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The Women's Legal Defense and Education Fund

January 28, 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: 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 Legal Momentum, the Women's Legal Defense and Education Fund, (Legal Momentum) in response to the Department of Education's (ED) Notice of Proposed Rulemaking (NPRM or proposed rules) to express our strong opposition to, and grave concern regarding, the proposed rules relating to sexual harassment as published in the Federal Register on November 29, 2018.

Legal Momentum (www.legalmomentum.org), at nearly 50 years old, is the nation's oldest civil rights organization dedicated to advancing the rights of women and girls. Critical to advancing equal opportunities for women and girls in education is ensuring learning spaces are free from gender-based harassment and violence. Legal Momentum has long advocated for policies and practices which promote this. The proposed rules turn back the clock and jeopardize the safety of school communities and equality at large. I personally have over a decade of experience responding to sexual harassment and violence, first, as a sex crimes/child abuse prosecutor, and then as the Title IX Coordinator for the largest public K-12 school district in the country. I know firsthand the impact of sexual harassment and violence on a victim's life and education. I know the limitations of the criminal justice system in addressing that harm. I also know firsthand the power of schools to positively diminish that impact and am uniquely familiar with the ways in which schools implement policies aimed at preventing and responding to sexual harassment. The proposed rules will actually inhibit schools from effectively responding to sexual harassment—giving schools less flexibility and imposing more rigidity in what constitutes compliance—and will impose costs well beyond what is contemplated by the Department of Education. Victims will suffer.

Title IX of the Education Amendments of 1972 exists to ensure that no student's education is denied or limited on the basis of their sex. Sexual harassment and/or sexual assault should never be the reason that an education is altered or interrupted. The individual and societal economic impact of any person not achieving their education is tangible. The lifetime financial cost of

sexual assault to the individual victim is estimated between $87,000 to $240,776[1], an estimate which includes lowered educational attainment and lost wages. The national economic burden of sexual violence has been estimated at $263 billion a year.[2] The proposed rules permit, and in places *require*, institutions to refuse to respond to many instances of sexual harassment and violence. The outcome can only mean greater cost. Devastation will be endured by victims. Additionally, the proposed rules will cause significant costs to schools, well beyond what the NPRM acknowledges; to overhaul policies, to try to protect their communities while also complying with the proposed rules which do not promote safety, to meet their obligations under both the proposed rules and those established obligations with which these proposed rules conflict. The proposed rules are legally flawed, bad policy, and diminish the mandate of Title IX.

Because the proposed rules mandate a system that will fail to effectively address sexual harassment, will hamper victims' and survivors' attempts to access services and support, and will hinder schools from protecting their own communities, Legal Momentum opposes promulgation of these rules. Numerous specific problematic provisions, expanded upon below, lead us to this position.

1. The Proposed Rules Limit Who is Entitled to the Protections of Title IX

The proposed rules contain several provisions which limit who would receive a response to their victimization from their school and thereby, limits who receives the protections of Title IX.

a. Definition of Harassment, NPRM §§106.30, 106.45(b)(3)

The proposed rules amend the definition of harassment based on sex to include only conduct that is "(i) an employee [of the school] conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; (ii) 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; or (iii) sexual assault." The proposed rules *require* schools to dismiss any formal complaint that does not allege conduct fitting within the preceding proposed definition.

This definition contravenes Supreme Court precedent and the Department of Education's own properly-noticed 2001 guidance defining sexual harassment as "unwelcome conduct of a sexual nature" [3] and narrows conduct warranting an institutional response to those circumstances in which a student's educational access has been "effectively denie[d]." There is no legally sound justification for adopting as the standard by which schools should measure their need to respond to sexual harassment/violence, the legal standard for recovery of monetary damages to remedy a Title IX violation. Even in setting out the high bar for recovery of money

[1] "Rape and Sexual Assault: A Renewed Call to Action," The White House Council on Women and Girls, January 2014, citing Miller, T.R., Cohen, M.A., & Wiersema, B. (1996). Victim costs and consequences: A new look. National Institute of Justice. https://www.ncjrs.gov/pdffiles/victcost.pdf; Delisi, M. (2010). Murder by numbers: Monetary costs imposed by a sample of homicide offenders. The Journal of Forensic Psychiatry & Psychology, 21, 501-513.; Cohen, M. A., and Piquero, A.R. (2009) "New Evidence on the Monetary Value of Saving a High Risk Youth," Journal of Quantitative Criminology, 25(1), 25–49. French, Michael T., Kathryn E. McCollister, and David Reznik (2010) The Cost of Crime to Society: New Crime-Specific Estimates for Policy and Program Evaluation. Drug Alcohol Dependence, 108(1-2), 98-109.

