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**Sent via Electronic Submission at <https://www.regulations.gov>**

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

**RE Docket No. ED-2018-OCR-0064-0001 Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (RIN 1870-AA14)**

Dear Ms. Bull:

The National Education Association (“NEA”) appreciates the opportunity to comment on the notice by the U.S. Department of Education (“ED”) of their proposed amendments to regulations relating to Title IX of the Education Amendments of 1972 (“Title IX”) (the “proposed rule”). The proposed rule would erode the school climate for all students, particularly in K-12 schools, where educators play a key role in fostering equality, respect, and healthy relationships among students during important phases of their social and emotional development. Rather than building on the progress that has been made toward achieving safe and inclusive schools for all students, the proposed rule obligates schools to shield harassing behaviors and discourages students from coming forward about harassment.

NEA knows that all students are vulnerable to sexual harassment and violence, that far too few instances are reported, and that problematic behaviors and attitudes can be remedied with effective and age-appropriate interventions. Far from extending more fairness into Title IX processes, the proposed rule would drastically scale back schools’ ability to address sexual harassment while also introducing inflexible procedural requirements for investigating complaints, many of which are blatantly inappropriate for young students in K-12 schools. Among the more glaring reversals of policy in the proposed rule are:

- A sharply narrowed definition of sexual harassment, which would require schools to ignore harassment until it becomes repeated and severe;<sup>1</sup>
- Limitations on institutional responsibility, including a higher notice standard for triggering liability and the exclusion of off-site conduct;<sup>2</sup>
- Weakened standards governing institutional responses to reported harassment, including a safe harbor for schools that merely adhere to certain procedural requirements and insulation from liability for all responses to sexual harassment that are not “deliberately indifferent”;<sup>3</sup>
- Arduous requirements for grievance procedures, including live hearings and cross-party questioning by attorney advisors that pit students against each other in adversarial proceedings;<sup>4</sup> and
- Allowing religious schools to claim a right to violate Title IX, even if the school never previously requested a religious exemption from ED.<sup>5</sup>

This sharp reversal of course will erode the progress that has been made toward ensuring equal access to education and encouraging schools to adopt policies that help students cultivate healthy, respectful relationships with all of their peers. As discussed in detail below, many of the changes contemplated by the proposed rule are incompatible with Title IX’s premise of ensuring a non-discriminatory educational environment and equitable grievance procedures for addressing all forms of sex discrimination, including sexual harassment and sexual assault.

Because K-12 schools are often the first place where young people experience and report gender-based violence or sexual harassment, NEA’s more than three million members—who include teachers, counselors, and education support professionals—know that they have a key role to play in preventing and addressing sexual harassment among our youngest students. NEA and its members believe that effective anti-harassment policies and early intervention are imperative to protecting child safety, ensuring full and equal access to education, and building the foundation for healthy relationships and gender attitudes in the future.

In the higher education context, NEA represents both faculty and staff at colleges and universities around the country, as well as students studying to be teachers, some of whom are also employed on their campuses. While this comment letter focuses primarily on K-12 schools, the proposed rule poses some of the same fundamental problems within post-secondary institutions, and has particular implications for adult students, as noted in the discussion below.

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<sup>1</sup> Proposed §§ 106.30 & 106.45(b)(3).

<sup>2</sup> Proposed §§ 106.30, 106.44(a), & 106.45(b)(3).

<sup>3</sup> Proposed §§ 106.44(a) & 106.44(b)(1)-(4).

<sup>4</sup> Proposed § 106.45(b)(3)(vi)-(vii).

<sup>5</sup> Proposed § 106.12(b).

## The Proposed Rule Would Lead to More Sexual Harassment and Violence in Schools and Harm Educational Outcomes.

If implemented, the proposed rule will negatively impact learning and health due to both its substance and the overall chilling effect it will have on reporting and prevention of sexual harassment and violence, as well as on the grievance process. Under the proposed rule, our elementary, middle, and high schools will be less safe for all students, and educational outcomes will suffer. This will impact the entire trajectory of students' educational lives, beginning at a critical young age when they are first forming ideas and attitudes about appropriate behaviors and healthy relationships, up through their experiences as young adults on college campuses.

