



Office for Civil Rights
U.S. Department of Education
RE: ED-2018-OCR-0064

**PUBLIC COMMENT BY THE VICTIM RIGHTS LAW CENTER ON THE
DEPARTMENT OF EDUCATION'S PROPOSED REGULATIONS REGARDING TITLE IX OF THE
EDUCATION AMENDMENTS OF 1972**

INTRODUCTION

The proposed regulations concerning Title IX of the Education Amendments of 1972 (“Title IX”) released by the Department of Education (“the Department”) on November 29, 2018 are legally unsound. The suggested changes to the regulatory framework, beginning with the rescission of the 2011 and 2014 guidance documents and simultaneous implementation of interim guidance in September 2017, reveal a fundamental disregard for the purpose and meaning of Title IX and victims of sexual harassment.¹ The result is a new framework that will incentivize institutions of higher education to place a greater emphasis on the rights of respondents than protection for complainants, cause fewer victims of rape and sexual assault to come forward, and foreclose victims’ ability to seek redress from the Department. These changes reflect an unfounded reaction to current adjudicatory practices among institutions of higher education that fails to consider the history and purpose of Title IX, the reality of sexual harassment and gender-based violence on campuses, and the critical differences in function

¹ While the Department’s language would suggest that it took a fair and balanced approach to understanding campus adjudication processes, a close reading reveals a strong prejudice towards respondent-focused information. For instance, the Preamble repeatedly cites the same respondent-friendly perspectives, but only includes one citation to a victim-centered perspective.

The Department also notes that the proposed changes came after “personally engaging numerous stakeholders.” Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462, 61464 (Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106) [hereinafter “NPRM”]. While the meeting participants were largely balanced between organizations and individuals representing respondents’ interests and victims’ interest, the sources cited in the proposed rule as well as the perspectives cited were overwhelmingly in support of respondents. This illuminates the bias that undergirds these proposed changes across the board. Proposed provisions repeatedly restrict the ability of institutions to adequately address civil rights violations on their campus and will prevent victims from accessing their education.

The Department would also have the public believe that there was overwhelming and widespread criticism of the Obama-era guidance documents. However, the statements carelessly cite to dissenting opinions of cases and ignore information that indicate the opposite: the changes brought about by the Dear Colleague Letter and the Frequently Asked Questions document were welcomed in a system that largely had no parameters which frequently resulted in quasi-judicial proceedings going awry. See Tiffany Buffkin, et al., *Widely Welcomed and Supported by the Public: A Report on the Title IX-Related Comments in the U.S. Department of Education’s Executive Order 13777 Comment Call*, CAL. L. REV. ONLINE (forthcoming), available at SSRN: <https://ssrn.com/abstract=3255205> or <http://dx.doi.org/10.2139/ssrn.3255205>; TITLE IX AND THE PREPONDERANCE OF THE EVIDENCE: A WHITE PAPER (November 29, 2016), available at <http://www.feministlawprofessors.com/wp-content/uploads/2017/07/Title-IX-Preponderance-White-Paper-signed-7.18.17-2.pdf> (signed by dozens of law professors and scholars).

between educational institutions, the judicial system, and the Department as the agency overseeing Title IX compliance. The Victim Rights Law Center (“VRLC”) has provided free legal services to rape and sexual assault victims for fifteen years and opposes the vast majority of proposed changes by the Department for all of the reasons outlined in this Comment. Furthermore, the VRLC wishes to reiterate its concern that the Department has lost sight of its duty and mandate to ensure that institutions are protecting the civil rights of its students who experience sex discrimination. The abdication of this responsibility and concurrent erasure of protections for victims of sexual violence make pursuing any educational recourse more dangerous for victims. This is not only misaligned with Title IX; it stands in complete contradiction to it.

BACKGROUND/CONTEXT

The VRLC has been practicing law in the education realm since its inception in 2003, eight years prior to the 2011 Dear Colleague Letter (“DCL”). In those eight years, VRLC attorneys practiced in an arena characterized by untrained adjudicators, unreliable and variable standards, and unaddressed complaints of sexual assault and rape.² Notably, adjudications

² For cases demonstrating instances of school officials ignoring or brushing aside victim's complaints, *see* S.G. v. Rockford Bd. of Educ., 2008 U.S. Dist. LEXIS 95522, at *15-16 (N.D. Ill. Nov. 24, 2008); James v. Indep. Sch. Dist. No. 1-007, 2008 U.S. Dist. LEXIS 82199, at *6 (W.D. Okla. Oct. 16, 2008); Bruning v. Carroll Cnty. Sch. Dist., 486 F. Supp. 2d 892, 915-16 (N.D. Iowa 2007); Bashus v. Plattsmouth Cnty. Sch. Dist., 2006 U.S. Dist. LEXIS 56565, at *10 (D. Neb. Aug. 3, 2006); Doe v. Derby Bd. of Educ., 451 F. Supp. 2d 438, 447-48 (D. Conn. 2006); Doe v. E. Haven Bd. of Educ., 430 F. Supp. 2d 54, 63-65 (D. Conn. 2006), *aff'd*, 200 F. App'x 46, 49 (2d Cir. 2006); Martin v. Swartz Creek Cmty. Schools, 419 F. Supp. 2d 967, 974 (E.D. Mich. 2006); Jones v. Ind. Area Sch. Dist., 397 F. Supp. 2d 628, 645-46 (W.D. Pa. 2005); Theno v. Tonganoxie Unified Sch. Dist. No. 464, 394 F. Supp. 2d 1299, 1301 (D. Kan. 2005); Ray v. Antioch Unified Sch. Dist., 107 F. Supp. 2d 1165, 1170 (N.D. Cal. 2000).

For cases where the victim reported the rape to a school official or some other authority figure, but the school did nothing to prevent the offender or his friends from continually coming in contact with the victim, *see* Patterson v. Hudson Area Sch., 551 F.3d 438, 450 (6th Cir. 2009); Doe v. Brimfield Grade Sch., 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008); Doe v. Hamden Bd. of Educ., 2008 U.S. Dist. LEXIS 40269, at *17 (D. Conn. May 19, 2008); M. v. Stamford Bd. of Educ., 2008 U.S. Dist. LEXIS 51933, at *28 (D.Conn. 2008); James, 2008 U.S. Dist. LEXIS 82199, at *6; *Rockford Bd. of Educ.*, 2008 U.S. Dist. LEXIS 95522 at *10, *14-15; *Bashus*, 2006 U.S. Dist. LEXIS 56565, at *10-11; *Derby Bd of Educ.*, 451 F. Supp. 2d at 444- 45; Doe v. Erskine Coll., 2006 U.S. Dist. LEXIS 35780, at *39 (D.S.C. May 25, 2006); *E. Haven Bd of Educ.*, 430 F. Supp. 2d at 59-60; *Martin*, 419 F. Supp. 2d at 974; *Jones*, 397 F. Supp. 2d at 645-46; *Theno*, 394 F. Supp. 2d at 1310-11; Letter from Charlene F. Furr, Operations Officer, Dall., Office for Civil Rights, U.S. Dep't of Educ., to Jimmy D. Hattabaugh, Superintendent, Mansfield Sch. Dist. (Apr. 16, 2007) (on file with author); Letter from Cathy H. Lewis, Acting Dir., Policy & Enforcement Serv., Office for Civil Rights, U.S. Dep't of Educ., to Thomas Crawford, Superintendent, Acad. Sch. Dist. (Apr. 16, 1993) (on file with author).

For cases in which the school conducted a biased investigation, *see* *Patterson*, 551 F.3d at 439; *Brimfield Grade Sch.*, 552 F. Supp. 2d at 823; S.S. v. Alexander, 177 P.3d 724, 740 (Wash. Ct. of App. Div. 1, 2008); Siewert v. Spencer-Owen Cmty. Sch. Corp., 497 F. Supp. 2d 942, 954 (S.D. Ind. 2007); Erskine, 2006 U.S. Dist. LEXIS 35780, at *33-34; *Theno*, 394 F. Supp. 2d at 1310-11; Kelly v. Yale Univ., 2003 U.S. Dist. LEXIS 4543, at *3 (D. Conn. Mar. 26, 2003); Letter from John E. Palomino, Reg'l Civil Rights Dir., S.F., Office for Civil Rights, U.S. Dep't of Educ., to Ruben Armifiana, President, Sonoma State Univ. (Apr. 29, 1994) (on file with author).

For cases demonstrating instances when school officials investigated and determined that the sexual violence did occur, but did not discipline or minimally disciplined the assailant, and did not protect the survivor from any

during this time were often quasi legal trials with actively participating attorneys and cross-examination, but without trained professionals ensuring that the proceedings were structured, balanced, and equitable, and without guidance about what process was to be expected and implemented in such cases. The VRLC's education practice throughout these years was characterized by navigating bizarre and inappropriate adjudication processes.

The DCL prompted a sea-change among institutions of higher education with respect to Title IX: it clarified that institutions were required to respond to sexual harassment immediately when on constructive notice of incidents that violated their policy, incorporated provisions to ensure individuals were explained their rights and options upon disclosure of sexual harassment and led to an increase in reporting across the country. This letter responded to systemic problems in campus disciplinary processes while recognizing and balancing the reality of sexual harassment and gender-based violence on campus.³ The DCL and the subsequent 2014 Frequently Asked Questions document ("FAQ") were, in fact, not vilified across the board, as the Department suggests. Rather, they were largely welcomed by all parties involved, including respondent advocates, for providing structure in the midst of unregulated disorder.⁴

retaliation, *see* *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 262 (6th Cir. 2000); *S.S. v. Alexander* 177 P.3d at 739; *Hamden*, 2008 U.S. Dist. LEXIS 40269, at *5; *Stamford*, 2008 U.S. Dist. LEXIS 51933, at *28; *Siewert*, 497 F. Supp. 2d at 954; *Derby Bd. of Educ.*, 451 F. Supp. 2d at 447; *Doe v. Oyster River Coop. Sch. Dist.*, 992 F. Supp. 467, 481 (D.N.H. 1997); *see also* Sonoma State Univ. Letter (stating that after the victim reported the sexual violence she experienced, the university declared it was only a "miscommunication" and failed to take any further action); Letter from Patricia Shelton, Branch Chief, and C. Mack Hall, Div. Dir., Office for Civil Rights, U.S. Dep't of Educ., to James C. Enochs, Superintendent, Modesto City Schools (Dec. 10, 1993) (on file with author) (finding that once the victims told the principal, school officials did nothing more than lecture the assailants about their actions); Kristen Lombardi, *A Lack of Consequences for Sexual Assault: Students Found "Responsible" Face Modest Penalties, While Victims are Traumatized*, CTR. FOR PUB. INTEGRITY (Feb. 24, 2010), <http://www.publicintegrity.org/investigations/campus-assault/articles/entry/1945/> (explaining that at many campuses, abusive students are rarely disciplined, and when they are, it is rarely more than a slap on the wrist).

³ U.S. Department of Education, Office of Postsecondary Education, Summary Crime Statistics (data compiled from reports submitted in compliance with the Clery Act), *available at* <http://www2.ed.gov/admins/lead/safety/criminal2007-09.pdf> (finding that campuses reported approximately 3,300 forcible sex offenses as defined by the Clery Act); CHRISTOPHER P. KREBS ET AL., *THE CAMPUS SEXUAL ASSAULT STUDY: FINAL REPORT* xiii (2007), *available at* <http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> (study found that about 1 in 5 women were victims of completed or attempted sexual assault while in college).

⁴ "In June 2017, the U.S. Department of Education opened a public comment forum requesting input on the Trump Administration's Executive Order 13777, which established a federal policy to 'alleviate unnecessary regulatory burdens.' By the end of that August, 10,856 comments had been entered into the system and a few hours clicking through the comments gave the impression that commenters overwhelmingly both commented on Title IX and wrote in support of continuing OCR's robust regulatory enforcement of civil rights in education." Indeed, of the 12,035 total public comments addressing Title IX, 11,528 – 97% -- supported upholding the 2011 DCL compared to 123 (less than 1%) specifically advocated for rescinding the 2011 DCL. Buffkin et al., *supra* note 1, at 12.

This isn't to say there aren't critics of these guidance documents. There have been notable outspoken critics of this guidance, most of whom are repeatedly cited in the proposed regulation. The point here is the misleading nature of the Department's language around the 2011 and 2014 guidance particularly in light of widespread public support of the 2011 and 2014 guidance documents.

