January 24, 2019

Brittany Bull
US Department of Education
400 Maryland Avenue SW, Room 6E310
Washington, DC 20202

Re: Docket No. ED-2018-OCR-0064, Comments in Response to Proposed Rulemaking: Amending Title IX of the Education Amendments of 1972

Dear Sir/Madam:

We are writing on behalf of a coalition consisting of the American Federation of State and County Municipal Employees (AFSCME), the American Federation of Teachers (AFT), the National Education Association (NEA) and the Service Employees International Union (SEIU) in response to the Department of Education's Notice of Proposed Rulemaking (proposed rule) to express our strong opposition to the proposed rule to modify Title IX regulatory requirements pertaining to the treatment and handling of sexual harassment claims by universities and schools (recipients).[1] We urge that the proposed rule be withdrawn and that the guidelines from 2011[2] and 2014[3] that were previously rescinded be reinstituted for recipients to rely on until a new and even more robust rule is put in place.

Collectively, our four organizations represent thousands of individuals who provide critical educational and support services across the educational spectrum. AFSCME members serve in various capacities at institutions of higher education, including providing financial, technical, and administrative services; keeping buildings and grounds clean and safe, preparing food, and working in classrooms. AFSCME members also provide critical services in K-12 education, including assisting in classrooms, feeding and transporting students, and providing essential clerical, custodial, maintenance and other support services. Individuals belonging to the AFT serve in a variety of roles in both higher education and K-12 education, including as both full- and part-time faculty, professional staff, and graduate employees in public, private, two-year and four-year institutions of higher education, and as teachers and paraprofessionals in our nations K-12 schools. Individuals belonging to the NEA likewise serve in a variety of positions in early, K-12 and higher education settings, including as classroom teachers, paraeducators and other education support professionals, specialized instructional support personnel, aspiring educators, as well as higher education faculty and staff. Finally, SEIU members working in education include thousands of graduate student workers, full and part time college faculty, and support professionals working in K-12 settings.

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[1] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462 (Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106)

[2] U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter on Sexual Violence (April 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf

[3] U.S. Dep't of Educ., Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence (April 29, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf

As a group collectively representing workers in many different educational settings, our concerns with the proposed rule include the following:

A. The proposed notice requirement undermines Title IX's discrimination protections by making it harder to report sexual harassment and assault. (§§ 106.44(a) & 106.30)

Under the proposed rules, schools would only be responsible for addressing sexual harassment when one of a small subset of school employees actually knew about the harassment. Schools would not be required to address sexual harassment unless there was "actual knowledge" of the harassment by (i) a Title IX coordinator, (ii) a K-12 teacher (but only for student-on-student harassment, *not* employee-on-student harassment); or (iii) an official who has "the authority to institute corrective measures."[4] This is a dramatic change, as the Department has long required schools to address *student-on-student* sexual harassment if almost any school employee[5] either knows about it or should reasonably have known about it.[6] This standard takes into account the reality that many students disclose sexual abuse to employees – including employees who are our members - who do not have the authority to institute corrective measures, both because students seeking help turn to the adults they trust the most and because students are not informed about which employees have authority to address the harassment. The 2001 Guidance also requires schools to address all employee-on-student sexual harassment, "whether or not the [school] has 'notice' of the harassment."[7] The 2001 Guidance recognized the particular harms of students being preyed on by adults and students' vulnerability to pressure from adults to remain silent and accordingly acknowledged schools' heightened responsibilities to address harassment by their employees.

Under the proposed rules, in contrast, if a K-12 student told a non-teacher school employee they trust—such as a guidance counselor, teacher aide, or athletics coach—that they had been sexually assaulted by another student, it would not constitute "actual knowledge" under the proposed rule.[8] Similarly, if a K-12 student told a teacher that she had been sexually assaulted by another teacher or other school employee, it would not constitute "actual knowledge" under the proposed rule.[9] Perversely, the proposed rules thus provide a more limited duty for K-12 schools to respond to a student's allegations of sexual harassment by a school employee than by a student.

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[4] Proposed rule changes relating to Title IX, 83 Fed. Reg. 61,466 (Nov. 29, 2018) (to be codified at 34 C.F.R. § 106.30)

[5] U.S. Dep't of Educ., Office for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, at 13 (Jan. 19, 2001), (this duty applies to "any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility.")
https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html#_ednref74

[6] *Id* at 14.

[7] *Id.* at 10.