Although it does not receive as much attention as the prevalence of sexual assaults on college campuses, sexual harassment among K-12 children is a serious and widespread problem that adversely affects students' emotional and educational development. One in four girls and one in six boys will be sexually abused before they turn 18 years old.<sup>6</sup> And girls are far more likely than boys to be sexually harassed in school, with a recent study finding that more than half of all girls (56 percent) in grades 7-12 experience sexual harassment.<sup>7</sup> Any form of sexual harassment is likely to have a profound impact on students' ability to participate in and benefit from their education—the physical and psychological harms caused by sexual harassment lead to worse academic, disciplinary, and retention outcomes in schools. And when not effectively addressed, sexual harassment creates a toxic school environment for all students.

ED's Office of Civil Rights ("OCR") has long recognized that sexual harassment can "interfere with a student's academic performance and emotional and physical well-being" and that "[p]reventing and remedying sexual harassment in schools is essential to ensuring a safe environment in which students can learn."<sup>8</sup> Research likewise shows that targets of sexual harassment experience anxiety, distress, confusion, loss of self-esteem, and depression.<sup>9</sup> K-12 students who experience sexual harassment are likely to react by talking less in class, not wanting to go to school, and finding it hard to pay attention in school.<sup>10</sup> And by the time they reach college, sexually victimized students are more likely to drop classes, change residences,

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<sup>6</sup> Finkelhor, D., Hotaling, G., Lewis, I.A., Smith, C. Sexual abuse in a national survey of adult men and women: Prevalence, characteristics, and risk factors. (1990) *Child Abuse and Neglect*, 14 (1), pp. 19-28.

<sup>7</sup> Catherine Hill & Holly Kears, *Crossing the Line: Sexual Harassment at School*, AAUW, 11 (2011) [hereinafter *Crossing the Line*], available at <https://www.aauw.org/research/crossing-the-line>. Other reports indicate that 7 in 10 girls experience harassment before they leave high school. See, e.g., Alyson Klein and Evie Blad, *DeVos Rewrites Title IX Guidance on Sexual Assault and Harassment*, EDUCATION WEEK, Nov. 27, 2018, available at <https://www.edweek.org/ew/articles/2018/11/28/devos-rewrites-title-ix-guidance-on-sexual.html>.

<sup>8</sup> U.S. Dep't 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>.

<sup>9</sup> See e.g., Greetje Timmerman, *Adolescents' Psychological Health and Experiences with Unwanted Sexual Behavior at School*, 39 *Adolescence* 156, 817-25 (2004).

<sup>10</sup> AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, *HOSTILE HALLWAYS: BULLYING, TEASING AND SEXUAL HARASSMENT IN SCHOOL* (2001) [hereinafter *Hostile Hallways*].

and have lower GPAs, creating long-term adverse consequences for professional success and earning potential.<sup>11</sup>

Girls are sexually harassed at higher rates than boys, and girls who suffer these forms of trauma are more likely to have serious behavioral, emotional, and health problems.<sup>12</sup> Additional barriers to success in school often follow because the victims feel powerless and unable to control their life and its trajectory.<sup>13</sup> These negative outcomes are exacerbated when sexual harassment goes unaddressed, leaving victimized students feeling vulnerable and afraid. Feeling unsafe at school has been correlated with declining academic performance, skipping school, and dropping out.<sup>14</sup> A recent survey found that nearly one-third (32 percent) of students who experienced harassment reported not wanting to go to school as a result of the harassment, and girls were more likely than boys to report harassment affecting them in this way.<sup>15</sup>

Despite the profound negative consequences of harassment and sexual violence, very few instances are actually reported. A recent study found that only 9 percent of students who had experienced sexual harassment at school reported the incident to a teacher, guidance counselor, or other adult at school.<sup>16</sup> This problem persists into post-secondary education, where an estimated 80 percent of campus sexual assaults and rapes go unreported.<sup>17</sup>

Students do not report their sexual harassment for a variety of reasons, which may include fear of retaliation or revictimization, fear that they will not be believed, or feelings of shame or embarrassment.<sup>18</sup> Some students—especially students of color, undocumented

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<sup>11</sup> Victoria L. Banyard et al., *Academic Correlates of Unwanted Sexual Contact, Intercourse, Stalking, and Intimate Partner Violence: An Understudied but Important Consequence for College Students*, *J. of Interpersonal Violence*, 1-18 (June 21, 2017), available at <http://journals.sagepub.com/doi/10.1177/0886260517715022>.