In light of these changes, reports of sexual harassment increased, as did the petitions to the Office for Civil Rights (OCR).⁵ That is, at least in part, what this subregulatory guidance was designed to do.⁶ This is willfully ignored in the proposed regulation (“NPRM”); the Department would have the public believe that the “hundreds of students” that filed complaints with OCR and the lawsuits that were filed by respondents in this timeframe reflect a problem with the guidance itself rather than indicate the need for it in the first place.⁷ In fact, a direct comparison between cases pre-2011 DCL and post-2011 DCL reveals a marked positive shift in the way campus disciplinary processes were implemented and a new willingness for victims of sexual assault to come forward. The NPRM will dismantle these changes and fundamentally shift the Title IX paradigm.

This Comment will address the problematic ideological and legal underpinnings of the NPRM, as well as its practical implications for victims trying to access their education. It is important to note, however, that the **Department’s lack of clarity on the status of the 2001 Guidance makes it impossible to comment effectively on the NPRM.** While the NPRM states that it is “reconsidering” at least portions of the 2001 Guidance, it never explicitly addresses whether the entirety of the Guidance will be rescinded. This is problematic because the 2001 Guidance addresses a broad range of issues, such as retaliation, that are entirely ignored in the NPRM. This glaring omission limits the public’s ability to effectively comment on the NPRM, since it prevents an understanding of the full extent of the changes to the Title IX system. If the 2001 Guidance is rescinded, there are significant gaps in the NPRM that deserve to be addressed; if the 2001 Guidance is not rescinded, there are direct contradictions between the documents that will cause confusion and chaos for institutions and parties.

⁵ Indeed, an increase in victim reporting should be understood in the larger context of Title IX – as “critical to adequately meeting Title IX obligations” since “equal opportunity in education includes creating and maintaining systems in which victims of sexual assault report sexual assaults and receive the education-related remedies that they need in order to continue their education. Unless victims report, educational institutions may remain unaware of the contours of the problem and victims will not be provided equal access to education.” Naomi Mann, *Taming Title IX Tensions*, 20 J. CONST. L. 631, 669 (2018).

⁶ Office for Civil Rights, Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali, U.S. Dep’t Educ. 1 (Apr. 4, 2011) [hereinafter “2011 DCL”]; CATHERINE E. LHAMON, ASSISTANT SEC’Y, OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014) [hereinafter “2014 FAQ”]; Office for Civil Rights, Dear Colleague Letter from Acting Assistant Secretary for Civil Rights Seth M. Galanter, U.S. Dep’t of Educ., 2 n.4 (Jan. 25, 2013); see also Erin Buzuvis, *Title IX & Procedural Fairness: Why Disciplined-Student Litigation Does Not Undermine the Role of Title IX in Campus Sexual Assault*, 78 MONT. L. REV. 1, 72 (2017) (“It is possible, therefore, that students disciplined for sexual assault are just as litigious as they were prior to the Dear Colleague Letter – there are simply more of them today. This is not because of problems that the Letter caused; rather, it is because of the problems it corrected.”).

⁷ NPRM, *supra* note 1, at 61465. It is also notable that the ability to cite how many complaints were filed with OCR is a product of 2011 Dear Colleague Letter. Data from prior to its issuance was not publicly available. Inserting such information without context is uninterpretable since the Department provides no point of comparison.

I. THE DEPARTMENT HAS LOST SIGHT OF ITS STATED PURPOSE.

The Preamble of the NPRM argues that the context is ripe for the proposed regulations, such that the actual changes seem reasonable in light of the “lack of clear regulatory standards” that have “undermined confidence” in reliability of outcomes solely precipitated by the Obama-era guidance.⁸ The problem is that the entire premise relied on by the Department is fundamentally flawed; it is built on a series of assumptions and biases that, when untangled, reveal what can only be understood as an effort to eliminate educational processes as avenues of redress for victims of sexual harassment.

In making the case for these changes and the adoption of purloined authority, the Department repeatedly emphasizes criticism from a few select groups of individuals and organizations that do not represent the majority of stakeholders.⁹ The Preamble then suggests that the proper way forward is an alignment of agency review of Title IX compliance with select aspects of legal jurisprudence and, in particular, misapplied Supreme Court precedent. In so doing, the Department completely fails to understand the important distinctions in both object and purpose between these different avenues and essentially forecloses the path for redress at the institution writ large.¹⁰

In addition to the Preamble’s duplicitous narrative, the general text of the NRPM is reflective of an agency that has veered off course and lost sight of its obligation to enforce Title IX. The

⁸ *Id.*

⁹ The Department would have the public believe that it is responding to rampant problems arising from students being accused of, and adjudicated responsible for, sexual assault without proper process or protections. This is not the reality of campus sexual assault. According to one study, only 45% of disciplinary proceedings result in the accused student being found responsible for sexual assault. *Confronting Campus Sexual Assault: An Examination of Higher Education Claims*, United Educators, 10–12, available at <https://perma.cc/6NWY-ARX6>. This report further notes that among students who are found responsible, most are sanctioned by something other than expulsion. In cases where the accused is found responsible, the student is expelled 43% of the time. *Id.* at 12; see also Tyler Kinkade, *Fewer than One-Third of Campus Sexual Assault Cases Result in Expulsion*, HUFFINGTON POST (Sept. 29, 2014, 8:59 AM EST), available at <https://perma.cc/2N4Z-5N8H> (reporting that among students found responsible for sexual assault, only 30% are expelled).

¹⁰ The NPRM is rife with inconsistencies and irony. It suggests an alignment of agency standards with legal precedent while failing to take into account the distinct differences in remedies between civil courts and campus disciplinary processes. Then the NPRM explicitly departs from civil litigation standards on the grounds of these previously ignored distinctions. The NPRM incorporates elements of the criminal justice system while, in the same breath, taking issue with the overreach of institutions adjudicating sexual assault. In short, the logic presented in this NPRM does not hold water and suggests that the Department has failed to understand not only basic tenets of the law, but also of its own purpose. These finer points will be addressed in detail later in this Comment.

Additionally, the NPRM’s creation of a safe harbor suggests that OCR’s interest and ability to meaningfully investigate allegations of Title IX violations by victims are null and void. When coupled with the proposed “deliberate indifference” standard for investigated cases, the changes will effectively prevent victims from obtaining equal access to their education that Title IX was designed to provide for in the first place and leave them with no recourse.

proposed regulation is rife with overly prescriptive requirements while, at the same time, purporting to promote flexibility in addressing sexual harassment. In an effort to incorporate respondent-friendly measures in the guise of due process protections, the Department steps outside their purview, culling portions of criminal procedure – including a presumption of innocence, a right to cross examine the reporting party, and a mandated hearing – and haphazardly applying them to a disciplinary proceeding. Ignoring basic legal distinctions, they conflate the criminal justice system with regulatory law, resulting in an overly prescriptive system that alienates victims and is impossible to navigate for all parties. The NPRM reflects the Department’s abdication of responsibility for protecting the civil rights of students who are victims of sexual harassment – ostensibly the primary role of the agency.¹¹ This new system will make it harder and more dangerous for victims of sexual harassment to come forward and seek redress, lead to careless adjudication processes, and engender a deep-seated lack of faith in the agency’s willingness to protect the civil rights of students.

Finally, throughout the NPRM, the Department perpetuates the falsity that sexual assault and rape allegations stand apart from all other potentially criminally prosecutable offenses that occur in educational programs and activities. The overemphasis on procedural due process in campus sexual assault cases stands in stark contrast to other cases where a student is accused of a violation that may lead to expulsion, such as plagiarism or even misconduct that may also be a felony under state law (i.e. distribution of drugs). In those contexts, however, the recognition that an institution of higher education has the discretion to implement its own community standards and discipline its students goes unchallenged; there is little discussed about the rights of the accused to heightened procedural protections, such as counsel and cross-examination. This discrepancy underscores that the focus of the Department’s ire is on the nature of the allegation, not the nature of the deprivation at issue. Thus, while allegations of sexual harassment will *require* a higher burden of proof in many cases and must overcome the application of pseudo legal procedures, these requirements are not reflected in any other campus disciplinary cases. This is fundamentally misaligned with procedural due process analyses and, once again, illuminates the Department’s failure to understand the legal principles it is seeking to promote.¹²

The effect of this ill-conceived framework by the Department is that victims of sexual assault and rape will be left with little possibility of obtaining a remedy affording them equal access to their education. For the reasons laid out in this Comment, it would seem as if that is the Department’s ultimate design.

¹¹ “How to File a Discrimination Complaint with the Office for Civil Rights,” *available at* www2.ed.gov/about/offices/list/ocr/docs/howto.html (“It is the mission of the Office for Civil Rights to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights.”).

¹² Deprivation of access in an educational context is distinct from other deprivations (such as those occurring in a criminal justice context) and therefore do not demand a greater level of process. Mann, *supra* note 5, at 668.

II. THE APPLICATION OF A DELIBERATE INDIFFERENCE STANDARD TO AGENCY REVIEW IS AN INTENTIONAL ABDICATION OF RESPONSIBILITY BY THE DEPARTMENT TO ENFORCE TITLE IX.

Proposed § 106.44(a) is problematic on its face and in practice. Broken down into its component parts, this provision adopts a deliberate indifference standard, includes an actual knowledge requirement, and narrows the definition of sexual harassment. The effect of these, if implemented, will be the exclusion of victims of sexual harassment from the purview of Title IX, significant reporting hurdles for those who experience conduct prohibited by Title IX, and the elimination of the Department as a viable mechanism to hold institutions accountable when they fail to respond adequately. This provision in and of itself exemplifies the Department's unraveling of Title IX protections for victims and should not be implemented.

The following sections will outline the insidious nature of this provision, starting with deliberate indifference and moving to the skeletal definition of sexual harassment.

A. Deliberate Indifference is a Grossly Inappropriate and Unwarranted Standard for the Department to Adopt when Investigating Institutional Failure to Respond to Sex Discrimination.

The Department intentionally conflates the deliberate indifference standard with administrative agency review, misaligning the Department's public duty to enforce Title IX with Supreme Court precedent pertaining to private rights of action for money damages. The decision to do this, regardless of any justification provided in the NPRM itself, is emblematic of the Department's intention to wash its hands of any oversight when it comes to sex discrimination in educational settings and leave victims to fend for themselves amidst pervasive sexual harassment. This decision was entirely voluntary, and for the reasons set forth below, will have dire consequences for victims.

The deliberate indifference standard is derived from *Davis* – a decision coming out of a private lawsuit for money damages based on institutional failure to respond to sexual harassment. This standard of liability was developed over time in response to third-party claims for money damages under Title IX in the absence of an explicit private right of action under Title IX.¹³ The Courts' decision to limit liability of institutions in these settings reflects a recognition of Title IX's legislative history and the difference between public and private remedies associated with Title IX. Previously, the Department itself acknowledged this distinction and the Court's intent, stating, "the Court was explicit in *Gebser* and *Davis* that the liability standards established in these cases are limited to private actions for monetary damages."¹⁴ Indeed, in *Gebser*, the Court "was concerned with the possibility of a money damages award against a

¹³ See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 642 (1999).

¹⁴ Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, Preamble at ii. [hereinafter 2001 Guidance] (citing *Gebser*, 524 U.S. at 283, and *Davis*, 526 U.S. at 639).

school for harassment about which it had not known. In contrast, the process of administrative enforcement requires enforcement agencies such as OCR to make schools aware of potential Title IX violations and to seek voluntary corrective action before pursuing fund termination or other enforcement mechanisms.”¹⁵ Further, Commenters on the 2001 Guidance “uniformly agreed with [the Department] that the Court limited the liability standards established in *Gebser* and *Davis* to private actions for monetary damages.”¹⁶ Thus, the Department has previously acknowledged that its enforcement is largely equitable in nature, directing institutions to “change policies, procedures, and other responses that do not comply with Title IX”¹⁷ in contrast to judicial enforcement of an action by private party for money damages.

