of reports the Title IX offices receive. Rapists will remain on campus allowing them to assault more people and making campuses less safe. Additionally, the narrowed version of sexual harassment in the proposed rules will allow acts of sexual harassment that no longer qualify as such to go unchallenged. Perpetrators' behaviors will go unchecked leading to escalating abusive actions over time. It is clear that the proposed rules provide safe harbors for institutions and perpetrators, while restricting safety measures and avenues of help for victims thereby putting more students at increased risk.

FCASV is gravely concerned and strongly opposed to the proposed rules, which will have critical consequences for survivors and will allow abusive behaviors and assaults to go unaddressed.

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**1. The proposed rules weaken protections for sexual assault survivors while strengthening the rights of respondents.**

The proposed rules weaken protections for sexual assault survivors and make it easier for rapists to thrive and commit more assaults without facing any repercussions.

- a) Schools would have the authority to deny “supportive measures” for victims. For example, schools could deny student requests for transfers of their harassers or perpetrators to another class or dorm because it would “unreasonably burden” the other party. In turn, survivors would have to change their schedules and the onus would be on victims to avoid their harasser or perpetrator.
- b) Under the proposed rules, students who report sexual harassment will have their reports dismissed if institutions arbitrarily find the harassment insufficient under the proposed framework until the behavior escalates to the point that it is actively harming a survivor’s education; student victims are likely to drop out of school or see their grades deteriorate as behavior escalates. This rule would allow hostile environments to continue, further harming students and undermining the entire spirit of the law.
- c) Sexual violence is a difficult topic, especially for survivors who are coming forward to report victimization. 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.”<sup>1</sup> This reduces the number of avenues a victim has to report their harassment or assault.
- d) Under the proposed rules, survivors will have the added burden to report in person to their Title IX office in order to move forward with the complaint process. By adding an additional layer to reporting, this will further deter survivors from reporting. Currently, survivors can write statements in their advocates’ offices who can assist them in a safe space with writing down their comments that will then be submitted to the Title IX office or the conduct office. The victim advocate can also currently assist with providing confidential avenues for accommodations so that survivors can continue in their programs without filing a formal complaint or requiring them to report to the Title IX director. Taking this service away from those who are trained with trauma-informed skills is ignoring the needs of survivors after an unimaginable victimization. This may also require victims to tell their story multiple times to multiple strangers before they find the right office and speak to a person who qualifies as an authority to take corrective action.
- e) Greater rights are given to the respondent in the proposed rules than to the complainant, which creates an unequal process. The Department goes further in its protection of respondents by instructing institutions to assume the respondent is innocent until proven responsible. This creates an unequal process and places the burden to prove the harassment on the complainant. This sends a message that the respondent’s experience in the disciplinary process is more valued than a complainant’s. The student conduct process has operated equitably under the mandate that both parties are equal and presumptions are prohibited. The presumption of innocence forces the adjudicators of the process to take a position before the hearing ever

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<sup>1</sup> Proposed rule § 106.30.

begins. These proposals go against the intent of Title IX and illustrate the Department's intent to protect the respondent and play into the myth that people lie about sexual assault.

## **2. The proposed rules will deter reports from victims.**

The proposed rules will decrease the number of reports the Title IX office receives, which means rapists will remain on campus allowing them to assault more people and make schools less safe. Already, only 12% of college survivors<sup>2</sup> and 2% of girls ages 14-18<sup>3</sup> report sexual assault to their schools or the police. When schools fail to provide effective responses, the impact of sexual harassment can be devastating.<sup>4</sup> 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.<sup>5</sup> For example, 34% of college survivors drop out of college.<sup>6</sup>

Beyond the trauma of deciding to come forward and report, survivors will more often than not be repeatedly triggered and traumatized throughout the Title IX complaint process. The proposed rules will lead to an inequitable process for complainants. Victims will decide to forgo reporting sexual harassment and assault because they will receive unfair treatment throughout the process and be further traumatized. These proposed rules will have a detrimental impact on victims who will choose to not report and instead continue to suffer abusive actions.