<sup>12</sup> Yael Dvir et al., *Childhood Maltreatment, Emotional Dysregulation, and Psychiatric Commodities*, *Harvard Review Psychiatry* 22, 149-161 (2014), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4091823/>; Stephanie Dallam, *The Long-Term Medical Consequences of Childhood Trauma*, in *THE COST OF CHILD MALTREATMENT: WHO PAYS? WE ALL DO.*, 1-14 (K. Franey, R. Geffner, & R. Falconer eds., 2001), available at <https://www.leadershipcouncil.org/1/res/dallam/4.html>.

<sup>13</sup> David Finkelhor & Angela Browne, *The Traumatic Impact of Child Sexual Abuse: A Conceptualization*, *Am. J. of Orthopsychiatry* 55, 1-7 (1985), available at [http://www.csom.org/train/victim/resources/the%20traumatic%20im-](http://www.csom.org/train/victim/resources/the%20traumatic%20impact%20of%20child%20sexual%20abuse.pdf)

<sup>14</sup> See, e.g., *Hostile Hallways*, *supra* note 10 at 4.

<sup>15</sup> *Crossing the Line*, *supra* note 7 at 3.

<sup>16</sup> *Crossing the Line*, *supra* note 7 at 2. A different study found that only 2 percent of girls ages 14 to 18 report sexual assault to their schools or the police. National Women's Law Center, *Let Her Learn: Stopping School Pushout for: Girls Who Have Suffered Harassment and Sexual Violence* 2 (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>.

<sup>17</sup> U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, RAPE AND SEXUAL VICTIMIZATION AMONG COLLEGE-AGED FEMALES, 1995-2013 (2014), available at <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf>.

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

students,<sup>19</sup> LGBT students,<sup>20</sup> and students with disabilities—face even higher barriers to reporting sexual harassment and violence than their peers, especially in terms of reporting to police.<sup>21</sup> For example, these students may face an increased risk of being subjected to police violence or deportation, or fear contributing to the criminalization of boys of color. For these students, Title IX protections in schools may be their only avenue for relief.

Rather than seeking to address the causes of underreporting, the proposed rule would discourage even more young students from coming forward by sending the message that adults and schools do not believe victims of harassment. Among other things, the proposed rule imposes a presumption in all Title IX investigations that no harassment actually occurred,<sup>22</sup> and forces schools to respond to complaints of sexual harassment by first issuing written notice of any code of conduct that prohibits knowingly making false statements.<sup>23</sup> A child who actually summons the courage to report harassment will thus immediately be told that the school assumes it did not happen and that she or he will be in trouble if she or he is not telling the truth. This message is emotionally and psychologically damaging to students, especially when continually reinforced throughout their educational experience into college.

Many other provisions in the proposed rule, described in more detail below, not only roll back prior ED policies and guidance that sought to encourage reporting,<sup>24</sup> but would impose arduous procedural requirements that would insulate students accused of sexual misconduct and make it harder for those who experience sexual misconduct to seek remediation. The proposed rule would reverse decades of policy and turn Title IX inquiries into formal adversarial proceedings.

A one-size-fits-all adversarial process is particularly inappropriate for K-12 schools. Classrooms are not courtrooms. Incidents of sexual harassment and violence impact far more students than the victim and the perpetrator. In drafting the proposed rule, ED loses sight of the fact that Title IX is not just about adjudicating sexual assault claims on college campuses; rather, Title IX's mandate of equal access to education regardless of sex is fulfilled by giving schools the tools they need to prevent sexual harassment in all its forms and to meaningfully and holistically address it when it occurs. This is especially true in the K-12 context, where educators

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

<sup>20</sup> Nat'l Ctr. 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>.

<sup>21</sup> Studies also show that these students experience sexual harassment at higher rates than their other peers. See, e.g., *Let Her Learn: Sexual Harassment and Violence*, supra note 16 at 2-3.

<sup>22</sup> Proposed § 106.45(b)(1)(iv).

<sup>23</sup> Proposed § 106.45(b)(2)(i)(B).

<sup>24</sup> See 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>; U.S. Dep't of Educ., Office for 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>; 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>.

have a greater responsibility to develop students' social attitudes and values and to ensure that our youngest students are safe and able to stay in school.

