

January 30, 2019

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Submitted electronically

RE: Docket ED-2018-OCR-0064-0001, Department of Education RIN1870-AA14,
Proposed Rules for Nondiscrimination on the Basis of Sex in Education
Programs or Activities Receiving Federal Financial Assistance

Dear Ms. Bull:

YWCA USA submits these comments on the proposed rules published at 83 FR 61462 (November 29, 2018), RIN 1870-AA14, with the title, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (the “Proposed Rules” or “Rules”).

As one of the oldest and largest women’s organizations in the nation, YWCA USA is dedicated to eliminating racism, empowering women, and promoting peace, justice, freedom, and dignity for all. Today, we serve over 2 million women, girls, and their families through a network of 210 local associations in 46 states and the District of Columbia by combining programming and advocacy to generate lasting change in the areas of racial justice and civil rights, empowerment and economic advancement for women and girls, and health and safety of women and girls.

Annually, YWCAs serve more than 89,000 women, girls, and community members across 28 states through programs that address sexual violence. Together, YWCAs comprise the largest national network of direct providers of comprehensive sexual violence survivor services in the United States. YWCAs provide needed care and support for survivors through hotlines; emergency housing; crisis response, intervention, and support; HIV/AIDS/STD services; counseling and ACE assessments; resources and advocacy while undergoing law enforcement and medical procedures; and case management services. Our programs serve survivors from all populations, races, ethnicities, sexualities, and gender identities in culturally-sensitive ways.

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YWCA believes that all students deserve to access the full range of educational opportunities in safe, supportive learning environments, and that the Department of Education is a key partner in this endeavor. However, too many of our young people continue to experience barriers to educational success in the form of sexual harassment and assault. This is especially true for students who have been historically marginalized, including students of color, those who are immigrants, LGBTQ+, or who have a disability. This is why we write to express our strong opposition to the Proposed Rules, which would fail to respond to the realities of sexual violence in schools. Additionally, the Proposed Rules would discourage reporting of sexual violence, and prioritize protecting schools over protecting survivors. Finally, the Proposed Rules would impermissibly tilt the process in favor of named harassers, retraumatize complainants, and conflict with Title IX's nondiscrimination mandate.

I. **Title IX's implementation rules must be responsive to the realities of sexual violence in schools, including the prevalence of sexual violence, existing barriers to reporting, and the devastating impacts on survivors when schools fail to provide effective responses.**

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.¹ More than 1 in 5 girls ages 14-18 are kissed or touched without their consent.²
- During college, 62% of women and 61% of men experience sexual harassment.³ More than 1 in 5 women and nearly 1 in 18 men are sexually assaulted in college.⁴
- Men and boys are far more likely to be victims of sexual assault than to be falsely accused of it.⁵

¹ Catherine Hill & Holly Kearn, *Crossing the Line: Sexual Harassment at School*, AAUW (2011) [hereinafter *Crossing the Line*], available at <https://www.aauw.org/research/crossing-the-line>.

² National Women's Law Center, *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence 1* (Apr. 2017) [hereinafter *Let Her Learn: Sexual Harassment and Violence*], available at <https://nwlc.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence>.

³ Catherine Hill & Elena Silva, *Drawing the Line: Sexual Harassment on Campus*, AAUW 17, 19 (2005) [hereinafter *Drawing the Line*], available at <https://history.aauw.org/aauw-research/2006-drawing-the-line> (noting differences in the types of sexual harassment and reactions to it).

⁴ E.g., David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, ASSOCIATION OF AMERICAN UNIVERSITIES 13-14 (Sept. 2015) [hereinafter *AAU Campus Climate Survey*], available at <https://www.aau.edu/key-issues/aau-climate-survey-sexual-assault-and-sexual-misconduct-2015>.

⁵ E.g., Tyler Kingkade, *Males Are More Likely To Suffer Sexual Assault Than To Be Falsely Accused Of It*, HUFFINGTON POST (Dec. 8, 2014) [last updated Oct. 16, 2015], https://www.huffingtonpost.com/2014/12/08/false-rape-accusations_n_6290380.html.