This distinction is critical. The application of the deliberate indifference standard to agency review is an effort to effectively nullify agency review. This is in conflict with the Department’s mandate, its purpose, and the Court’s intent when creating this standard. The Court in *Davis* essentially equated deliberate indifference to intentional discrimination, purposely setting the bar for relief almost impossibly high due to the lack of notice provided to institutions in third-party claims for money damages.¹⁸ Indeed, the consequences have borne out in *Davis* progeny, where courts have across the board determined that only the most severe cases can meet the deliberate indifference standard.¹⁹ This means that private litigation, at least by complainants, is not an avenue that encourages or incentivizes institutions to adequately address sexual harassment, in direct conflict with the mandate of Title IX to prohibit discrimination on the basis of sex. Moreover, court cases applying deliberate indifference have communicated that an institution can essentially do nothing in response to allegations of sexual harassment and are still not found deliberately indifferent.²⁰ One case decision actually noted

¹⁵ *Id.* at iii – iv.

¹⁶ *Id.* at iv.

¹⁷ Nancy Chi Cantalupo, *How Should Colleges and Universities Respond to Peer Sexual Violence on Campus? What the Current Legal Environment Tells Us*, 3 NASPA J. ABOUT WOMEN HIGHER EDUC. 49, 63 (2010) [hereinafter “*How Should Colleges?*”]; 2001 Guidance, *supra* note 14.

¹⁸ *Davis*, 526 U.S. at 642 (emphasis added).

¹⁹ See Catherine MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 7 (2016) (“Schools are routinely found sufficiently responsive to reported sexual harassment as not to be deliberately indifferent when they do almost nothing about it. The most stringent standards to which schools have been held in this highly fact-intensive inquiry, resulting in the most positive outcomes for sexually harassed students, have occurred in cases in which a teacher had sex with or sexually molested an underage, disabled, or boy student—or all three at once.”) (internal citations omitted).

²⁰ See, e.g., *Wyer v. Connecticut State University System*, 100 F. Supp. 3d 182, 195 (D. Conn. 2015) (holding that “[t]he deliberate indifference standard . . . is not an invitation for courts to second-guess disciplinary decisions” and therefore a university’s one-week paid suspension was deemed an adequate punishment for sexually propositioning a student in a closet and blocking her exit.); *Doe v. Bd. of Educ. of Prince George’s Cty.*, 605 Fed. App. 159, 170 (4th Cir. 2015) (where a boy was assaulted and harassed for a year, then forced to engage in sex with another male student on school grounds, but the institution was not found deliberately indifferent because it separated the two students, imposed a suspension on the offender, and gave the victim an escort to the bathroom, but later placed the two students in the same classroom after the suspension was over.); *Roe v. St. Louis Univ.*, 746 F.3d 874, 883 (8th Cir. 2014) (where the university’s lack of response to a known

that, when it comes to peer-on-peer harassment, “[t]his ‘high standard’ precludes a finding of deliberate indifference in all but ‘limited circumstances.’”²¹ The Department’s decision to adopt this standard essentially negates the Department’s ability to perform regulatory oversight, one of its primary functions.

Further, the Department fails to acknowledge – or perhaps care – that administrative review is often not pursued for individual remedies, but for victims to seek accountability for systemic failures in response to sex discrimination. VRLC’s sexual assault clients have filed complaints with the Department knowing that they would never get any personal remedy, and that any resolution could be rendered years after they had moved on from their institution. Still, the role of the Department was important in that it gave victims an ability to raise awareness of unfair and inadequate processes that often failed to take their complaints seriously or retraumatized them, thus improving the process for future victims. Foreclosing this avenue is an abdication of the Department’s central responsibility in enforcing Title IX. By proposing this action, the Department is closing ranks on victims, ensuring they do not have meaningful access to a mechanism to hold their institutions accountable for the ways they fail in responding to sex discrimination.

In the VRLC’s practice, very few clients have been in a position to bring a private civil lawsuit due to the high burden threshold, cost, or a combination thereof, despite their experiences of sexual harassment. Historically, these victims have depended on Title IX and the Department to obtain justice. The adoption of the deliberate indifference standard will cut off all avenues of redress and truncate educational institutions’ motivation to remedy ongoing sexual harassment. All but a very few will be without remedy, forcing many to endure sexual harassment in their education. The appropriateness of the court’s reliance on this standard in private actions is a different discussion, but one crucial aspect of this jurisprudence is that, in addition to the requirements being impossible to meet, it has “not promoted, and does not promote, sex equality in the educational setting.”²² Yet, the Department has deemed it “the best policy approach,”²³ finding that foreclosing avenues that protect civil rights is the best policy for advancing and interpreting Title IX.

report of rape was justified by the plaintiff’s failure to file a formal complaint.); *Moore v. Regents of the Univ. of Cal.*, No. 15-CV-05779-RS, 2016 WL 2961984 at *7–8 (N.D. Cal. May 23, 2016) (concluding that failure to provide housing or academic accommodations did not constitute deliberate indifference – suggesting that even violations of policies promulgated by the Department itself do not automatically qualify as deliberate indifference).

²¹ *Doe v. Bd. of Educ. of Prince George’s Cty.*, 982 F. Supp. 2d 641, 654 (D. Md. 2013).

²² Mackinnon, *supra* note 19.

²³ NPRM, *supra* note 1, at 61468.

- i. *Requiring actual knowledge to trigger an institution's obligations under Title IX will make reporting more difficult and campuses more dangerous for victims.*

Part and parcel of the problem with the deliberate indifference standard is the requirement of actual knowledge to trigger an institution's obligation to respond to sex discrimination. The actual knowledge standard was initially established in *Gebser*, where the Court held that an educational entity cannot be held liable for money damages unless an official of the school district with the authority to institute corrective measures has actual notice of, and is deliberately indifferent to, the harassment.²⁴ Appropriating the actual notice requirement in the context of administrative agency review will limit access to administrative remedies for many victims and thus, continue to limit victims' access to justice and support.

Considered against this backdrop, the NPRM's shift to actual knowledge to trigger an institution's obligation to respond to sexual harassment will further quell reporting and cultivate a more dangerous context for victims to come forward. Previously, institutions were encouraged to designate many responsible employees such that reporting was not in and of itself as difficult for victims. In practical terms, the NPRM will now require victims to make a report in person to one specific, designated individual on campus in order to receive supportive measures, file a complaint, or obtain interim measures. For victims who attend large institutions, i.e. one comprised of over 50,000 students, this is impracticable and will deter reporting. What if, for instance, the victim does not know who exactly they should report to when they are assaulted? What if this designated individual is located at another campus? Reducing the number of designated individuals to report to places a greater burden on victims already dealing with the aftermath of trauma. In many cases, it will be too daunting to take on. In other cases, the process of getting to the right person may entail disclosing and reliving the assault several times before landing in the right office. Essentially, by requiring actual notice before an institution must respond, the Department is asking all women and members of vulnerable populations, such as those with disabilities and those who are gender non-conforming, to prepare themselves in advance to be retraumatized in order to find the one designated person on campus they should reach out to in case they are assaulted. Even if they manage to get to this one person, there are a number of factors that may prevent them from reporting altogether, including the person being unavailable or generally unapproachable.

²⁴ *Gebser*, 524 U.S. at 283.

Despite the well-documented, alarmingly high rate of rape and sexual assault in higher education contexts,²⁵ there is a correspondingly high percentage of victims who do not report.²⁶ Factors that contribute to the lack of reporting include, *inter alia*, shame, trauma, fear of the perpetrator, fear that they will not be believed, hesitation to share with administrators that they may see on a regular basis, fear of being attacked or blamed for the assault, and fear of retaliation.²⁷ Victims experience a range of emotions and responses in the aftermath of an

²⁵ According to an American Association of Universities survey from 2015, the incidence of sexual assault and other sexual misconduct due to physical force, threats of physical force, or incapacitation among undergraduate female respondents was 23.1%. By the time the students were seniors, 26.1% of women and 29.5% of students who identify as genderqueer, trans, or other identification reported nonconsensual sexual contact through completed penetration or sexual touching by physical force or incapacitation. In addition, 61.9% of undergraduate females reported sexual harassment. DAVID CANTOR ET AL., *Report on the AAU Climate Survey on Sexual Assault and Sexual Misconduct*, WESTAT (2015), available at: http://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/Report%20on%20the%20AAU%20Campus%20Climate%20Survey%20on%20Sexual%20Assault%20and%20Sexual%20Misconduct.pdf.

According to another study, an estimated 20–25% of undergraduate women are victims/ survivors of peer sexual violence. See Brenda J. Benson et al., *College Women and Sexual Assault: The Role of Sex-Related Alcohol Expectancies*, 22 J. FAM. VIOLENCE 341, 348 (2007). “Most victims are between the ages of 15 and 24, and ‘experience rape at rates four times higher than the assault rate of all women ... College women are more at risk ... than women the same age but not in college.’ Sexual assaults most often happen during a victim’s first year in college, often during the first week they are on campus. In one study, 12.8% of completed rapes, 35% of attempted rapes, and 22.9% of threatened rapes took place on a date. Most perpetrators are known to the victim, including classmates and friends (70% of completed or attempted rapes) and boyfriends or ex-boyfriends (24.7% of completed rapes and 14.5% of attempted rapes). Often the victim has been drinking or has been given alcohol.” Cantalupo, *How Should Colleges?*, *supra* note 17, at 52.

For further information related to the pervasiveness of sexual harassment and sexual assault, see MacKinnon, *supra* note 19.

²⁶ Some studies estimate the percentage of victims that do not report to be 90%. Cantalupo, *How Should Colleges?*, *supra* note 17, at 49. Other data indicates a rate of 63% nonreporting by victims. Beverly Engel, *Stop Shaming Victims of Sexual Assault for Not Reporting*, PSYCHOLOGY TODAY (Sep. 23, 2018), available at: <https://www.psychologytoday.com/us/blog/the-compassion-chronicles/201809/stop-shaming-victims-sexual-assault-not-reporting>.

It is important to note here that while reporting among sexual assault victims tends to be low across the board, there was a marked shift in victims coming forward and seeking assistance after the 2011 DCL and 2014 FAQ.

²⁷ See Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 213 (2011) [hereinafter “*Burying Our Heads*”] (“The vast majority of the reasons that victims provide involve victims’ fears that they will not be believed or will face hostile treatment, especially from authority figures. Fear of hostile treatment or disbelief by legal and medical authorities prevents 24.7% of college rape survivors from reporting. Other factors include not seeing the incidents as harmful, not thinking a crime had been committed, not thinking what happened was serious enough to involve law enforcement, not wanting family or others to know, lack of proof, and the belief that no one will believe them and nothing will happen to the perpetrator. Moreover, the stakes of a victim’s report not being credited are quite high for the victim. Not being believed and official mishandling can increase survivor trauma.”) (internal citations omitted).

assault and are faced with overwhelming pressure to move forward with their lives, often in the same spaces as their perpetrators.²⁸ Students at this critical juncture may be debilitated from the sexual assault, such that getting through each day is the most they can muster. VRLC attorneys witness this on a regular basis. The notion that victims who have just been through one of the most, if not the most, traumatic experiences of their lives are expected to think clearly and strategically about reporting to the right person at their institution is unrealistic and, plainly, uninformed.

This indicates that the Department is not actually concerned about addressing the pervasiveness of sexual harassment on campuses. A shift to actual notice and the elimination of responsible employees within higher education institutions will undoubtedly make campuses more dangerous for the following reasons:

- **This proposal makes campuses more dangerous by delaying victims' ability to obtain safety measures.** Under the current framework, responsible employees serve as the institution's eyes and ears on the ground. This has enabled victims to obtain information and assistance, including getting safety measures implemented in unsafe situations. Numerous student victims who seek assistance from the VRLC do not know what Title IX is or what it guarantees. Many of them have disclosed to trusted employees, such as Resident Advisors, coaches, teaching assistants, or professors. Because of their duty to relay information to the Title IX Office, responsible employees often facilitate a prompt response that includes basic protective measures for the victim. Eliminating responsible employees will delay, if not totally hinder, the ability of victims to get prompt assistance in the wake of trauma.
- **This proposal makes campuses more dangerous by allowing untrained employees to determine whether behavior is sufficiently serious to warrant a response.** Under the previous guidance, institutions were required to designate and train responsible employees about gender-based violence on campus. By removing responsible employees, the Department conveys how little it understands or cares about the realities of sexual harassment. For instance, a student may report to their professor about being uncomfortable with a classmate that touched them inappropriately after making overtly

Notably, the NPRM is *completely silent* on retaliation, leaving victims with no assurance that they will be protected if they experience retaliation for report or otherwise participating in a complaint process on campus.