[8] *See* proposed rule change relating to Title IX, 83 Fed. Reg. 61,496 (Nov. 29, 2018) (to be codified at 34 C.F.R. § 106.30) (limiting notice to "a teacher in the elementary and secondary context with regard to student-on-student harassment.")

[9] *Id.*

Sexual assault is already very difficult to talk about. Sections 106.44(a) and 106.30 would mean even when students find the courage to talk to the adult school employees they trust, schools would frequently have no obligation to respond. As organizations representing school employees in a variety of jobs and job settings, this is of paramount concern to us.

B. The proposed definition of harassment improperly prevents schools from providing a safe learning environment.

The proposed rule defines sexual harassment as "an employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the [school's] education program or activity; or sexual assault, as defined in 34 CFR 668.46(a)."[10] Under this definition, even if a student reports sexual harassment to the "right person," their school may not be able to act on the student's Title IX complaint if the harassment hasn't yet advanced to a point that it is actively harming a student's education. The Department's proposed definition is out of line with Title IX purposes and precedent, discourages reporting, and excludes many forms of sexual harassment that interfere with access to educational opportunities.

The Department does not provide a persuasive justification to change the definition of sexual harassment from that in the 2001 Guidance, which defines sexual harassment as "unwelcome conduct of a sexual nature."[11] The current definition rightly charges schools with responding to harassment before it escalates to a point that students suffer severe harm. But under the Department's proposed, narrower definition of harassment, students would be forced to endure repeated and escalating levels of abuse, from a student or teacher, before their schools would be required to investigate and stop the harassment. If a student is turned away by their school after reporting sexual harassment, the student is extremely unlikely to report a second time when the harassment escalates.

The Department repeatedly attempts to justify its proposed definition by citing "academic freedom and free speech."[12] But harassment is not protected speech if it creates a "hostile environment,"[13] i.e., if the harassment limits a student's ability to participate in or benefit from a school program or activity.[14] And schools have the authority to regulate harassing speech; the

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[10] Proposed rule change relating to Title IX, 83 Fed. Reg. 61,496 (Nov. 29, 2018) (to be codified at 34 C.F.R. § 106.30)

[11] U.S. Dep't of Educ., Office for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, at 2 (Jan. 19, 2001) https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf

[12] Proposed rule change relating to Title IX, 83 Fed. Reg. 61464, 61484 (Nov. 29, 2018) (to be codified at 34 C.F.R. § 106.6(d)(1))

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

[14]

Supreme Court held in *Tinker v. Des Moines* that school officials can regulate student speech if they reasonably forecast "substantial disruption of or material interference with school activities" or if the speech involves "invasion of the rights of others."[15] There is no conflict between Title IX's regulation of sexually harassing speech in schools and the First Amendment.

C. The proposed rules fail to impose clear timeframes for investigations and allow impermissible delays.

The proposed rules require schools to have "reasonably prompt timeframes," but allows them to create a "temporary delay" or "limited extension" of timeframes for "good cause," which includes "concurrent law enforcement activity."[16] Under the proposed rules, if there is an ongoing criminal investigation, the school would be allowed to delay its Title IX investigation for an unspecified length of time. While criminal investigations seek to punish an abuser for their conduct, Title IX investigations should seek to ensure that complainants are able to access educational opportunities that become inaccessible due to harassment. Students should not be forced to wait months or years until after a criminal investigation is completed in order to seek resolution from their schools. The Association of Title IX Administrators (ATIXA) agrees that a school that "delay[s] or suspend[s] its investigation" at the request of a prosecutor creates a safety risk to the survivor and to "other students, as well."[17]

D. The proposed rules would improperly require survivors and witnesses in college and graduate school to submit to live cross-examination by their named harasser's advisor of choice, causing further trauma.

Proposed rule § 106.45(b)(3)(vii) requires colleges and graduate schools to conduct a "live hearing," and requires parties and witnesses to submit to cross-examination by the other party's "advisor of choice"— often an attorney who is prepared to grill the survivor about the traumatic details of the assault, or possibly an angry parent or a close friend of the named harasser. The adversarial and contentious nature of cross-examination would further traumatize college and graduate school survivors who seek help through Title IX. Being asked detailed, personal, and humiliating questions often rooted in gender stereotypes and rape myths that tend to blame victims for the assault they experienced[18] would understandably discourage many students—parties and witnesses— from participating in a Title IX grievance process, chilling those who have experienced or witnessed harassment from coming forward. Nor would the proposed rules entitle

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U.S. Dep't of Educ., Office for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, (Jan. 19, 2001) https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf

[15] 393 U.S. 503, 513, 514 (1969).