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

- 24 percent of Latina girls, 23 percent of Native American girls, and 22 percent of Black girls are kissed or touched without their consent.⁶
- More than half of LGBTQ students ages 13-21 are sexually harassed at school.⁷
- Nearly 1 in 4 transgender and gender-nonconforming students are sexually assaulted during college.⁸
- 78% of transgender or gender non-conforming youth are sexually harassed during grades K-12, and 12% experience other sexual violence. Those who are Native American, Black, and multi-racial experience higher rates of sexual violence than students of other races, with 58% experiencing harassment or sexual assault.⁹
- Students with disabilities are 2.9 times more likely than their peers to be sexually assaulted.¹⁰
- While 6 percent of girls overall report being forced to have sex when they do not want to, and these rates are higher for LGBTQ girls (15 percent), girls who are 18 years old (13 percent), Native American girls (11 percent), Black girls (9 percent), and Latinas (7 percent).¹¹

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

- Nearly 9 in 10 college students live off campus.¹²
 - 41% of college sexual assaults involve off-campus parties.¹³
- Students are far more likely to experience sexual assault if they

⁶ *Let Her Learn: Sexual Harassment and Violence*, supra note 2 at 3.

⁷ Joseph G. Kosciw et al., *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools*, GLSEN 26 (2018) [hereinafter *2017 National School Climate Survey*], available at <https://www.glsen.org/article/2017-national-school-climate-survey-1>.

⁸ *AAU Campus Climate Survey*, supra note 4 at 13-14.

⁹ Grant, J. M., Mottet, L. A., Tanis, J., Harrison, J., Herman, J. L., & Keisling, M. (2011). Injustice at every turn: A report of the National Gender Discrimination Survey. Retrieved from The National Gay and Lesbian Task Force: http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf

¹⁰ National Women's Law Center, *Let Her Learn: Stopping School Pushout for: Girls With Disabilities* 7 (2017) [hereinafter *Let Her Learn: Girls with Disabilities*], available at <https://nwlc.org/resources/stopping-school-pushout-for-girls-with-disabilities>.

¹¹ *Let Her Learn: Sexual Harassment and Violence*, supra note 2 at 3.

¹² Rochelle Sharpe, *How Much Does Living Off-Campus Cost? Who Knows?*, NEW YORK TIMES (Aug. 5, 2016), <https://www.nytimes.com/2016/08/07/education/edlife/how-much-does-living-off-campus-cost-who-knows.html> (87%).

¹³ United Educators, *Facts From United Educators' Report - Confronting Campus Sexual Assault: An Examination of Higher Education Claims*, https://www.ue.org/sexual_assault_claims_study.

are in a sorority (nearly 1.5x more likely) or fraternity (nearly 3x more likely).¹⁴

- Only 8% of all sexual assaults occur on school property.¹⁵

Reporting sexual violence is a significant challenge for survivors. Already, only 12% of college survivors¹⁶ and 2% of girls ages 14-18¹⁷ 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.¹⁸ Some students—especially students of color, undocumented students,¹⁹ LGBTQ students,²⁰ 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.

Ineffective responses by schools to reports of sexual violence significantly and negatively impact survivors. When schools fail to provide effective responses, the impact of sexual violence can be devastating.²¹ 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.²² For example, 34% of college survivors drop out of college.²³ Others, particularly girls of color, are pushed in to the juvenile justice system when their educational institutional fail to provide them with appropriate care and resources after the trauma they have experienced.²⁴

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¹⁴ Jennifer J. Freyd, *The UO Sexual Violence and Institutional Betrayal Surveys: 2014, 2015, and 2015-2016* (Oct. 16, 2014), available at <https://www.uwire.com/2014/10/16/sexual-assault-more-prevalent-in-fraternities-and-sororities-study-finds> (finding that 48.1% of females and 23.6% of males in Fraternity and Sorority Life have experienced non-consensual sexual contact, compared with 33.1% of females and 7.9% of males not in FSL).

¹⁵ RAINN, *Scope of the Problem: Statistics*, <https://www.rainn.org/statistics/scope-problem>.

¹⁶ *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>.

¹⁷ *Let Her Learn: Sexual Harassment and Violence*, *supra* note 2 at 1.