### **The Proposed Rule Would Diminish Schools' Obligations to Prevent and Address Sexual Harassment and Violence.**

The proposed rule drastically narrows the scope of Title IX protections by restricting when and how districts can investigate and under what circumstances students can report sexual harassment. The overwhelming effect of the new rule is to limit schools' obligations to students who file complaints of sexual harassment and violence under Title IX. Under the new policy, schools will likely investigate far fewer complaints, and ED will hold fewer schools accountable for failing to ensure that they are free of sexual harassment and assault. This is particularly troubling in the context of K-12 schools, where appropriate oversight from ED could have the greatest impact in encouraging schools to address the root causes of and remediate the potential long-lasting effects of sexual violence.

This marked reduction in school responsibility results from ED importing into its proposed rule the narrow standards that apply in private litigation for money damages under Title IX and applying them in the administrative enforcement context.<sup>25</sup> But private suits for individual monetary damages serve a fundamentally different purpose than Title IX's administrative enforcement process. Where private civil suits primarily serve to provide compensation to a victim of sexual harassment, often long after the harassment occurred, administrative enforcement focuses on securing immediate corrective action for not only the individual student victim but for other students who have potentially been impacted by the incident. For that reason, OCR's enforcement practice is proactive and seeks to make schools aware of potential Title IX violations and encourage voluntary corrective action by the school before OCR pursues termination of federal funding or other enforcement mechanisms. Intervention by OCR is not in itself punitive; it is an opportunity for the federal government to proactively ensure that schools are using best practices to prevent and address sexual harassment in order to meet their obligations for receiving federal funds. But the proposed rule thwarts the preventative and remedial actions that promote positive school climates and protect students from sexual harassment by restricting the instances in which schools are permitted to respond to reported incidents and weakening the standards that apply to those institutional responses.

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<sup>25</sup> In fact, the definition of "sexual harassment" under the proposed rule is even more restrictive than the test for a valid Title IX claim in civil litigation in some federal circuits. *See, e.g., Feminist Majority Foundation v. Hurley*, 911 F.3d 674 (4th Cir. 2018) (Plaintiff must show that harassment was "sufficiently severe or pervasive to create a hostile (or abusive) environment in an educational program or activity") (emphasis added) (citing *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) (en banc)). In contrast, cases applying a standard that mirrors the proposed rule highlight the egregious results of this break with prior administrative policy. *See, e.g., Hawkins v. Sarasota Cty. Sch. Bd.*, 322 F.3d 1279 (11th Cir. 2003) (holding that second-grade child plaintiffs could not recover damages from their school board for failure to address conduct by a fellow student over a period of months that included, among other things, forcibly rubbing his body against one, forcibly grabbing their chests, and demands for oral sex because it did not have "the systemic effect of denying the girls equal access to education"); *Ross v. Mercer Univ.*, 506 F. Supp. 2d 1325 (M.D. Ga. 2007) (holding that rape would not meet the standard because a single rape is not "pervasive").

First, schools would only be permitted to investigate the most extreme complaints of sexual harassment and violence due to a dramatically limited definition of what constitutes “sexual harassment” triggering a Title IX investigation. Schools would only need to investigate reports of “unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access” to education.<sup>26</sup> This is a far more limited definition of sexual harassment than “unwelcome conduct of a sexual nature,” which was previously used by OCR in the Title IX context.<sup>27</sup> Indeed, the proposed rule’s definition of “sexual harassment” is even more limited than the standard applied in cases of workplace harassment of adults, which asks only whether “unwelcome . . . verbal or physical conduct of a sexual nature . . . unreasonably interfere[ed] with an individual’s work performance or creat[ed] an intimidating, hostile, or offensive working environment.”<sup>28</sup> In other words, in order to obtain proactive relief under Title IX from OCR, a K-12 student would have to endure more extreme levels of harassment in school than an adult woman in her office would have to endure in order to have a viable Title VII claim.

Not only will the proposed rule subject students to more severe and repeated forms of harassment before schools are required to intervene, it will also introduce inconsistent and unworkable standards for effectively addressing harassment of vulnerable groups protected by other federal nondiscrimination laws. As educators know, sexual harassment and violence operate on an intersectional basis and disproportionately impact LGBTQ students, students with disabilities, and girls of color.<sup>29</sup> Under the proposed rule, sexual harassment that, for example, draws on racial stereotypes could lead to different outcomes depending on whether it is categorized as race discrimination, which is actionable when it is “sufficiently serious” so as to “limit” a student’s ability to participate in or benefit from his or her education—a broader standard—or, alternatively, as “sexual harassment” as narrowly defined in the proposed rule.