²⁸ See Lynn Langton & Jennifer Truman, U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Socio-emotional Impact of Violent Crime 3* (2014), available at <https://www.bjs.gov/content/pub/pdf/sivc.pdf> (reporting that 70% of sexual assault survivors experience moderate to severe distress, which is a larger percentage than for any other violent crime); Starre Vartan, *The Lifelong Consequences of Rape*, PAC. STANDARD (Dec. 15, 2014), available at <https://psmag.com/social-justice/lifelong-consequences-rape-96056> ("For reasons that aren't entirely clear to researchers, rape is different from other forms of physical violence and trauma. Even though people may suffer from PTSD following a variety of terrible events, ... rape victims are more likely to experience long-lasting mental and physical problems – and here, long-term can mean a lifetime of torment."); Barbara Rothbaum et al., *A Prospective Examination of Post-Traumatic Stress Disorder in Rape Victims*, 5 J. TRAUMATIC STRESS 455 (1992) (finding that 94% of women who are raped experience symptoms of post-traumatic stress disorder during the two weeks following the rape).

sexual remarks. Considered in isolation, the professor may not believe the behavior serious enough to either recommend the student reach out to the Title IX Coordinator or figure out a way to address the situation. Furthermore, the professor likely will not recognize if the behavior occurs more frequently or escalates that the student's safety may be at risk. Many employees are not experts in sexual harassment or understand the dynamics of how victims respond to being harassed. Additionally, professors, coaches, RAs, or teaching assistants that know accused students well may not believe the victim when they disclose, given their exposure to the accused student. As such, they may respond to victims out of personal preferences or biases that will impact the victim's understanding of what happened, its seriousness, and their ability to obtain assistance from trained professionals. In contrast, the designation of responsible employees has led to increased and ongoing training to help employees identify sexual harassment and establish protocols to refer all questionable cases to the Title IX coordinator. Once again, this change indicates that the Department is not concerned with addressing the pervasiveness of sexual harassment on campuses but protecting institutions and limiting victims' access to remedies.

- **This proposal makes campuses more dangerous by eliminating avenues by which the institution identifies a threat on campus.** One of most important roles of a Title IX Coordinator is to identify patterns of discrimination at the institution.²⁹ Eliminating responsible employees exposes the insidious nature of the Department's changes. Currently, Title IX Coordinators receive reports from responsible employees that assist them in identifying discrimination by individuals as well as pockets of harassment by groups. Without the requirement that responsible employees report behaviors, the Title IX Coordinator is reliant solely on victim reports to ensure their campus community is safe from serial perpetrators or other threats. The NPRM's suggestion that the impact of serial predation will be corrected by requiring the Title IX Coordinator to act upon learning of a second report of the same respondent is inherently flawed. This logic hinges on the premise that victims will ever come forward, despite the 5% reporting rates of sexual violence on campuses. The reality is that a shift to actual knowledge means that the Title IX Coordinator will be less informed than they have been since 2011, thereby decreasing their ability to promptly identify and take action to ensure the campus community is alerted and procedures are implemented to address the risk and incidents. This *by definition* makes campuses more dangerous.

The concerns listed above are not only the concerns of victims; they are practical safety concerns for students and other individuals that make up the entire campus community. Yet, these concerns are not discussed, cited, or otherwise given voice in the NPRM. Instead, the Department justifies its position by suggesting that it is necessary to achieve "an essentially uniform standard" with private litigation for money damages. In so doing, the Department fails to recognize the unique analysis of Supreme Court precedent on which it is relying. While the Supreme Court required proof of actual notice and deliberate indifference in order for a

²⁹ See Letter from Catherine Lhamon Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter on Title IX Coordinators at 3 (Apr. 24, 2015) ("This responsibility includes monitoring outcomes, identifying and addressing any patterns, and assessing effects on the campus climate.").

plaintiff to prevail in a private lawsuit for damages based on the sexual harassment, the Court expressly reserved the ability of the enforcing agency, the Department, to impose a different standard of compliance on institutions through its administrative enforcement of Title IX.³⁰ Administrative enforcement is distinct from a lawsuit in that it provides an opportunity for an institution to come into compliance before any loss of federal funds (whereas no such compliance agreement would avoid a damages award imposed through litigation). The NPRM's justification for conflating these processes overlooks the ways in which the Supreme Court itself has upheld the distinctions between administrative review and private litigation. Such a duplicitous justification on the Department's part indicates a willful attempt to make reporting incidents of sexual harassment, including sexual assault, more difficult for victims.

B. Narrowing the Definition of Sexual Harassment Will Deny Redress to Victims of Sexual Harassment and Make Institutions More Dangerous.

The NPRM's proposed definition of sexual harassment in § 106.44(e)(1) narrows the scope of behavior covered by Title IX and eliminates the concept of hostile environment entirely, deviating from long-standing federal guidance as well as statutory language. If implemented, it will effectively deny redress to a significant percentage of victims of sexual harassment. Coupled with the lack of guidance related to how sexual harassment will be assessed and understood by institutions, this change will make institutions more dangerous for victims and reflects the Department's ultimate goal of limiting the scope and applicability of Title IX.

Federal guidance related to Title IX has long contemplated and promulgated standards related to the seriousness of conduct covered by the statute.³¹ In 1997, the Department indicated that hostile environment sexual harassment, as distinct from quid pro quo harassment, was indicated by "severe, persistent, or pervasive" conduct.³² It went on to note that the benchmark for determining applicability of Title IX was whether that conduct had the effect of "limit[ing] a student's ability to participate in or benefit from an education program or activity."³³ Then, in 2001, the Revised Sexual Harassment Guidance contemplated sexual harassment in the context of *Davis* and the relationship between regulation and Supreme Court precedent. In so doing, it acknowledged the benefit of having a consistent standard, but proceeded by providing a detailed roadmap for institutions to determine whether conduct was "sufficiently serious" to trigger an institution's response. This included instructing institutions to "look at the 'constellation of surrounding circumstances, expectations, and relationships'" and noted the *Davis* Court "cited approvingly to the underlying core factors described in the 1997 guidance

³⁰*Gebser*, 524 U.S. at 292; *Davis*, 526 U.S. at 638-639.

³¹Office for Civil Rights, U.S. Dep't of Educ., Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (1997) [hereinafter "1997 Guidance"]; 2001 Guidance, *supra* note 14.

³² 1997 Guidance, *supra* note 31.

³³ *Id.*

for evaluating the context of sexual harassment.”³⁴ The 2001 Guidance also provided additional clarification of the factors to consider when assessing conduct, recognizing that the *Davis* opinion addressed a specific set of facts that was not emblematic of all cases, particularly in higher education contexts. Such factors included: the degree to which the conduct affected one or more students’ education, the type, frequency and duration of the conduct, the identity of and relationship between the alleged harasser and the subject/subjects of the harassment, the number of individuals involved, the age and sex of the alleged harasser and the subject/subjects of harassment, the size of the institution, location of the incidents, and context in which they occurred, and other incidents at the institution.³⁵ It also provided an in-depth discussion of welcomeness, recognizing the degree to which such concepts, when left unaddressed, can present confusion and be manipulated.³⁶

None of this is present in the NPRM. Instead, the Department spends approximately one page on its decision to narrow the definition to requiring severity, pervasiveness, **AND** objective offense without any guidance as to how institutions make determinations related to these terms and their meaning.³⁷ There is no discussion of how to assess unwelcomeness, nor is there any provision of examples to guide institutions in ambiguous or gray areas. The Department has eliminated a useful and well-developed framework and has left in its place a vacuum. This scheme is dangerous for victims in educational settings. Consider the following scenarios:

1. A young woman is taunted by a classmate about her breasts or genital area and the conduct has gone on for some time. Under the proposed definition, it is unlikely that this conduct would be considered severe or pervasive enough to fall under Title IX. If

³⁴ 2001 Guidance, *supra* note 14 at vi (citing *Davis*, 526 U.S. at 651) (“Whether gender-oriented conduct rises to the level of actionable ‘harassment’ thus ‘depends on a constellation of surrounding circumstances, expectations, and relationships, including, but not limited to, the ages of the harasser and the victim and the number of individuals involved.’”).

³⁵ *Id.* at 6-7.

³⁶ *Id.* at 7-9. For instance, the Guidance notes: “If there is a dispute about whether harassment occurred or whether it was welcome — in a case in which it is appropriate to consider whether the conduct would be welcome — determinations should be made based on the totality of the circumstances.” *Id.* at 8-9. The Guidance then provides a list of factors to consider in making this determination. *Id.* at 9.

³⁷ NPRM, *supra* note 1, at 61463, 61496. The “and” in this phrase is emphasized to demarcate how significantly the Department has narrowed the definition of sexual harassment. In the past, the Department took the position that sexual harassment had to be severe, persistent, **OR** pervasive, which did not so rigidly define conduct that would trigger an institution’s obligation to respond. *See* 1997 Guidance; Office for Civil Rights, Dep’t of Educ., Q & A on Campus Sexual Misconduct (2017). A shift to “severe, pervasive, and objectively offensive” is therefore not only breaking with decades of precedent, but also drastically weakens protections for students who experience sexual harassment in their education. To put this into perspective, hostile environment is defined more broadly under Title VII than here in the NPRM: the Supreme Court has ruled that to violate Title VII harassment must be “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’” *Meritor Savings Bank v. Vinson*, 106 S. Ct. 2399, 2406 (1986). In essence, adults in employment settings will be afforded *more* protection than minors and students in higher education settings under the framework proposed by the Department.

- the taunts are made by a few of her classmates, would that constitute severe and pervasive conduct? What if the young woman was actually in middle school and being taunted by students in high school? What if she was a freshman in college? The ambiguity will create scenarios in which victims are asked to endure sexual harassment that institutions may arbitrarily deem not sufficiently serious under this framework, even if the students end up withdrawing from academic and extracurricular opportunities because of the behavior.³⁸
2. A professor regularly directs sexually explicit and inappropriate comments to a specific student during class. Does this constitute sexual harassment of the student under the Department's proposed definition? What about those who witness the behavior on a regular basis, some of whom are victims of sexual assault? Can an individual pursue a sexual harassment complaint if they are not the individual to whom the harassment is targeted? The NPRM suggests that Title IX does not extend to these situations, such that the students affected would have to choose between subjecting themselves to the harassment and removing themselves from the class or otherwise limiting their involvement.³⁹ The proposed definition would provide little protection in student/employee situations, where the power dynamic clearly favors a campus or secondary school employee.
 3. A student is raped off campus by another student or employee with whom they share a class/classes or otherwise interact with at the institution. The proposed definition forecloses a remedy for this student under Title IX. Given that 87% of campus students live off-campus⁴⁰, the Department's prohibition on providing a Title IX complaint remedy for those students unfortunate enough to be sexually assaulted off-campus, shows not only a total lack of understanding of how sexual violence is committed, but an utter disregard for the safety of all elementary, secondary and campus communities. According to the NPRM, a victim who has been raped by another student/employee at an off-campus party and must see their perpetrator in class the next day, would only be allowed to ask for supportive measures, but would not be afforded the right of a Title IX complaint. In other words, off-campus sexual violence is not considered sufficiently severe and pervasive to require institutional response. In light of the Department's additional changes to actual notice, which limit a campuses' ability to learn of serial predators or other serious threats to campus safety, prohibiting victim reports of off-

³⁸ This example is lifted from the 2001 Guidance (see page 6) as one that would fall under the scope of Title IX.

Notably, in the K-12 context, many states have developed robust anti-bullying laws. These laws and their corresponding policies will ultimately offer more protection than Title IX, a **federal anti-discrimination** statute, if the limitations proposed by the Department are enacted.

³⁹ This example is also lifted from the 2001 Guidance (see page 6) as one that would fall under the scope of Title IX.

⁴⁰ Rochelle Sharp, *How Much Does Living Off-Campus Cost? Nobody Knows*, N.Y. TIMES (Aug. 15, 2016), available at <https://www.nytimes.com/2016/08/07/education/edlife/how-much-does-living-off-campus-cost-who-knows.html>

campus assault is yet another way campuses will never know of the threats that exist within their communities due to a logistical technicality.

In such situations, the Department requires the institution's analytical focus to be on the interaction or conduct that takes place after the fact without considering the rape itself – a marked departure from decades of widespread recognition of hostile environment sexual harassment. Eliminating hostile environment in its entirety from analyses of sexual harassment leaves victims like the one in this scenario without educational recourse. It also reflects the Department's ignorance of the realities of sexual violence – how conduct considered benign when examined in isolation can be oppressive and limiting when considered in the context of sexual trauma. The decision to eliminate hostile environment without anything in its place is a callous decision that fundamentally contradicts the object and purpose of Title IX.