[2] Peterson, C., DeGue, S., Florence, C., Lokey, C., "Lifetime Economic Burden of Rape Among U.S. Adults," June 2017, National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, Atlanta, Georgia.

[3] U.S. Department of Education, Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001), available at https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html.

damages under Title IX, the Supreme Court recognized that federal departments and agencies are free to promulgate rules to carry out the objectives of Title IX.[4] These objectives include the prevention of discriminatory harm so great as to effectively deny one's education. The *requirement* that schools dismiss any complaint not fitting this unjustifiably narrow definition will put schools in the untenable position of standing idly by while harmful conduct is perpetrated, waiting for it to rise to the level fitting this definition. Victims will suffer unnecessarily and educations will be needlessly interrupted, resulting in real costs to the individual and society over their lifetime. Schools will find themselves defending their actions at great litigation costs not anticipated by the proposed rules.

Additionally, when considered in the K-12 setting--one of compulsory education--adopting this narrow definition has the perverse effect of requiring sexual harassment against children to be markedly more severe for their school to be able to respond than would be permitted to go on in a workplace before triggering an obligation for an employer to respond. No rationale, legal or otherwise, exists which justifies this.

b. Conduct perpetrated off-campus or online, NPRM §§106.30, 106.45(b)(3)

The proposed rules *require* schools to dismiss any formal complaint that involves conduct that "did not occur within the school's program or activity."

This contradicts Title IX jurisprudence recognizing that schools can be held responsible for discriminatory harassment that occurs outside of a school program or activity but which limits or denies a victim's education.[5] It contravenes the Clery Act's reporting requirements, which include off-campus incidents within certain geography.[6] And it conflicts with some states' laws, including New York, which require schools to respond to off-campus and online sexual harassment and assault.[7]

It is also uninformed, bad policy. 87% of college students live off-campus.[8] Only 8% of sexual assaults are perpetrated on school property.[9] Mandated data collection in New York State recently revealed that 48% of incidents of dating violence, domestic violence, sexual assault, and stalking reported to school Title IX Coordinators involved incidents that were perpetrated off-campus.[10] Additionally, given the digital world we live in—most especially among K-12 and college populations—the perpetration of sexual harassment and violence most often includes, or takes part exclusively on, social media and internet-based applications. As students travel to and from school property and programs, this conduct persists and has a serious impact on victims' physical and emotional safety and ability to continue their educations uninterrupted.

Nothing exists to suggest that the perpetration of sexual harassment or assault off-campus or online has any less impact on survivors' educations than when tormented by their perpetrators in-person, on-campus and therefore, demands an institutional response and amounts to discrimination under Title IX.

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[4] *See Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).
[5] *See e.g., Feminist Majority Foundation v. Hurley*, 2018 U.S. App. LEXIS 35556 (4th Cir. 2019)
[6] 34 C.F.R 668.46
[7] New York Education Law 129-B
[8] "How Much Does Living Off Campus Cost? Who Knows," *The New York Times*, August 5, 2016, available at https://www.nytimes.com/2016/08/07/education/edlife/how-much-does-living-off-campus-cost-who-knows.html.
[9] "Scope of the Problem: Statistics," Rape, Abuse & Incest National Network, available at https://www.rainn.org/statistics/scope-problem.
[10] "Enough is Enough" Interim Aggregate Data Report, New York State Education Department (November 8, 2018), available at http://www.highered.nysed.gov/oris/enoughisenough.html.

c. Notice, §§ 106.30, 106.44(a)

The proposed rules only impose an obligation on schools to respond to sexual harassment and violence upon *actual knowledge* of the harassment by a Title IX Coordinator or an official who has "the authority to institute corrective actions on behalf of the [school]"; or, with regard to peer-to-peer sexual harassment in the K-12 setting only, a teacher.