¹⁸ RAINN, *Campus Sexual Violence: Statistics*, <https://www.rainn.org/statistics/campus-sexual-violence>.

¹⁹ See Jennifer Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation*, NY TIMES (April 30, 2017), <https://www.nytimes.com/2017/04/30/us/immigrants-deportation-sexual-abuse.html?mcubz=3>.

²⁰ National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey: Executive Summary* 12 (Dec. 2016) [hereinafter *2015 U.S. Transgender Survey*], available at <https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf>.

²¹ 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/qvzpd/i-dropped-out-of-college-because-i-couldnt-bear-to-see-my-rapist-on-campus.

²² 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>.

²³ 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>.

²⁴ YWCA USA, *On a Mission for Girls of Color: Inequality at School* (2016).

http://intranet.ywca.org/atf/cf/%7B38f90928-ee78-4ce9-a81e-7298da01493e%7D/WHY_WOMEN_OF_COLOR_MINI_PAPER.PDF.

II. The Proposed Rules would discourage reporting of sexual harassment and assault and prioritize protecting schools over protecting survivors.

a. 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)

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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.”²⁵ This is a dramatic change, as the Department has long required schools to address *student-on-student* sexual harassment if almost any school employee²⁶ either knows about it or should reasonably have known about it.²⁷ 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.”²⁸ 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.²⁹ If a K-12 student told a teacher that she had been sexually assaulted by another teacher or

²⁵ Proposed rule § 106.30.

²⁶ This duty applies to “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.” U.S. Department of Educ., Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001) [hereinafter 2001 Guidance], available at <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>.

²⁷ *Id.* at 14.

²⁸ *Id.* at 10.

²⁹ See proposed rule § 106.30 (83 Fed. Reg. 61496) (for K-12, limiting notice to “a teacher in the elementary and secondary context with regard to student-on-student harassment).



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other school employee, the school would have no obligation to help her.³⁰ 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.

b. 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”³¹ 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.”³² 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.

³⁰ See *id.*

³¹ Proposed rule § 106.30.

³² 2001 Guidance, *supra* note 26.



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The Department repeatedly attempts to justify its proposed definition by citing “academic freedom and free speech.”³³ But harassment is not protected speech if it creates a “hostile environment,”³⁴ i.e., if the harassment limits a student’s ability to participate in or benefit from a school program or activity.³⁵ 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.”³⁶ There is no conflict between Title IX’s regulation of sexually harassing speech in schools and the First Amendment.

c. 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, in direct contravention of Title IX’s statutory language.

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. 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”³⁷ 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,”³⁸ regardless of where it occurs.³⁹

³³ 83 Fed. Reg. 61464, 61484. *See also* § 106.6(d)(1), which states that nothing in Title IX requires a school to “[r]estrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution.”

³⁴ *See* Joanna L. Grossman & Deborah L. Brake, *A Sharp Backward Turn: Department of Education Proposes to Protect Schools, Not Students, in Cases of Sexual Violence*, VERDICT (Nov. 29, 2018) [hereinafter *A Sharp Backward Turn*], available at <https://verdict.justia.com/2018/11/29/a-sharp-backward-turn-department-of-education-proposes-to-protect-schools-not-students-in-cases-of-sexual-violence>. (“There is no legitimate First Amendment or academic freedom protection afforded to unwelcome sexual conduct that creates a hostile educational environment.”).

³⁵ 2001 Guidance, *supra* note 26.

³⁶ 393 U.S. 503, 513, 514 (1969).

³⁷ 20 U.S.C. § 1681(a).

³⁸ 2001 Guidance, *supra* note 26.