C. Adopting a Drastically Restrictive Interpretation of the Geographical Reach of Title IX and the Scope of its Application to Educational Programs and Activities is an Effort to Foreclose Educational Remedies and Undermine Title IX Protections.

In addition to adopting deliberate indifference, requiring actual knowledge, narrowing the definition of sexual harassment and eliminating hostile environment altogether, the Department goes *even further* by stating that study abroad programs and other extensions of institutions' academic programs and activities outside of the geographical United States could be excluded from Title IX's reach. By taking this approach, the Department again chooses to adopt the most restrictive interpretation of the statute. In so doing, it ignores the object and purpose of Title IX as well as the shifting nature of higher education over four decades. While the concept of studying abroad or having satellite campuses across the globe may not have been contemplated in the 1970s when this statute was written, international exposure and integration are central aspects to higher education today. Current estimations indicate that over 300,000 students study abroad in any given year and that 10% of all U.S. graduates have studied abroad.⁴¹ It is rare to find an institution of higher education that does not have an international presence or focus.⁴² Indeed, even the federal government recognizes the need for

⁴¹ NAFSA: Association of International Educators, Trends in U.S. Study Abroad, at https://www.nafsa.org/Policy_and_Advocacy/Policy_Resources/Policy_Trends_and_Data/Trends_in_U_S__Study_Abroad/ (“Nationally, the number of U.S. students studying abroad for credit during the 2016-2017 academic year grew 2.3 percent from 325,339 students to 332,727 students. This represents about 1.6 percent of all U.S. students enrolled at institutions of higher education in the United States and about 10 percent of U.S. graduates.”); U.S. Dep’t of State, U.S.A. Study Abroad, Study Abroad Data, at <https://studyabroad.state.gov/value-study-abroad/study-abroad-data> (“In academic year 2015/16 a total of 325,339 U.S. students studied abroad for academic credit, an increase of 4 percent over the previous year.”); Elizabeth Redden, *Study Abroad Numbers Grow*, INSIDE HIGHER EDUC. (Nov. 13, 2018), at <https://www.insidehighered.com/news/2018/11/13/study-abroad-numbers-continue-grow-driven-continued-growth-short-term-programs> (Women have historically studied abroad at higher rates than men, and the gap has only widened over the last decade. Women made up more than two-thirds (67.3 percent) of students studying abroad in 2016-17, compared to 65.1 percent a decade earlier.).

⁴² Over 85 percent of U.S. colleges and universities report that they offer multiple types of education-abroad programs. Brian Whalen, *The Management and Funding of US Study Abroad*, 50 INT’L HIGHER EDUC. 15 (2008). The national source for college and university rankings, U.S. News, publishes a list of colleges that have

students to have international experience in order to compete in an increasingly globalized society. The U.S. Department of State has a website dedicated to study abroad, noting that “[a]n international experience should be part of your education, whatever your goals, socioeconomic status, or field of study.”⁴³ In addition to study abroad programs, certain degrees require fieldwork in order for students to graduate (i.e. Anthropology). For many of these students, fieldwork is not only necessary for an academic degree, but central to their research and essential to their careers.

In light of this reality of higher education, the Department’s suggestion that these programs could be properly excluded from Title IX’s reach is beyond the pale. Not only is it absurd to tell students that if they participate in an academic program in a different country that is controlled by their home institution, they will not have any Title IX rights if they are assaulted in the course of that program, it is also absurd for institutions and the federal government to encourage international exposure while hedging on whether victims of sexual harassment will be protected by a federal law designed to protect them. The Department’s decision to adopt such a restrictive approach to Title IX further underscores the extent to which it is intent upon stripping protections for victims and making Title IX an elusive remedy.

III. BY INCORPORATING A SAFE HARBOR FOR INSTITUTIONS, THE DEPARTMENT FURTHER STIFLES THE ABILITY OF VICTIMS TO SEEK REDRESS FOR VIOLATIONS OF TITLE IX.

If the adoption of deliberate indifference is a barrier for victims, then offering a safe harbor to institutions is a complete barricade. The NPRM essentially sets up a two-pronged analysis that makes a finding of noncompliance virtually impossible. First, if an institution checks procedural boxes laid out in §106.45 in response to a formal complaint or multiple complaints, it will be afforded safe harbor by the Department. If, however, the institution fails to comply with §106.45 in some way, the institution’s response will be subjected to a deliberate indifference standard, which, as discussed above, is an extremely heightened standard that is rarely met. The incorporation of a safe harbor further illustrates the Department’s perspective of Title IX as detached, general instruction for educational institutions as opposed to a civil rights law. In civil rights and anti-discrimination contexts, process matters, but must be designed to meet the stated purposes of the statute. In the Title IX context, the proper end must be the statute’s object and purpose as an anti-discrimination mandate (to prohibit discrimination on the basis of sex in education programs and activities receiving Federal financial assistance), not saving institutions money by limiting liability. Safe harbor attached solely to process without any substantive inquiry into the nature and experience of that process does not advance Title IX’s objectives.

the highest percentage of students who participated in study abroad during their undergraduate years. The website notes, “Some of the schools listed below believe studying abroad to be such a valuable learning experience that they require every undergraduate student to do so.” U.S. News, Higher Education, Colleges, Most Students Studying Abroad, at <https://www.usnews.com/best-colleges/rankings/most-study-abroad>.

⁴³ Study Abroad Data, *supra* note 41.

The following elements of the safe harbor section of the NPRM further demonstrate how significantly the Department has erred in its proposal:

§ 106.44(e)(5): Formal Complaint. The NPRM requires a formal complaint to trigger an institution's obligation to respond and implement its grievance procedures. Its definition of a formal complaint is narrow, requiring a signature by the complainant or the Title IX Coordinator and specifically requesting initiation of grievance procedures. This is problematic on multiple fronts. First, it deviates from the Department's stated goals of promoting flexibility in how institutions create and implement disciplinary measures by providing a specific and narrow definition that is required by all institutions, no matter the age or ability of complainants. Secondly, read in conjunction with the actual notice requirement, this will present accessibility issues that will hinder reporting. Consider, for instance, institutions with satellite campuses with just one Title IX Coordinator. An individual is tasked with going in-person to the Title IX Coordinator to report sexual harassment or sexual assault to learn about their options. If they are not ready to move forward with a formal complaint, they face having to come back in-person to file a formal complaint with a signature. This is further complicated by those students who do not have reliable transportation or extra funds to spend on transportation. The restrictive definition imposes unnecessary barriers to filing a complaint that will detrimentally impact victims' willingness to do so. Considered in the larger context of the NPRM, this seems to be the end goal of the Department.

§ 106.44(b)(2): Actual Knowledge of Reports by Multiple Complainants. This proposal reveals the extent to which the Department, again, fails to consider its implications for victims and reporting. This particular proposal, requiring the Title IX Coordinator to file a formal complaint in response to actual knowledge of reports by multiple complainants of conduct by the same respondent, contradicts the NPRM's assertion of concern for complainant autonomy when it comes to reporting, and turns a blind eye to the safety implications for victims. If, for instance, a victim reports to the Title IX Coordinator and does not wish to move forward with a formal complaint, yet does not know that there have been other reports by victims in similar circumstances, there is a complete loss of autonomy over whether a process will move forward. Those victims that came forward previously and did not wish to pursue a formal complaint will be forced into potentially dangerous situations unknowingly, since nothing in the NPRM imposes a duty on the institution to go back and offer safety measures or accommodations. This will put victims in harm's way without their knowledge or input.

This proposal also alters a vital role of the Title IX Coordinator, removing their discretion in conducting a safety risk analysis for the complainant and the community. Previously, Title IX Coordinators were called upon to conduct such an analysis in the wake of a report of sexual harassment and the complainant's request for confidentiality. They were explicitly allowed to balance factors, such as whether there was an increased risk of future similar acts of violence, whether the act was carried out with a weapon, the age of the complainant, whether there were multiple perpetrators, whether the institution was on notice of other prior actions by the same perpetrator, etc., in order to determine whether to pursue an investigation.⁴⁴ This analysis also

⁴⁴ 2014 FAQ, *supra* note 6, at 21.

took into consideration the implications for the victim if an investigation was pursued. Under the new proposed framework, the Title IX Coordinator will have no discretion when a second victim comes forward, irrespective of the danger or harm that an investigation may cause the first or second victim. It also complicates the Title IX Coordinator's role of responding to reports. For instance, if the Title IX Coordinator receives a report from a Resident Advisor or faculty member, not from the victim themselves, and then subsequently receives a report from a victim alleging a similar incident with the same perpetrator, is the Title IX Coordinator required to pursue an investigation at that point? Would the first report, albeit not from a victim, constitute actual notice for the purposes of this provision? If not, it puts the Title IX Coordinator in a perilous situation with respect to protecting the campus community. This will put Title IX Coordinators in challenging and sometimes impossible situations.

Moreover, such a process seems designed to fail: if the Title IX Coordinator files a formal complaint, but no complainant is willing to participate or provide further information, the procedural elements required by the NPRM, including the notice requirement and cross-examination, cannot be met. Such a requirement will reliably result in a non-responsibility finding for the respondent, while falling short of meeting due process requirements along the way. This designed-to-fail framework protects an institution from a claim by another victim that is attacked by the same perpetrator, since all the institution has to do is show that it made a pro forma attempt to comply with its obligations and therefore qualifies for safe harbor.⁴⁵

§ 106.44(b)(3) & §106.44(e)(4): Supportive Measures. The NPRM suggests that its definition of supportive measures is a neutral stance in the face of allegations prior to an adjudication. This is far from true. By prohibiting such measures from ever “unreasonably burdening the other party,” the Department strips institutions of the ability to impose unilateral no contact orders or other safety measures designed to protect the complainant when it identifies the need to do so. If implemented, this provision will lead to complainants solely bearing the burden of making any changes to their housing or academics in order to feel safe. Consider, for instance, a student who has been repeatedly sexually harassed on campus. There are witnesses and other substantial evidence suggesting the ongoing nature and severity of the harassment. The victim and perpetrator have two courses together and live in the same building. If the victim is able to get to the Title IX Coordinator in order to report, they will be informed that they can pursue a formal complaint, but during the pendency of that process the onus will be on the victim to remove themselves from any situation in which they feel unsafe. This means that, on top of the upheaval imposed by the harassment itself, the victim will experience even more upheaval by having to change significant aspects of their life on campus. Ironically, the Department repeatedly emphasizes that supportive measures are “designed to restore or preserve access to the recipient’s education program or activity.” Considering that complainants will be forced to limit participation in education programs or activities due to this definition, this emphasis is clearly not intended to support victims.

Additionally, the NPRM clearly states that the Title IX Coordinator is the only individual who can coordinate supportive measures. Restricting institutions’ ability to identify other

⁴⁵ Notably, this framework also protects serial perpetrators who will benefit from a system designed to fail on this front.

individuals on campus who may be able to fulfill that role again contradicts the Department's insistence on victim autonomy or the importance of allowing institutions flexibility in responding to sex discrimination. More broadly, this proposal fails to consider the practical needs and abilities of victims who are trying to feel safe as they continue to pursue their education. For a variety of personal identity reasons – not to mention the inherent danger of the “multiple victim complaint requirement” above – victims may be better supported by advocates and other campus administrators without the Title IX Coordinator's involvement. In line with requiring actual knowledge and the definition of a formal complaint, the restrictive approaches promoted in the NPRM underscore how little the Department is concerned about promoting or advancing Title IX's object and purpose.

IV. THE PROPOSED GRIEVANCE PROCEDURES CREATE A FRAMEWORK THAT ROLLS BACK PROTECTIONS FOR VICTIMS, PRIORITIZES RESPONDENTS, AND WILL LEAD TO FRAUGHT AND HARMFUL ADJUDICATION PROCESSES.

The grievance procedures outlined in proposed § 106.45 reflect an attempt by the Department to over-prescribe adjudication processes, eliminate critical protections for victims, and undermine the function of Title IX as a statute designed to address historic sex inequality in education. These procedures reveal the crux of the Department's proposal: to reconfigure Title IX as a tool to protect respondents and discredit and intimidate victims. The following sections address key provisions of § 106.45 that exemplify this effort.