Second, schools “must dismiss” a formal complaint if the alleged conduct “did not occur within the [school’s] program or activity.”<sup>30</sup> This runs counter to a longstanding mandate under prior Title IX guidance to eliminate any harassment that creates a “hostile environment” at school, regardless of where it took place, and federal court decisions applying that same rule.<sup>31</sup> Many of the ways in which students are commonly harassed by peers would be outside of the protections of Title IX under the proposed rule. Students would no longer be protected from harassing behaviors such as using cell phones or social media sites to call students sexually-charged epithets, spread sexual rumors, rate students on sexual activity or performance,

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<sup>26</sup> Proposed §§ 106.30 & 106.45(b)(3).

<sup>27</sup> 2001 Guidance.

<sup>28</sup> 29 C.F.R. § 1604.11(a); *see also, e.g., Pa. State Police v. Suders*, 542 U.S. 129, 133 (2004) (to be actionable under Title VII, plaintiffs must show “harassing behavior ‘sufficiently severe or pervasive to alter the conditions of [their] employment’” (emphasis added)) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)).

<sup>29</sup> *See, e.g., Let Her Learn: Sexual Harassment and Violence*, *supra* note 16 at 2-3; Human Rights Campaign, *Growing Up LGBT in America* (2012) at 16, *available at* [http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/Growing-Up-LGBT-in-America\\_Report.pdf](http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/Growing-Up-LGBT-in-America_Report.pdf); Gay, Lesbian, and Straight Educ. Network, *The 2013 National School Climate Survey* (2014) at xvi, *available at* [http://www.glsen.org/sites/default/files/2013%20National%20School%20Climate%20Survey%20Full%20Report\\_0](http://www.glsen.org/sites/default/files/2013%20National%20School%20Climate%20Survey%20Full%20Report_0).

<sup>30</sup> Proposed §§ 106.30, 106.45(b)(3).

<sup>31</sup> *See, e.g., Feminist Majority*, 911 F.3d at 687-89.

disseminate explicit photographs or videos of a student, or circulate, show, or create emails or websites of a sexual nature. And Title IX coordinators and other school officials charged with addressing sexual harassment could be helpless to address this conduct even when it interferes with the classroom environment or keeps the harassed students from coming to school.

For postsecondary institutions, removing responsibility for incidents that occur outside of formal programs or on off-campus property egregiously misunderstands the nature of a college or university environment. Many of the educational and social benefits of a residential college experience occur in the larger aspect of the campus community—including affiliated student groups and organizations, off-campus learning and work experiences, fraternities and sororities, and other places that students gather to study, learn, and socialize—and therefore must be included in the scope of institutional responsibility.

Third, schools would not be responsible for investigating any instances of sexual harassment unless a very specific category of school “officials” know about the harassment. Under the proposed rule, schools would not be required to address sexual harassment unless there was “actual knowledge” of the harassment by (i) a Title IX coordinator;<sup>32</sup> (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>33</sup> For example, if a K-12 student told an adult school employee they trust—such as a playground supervisor, guidance counselor, or athletics coach—that they had been sexually harassed or assaulted by another student, or if they told a teacher that they had been sexually abused by another school employee, their school would have no obligation under Title IX to help them. This is a sharp break with prior guidance, which required schools to take proactive steps to prevent and address harassment that employees knew or reasonably should have known about.

Fourth, schools may be compelled to adopt a more demanding standard of proof in evaluating claims of sexual harassment. A standard of proof reflects a judgment about how to balance competing interests. Preponderance of the evidence, which was applicable under the 2011 Guidance,<sup>34</sup> is the only standard of proof that treats both sides equally, and is consistent

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<sup>32</sup> Limiting schools’ obligations to investigate sexual harassment to cases of actual knowledge by a Title IX coordinator is especially problematic in the K-12 context where some schools do not even have a dedicated Title IX coordinator onsite. In some cases, one Title IX coordinator may serve an entire school district and, in others, there is no designated Title IX coordinator at all. *See, e.g., Sue Klein, Reinventing the Role of the Title IX Coordinator: A Requirement and Resource* at page v, FEMINIST MAJORITY, available at <http://www.feminist.org/education/pdfs/Full-Title-IX-Coordinators-9-16.pdf>.

<sup>33</sup> Proposed §§ 106.30 & 106.45(b)(3).