[16] Proposed rule change relating to Title IX, 83 Fed. Reg. 61,497 (Nov. 29, 2018) (to be codified at 34 C.F.R. § 106.45(b)(1)(v))

[17] Association of Title IX Administrators, *ATIXA Position Statement on the Proposed Legislation Entitled: Promoting Real Opportunity, Success, And Prosperity Through Education Reform (PROSPER) Act (Higher Education Act Reauthorization)* (Jan. 18, 2018), *available at* https://atixa.org/wordpress/wp-content/uploads/2015/03/ATIXA-POSITION-STATEMENT-ON-PROSPER-ACT-Final.pdf.

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

the survivor to the procedural protections that witnesses have during cross-examination in the criminal court proceedings that apparently inspired this requirement; schools would not be required to apply rules of evidence or make a prosecuting attorney available to object or a judge available to rule on objections. The live cross examination requirement would also lead to sharp inequities if one party can afford an attorney and the other cannot.

Neither the Constitution nor any other federal law requires live cross examination in school conduct proceedings. The Supreme Court does not require any form of cross-examination (live or indirect) in disciplinary proceedings in public schools under the Due Process clause.[19] Instead, the Court has explicitly said that a 10-day suspension does not require "the opportunity … to confront and cross-examine witnesses"[20] and has approved at least one circuit court decision holding that expulsion does not require "a full-dress judicial hearing, with the right to cross-examine witnesses."[21]The vast majority of courts that have reached the issue have agreed that live cross-examination is not required in public school disciplinary proceedings, as long as there is a meaningful opportunity to have questions posed by a hearing examiner.[22] The Department itself admits that written questions submitted by students or oral questions asked by a neutral school official are fair and effective ways to discern the truth in K-12 schools,[23] and proposes retaining that method for K-12 proceedings. The Department has not explained why the processes that it considers effective for addressing harassment in proceedings involving 17- or 18-year-old students in high school would be ineffective for 17- or 18-year-old students in college.

Not surprisingly, Title IX and student conduct experts oppose these proposed rules. The Association of Title IX Administrators (ATIXA) announced in October 2018 that it opposes live, adversarial cross-examination, instead stating, "investigators should solicit questions from the parties, and pose those questions the investigators deem appropriate in the investigation interviews."[24] The Association for Student Conduct Administration (ASCA) agrees that schools should "limit[] advisors' participation in student conduct proceedings."[25] The American Bar Association recommends that schools provide "the opportunity for both parties to ask questions through the hearing chair."[26]

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[19] Of course, private schools are not impacted by Constitutional due process requirements.
[20] *Goss v. Lopez*, 419 U.S. 565, 583 (1975)
[21] *E.g. Dixon v. Alabama St. Bd. of Ed.*, 294 F.2d 150, 159 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961). *See also Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993) (holding no due process violation in expulsion of college student without providing him to right to cross-examination).
[22] Grossman & Brake, *A Sharp Backward Turn* (Nov. 29, 2018) https://verdict.justia.com/2018/11/29/a-sharp-backward-turn-department-of-education-proposes-to-protect-schools-not-students-in-cases-of-sexual-violence
[23] 83 Proposed rule change relating to Title IX, 83 Fed. Reg. 61,476 (Nov. 29, 2018) (to be codified at 34 C.F.R. § 106.45(b)(3)(vi))
[24] Association of Title IX Administrators, *ATIXA Position Statement on Cross-Examining: The Urge to Transform College Conduct Proceedings into Courtrooms* 1 (Oct. 5, 2018), *available at* https://atixa.org/wordpress/wp-content/uploads/2018/10/ATIXA-Position-Statement_Cross-Examination-final.pdf.
[25]Association for Student Conduct Administration, *Student Conduct Administration & Title IX: Gold Standard Practices for Resolution of Allegations of Sexual Misconduct on College Campuses* (2014) https://www.theasca.org/Files/Publications/ASCA%202014%20White%20Paper.pdf
[26] American Bar Association, *ABA Criminal Justice Section Task Force On College Due Process Rights and Victim Protections: Recommendations for Colleges and Universities in Resolving Allegations of Campus Sexual Misconduct* 8-10 (June 2017).

We urge you to withdraw this proposed rule, which makes the individuals who are our members and who are dedicated to educating and nurturing less safe and compromises their ability to do their jobs and protect their students. Please reinstate the previous guidelines, and draft a rule that protects vulnerable communities within the education system. Thank you for the opportunity to submit comments on the NPRM. Please do not hesitate to contact us to provide further information.

Sincerely,

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Service Employees International Union (SEIU)

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