A. The Department's Extension of Title IX to Reverse Discrimination Has No Basis in Law and Equates Respondents' Treatment in a Disciplinary Process with Victims' Experiences of Severe, Pervasive, and Objectively Offensive Sexual Harassment.

Though the *opening line* of the NPRM's first substantive proposal states that the statute itself does not specifically discuss sexual harassment,⁴⁶ long-standing legal precedent places sexual harassment squarely within the ambit of Title IX.⁴⁷ There is no legal corollary justifying the Department's position that a respondent's treatment in an educational program's adjudication process qualifies as sex discrimination under Title IX. The Department declares this proposition *sua sponte*, asserting its intent to treat it the same as a victim's experience of sexual harassment. In other words, in a framework which requires a Complainant's sexual harassment to be severe, pervasive and objectively offensive in order to qualify for Title IX protections, the Department now equates a respondent's experience during an adjudication process to the same level of systemic sexual discrimination that victims experience. This flawed premise cuts against the fabric of Title IX and exposes how far the Department will go in order to protect and promote the interests of respondents.

⁴⁶ NPRM, *supra* note 1, at 61466. The fact that this is placed in the opening line of the first proposed change of the NPRM is no accident. It illuminates the Department's skewed perspective with respect to Title IX and its attempt via the NPRM to undermine the current regime and its legal foundation. Notably, the statute also fails to specifically mention college athletics, but that has not been widely criticized as outside of the purview of Title IX.

⁴⁷ *Gebser*, 524 U.S. at 283.

Additionally, this proposal ignores the statute’s legislative history and the long-term impact of sexual assault on a victim’s ability to access education and opens agency review to respondent complaints.⁴⁸ The legislative history indicates an expressed intention by legislators to address pervasive gender inequality in education. Senator Birch Bayh, one of the amendment’s sponsors, stated in support of passage that Title IX was a direct reaction to the Civil Rights Act and “an important first step in the effort to provide for the women of America something that is rightfully theirs - an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work.”⁴⁹ The statute was clearly designed to address and confront the systemic gender inequality in education. It was not, as the Department suggests, enacted from a place of neutrality or with the end goal of transforming disciplinary proceedings into quasi legal proceedings.

The breadth of the statutory language brought much-needed attention to the structural and systemic barriers that led to gender inequality in education. Sexual harassment is widely accepted and acknowledged as one of these barriers, even by the Supreme Court. Rates of sexual assault in higher education are estimated at around 20% and a majority of the victims are women.⁵⁰ The effects of sexual assault on education have been well-documented: victims of sexual assault generally experience adverse educational outcomes, ranging anywhere from a drop in grades to withdrawal and even expulsion from the educational institution. Additional effects include the “ability to stay at the institution of one’s choice, ability to graduate on time, ability to maintain scholarships, and even the ability to continue education itself.”⁵¹ Victims are also at an increased risk for post-traumatic stress disorder, depression, suicidality, lower earnings, homelessness, and poverty.⁵² It is undeniable that there remains a pressing need for Title IX protections as a result of pervasive sexual assault and harassment. Downplaying the context of sexual harassment and its impact on victims’ education, the NPRM casts Title IX as merely a mechanism meant to provide procedures to safeguard the accused without any acknowledgement of the statute’s original purpose or continuing need.⁵³ This depiction of Title IX is grossly inaccurate and ignores its fundamental purpose as borne out in history, jurisprudence, and basic facts.

⁴⁸ Ironically, the NPRM forecloses an avenue of redress for victims (via safe harbor and other restrictive provisions) but *creates* an avenue for respondents to obtain redress.

⁴⁹ 118 Cong. Rec. 5807 (1972) (statement of Sen. Birch Bayh).

⁵⁰ Mann, *supra* note 5, at 50 (internal citations omitted).

⁵¹ *Id.* at 638.

⁵² *Id.* at 638.

⁵³ NPRM, *supra* note 1, at 61472.

B. In Addition to Endorsing Reverse Discrimination as Under Title IX’s Purview, the Department Proposes Extra Safeguards for Respondents While Simultaneously Negating Victims’ Experiences.

Building on its flawed position that respondents’ experiences through an adjudication process equate to a victim’s experience of severe, pervasive and objectively offensive conduct, the Department proposes additional safeguards for respondents in § 106.45(b)(1)(i). It requires institutions to “[t]reat complainants and respondents equitably. An equitable resolution for a complainant must include remedies where a finding of responsibility for sexual harassment has been made against the respondent; such remedies must be designed to restore or preserve access to the recipient’s education program or activity. An equitable resolution for a respondent must include due process protections before any disciplinary sanctions are imposed.”⁵⁴

A close reading of this provision reveals the Department’s underlying objective of convincing the public that a respondent’s experience in a disciplinary process is more serious than a complainant’s. The selective wording of this provision entirely downplays the experiences of victims, sidestepping (or rejecting) entirely the reality of sexual harassment and the need to ensure fair treatment in an adjudication process. In describing the “distinct interests” of the parties in grievance processes, the Department suggests that complainants have an interest in receiving remedies (that are solely designed to facilitate access to educational programs and activities as long as they do not burden the respondent), while the respondent’s interests demand additional due process protections. This juxtaposition suggests that victims would not prioritize fair treatment in an adjudication process for themselves as well. It also describes the ramifications of a process for a respondent in a particularly dire way (“the resulting sanctions against the respondent could include a complete loss of access to the education program or activity of the recipient”), while again downplaying the impact to the complainant (“complainant’s access to the recipient’s education program or activity can be *limited* by sexual harassment”). The wording of this provision should not go unnoticed – whereas here, the Department chooses to frame the impact of sexual harassment on a victim as potentially “limiting,” the rest of the NPRM repeatedly insists on a higher threshold for conduct to fall under Title IX (“effectively denies”). The choice of words here underscores the brazen attempt to persuade the public that when it comes to process, the interests of the respondents overshadows and ultimately trumps the interests of the complainant. From that vantage point, due process protections are crucial only when applied to respondents. This fundamentally flawed perspective is ultimately emblematic of the NPRM’s bottom line: to serve the interests of respondents and institutions as opposed to promoting and protecting civil rights in education.

⁵⁴ The NPRM states that the concerns about the respondent requires a process that “seriously considers contrary arguments or evidence the respondent might have” as well as the specific due process protections outlined in the rest of the NPRM. The complainant is not guaranteed these opportunities. Instead, the NPRM indicates that the outcome of the process that could provide remedies and restore access to education sufficiently satisfies the complainant’s stake in and experience with the process. *Id.* This flies in the face of equity.

C. Requiring a Presumption of No Harassment Will Effectively Shift the Burden of Proof to the Complainant and Perpetuates the Myth that False Allegations are Common.

In the same vein as providing additional safeguards for respondents, the very next provision requires institutions to adopt a presumption of no harassment under the auspices of shoring up impartiality. To be clear, requiring a presumption does not guarantee, nor is it necessary for, impartiality on the part of the recipient/adjudicator. Educational proceedings have operated under the mandate to treat the parties equitably for decades, where presumptions about either party are prohibited. A presumption of no harassment fundamentally alters this equitability framework and forces the institution to take a position before any evidence is examined or weighed. To suggest that this provision promotes impartiality is an attempt to detract from how it actually advances the interests of respondents.

Imposing a presumption of no harassment also shifts the burden of proof onto the complainant, despite the Department's effort to convince the public that the burden remains with the recipient. It is well-established that imposing a presumption shifts the burden of proof onto the party without the presumption protection.⁵⁵ If the decision to require a presumption is in line with fair proceedings in legal systems, as explicitly stated by the NRPM, then the logical extension is that it be applied in the same fashion. Merely stating that the recipient will bear the burden of proof does not in practical terms make it so. Rather, it makes the Department seem naïve to the actual legal underpinnings of their assertions.

The Department's justification for requiring a presumption is entirely respondent-focused and perpetuates the insidious myth that women lie about being sexually harassed. According to the NPRM itself, this provision is a reaction to the "stigma and reputational harm that accompany an allegation of sexual misconduct." The NPRM is noticeably silent on the reputational harm and stigma that accompanies coming forward about being sexually harassed. In fact, fear of stigma and retaliation are commonly identified as barriers to coming forward, not to mention navigating overly intrusive questions about prior sexual history, behavior, the clothes the victim was wearing, or whether their conduct post-incident met the expectations of the interviewer.⁵⁶ Victims are often in a lose-lose position. If they had a forensic medical examination completed, they endured hours of invasive and painful evidence collection. If they did not seek medical attention, their credibility is questioned. Either way, the intrusion, both physically and mentally, into a victim's life when they come forward about an assault is literally given no space –not even one word – by the Department.⁵⁷

⁵⁵ Stephen Dwyer, *Presumptions and Burden of Proof*, 21 LOY. L. REV. 377, 377 (1975).

⁵⁶ See, e.g., Sable, et al., *Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students*, J. AM. COLLEGE HEALTH, 55, 157-162 (2006). ("The . . . barriers prevalent 30 years ago, prior to efforts by the rape reform movement, continue to be considered important among college men and women. The barriers rated as the most important were (a) shame, guilt, embarrassment, not wanting friends and family to know; (b) concerns about confidentiality; and (c) fear of not being believed. Both genders perceived a fear of being judged as gay as an important barrier for male victims of sexual assault or rape and fear of retaliation by the perpetrator to be an important barrier for female victims.")

⁵⁷ This does not even account for the race and power dynamics that victims grapple with in deciding whether to report. It is well-documented that women of color, along with gender nonconforming individuals, are more

At bottom, the framing of a presumption requirement by the Department reflects the deep-seated, yet thoroughly debunked, belief that women lie about being raped and sexually harassed. In reality, the rate of false sexual assault allegations lies somewhere between 2% and 10%.⁵⁸ These estimations may even be on the higher side, considering the inherent difficulties with defining “false allegations.” These definitions can vary by jurisdiction, but in general there is a material difference between an unfounded report and a false report, and what underlies a victim’s decision to recant or withdraw their complaint. In this context, the Department’s insistence on a presumption is contraindicated. Inserting this into an educational adjudication stamps the process with the question of whether the victim is telling the truth and whether “real” sexual harassment occurred. This perpetuates victim-blaming, excusing behavior of accused students, and the idea that false claims are common.⁵⁹

D. Requiring a Live Hearing with Adversarial Cross-Examination is a Barely Disguised Design to Minimize Reporting, Bolster the Accused, and Will Have a Devastating Impact on Victims Most Traumatized by Their Experience of Sexual Harassment.

Adversarial cross-examination is not an appropriate evidentiary tool to impute into campus disciplinary proceedings. First and foremost, educational institutions are not courtrooms. They are communities focused on learning, with codes of conduct designed to articulate their unique value system, protect the community and promote this core responsibility. Mandatory adversarial processes “cut against the learning goal of discipline, and superimpose a high conflict procedure into a non-adversarial community and system.”⁶⁰ By requiring adversarial cross-examination, the Department is fundamentally changing the nature of educational disciplinary proceedings into quasi legal trials without accounting for the training, limits, and protections that are necessary to prevent complete chaos. The imposition of cross-examination reflects the Department’s anti-victim perspective on Title IX, is overly prescriptive and practically flawed, and will have a long-lasting devastating impact on victims and campus adjudications writ large.

disproportionately targeted. The risks of coming forward for victims cannot be separated from the racism, homophobia, transphobia, and misogyny present in communal campus life.

⁵⁸ A multi-site study of eight U.S. communities (a combined 2,059 cases of sexual assault) found a 7.1 percent rate of false reports. Kimberly Lonsway et al., *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault*, NAT’L CTR. FOR THE PROSECUTION OF VIOLENCE AGAINST WOMEN (2009). A study of 136 sexual assault cases in Boston from 1998-2007 found a 5.9 percent rate of false reports. Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318 (2010).

⁵⁹Joanne Belknap, *Rape: Too Hard to Report and Too Easy to Discredit Victims*, 12 VIOLENCE AGAINST WOMEN 1335, 1335-1336 (2010).