<sup>34</sup> 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](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.

with Title IX's requirement that grievance procedures be "equitable." The 50/50 preponderance standard recognizes the high costs of a false conclusion to either the harassed student or the harasser by avoiding any presumption that the conduct did or did not occur. But under the proposed rule, schools would be required to use the clear and convincing standard in student sexual harassment investigations if the clear and convincing standard is used in complaints against employees or in other student violations of its code of conduct that carry the same potential penalties as a finding of sexual harassment.<sup>35</sup>

Finally, schools would only be required to respond to known sexual harassment in a manner that is not "deliberately indifferent."<sup>36</sup> The proposed rule creates a "safe harbor" whereby schools that simply adhere to the new prescribed procedural requirements (regardless of the ultimate finding) are by definition not deliberately indifferent.<sup>37</sup> Further, any response to the harassment that is not "clearly unreasonable" will shield a school from liability.<sup>38</sup> Workplace harassment laws hold employers to a higher standard in addressing sexual harassment than ED's proposed rule would apply to K-12 schools.<sup>39</sup> In this respect, the proposed rules would again provide young students with less protection from harassment in schools than adults receive in their workplaces. Adding to the confusion and absurdity, in the higher education context, many students are employed by their colleges and universities. These student-employees may be subject to differing levels of protection depending on whether they are classified as students or as employees.

Together, these provisions of the proposed rule would increase trauma for survivors and create a toxic school climate by insulating harassment and violence.

### **The Proposed Rule Would Erode the School Climate for all Students.**

As a representative of education professionals committed to great public schools for all students, NEA is particularly concerned about the ways in which the proposed rule will impede progress toward healthy and inclusive school environments, beginning with our youngest

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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.nchem.org/documents/202-GeorgetownUniversity--110302017Genster.pdf>.

<sup>35</sup> Proposed § 106.45(b)(4)(i). Although the proposed rule purports to give schools a choice between these standards, by tying the standard for student harassment to the standard applied to harassment by employees and/or other student code violations, ED is effectively requiring a standard of proof that gives preference to accused harassers. Where school employees have contracts that require use of the clear and convincing standard in all employee misconduct investigations, schools would be required to adopt the same standard for student sexual harassment investigations, even if the school uses the preponderance standard for all other types of student misconduct. And regardless of the standard applied in employee misconduct investigations, if the school uses a clear and convincing standard for any investigations of other serious student conduct violations, it would likewise be required to apply this higher standard to sexual harassment investigations.

<sup>36</sup> Proposed § 106.44.

<sup>37</sup> Proposed §§ 106.44(a) & 106.44(b)(1)-(4).

<sup>38</sup> Proposed § 106.44.

<sup>39</sup> 29 C.F.R. § 1604.11(a).

students.<sup>40</sup> Elementary, middle and high schools are places to foster equality, respect, and healthy relationships among students during important phases of their social and emotional development. Educators have a key role to play in teaching students about consent, personal boundaries, and healthy relationships.<sup>41</sup> Robust anti-harassment trainings and policies are essential to correcting harassing behaviors and creating positive school climates for all students, both girls and boys. As ED itself stated when it rescinded the 2011 and 2014 Guidance, “[i]n the forty-five years since the passage of Title IX, we have seen remarkable progress toward an educational environment free of sex discrimination.”<sup>42</sup> Now, breaking sharply from its prior policies, ED wants to roll back the progress it has made towards achieving safe and inclusive schools for all students.

The proposed rule would create perverse incentives for schools to shield destructive, abusive behaviors and erode positive school climates. It would encourage schools to avoid Title IX liability by adopting practices that make reporting sexual harassment and violence unnecessarily burdensome, complex, or traumatic in order to deter students from coming forward. It would incentivize schools to discourage student access to trusted adults in order to limit the cases in which employees deemed responsible are aware of the harassment and required to take corrective measures. And schools would have reason to bypass proven best practices and create an environment that intimidates and marginalizes victims and survivors. Alleviating schools from their responsibility to proactively prevent and redress harassment is detrimental to all students.

Together, these provisions would send the message that sexual harassment will be tolerated—even actively defended—in our K-12 schools. Insulating perpetrators and withdrawing protections and support from victims is harmful to both the harasser and harassed student. Harassment among young students presents an opportunity to correct problematic behaviors early on, educate students about equality and respect, and foster healthier attitudes around sex and gender for the future. This can only be achieved when schools are rewarded, not deterred, from adopting robust training practices and policies that allow them to prevent, root out, and head-on address ongoing harassment.