This puts an onerous burden on victims to seek out the proper person to whom to complain about sexual harassment and assault and gives schools permission to ignore sexual harassment. There are many professionals to whom a victim would likely turn before those who establish actual notice to the school. In the higher education setting, a professor, a resident's assistant, or an athletic coach are all logical and likely people to whom a victim may turn. Yet none of those disclosures would require the school to respond to the harassment. In the K-12 setting, where the student population is exclusively *children*, this rule is particularly troublesome. School-based staff who have the most contact with students, including guidance counselors, teacher's aides, athletics coaches, and lunchroom and playground monitors are all exempted. None of these student-facing professionals would qualify as the type deemed to put the school on notice. Children will not always want, or be able to, turn to their parents. A fourth grader is unlikely to have access to the information necessary to understand she must find the school's Title IX Coordinator or disclose to her teacher. Schools would be permitted to turn a blind eye to harassment unless and until a child figures out the narrow group of people to whom she or he must complain. Additionally, for those children subjected to sexual harassment or assault by a school employee, even a disclosure to a teacher would not constitute actual knowledge on the part of the school to act. In the K-12 context, this proposed provision likely conflicts with states' mandatory reporting laws for certain instances sexual abuse and assault.

Under this proposed rule, victims who have the courage to seek help will be abandoned. This will have a devastating impact on their ability to continue their educations and will deter victims from seeking assistance again. The harms suffered in the aftermath of sexual harassment/assault will go untreated, will persist, and will likely be exacerbated.

2. <u>The Proposed Rules Purport to Provide Due Process Protections but Actually Create an Inequitable Administrative Response.</u>

Several provisions of the proposed rules purport to provide greater due process protections. In fact, the proposed rules contravene the hallmark of Title IX's mandate, that which requires an "equitable" response to complaints of sexual harassment/assault. The inequities presented by the proposed rules will be suffered by victims and survivors.

a. Standard of Proof, § 106.45(b)(4)(i)

The proposed rules, under most circumstances, require schools to use the "clear and convincing" burden of proof. Under the proposed rules, schools are only permitted to use the "preponderance of the evidence" standard when this standard is used for all other misconduct that carries the same maximum disciplinary sanction and when it uses this standard in adjudicating complaints against employees.

The "preponderance of the evidence" standard is, by nature, equitable. It places no burden on either party. It simply requires evidence, presented by either party, that the allegations were "more likely than not" true. By

contrast, any heightened standard necessarily imposes a burden on one party – the "charging" or "accusing" party. Not only is the "clear and convincing" standard unnecessary to affording due process, it is inherently inequitable. Additionally, the "preponderance of the evidence" standard leaves less room for error. It is simply understood as "more likely than not." The school grievance process, at any institution, is not conducted by attorneys or judges with years of experience studying and applying standards of proof. The "clear and convincing" standard is amorphous and vague. Further, the inequity presented by this standard will not be balanced with the complex standards of evidence employed in a courtroom. The standard will not be easily understood and, already inherently inequitable, its application will be inconsistent. The inconsistent and inequitable resolutions of complaints will expose both victims and those accused of violations to unjust processes and will expose schools to litigation costs and greater liability for failed application of the standard.

There is no justification for the proposition that the "preponderance" standard does not meet the goals of Title IX and does not protect a student's due process rights. The "preponderance" standard is used in all civil rights litigation. It is also used in the adjudication of civil rights administrative cases that involve discrimination based upon other protected characteristics. The Department of Education applies the "preponderance" standard to cases under Title VI of the Civil Rights Act of 1964, which prohibits discrimination in education on the basis of race, color, or national origin. The U.S. Equal Employment Opportunity Commission applies the "preponderance" standard to hearings adjudicating discrimination in federal employment. Perhaps the most egregious imbalance to applying any standard other than the "preponderance" in these Title IX grievance processes is the fact that any legal challenge by a student disciplined as a result of this process will utilize the "preponderance" standard in that court action.