## **3. The proposed rules narrow the definition of sexual harassment, which will allow abusive behaviors to go unchecked.**

This narrowed definition will allow acts of sexual harassment that no longer qualify as such to go unchallenged. Perpetrator behaviors will go unchecked allowing these behaviors to escalate over time. 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."<sup>7</sup>

The narrowed definition would only allow schools to take action when a student's access to education has been denied. Victims will have to suffer repeated acts of violence and abusive behaviors before they can ask schools for help. While these behaviors become rampant and escalating, hostile learning environments will cause survivors to suffer extensive traumas and drop out, and perpetrators will breathe easy knowing they will not be held accountable for their actions.

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<sup>2</sup> Poll: One in 5 women say they have been sexually assaulted in college, WASHINGTON POST (June 12, 2015), <https://www.washingtonpost.com/graphics/local/sexual-assault-poll>.

<sup>3</sup> Let Her Learn: Sexual Harassment and Violence, *supra* note 2 at 1.

<sup>4</sup> E.g., Audrey Chu, I Dropped Out of College Because I Couldn't Bear to See My Rapist on Campus, VICE (Sept. 26, 2017), [https://broadly.vice.com/en\\_us/article/qvjzpd/i-dropped-out-of-college-because-i-couldnt-bear-to-see-my-rapist-on-campus](https://broadly.vice.com/en_us/article/qvjzpd/i-dropped-out-of-college-because-i-couldnt-bear-to-see-my-rapist-on-campus).

<sup>5</sup> E.g., Alexandra Brodsky, How much does sexual assault cost college students every year?, WASHINGTON POST (Nov. 18, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/11/18/how-much-does-sexual-assault-cost-students-every-year>.

<sup>6</sup> Cecilia Mengo & Beverly M. Black, Violence Victimization on a College Campus: Impact on GPA and School Dropout, 18(2) J.C. STUDENT RETENTION: RES., THEORY & PRAC. 234, 244 (2015), available at <https://doi.org/10.1177/1521025115584750>.

<sup>7</sup> Proposed rule § 106.30.

**4. The proposed rules would require schools to ignore harassment and assaults that occur outside of a school activity, even when it creates a hostile educational environment.**

The majority of college students live off-campus.<sup>8</sup> Removing the responsibility of universities for harassment and assaults that happen off-campus is extremely dangerous. Not requiring hearings on these off-campus offenses allow the perpetrators back on campus where victims can be stalked, harassed, and made to live in fear. This without a doubt protects perpetrators and allows them to continue receiving an education while survivors are forced into the shadows and many times will withdraw from school out of fear.

The proposed rules tell survivors that if it happens off-campus, it doesn't matter to their campus community. The location of the assault or harassment does not dictate the effects and trauma the survivor experiences. The proposed rules will force victims to continue facing their perpetrators on campus, directly impacting their school environment and ability to receive a violence-free education.

**5. 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.**

Currently, during a university process, survivors are questioned by a panel or an investigator and do not have to face cross-examination. Under the proposed rules, it would be mandated that survivors be subjected to traumatic cross-examination. This could include questions about specific and painful details related to the assault or harassment that could further traumatize the victim. The adversarial nature of live cross-examination would lead future students to not report their victimizations.

Cross-examination is yet another criminal standard not an educational one. This proposal will undoubtedly deter survivors from reporting and bolster the accused. The administrative student conduct process at institutions is focused on educating and protecting the campus community. It is, and should, be up to institutions to strike the balance between a process that is educational and punitive to ensure the safety of their communities.

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. The addition of cross-examination to this process creates an adversarial community and process that reflects the Department's anti-victim perspective and demonstrates how the Department is trying to use Title IX to protect respondents.

**6. The proposed rules would exclude sexual harassment against a person outside of the U.S.**

Only applying these rules to "persons in the U.S." ignores the large number of students who study abroad and the American university campuses that exist outside the U.S. We also know that students choose to travel abroad with service groups associated with their universities over the summer and as alternative spring breaks.

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<sup>8</sup> Sharpe, How Much Does Living Off-Campus Cost, supra note 10.