And limiting K-12 schools’ obligations to address incidents of sexual harassment fails to acknowledge that harassers may themselves be victims of abuse. Depending on the age of the child and other factors, harassing behavior or other sexual misconduct may be an indicator that the perpetrator himself or herself is actually a possible victim of other sexual or physical abuse. Educators are uniquely positioned to interrupt the perpetuation of harassment and abuse during

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<sup>40</sup> Inclusion is a critical component of a healthy school climate. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (“[C]lassroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.”).

<sup>41</sup> The Every Student Succeeds Act explicitly recognizes the need for programs and activities that “improve instructional practices for developing relationship-building skills, such as effective communication, and improve safety through the recognition and prevention of coercion, violence, or abuse, including teen and dating violence, stalking, domestic abuse, and sexual violence and harassment.” 20 U.S.C. § 7118 (5)(C)(iv) (2015).

<sup>42</sup> U.S. Dep’t of Educ. Office for Civil Rights, *Dear Colleague Letter* (Sept. 22, 2017) [hereinafter 2017 Colleague Letter], available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>

these developmentally critical years if they are supported by effective policies that address social inequality, consent, physical boundaries, inappropriate behavior, and other important health concepts.<sup>43</sup>

Contrary to ED's claim that the new rule is necessitated by a current lack of due process and flexibility in investigating sexual harassment complaints, nothing about the earlier, now-rescinded 2011 and 2014 Guidance limited the use of age-appropriate restorative or alternative justice practices once sexual harassment had been elevated to the complaint and grievance stage.<sup>44</sup> The prior guidelines simply acknowledged that in order to address sexual harassment in any meaningful way and to prevent future harassment, schools must first be held accountable for fulfilling their obligations under Title IX, including taking proactive steps to learn about ongoing harassment. Far from allowing for greater flexibility, the proposed rule's rigid, adversarial requirements for investigating complaints, such as limiting grievance procedures to formal complaints,<sup>45</sup> the inclusion of attorney advisors,<sup>46</sup> and cross-party questioning,<sup>47</sup> will make it harder, not easier, to creatively and holistically correct harassing behavior and educate K-12 students about sex discrimination.

Finally, the proposed rule would permit religious schools to opt out of Title IX compliance without notice or warning to ED or to current or prospective students, which will make schools less inclusive and deny students and parents the information necessary to make choices about whether to expose themselves to potentially harmful, discriminatory school environments. Current policy allows religious institutions to claim religious exemptions from compliance with Title IX by notifying ED in writing and identifying the conflict between their religious tenets and specific Title IX provisions.<sup>48</sup> The proposed rule removes that requirement,<sup>49</sup> which would allow schools to conceal their intent to discriminate, exposing students to harm, especially LGBTQ students, pregnant or parenting students (including those who are unmarried), and students who access or attempt to access birth control or abortion services.

## Conclusion

NEA believes that all children deserve the best chance to learn and succeed. Effective anti-harassment policies that create safe and supportive school environments are necessary to achieving that mandate. ED wants to tie the hands of educators when it comes to preventing and remedying harassing behaviors, which will make schools less safe, harm educational outcomes,

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<sup>43</sup> See, e.g., School Safety Omnibus Amendment Act of 2018 (22-951) (report of the Committee on Education for the Council of the District of Columbia), citing Beth Jacobson, *Three Ways Schools Can Help Prevent Sexual Assault*, America's Promise, April 26, 2018.

<sup>44</sup> See, e.g., OAKLAND UNIFIED SCH. DIST. Board Policy 5145.7 Sexual Harassment (revised June 14, 2017), available at <https://www.ousd.org/Page/15492>.

<sup>45</sup> Proposed §§ 106.44(b) & 106.45.

<sup>46</sup> Proposed § 106.45(b)(3).

<sup>47</sup> Proposed § 106.45(b)(3)(vii).

<sup>48</sup> 34 C.F.R. § 106.12.

<sup>49</sup> Proposed § 106.12.

and erode school climates for all students. The proposed rule is inconsistent with, and undermines the purposes of, Title IX, and must be withdrawn.

Sincerely,

/s/

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National Education Association

/s/

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Staff Counsel  
National Education Association

/s/

Gypsy Moore  
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/s/

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