Tying the standard of proof in peer-to-peer harassment with standards used in complaints against employees is also flawed. The reality in educational institutions, both K-12 districts and institutions of higher education, is that many employees are subject to employment contracts or union collective bargaining agreements. These often dictate specific standards for adjudicating grievances. Despite the fact that the proposed rules purport to give schools choice, schools will be forced to use the "clear and convincing" standard if they are contractually obligated to employ anything other than the "preponderance of the evidence" standard for an employee. In order to change that, schools must expend great resources to renegotiate contracts and collective bargaining agreements—likely multiple such contracts. A 2002 report, funded by the Department of Justice, revealed that, at that time, 80% of schools were already using the "preponderance of the evidence" standard.[11] The proposed rules would require an overhaul of grievance procedures—likely not just those involving sexual harassment/assault—in order to comply with the inequitable requirement of the proposed rules. Overhaul of school disciplinary procedures is no small task. It is resource intensive and requires involvement by many various administrators and educators. It often requires action or review by boards of trustees or local government bodies. Any change to the standard of proof will require intensive training for any person involved in the grievance process—a great expense, especially for those schools that took seriously the charge to adequately train those people in the "preponderance" standard. All of this will cause great confusion and survivors seeking safety and response to their victimization will get lost.

The regulations should give schools a clear path to promptly and equitably carry out grievance procedures. The proposed rules do anything but provide clear guidance.

[11] Karkane, H., Fisher, B., Cullen, F., "Campus Sexual Assault: How America's Institutions of Higher Education Respond," October 2002, available at https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf/

b. Cross-Examination, § 106.45(b)(3)(vi)-(vii)

The proposed rules require cross-examination of parties and witnesses during the grievance process. Under the proposed rules, K-12 schools must ask questions of both parties but may do so by either (i) conducting a live hearing or (ii) having each party submit written questions for the other party to answer. Institutions of higher education *must* conduct a live hearing during which parties and witnesses submit to cross-examination by the other party's advisor of choice. Additionally, the proposed rules mandate that a school "must not rely on any statement" of a student party or witness who does not submit to cross-examination.

Cross-examination is a hallmark component of judging evidence in our justice system. But it is not without boundaries or structure. Critical safeguards are deeply engrained in the practice of cross-examination. In state and federal courts there are statutorily mandated rules of evidence by which the cross-examiner is legally bound (e.g., the Federal Rules of Evidence). Cross-examinations are conducted by attorneys responsible for knowing the rules and applying them ethically. There is oversight by judges with expertise in the rules of evidence and a neutral eye to apply them. There are mechanisms for review of cross-examination questions during trial and depositions and on appeal. The foremost problem with mandated cross-examination in school grievance processes is that none of these safeguards exist. Nor should they – the justice system is a separate, parallel, track for adjudicating acts of discrimination. The prompt and equitable resolution of sexual harassment/assault on campus so as to protect the victim and school community is not that forum.

Sexual assault survivors have been long been subjected to repeated victimization by abusive cross-examination tactics. The proposed rules attempt to limit cross-examination by mimicking "rape shield laws" found in federal and state rules of evidence by "exclud[ing] evidence of the complainant's sexual behavior or predisposition, unless such evidence about the complainant's sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent." The application of rape shield exceptions is highly technical and has served as the basis for decades of litigation and judicial interpretation. While rape shield exclusions are absolutely essential to a fair process, it is not for application by non-legal advisors and administrators, and serves as further justification for not promulgating a mandatory cross-examination procedure.

The existence of an established standard of proof inherently allows for evaluation of the credibility of the evidence. Applying that standard will naturally include asking questions to flesh out facts and evidence. The formalized, legal process of cross-examination is not necessary to carry that out. Especially when it is allowed to be conducted by any "advisor" in front of a school administrator, both operating blind about the meaning of "cross-examination," defined by their own interpretation from prime time courtroom television dramas. In the instance that a party's "advisor" happens to be an attorney, the inequity will be apparent. Non-legally trained administrators will defer to these professionals. When only one party's advisor is an attorney, it is typically that of the accused student.