⁶⁰ Mann, *supra* note 5, at 665.

i. *Requiring cross-examination is representative of the Department’s skewed ideological perspective on adjudications in higher education and Title IX.*

In a seismic departure from past practice and guidance, the Department’s insistence on adversarial cross-examination reveals the deeply misplaced ideological commitments of an agency intent on dismantling protections for victims and bolstering the accused. The rationale underlying the shift is one-sided, focusing on select federal cases that have described the need for cross-examination in education settings while ignoring the split across the board in how courts understand the institution’s due process obligations to include or exclude adversarial cross-examination. A close examination of federal case law regarding the proper due process protections required in student disciplinary cases reveals a substantially different landscape than the Department has described in the NPRM. Many federal appellate courts that have grappled with this concept have either questioned whether there is a procedural due process right to any cross-examination at all or contemplated that any such right would be narrow.⁶¹ Indeed, many courts have recognized that “[f]undamental fairness without adversarial cross-examination is satisfied where the accused is provided with the opportunity to know the substance of the evidence against him and has the opportunity to provide evidence and testimony on his behalf.”⁶² Considering the body of law around this issue – as opposed to just one federal appellate decision cited by the Department – there are limits that may be appropriately placed on cross-examination once fundamental fairness has been provided.⁶³

⁶¹ *Id.* at 658; *See also* Newsome v. Batavia Local School Dist., 842 F.2d 920, 925–26 (6th Cir. 1988) (deciding that there is no right to cross-examine adverse witnesses in expulsion proceedings due to the burden it would place on school employees); Nash v. Auburn Univ., 812 F.2d 655, 664 (11th Cir. 1987) (“Where basic fairness is preserved, we have not required the cross-examination of witnesses”); Brewer v. Austin Independent School Dist., 779 F.2d 26, 263 (5th Cir. 1985) (rejecting argument that accused had a procedural due process right to cross-examination in a suspension case and stating, “[W]e reject any suggestion that the technicalities of criminal procedure ought to be transported into school suspension cases.”); Boykins v. Fairfield Bd. of Education, 492 F.2d 697, 701 (5th Cir. 1974) (holding that the right to cross-examination is not required in expulsion proceedings); Flaim v. Med. College of Ohio, 418 F.3d 629, 636 (6th Cir. 2005) (“Some circumstances may require the opportunity to cross-examine witnesses, though this right might exist only in the most serious of cases.”); Gorman v. University of Rhode Island, 837 F.2d 7, 16 (1st Cir. 1988) (“[T]he right to unlimited cross-examination has not been deemed an essential requirement of due process in school disciplinary cases.”); Winnick v. Manning, 460 F.2d 545, 549 (2d Cir. 1972) (“The right to cross-examine witnesses generally has not been considered an essential requirement of due process in school disciplinary proceedings.”); Dixon v. Alabama State Board of Education, 294 F.2d 150, 159 (5th Cir. 1961).

⁶² Mann, *supra* note 5, at 659. *See also* Nash v. Auburn Univ., 812 F.2d 655, 664 (11th Cir. 1987) (“Where basic fairness is preserved, we have not required the cross-examination of witnesses and a full adversary proceeding.”); Goss v. Lopez, 419 U.S. 565, 581 (1975); Flaim, 418 F.3d at 636, 641 (deciding whether the “accused individual has the right to respond and defend, which will generally include the opportunity to make a statement and present evidence” when the accused had the “opportunity to present his version of events . . . [and] point out inconsistencies or contradictions in the officer’s testimony”); Winnick, 460 F.2d at 549 (“The right to cross-examine witnesses generally has not been considered an essential requirement of due process in school disciplinary proceedings.”); Dixon, 294 F.2d at 158–59.

⁶³ *See* Mann, *supra* note 5, at 660-61 (“evidence does not need to be questioned in the traditional adversarial context, the content of cross-examination may be limited, the individuals that may be cross-examined may be limited, cross-examination may be denied where not material to the result, cross-examination does not have to be face-to-face, and cross-examination may be performed through a third party. Permissible cross-examination may be oral or written, with some courts holding that there is no right to change the submitted written questions

This legal landscape reflects courts' recognition of the material difference between educational institutions and courts of law.⁶⁴ Educational institutions and their disciplinary processes are geared toward protecting the learning environment and, as such, the remedies associated are qualitatively different than criminal or civil litigation. The sanctioning power of an institution is limited to reviewing and modifying the relationship it has with each student. For instance, educational institutions may impose sanctions such as moving a respondent's residence, requiring the respondent to stay away from the victim, or requiring the respondent to undergo specific training. Institutions have discretion to impose suspensions and expulsions, but often employ them only in egregious cases. In all cases, educational institutions have the obligation of striking the appropriate balance between preserving the integrity of the learning community and ensuring the safety of their community's members. Imposing an adversarial model in these settings "negatively affects the fabric of the educational community and detracts from the educational institution's ability to carry out its core functions."⁶⁵

The Department's failure to recognize the unique nature of disciplinary processes at educational institutions in the context of imposing adversarial cross-examination is willful ignorance with inappropriate and dangerous consequences. For instance, the Department theoretically agrees that the burdens of investigation and proof should rest with the institution and not with the parties, but imposes requirements that are practically inconsistent with this. Imposing adversarial features such as cross-examination in these settings shifts that burden to the parties and their advisors. That means that students/their advisors will be called on to prepare and conduct a cross-examination, which is a difficult and nuanced task. This position, and the Department's framing of it, presumes that students will have access to a skilled attorney, but that is generally not the case. Moreover, institutions will be called upon to coordinate advisors (i.e. provide counsel) for the parties, requiring significant resources that most institutions do not have. The risks and problems associated with this proposed structure is several-fold: it is practically flawed and will lead to potentially dangerous and uncontrolled kangaroo proceedings; it will prevent victims of sexual harassment from coming forward and will impact the most vulnerable populations; it will retraumatize victims who are brave enough

in response to the victim's testimony at a hearing. The cross-examination may be in front of a hearing board or an investigator) (internal citations omitted).

⁶⁴ *Goss*, 419 U.S. at 583 (imposing "truncated trial-type procedures" and noting that "further formalizing the . . . adversary nature" of the suspension process in all disciplinary cases might "destroy its effectiveness as part of the teaching process"); *Gorman*, 837 F.2d at 14 ("[T]he courts have not and should not require that a fair hearing is one that necessarily must follow the traditional common law adversarial method."); *Nash*, 812 F.2d at 664 ("[Defendants'] rights in the academic disciplinary process are not co-extensive with the rights of litigants in a civil trial or with those of defendants in a criminal trial."); *Linwood v. Board of Education*, 463 F.2d 763, 770 (7th Cir. 1972) (stating that an expulsion hearing "need not take the form of a judicial or quasi-judicial trial. . . . [It] is not to be equated . . . with that essential to a criminal trial"); *Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 16 (D. Me. 2005) ("[A] major purpose of the administrative process and hearing is to avoid formalistic and adversarial procedures.").

⁶⁵ *Mann*, *supra* note 5, at 653 (citing *Goss*, 419 U.S. at 583 ("[F]urther formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process.")).

to come forward; it will put institutions in a perilous situation with respect to the mandated provision of counsel.

ii. The Department's adversarial cross-examination mandate is simultaneously overly prescriptive and practically careless.

The Department's overly prescriptive approach to regulating the ins and outs of disciplinary processes is a marked departure from its self-proclaimed commitment to providing institutions flexibility. Adversarial cross-examination and a mandatory live hearing are not only prescriptive, but carelessly imposed, suggesting there was little forethought about the practicalities involved in complying with such a narrow regimen. For instance, the Department insists that the rules of evidence do not apply ("there are no rules of evidence in Title IX grievance processes"⁶⁶) in the context of adversarial cross-examination, which is in and of itself an evidentiary issue. Cross-examination is designed to elicit testimony and evidence, but is subject to appropriate limitations to both protect the witness and safeguard the integrity of the proceeding. A substantial body of law around cross-examination exists such that even those trained as lawyers and judges grapple with its nuance, application, and scope in legal proceedings. The NPRM is largely silent on the practical issues that inherently accompany cross-examination. There is no instruction related to who plays the role of gatekeeper/judge in determining the scope and limitations of cross-examination, whether there is a relevancy threshold that must be met for the information elicited, whether objections are allowed and whether such objections can be the basis of appeal, and what training adjudicators will be required to undergo in order to competently preside over a cross-examination. In fact, so little is said about how adversarial cross-examination is to be carried out that it suggests the traditional limits are inapplicable. As discussed below, this carelessness has dangerous consequences for the proceedings themselves and for victims.

iii. Cross-examination will turn campus disciplinary processes into kangaroo legal proceedings.

The NPRM requires that cross-examination be carried out by advisors to the parties, narrowing the discretion of institutions with respect to limiting advisors' roles and essentially forcing institutions to provide counsel. The NPRM is silent as to the weight that this puts on advisors and ignores the reality that cross-examination is an uncommon professional skill. If advisors are not competent in cross-examination, there is a significant chance that the proceeding will go awry. Moreover, there is the question of whether an institution-appointed advisor has to have equivalent skills to an advisor who is trained in cross-examination, and whether the guarantee of an advisor insinuates the guarantee of an effective advisor. The lack of information regarding the practicalities of mandatory cross-examination suggests that the Department either does not care about its ramifications or is actually ignorant of these predictable collateral problems. Either way, its insistence on cross-examination will lead to absurd and inappropriate proceedings.

⁶⁶ NPRM, *supra* note 1, at 61477.

Consider an institution that does not typically have attorneys participate in their disciplinary process, either due to a lack of resources or because attorneys are not readily available for this kind of representation. Without limits on cross-examination, individuals wholly untrained in cross-examination, such as fraternity brothers, parents, peers, or even faculty members, will be thrown into a quasi-legal arena and tasked with carrying it out. This will lead to chaotic, uncontrolled, and largely ill-conceived proceedings that can have dire consequences for both parties involved. Questioning will likely far exceed the scope of relevant information, the few limits placed on cross-examination will not be respected, and administrators will be called upon to make nuanced legal determinations about the scope of information solicited. The precariousness of this proposal suggests that the Department is listening to a select group of respondent-friendly organization and individuals and naively regulates from the perspective that parties have attorney advisors across the board. This is not the case; in fact, those parties who have attorney advisors are in the vast minority of those who participate in a disciplinary process. The carelessness of the Department's perspective has serious implications for all of those involved in the campus disciplinary process.

iv. Cross-examination will have a devastating impact on victims.

A central concern about cross-examination is the impact it will have on victims. In what can only be described as lip service, the Department suggests that it has seriously considered the concern about “any unnecessary trauma that could arise from personal confrontation between the complainant and respondent”⁶⁷ by allowing an institution to facilitate questioning with the parties in different places. It also states that general rape shield provisions will apply, but in a context in which the rules of evidence do not. This ignores how attorneys routinely attempt to circumvent rape shield limitations.⁶⁸ In such contexts, the need for trained and skilled adjudicators cannot be overstated. Without appropriate and reliable limits, victims will be faced with intrusive and retraumatizing questions that are designed to humiliate and victim-blame them – with little to no recourse. This is likely to have a chilling effect on victims, preventing them from coming forward but doing nothing to address the pervasive sexual harassment that occurs in educational contexts. Taking that to its logical end, more victims will be prevented from equal access to their education, which contradicts and undermines Title IX.

Underlying the Department's insistence on adversarial cross-examination, among other required elements aimed at molding campus adjudications into courtroom legal proceedings, is the unfounded notion that sexual assault and rape are different kinds of cases than others that could result in equal sanctions, referred to as “rape exceptionalism.”⁶⁹ The tendency to treat

⁶⁷ NPRM, *supra* note 1, at 61476. The wording here is particularly illuminating. Any trauma should be considered inexcusable in this context, not just “unnecessary” trauma.

⁶⁸ A comprehensive study in 2006 found that “applications to admit sexual history evidence were made in just under one-third of trials sampled, though in practice this evidence was raised in two-thirds of trials as it was often introduced without following the proper procedures. Hardly any applications were made in advance of the trial, contrary to procedural rules, and two-thirds of those made at trial were successful.” Claire McGlynn, *Rape Trials and Sexual History Evidence*, 81 J. CRIM. L. 5 (2017).

⁶⁹ Mann, *supra* note 5, at 666; Michelle Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 2000 (2016) (“Title IX Is about institutional accountability, a civil rights

sexual assault and rape victims as distinct from other crime victims has roots in criminal justice and civil litigation contexts, where victim testimony has been required to be corroborated and victims have carried extra burdens to establish that they resisted.⁷⁰ Contrasted to the lack of such requirements placed on other victims of physical crimes, it is clear that there has been unequal treatment. The Department is perpetuating this rape exceptionalism, suggesting that sexual harassment, sexual assault, and rape are so distinct from other disciplinary infractions that they require additional hurdles to establish credibility. This is ultimately attributable to the Department's belief that victims lie and must be subjected to additional scrutiny.