³⁹ U.S. Dep’t of Educ. *Office for Civil Rights, Questions and Answers on Campus Sexual Misconduct* (Sept. 2017) [hereinafter 2017 Guidance], available at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>. at 1 n.3 (“Schools are responsible for redressing a hostile environment that occurs on campus

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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.⁴⁰ The negative impact on the student's education is typically the same if they are forced to see their harasser regularly at school. If a middle school student is being sexually harassed by her classmates on Instagram or Snapchat outside of school, or on the way to/from school in a private carpool, her school would be forbidden from doing anything—even if she's too afraid to show up to class and face her harassers anymore. And almost 9 in 10 college students live off campus,⁴¹ 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 and sorority houses,⁴² this is particularly troubling: students of all genders are more likely to be sexually assaulted if they belong to a fraternity or sorority.⁴³

III. The grievance procedures required by the Proposed Rules would impermissibly tilt the process in favor of named harassers,

even if it relates to off-campus activities"); U.S. Dep't of Educ. Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence 1-2* (Apr. 29, 2014) [hereinafter 2014 Guidance], available at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> ("a school must process all complaints of sexual violence, regardless of where the conduct occurred"); U.S. Dep't of Educ. Office of Civil Rights, *Dear Colleague Letter: Sexual Violence* at 4, 6, 9, &16 (Apr. 4, 2011) [hereinafter 2011 Guidance], available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> ("Schools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school's education program or activity"); U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter: Harassment and Bullying* (Oct. 26, 2010) [hereinafter 2010 Guidance], available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (finding Title IX violation where "conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school," regardless of location of harassment).

⁴⁰ The Department itself admitted in the previous leaked draft of the NPRM that 41% of college sexual assaults occur off campus. See Letter from Anne C. Agnew to Paula Stannard et al., *HHS Review: Department of Education Regulation – Noon September 10*, U.S. DEP'T OF HEALTH & HUMAN SERVICES 79 n.21 (Sept. 5, 2018) [hereinafter Draft NPRM], available at <https://atixa.org/wordpress/wp-content/uploads/2018/09/Draft-OCR-regulations-September-2018.pdf>.

⁴¹ Sharpe, *How Much Does Living Off-Campus Cost?*, *supra* note 12..

⁴² Although the preamble mentions one case where a Kansas State college fraternity was considered an "education program or activity" for the purposes of Title IX, the Department emphasizes that there are many "factors" and that the determination would be specific to each incident. For example, it would depend on whether the school "owned the premises; exercised oversight, supervision, or discipline; or funded, sponsored, promoted, or endorsed the event or circumstance" (83 Fed. Reg. 61468). This multi-factor test is not only unnecessarily unclear and confusing but also is not included in the proposed regulatory language, making it difficult for students and schools to understand their rights and obligations under Title IX. Schools might certainly conclude that § 106.30 and § 106.45(b)(3) mandates dismissal of complaints from all students who are sexually assaulted at unrecognized fraternities, sororities, and other unrecognized social clubs; at unaffiliated local bars and clubs; in non-residential housing; and through online channels in many instances.

⁴³ Freyd, *supra* note 14..

**retraumatize complainants, and conflict with Title IX’s
nondiscrimination mandate.**

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.⁴⁴ The Proposed Rules purport to require “equitable” processes as well.⁴⁵ 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.

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**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.⁴⁶ The presumption of innocence is a criminal law principle, incorrectly imported into this context⁴⁷; 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.⁴⁸ Schools may be more likely to ignore or punish survivors who are women and girls of color,⁴⁹ pregnant and parenting

⁴⁴ 34 C.F.R. § 106.8(b).

⁴⁵ See proposed rule § 106.8(c).

⁴⁶ Indeed, the data shows that men and boys are far more likely to be victims of sexual assault than to be falsely accused of it. See, e.g., Kingkade, *supra* note 5.

⁴⁷ See also the Department’s reference to “inculpatory and exculpatory evidence” (§ 106.45(b)(1)(ii)), the Department’s assertion that “guilt [should] not [be] predetermined” (83 Fed. Reg. 61464), and Secretary DeVos’s discussion of the “presumption of innocence” (Betsy DeVos, *Betsy DeVos: It’s time we balance the scales of justice in our schools*, Washington Post (Nov. 20, 2018), https://www.washingtonpost.com/opinions/betsy-devos-its-time-we-balance-the-scales-of-justice-in-our-schools/2018/11/20/8dc59348-ecd6-11e8-9236-bb94154151d2_story.html).