Further, this provision of the proposed rules directly conflicts with § 106.44(b)(2) which requires Title IX Coordinators to file a formal complaint, and initiate the grievance process, where the institution has "actual knowledge of reports by multiple complainants of conduct against the same respondent." Presumably this mandate is triggered when the individual complainants do not file formal complaints on their own behalf. For a multitude of legitimate reasons, victims and survivors may put their schools on notice that they have been subjected to sexual harassment/assault but choose not to participate in the grievance process. Nevertheless, schools have an obligation to keep the school community safe. Under this provision of the proposed rules requiring no consideration of information not challenged by cross-examination, when an institution has actual

knowledge of serial sexual harassment/assault and the Title IX Coordinator meets their mandated obligation to file a formal complaint, it will be a fruitless exercise unless the victims/witnesses submit to cross-examination, even where other credible evidence sufficient to meet the standard of proof may exist.

c. Timeframe, § 106.45(b)(1)(v)

The proposed rules require schools to have "reasonably prompt timeframes" for conclusion of the grievance process but permit "temporary delay" of the grievance process or "limited extension" of the timeframe for good cause, which may include the absence of witnesses or concurrent law enforcement investigations.

Title IX requires schools to promptly and equitably respond to complaints of sexual harassment and assault. Previous Department of Education guidance recognized that 60 calendar days was prompt and was sufficient in most circumstances for schools to complete the grievance process in an equitable manner. The proposed rule requiring schools to conclude the grievance process in a "reasonably prompt timeframe" is not instructive and will create as much inequity as there are possible interpretations of what is "reasonably prompt".

Additionally, the permissible circumstances under which a school grievance procedure may be delayed should be extremely limited. There are few circumstances in which the school's grievance procedure would interfere with the criminal justice process. The mere existence of a concurrent law enforcement investigation is not reason enough to delay the school's grievance procedure. It is critical for victims and survivors that the school's grievance procedure continue, unless extraordinary circumstances exist, to lessen the disruption to their education and provide supportive measures. The criminal justice system and the school grievance process serve different goals and victims should be in a position to navigate both processes should they choose. School grievance processes can provide different outcomes than the criminal justice system, e.g., supportive and safety measures. Given the procedural obligations, judicial nature, and resource constraints of the criminal justice system, it is generally a much lengthier process. Victims should not be forced to drop pursuit of the criminal justice system in order to obtain the type of response only their school's grievance process can provide unless the circumstances are extraordinary. Additionally, we know that the commonplace continuances of the criminal justice system have a detrimental impact on victims' mental and emotional wellbeing; that should not be exacerbated by a complete standstill of both processes.

d. Mediation, §106.45(b)(6)

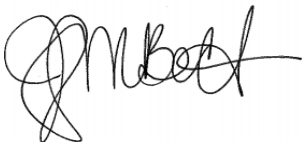
The proposed rules permit schools to use "informal resolution process[es], including mediation" to resolve sexual harassment complaints if such an informal process is voluntarily agreed to by the students in writing. The proposed rules permit schools to "preclude the parties from resuming a formal complaint" after an informal resolution process is commenced.

Historically, informal resolution processes, such as mediation, are disfavored and/or disallowed because victims and survivors are often coerced into submitting to these processes rather than using disciplinary grievance processes. Even when parties come to the informal process freely and voluntarily, the nature of these informal resolution processes requires the parties to come to a meeting of the minds. That is simply not always possible. Allowing schools to preclude the parties from resuming the grievance process if the mediation process is unsuccessful is unjust and fails to meet the intention of Title IX. For victims and survivors who engage in an informal resolution process that yields no resolution, or becomes untenable by exacerbating their trauma or for any other reason, they will be left with absolutely no recourse. Their rights to an education free from discrimination based on sex will be violated.

3. Conclusion

For the foregoing reasons, by undermining the protections of Title IX the proposed regulations fail to protect students—both the individual parties in a specific case and the school community at large—and muddy the compliance waters for schools. The result of these proposed regulations will be tangible costs to individuals, institutions, and society at large. School communities will be less safe. Educations will be limited and denied. The spirit of Title IX will be thwarted.

Sincerely,



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