This gives rapists the permission to commit their rapes abroad as long as they behave on U.S. soil. Perpetrators will know this and will count on this policy. It is perversely flawed to only protect students when they are in the U.S., and completely disregard violence and harassment they face when abroad.

**7. Shifting the standard of evidence prioritizes respondents over victims in an attempt to undermine victims' credibility and make educational remedies even harder to obtain.**

Allowing or encouraging institutions to use the lower standard of clear and convincing or beyond a reasonable doubt creates a more litigious process in which a complainant has to "prove" their case. Russlyn Ali, Assistant Secretary for Civil Rights at the Department of Education in 2011, estimated that 80% of higher education institutions were using the preponderance standard prior to the Dear Colleague Letter.<sup>9</sup> This demonstrates that the Dear Colleague Letter did not mark a radical shift in practice related to the standard of evidence, and that student conduct professionals generally agreed that the preponderance standard was the most appropriate standard in facilitating a resolution with the distinct interests at stake. In further support of this, a 2004 Model Student Conduct Code noted that the preponderance standard "correctly treats each [party] as equally important when a fact finder tries to decide what happened when facts are disputed."<sup>10</sup>

Professionals in higher education have long agreed that the preponderance standard is the most appropriate standard to use when hearing student conduct code violations due to the nature of the process and the interests that are at stake for both parties. "The 'clear and convincing' and 'beyond a reasonable doubt' standards inaccurately treat the Accused Student as more important than the student who believes s/he was a victim of misconduct and/or as having more important interests than all other members of the academic community have in the maintenance of a calm, peaceful and productive living/learning environment."<sup>11</sup>

In 1995 the Department found that applying the clear and convincing standard in a sexual harassment standard was inconsistent with the equitable grievance procedures under Title IX.<sup>12</sup> Using the higher standard of clear and convincing creates a perception before the hearing begins that the myth of people lying about being sexually assaulted or harassed does exist and, without evidence, calls into question the survivor's credibility. This sets up a power imbalance before any evidence has been presented and creates an additional undue burden that survivors must overcome to seek justice. Sexual violence cases shouldn't require a higher burden of proof than other student conduct cases.

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<sup>9</sup> Letter from Ass'n of Title IX Adm'rs et al. to Russlyn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, Dep't of Educ., 2 (Feb. 7, 2012), available at <https://www.prnewswire.com/news-releases/atixa-co-authors-letter-supporting-the-ocr-title-ix-dear-colleague-letter-on-campus-sexual-assault-139206759.html>.

<sup>10</sup> Edward Stoner II & John Wesley Lowery, Navigating Past the "Spirit of Subordination": A Twenty-First Century Model Student Conduct Code with a Model Hearing Script, 31 J. C. & U. L. 1, 49 (2004).

<sup>11</sup> Id.

<sup>12</sup> See Letter from Gary Jackson, Reg'1 Civil Rights Director., Office for Civil Rights., U.S. Dep't of Educ., to Jane Jervis, President, The Evergreen St. Coll. (Apr. 4, 1995).

**8. The adoption of the deliberate indifference standard for institutions allows agencies to essentially do nothing in response to sexual harassment allegations and removes accountability for failing to support or protect student survivors.**

Proposed § 106.44(a) adopts a deliberate indifference standard, includes an actual knowledge requirement, and narrows the definition of sexual harassment. The deliberate indifference recommendation, in effect, eliminated the Department as an avenue for survivors to pursue recourse when their institutions fail to address or protect them from sexual harassment. When institutions are not held accountable, abusers and rapists can continue their crimes on other students and complete their educations, while victims drop out to avoid further victimization.

One of the primary functions of the Department is to provide regulatory oversight to institutions and prevent discrimination. The standard is abdicating this responsibility of the Department, and turning its back on victims and ensuring survivors don't have recourse against their institutions. This is a huge step back for the Department and our country.

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FCASV 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 and assault. Thank you for the opportunity to submit comments on the NPRM. Please do not hesitate to contact Theresa Prichard, Esq. to provide further information.

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