⁴⁸ E.g., Tyler Kingkade, *When Colleges Threaten To Punish Students Who Report Sexual Violence*, HUFFINGTON POST (Sept. 9, 2015), https://www.huffingtonpost.com/entry/sexual-assault-victims-punishment_us_55ada33de4b0caf721b3b61c.

⁴⁹ E.g., Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARVARD J.L. & GENDER 1, 16, 24-29 (forthcoming), available at <https://ssrn.com/abstract=3168909>; National Women’s Law Center, *Let Her Learn: A Toolkit To Stop School Pushout for Girls of Color 1* (2016) [hereinafter *Let Her Learn: Girls of Color*], available at <https://nwlc.org/resources/let-her-learn-a-toolkit-to-stop-school-push-out-for-girls-of-color>.

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students,⁵⁰ and LGBTQ students⁵¹ because of harmful race and sex stereotypes that label them as “promiscuous.”

Women and girls of color already face unfair discipline due to race and sex stereotypes.⁵² 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.”⁵³ For example, Black women and girls are commonly stereotyped as “Jezebels,” Latinx 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).⁵⁴ 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.⁵⁵ The Department’s 2015-16 CRDC again shows that Black girls are more likely to be suspended and expelled than other girls.⁵⁶ 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.”⁵⁷

⁵⁰ Chambers & Erausquin, *The Promise of Intersectional Stigma to Understand the Complexities of Adolescent Pregnancy and Motherhood*, JOURNAL OF CHILD ADOLESCENT BEHAVIOR (2015), available at <https://www.omicsonline.org/open-access/the-promise-of-intersectional-stigma-to-understand-the-complexities-of-adolescent-pregnancy-and-motherhood-2375-4494-1000249.pdf>.

⁵¹ See e.g., David Pinsof, et al., *The Effect of the Promiscuity Stereotype on Opposition to Gay Rights* (2017), available at <https://doi.org/10.1371/journal.pone.0178534>.

⁵² National Women’s Law Center, *Let Her Learn: A Toolkit To Stop School Pushout for Girls of Color 1* (2016) [hereinafter *Let Her Learn: Girls of Color*], available at <https://nwlc.org/resources/let-her-learn-a-toolkit-to-stop-school-push-out-for-girls-of-color>.

⁵³ E.g., Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARVARD J.L. & GENDER 1, 16, 24-29 (forthcoming), available at <https://ssrn.com/abstract=3168909>.

⁵⁴ *Id.* at 24-25.

⁵⁵ U.S. Dep’t of Education, Office for Civil Rights, *A First Look: Key Data Highlights on Equity and Opportunity Gaps in Our Nation’s Public Schools*, at 3 (June 7, 2016; last updated Oct. 28, 2016), available at <https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf>.

⁵⁶ U.S. Dep’t of Education, Office for Civil Rights, *School Climate and Safety: Data Highlights on School Climate and Safety In Our Nation’s Public Schools* (Apr. 2018), available at <https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf>.

⁵⁷ NAACP Legal Defense and Educational Fund, Inc. & National Women’s Law Center, *Unlocking Opportunity for African American Girls: A Call to Action for Educational Equity* 5, 18, 20, 25 (2014), available at https://nwlc.org/wp-content/uploads/2015/08/unlocking_opportunity_for_african_american_girls_report.pdf. See also Sonja C. Tonnesen, *Commentary: “Hit It and Quit It”: Responses to Black Girls’ Victimization in School*, 28 BERKELEY J. GENDER, L. & JUST. 1 (2013), available at <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1312&context=bgj>.

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LGBTQ students are also 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,⁵⁸ and nearly 1 in 4 transgender and gender-nonconforming students are sexually assaulted during college.⁵⁹ 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.⁶⁰ They are also less likely to be believed due to stereotypes that they are more “promiscuous” or bring the “attention” upon themselves.

The presumption required by § 106.45(b)(1)(iv) conflicts with the current Title IX rules⁶¹ and other Proposed Rules,⁶² 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 experienced⁶³ 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

⁵⁸ 2017 National School Climate Survey, *supra* note 7 at 26.