In addition to this deeply flawed ideology, the overemphasis on due process in sexual harassment is at odds with the rights the Department is ostensibly seeking to promote. If the Department was actually concerned with the nature of the deprivation, as procedural due process analysis requires, then it would not be overly concerned with distinguishing sexual harassment cases from other disciplinary actions that carry similar risk of deprivation, i.e. plagiarism. Indeed, nothing coming out of the Department implies that every time a student is accused of violating a code of conduct that could risk suspension or expulsion, that they should have the right to counsel and adversarial cross-examination rights. Requiring only sexual harassment cases to take on the form of a courtroom legal proceeding reinforces the myth that victims lie and should be subjected to heightened scrutiny. These anti-victim ideological underpinnings of the NPRM reflect a shift in systemic values at the Department that will have long-term consequences for victims of sexual harassment in educational contexts.

E. Shifting the Standard of Evidence Prioritizes Respondents Over Victims in an Attempt to Undermine Victims' Credibility and Make Educational Remedies Even Harder to Obtain.

The NPRM's departure from the preponderance of the evidence standard is a predictable outgrowth of anti-DCL sentiment among those who decried its "overly prescriptive" regime. However, the Department's proposal overlooks several crucial facts and consequences in service to this perspective that does not actually carry water.

First, a preponderance standard was used by a majority of institutions prior to the release of the DCL. One study relying on data from public and private institutions indicated that over sixty percent of institutions utilized a preponderance standard, while other studies have estimated that it was actually around seventy percent.⁷¹ Russlyn Ali, Assistant Secretary for Civil Rights at the Department of Education in 2011, estimated that 80% of higher education

mechanism to hold institutions accountable for providing equal education."); see also Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 AKRON L. REV. 957, 957 (2008) ("Rape is an exceptional area of law.").

⁷⁰ Anderson, *supra* note 68 at 1943, 1946-50.

⁷¹ Angela Amar et al., *Administrators' Perceptions of College Campus Protocols, Response, and Student Prevention Efforts for Campus Sexual Assault*, 29 VIOLENCE & VICTIMS 579, 584-85 (2014); Jake New, *Burden of Proof in the Balance*, INSIDE HIGHER EDUC. (Dec. 16, 2016), available at <https://perma.cc/YD8T-8U56>.

institutions were using the preponderance standard prior to the DCL.⁷² This demonstrates that the DCL did not mark a radical shift in practice related to the standard of evidence, and that student conduct professionals generally agreed that the preponderance standard was the most appropriate standard in facilitating a resolution with the distinct interests at stake. In further support of this, a 2004 Model Student Conduct Code noted that the preponderance standard “correctly treats each [party] as equally important when a fact finder tries to decide what happened when facts are disputed.”⁷³ It specifically distinguished this standard from clear and convincing and beyond a reasonable doubt, noting: “The ‘clear and convincing’ and ‘beyond a reasonable doubt’ standards inaccurately treat the Accused Student as more important than the student who believes s/he was a victim of misconduct and/or as having more important interests than all other members of the academic community have in the maintenance of a calm, peaceful and productive living/learning environment.”⁷⁴ The Department expressed similar sentiment about the preponderance standard dating back to 1995, noting that applying clear and convincing in sexual harassment cases was inconsistent with equitable grievance procedures required by Title IX.⁷⁵ The same analysis is applicable today; the Department’s attempt to shift the standard represents a sea-change in Title IX and will have drastic consequences for victims as well as adjudications.

In addition to causing a baseline imbalance between the parties and shifting the burden of proof to the complainant, a move to clear and convincing will disproportionately affect marginalized communities. Underlying the effort to shift the standard are the rape myths that pervade the NPRM writ large. While they have already been discussed at length in other sections, it is worth noting that creating an unequal baseline at the outset perpetuates the myth that victims lie about being harassed or assaulted and sets a higher bar for credibility, particularly when it comes to incidents that do not involve force. It is widely known that victims who come forward without any corroborating evidence are met with a level of skepticism that often prevents cases from moving forward in the criminal justice system. Under a higher standard of evidence that endorses the baseline skepticism of victims, reporting will be further quelled. Of those who will feel this acutely are women victims of color who are already less likely to report than white women.⁷⁶ Elevating the standard of proof in disciplinary proceedings will increase the

⁷² Letter from Ass’n of Title IX Adm’rs et al. to Russlyn Ali, Assistant Sec’y for Civil Rights, Office for Civil Rights, Dep’t of Educ., 2 (Feb. 7, 2012), *available at* <https://www.prnewswire.com/news-releases/atixa-co-authors-letter-supporting-the-ocr-title-ix-dear-colleague-letter-on-campus-sexual-assault-139206759.html>.

⁷³ Edward Stoner II & John Wesley Lowery, *Navigating Past the "Spirit of Subordination": A Twenty-First Century Model Student Conduct Code with a Model Hearing Script*, 31 J. C. & U. L. 1, 49 (2004).

⁷⁴ *Id.*

⁷⁵ See Letter from Gary Jackson, Reg’l Civil Rights Director., Office for Civil Rights., U.S. Dep’t of Educ., to Jane Jervis, President, The Evergreen St. Coll. (Apr. 4, 1995).

⁷⁶ Sarah Ullman et al., *Exploring the Relationships of Women's Sexual Assault Disclosure, Social Reactions, and Problem Drinking*, 23 J. INTERPERSONAL VIOLENCE 1235, 1237 (2008); Martie Thompson et al., *Reasons for Not Reporting Victimization to the Police: Do They Vary for Physical and Sexual Incidents?*, 55 J. AM. COLL. HEALTH 277, 279 (2010) (finding that women of color are less likely to report sexual violence to the police than white women).

likelihood that women of color do not come forward, since it will amplify the skepticism of victims who do not conform to cultural stereotypes of who “real” victims are.⁷⁷

Compounding these concerns about the barriers to reporting is the predictable dilemma it sets up for educational institutions adjudicating cases with overlapping layers of discrimination. Nothing in the NPRM suggests or hints at a shifting standard with respect to allegations of racial discrimination, so preponderance will remain the standard in those contexts. Thus, when an institution is faced with allegations of sexual and racial harassment, the regulatory framework would “single[] out sexual harassment victims for differentially less protection than victims of racial or other kinds of discriminatory harassment.”⁷⁸ Addressing the intersectional dimensions of discrimination is a difficult task, but even more challenging in light of this inconsistent and incoherent scheme presented by the Department. Notably, the NPRM acknowledges that it is setting up this inconsistency, then proceeds to communicate how little it cares about addressing questions of intersectionality. What will transpire, therefore, is that victims of color will be disproportionately affected and have to navigate a confusing network of competing evidentiary standards and requirements in a context in which the odds are already stacked against them.

The impact of this proposal on victims will be significant and harmful, yet nothing in the Department’s rationale even mentions victims. It focuses solely on the possible ramifications for respondents. In fact, it essentially urges institutions to adopt a higher standard of evidence by acknowledging that faculty have more bargaining power than students and requiring that protections for faculty respondents be extended to students (the NPRM actually uses the language of “specially disfavored treatment of student respondents”).⁷⁹ While such sentiment is par for the course for the NPRM as a whole, the language here again underscores the extent to which the Department is regulating from the perspective of dismantling protections for victims as opposed to ensuring that the mandate of Title IX is appropriately upheld. The entire premise of the Department’s proposal willfully ignores that a victim’s educational access and opportunities will likely be greatly curtailed following harassment or assault – regardless of whether the respondent is ultimately held responsible. In such contexts, an endorsement of a higher standard is an inherently biased decision that favors the rights of the accused over rights of alleged victims. Such a decision does not just undermine the equitability doctrine that has appropriately presided over Title IX processes for decades, it flies in the face of it.

While the Department attempts to provide a legal justification for its proposal, suggesting that select administrative law cases that apply a higher standard of evidence are more appropriate for campus disciplinary processes than the overwhelming body of civil rights law, it is

⁷⁷ Deborah Brake, *Fighting the Rape Culture Wars Through the Preponderance of the Evidence Standard*, 78 MONT. L. REV. 109, 139 (2017). This maps how such rape myths are not just gendered, but also racialized. Sexual and racial stereotypes have roots back to slavery, where women of color were described as “lascivious and animalistic, and rendered legally unrapable.” *Id.* at 138.

⁷⁸ Nancy Chi Cantalupo, *And Even More of Us are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J. LAW & GEND. 7 (forthcoming 2019).

⁷⁹ NPRM, *supra* note 1, at 61477.

uninformed and unpersuasive. Civil rights cases have been adjudicated under the preponderance standard for years.⁸⁰ These include cases falling under Title VII and Title VI, the statute on which Title IX was closely modeled.⁸¹ Lawmakers have also expressed their intent for civil rights violations to be evaluated under the preponderance standard, such that the defendant's word is not privileged over that of the complainant.⁸² The Department's undue focus on the risk of reputational harm for the respondent ignores the educational context in which these civil rights violations are adjudicated, where the institution is called on to provide remedies and sanctions that fundamentally differ from civil or criminal litigation. In these settings, the stakes for both parties must be balanced and considered, and institutions must be able to take the steps it determines necessary to preserve the educational community. The Department does not even make a superficial attempt to balance the stakes for both parties; it only expresses concern over the outcomes for respondents. It is clear that a heightened standard is yet another attempt by the Department to close ranks on victims and foreclose access to a critical remedy.

CONCLUSION

The NPRM is a carefully crafted and strategic effort to dismantle the historic and current framework of Title IX. Each provision addressed by this Comment presents its own unique set of problems, both ideological and practical. Yet, when read together, the narrative that the Department has developed reveals an insidious and full-on offense against victims, designed to cast doubt on their reports of sexual harassment while advancing and protecting the interests of respondents. In the NPRM's hierarchy of priorities, victims come last. This is largely due to the flawed ideological underpinnings of the proposal which reflect outdated, archaic, and unfounded assumptions about sexual harassment and sexual violence and perpetuate the vicious cycle of harm against women and vulnerable populations. If this is formalized and codified in regulation, it will increase the pervasiveness of sexual harassment in educational contexts.

⁸⁰ See, e.g., *Bazemore v. Friday*, 478 U.S. 385, 400 (1986).

⁸¹ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 253 (1989) (all concurring justices in a plurality opinion agreeing that the preponderance standard applies) (citations omitted), superseded by statute, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074 5 107, as recognized in *Landgraf v. USI Film Prods.*, 511 U.S. 244,251 (1994); *Elston v. Talladega Cnty. Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993); 42 U.S.C.S 2000D (2006). As the Supreme Court has pointed out, Title VI served as a model for Title IX; the language of the two statutes is identical except for the protected classes named and the addition of the word "education" in Title IX. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694-98, 694- 95 n.16 (1979) (citing and comparing 110 Cong. Rec. 1540, 7062 (1964) (pertaining to Title VII of the Civil Rights Act of 1964), with 118 Cong. Rec. 5806-07 (1972) (pertaining to Title IX)). Other civil rights statutes, including Sections 1981, 1983, and 1985, also use the preponderance standard. See, e.g., *Lynch v. Belden & Co.*, 882 F.2d 262, 267, 269 (7th Cir. 1989) (Section 1981 claim).

⁸² See H.R. Rep. No. 88-914 (1963) (requiring the Equal Employment Opportunity Commission to prove "discrimination by a preponderance of the evidence"); S. Rep. No. 102- 197, at 51 (1991) ("It is a basic legal rule that civil cases ... do not require the kind of proof "beyond a reasonable doubt" demanded in criminal cases. Literally thousands of civil rights cases have proceeded under the traditional civil "preponderance" standard; [VAWA's civil rights remedy] simply follows suit.").

The VRLC has been serving the legal needs of sexual assault victims for fifteen years. The effects of sexual violence on clients' lives cannot be overstated or emphasized enough – they are simply devastating. Yet when given options for obtaining a remedy or the assurance that they will be treated with respect, dignity and equity in a process, the devastating effects start to have less power. Clients who have been able to walk their campuses without fear have exhibited monumental shifts in their ability to cope and to pursue the educational opportunities that bring them to life, an opportunity that all students should have. This is the fundamental purpose of Title IX: to restore that which is imbalanced and to safeguard those who pursue learning when they have been systemically barred from doing so. Indeed, that is the essence of civil rights protections. Let this not be dismantled by political ire and regressive ideology.