⁵⁹ AAU Campus Climate Survey, *supra* note 4 at 13-14 (Sept. 2015), available at <https://www.aau.edu/key-issues/aaucampusclimate-survey-sexual-assault-and-sexual-misconduct-2015>.

⁶⁰ 2015 U.S. Transgender Survey, *supra* note 20 at 12.

⁶¹ 34 C.F.R. § 106.8(b).

⁶² Proposed rules §§ 106.8(c) and 106.45(b).

⁶³ Zydervelt, S., Zajac, R., Kaladelfos, A. and Westera, N., *Lawyers’ Strategies for Cross-Examining Rape Complainants: Have we Moved Beyond the 1950s?*, BRITISH JOURNAL OF CRIMINOLOGY, 57(3), 551-569 (2016).

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 could also reinforce racial and class-based 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 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,⁶⁴ 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.

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.”⁶⁵ The Proposed Rule would allow schools to pressure survivors, including minors, into giving “consent” to mediation and

⁶⁴ 83 Fed. Reg. 61476.

⁶⁵ NASPA - Student Affairs Administrators in Higher Education, *NASPA Priorities for Title IX: Sexual Violence Prevention & Response 1-2* [hereinafter *NASPA Title IX Priorities*], available at https://www.naspa.org/images/uploads/main/NASPA_Priorities_re_Title_IX_Sexual_Assault_FINAL.pdf.

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.

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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.⁶⁶ 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.⁶⁷ 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.⁶⁸

The preponderance standard is used by courts in all civil rights cases.⁶⁹ 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

⁶⁶ The Department has required schools to use the preponderance standard in Title IX investigations since as early as 1995 and throughout both Republican and Democratic administrations. For example, its April 1995 letter to Evergreen State College concluded that its use of the clear and convincing standard “adhere[d] to a heavier burden of proof than that which is required under Title IX” and that the College was “not in compliance with Title IX.” U.S. Dep’t of Educ., Office for Civil Rights, *Letter from Gary Jackson, Regional Civil Rights Director, Region X, to Jane Jervis, President, The Evergreen State College* (Apr. 4, 1995), at 8, available at http://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed_ehd_1995.pdf. Similarly, the Department’s October 2003 letter to Georgetown University reiterated that “in order for a recipient’s sexual harassment grievance procedures to be consistent with Title IX standards, the recipient must . . . us[e] a preponderance of the evidence standard.” U.S. Dep’t of Educ., Office for Civil Rights, *Letter from Howard Kallem, Chief Attorney, D.C. Enforcement Office, to Jane E. Genster, Vice President and General Counsel, Georgetown University* (Oct. 16, 2003), at 1, available at <http://www.ncherm.org/documents/202-GeorgetownUniversity--110302017Genster.pdf>.

⁶⁷ Proposed rule § 106.45(b)(4)(i) permits schools to use the preponderance standard *only* if it uses that standard for all other student misconduct cases that carry the same maximum sanction *and* for all cases against employees. This is a one-way ratchet: a school would be permitted to use the higher clear and convincing evidence standard in sexual assault cases, while using a lower standard in all other cases.

⁶⁸ *E.g.*, Kingkade, *supra* note 5.

⁶⁹ Katharine Baker et al., *Title IX & the Preponderance of the Evidence: A White Paper* (July 18, 2017), available at <http://www.feministlawprofessors.com/wp-content/uploads/2017/07/Title-IX-Preponderance-White-Paper-signed-7.18.17-2.pdf> (signed by 90 law professors).

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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.⁷⁰ 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.⁷¹ 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.

Students, particularly women and those from marginalized communities rely on the Department’s enforcement of Title IX to ensure their access to educational opportunities. The Proposed Rules would significantly harm this crucial right and would set back decades of progress against sexual harassment and violence in our schools. To address these and other concerns, YWCA USA urges the Department to reject the Proposed Rules in their entirety.

YWCA appreciates the opportunity to share our views with you. If you have any questions, please contact YWCA USA Vice President of Public Policy and Advocacy Catherine Beane, at cbeane@ywca.org or 202-835-2354.

Sincerely



Alejandra Y. Castillo, CEO YWCA USA

⁷⁰ 83 Fed. Reg. 61477.

⁷¹ 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>.