



January 30, 2019

Kenneth L. Marcus
Assistant Secretary for Civil Rights
Department of Education
400 Maryland Avenue SW
Washington DC, 20202

RE: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance [Docket No. ED-2018-OCR-0064]

Dear Mr. Marcus,

The American Association for Justice (AAJ), formerly known as the Association of Trial Lawyers of America (ATLA), hereby submits comments in response to the Department of Education's (ED) notice of proposed rulemaking (NPRM) to redefine the standards for bringing sexual harassment claims under Title IX.¹

AAJ, with members in the United States, Canada, and abroad, works to preserve the constitutional right to trial by jury and to make sure people have access to justice through the legal system when their rights are violated. AAJ opposes the proposed rule because it creates unreasonable hurdles for survivors of sexual harassment seeking justice and accountability from discriminatory educational institutions. The proposed rule will weaken Title IX protections and further discourage survivors of sexual harassment from reporting harm.

Students who are sexually harassed already struggle with the difficult decision of reporting. Indeed, only 12% of female college survivors report sexual assault to their schools or to the police.² Sexual harassment continues to be rampant in our schools, with 62% of women and 61% of men experiencing sexual assault in college.³

The stated purpose of Title IX is to protect students from discriminatory sexual harassment. This proposed rule undermines that very purpose by creating an impossibly high standard of proof that a survivor must meet for sexual harassment discrimination claims under Title IX, while improperly shielding Title IX violators from liability. ED's proposed rule will shift the burden from schools to survivors to affirmatively show that a school was deliberately indifferent to sexual harassment misconduct, disregards any sexual misconduct that occurs off-campus, and allows for schools to delay investigations, denying justice to survivors of sexual abuse. This rule represents a direct attack on a

¹ See 83 FR 61462.

² Poll: One in 5 women say they have been sexually assaulted in college, Washington Post (June 12, 2015), available at <https://www.washingtonpost.com/graphics/local/sexual-assault-poll>.

³ Catherine Hill & Elena Silva, Drawing the Line: Sexual Harassment on Campus, AAUW 17, 19 (2005), available at <https://history.aauw.org/aauw-research/2006-drawing-the-line>.

survivor’s right to access to the courts and is especially concerning in light of the #MeToo movement and increasing demands from the public for increased accountability from those who commit and enable sexual harassment. For these reasons, AAJ strongly opposes ED’s proposed rule.

I. ED proposes an impossibly high standard of proof for student-survivors of sexual harassment.

Title IX prohibits sexual discrimination in any educational program that receives federal funding.⁴ ED is responsible for promulgating guidance and rules relating to discrimination – including sexual harassment.⁵ In 2001, ED released guidance (2001 guidance) creating a uniform standard for determining whether a Title IX school complied with sexual harassment discrimination requirements.⁶ This guidance was vetted by the public through notice and comment procedures. The 2001 guidance defined sexual harassment as “unwelcome conduct of a sexual nature” and required schools to address student-on-student harassment if any employee reasonably knew about the harassment. In the context of employee-on-student harassment, the 2001 guidance required schools to address harassment “whether or not the [school] has ‘notice’ of the harassment.” Schools that did not “take immediate and effective corrective action” violated Title IX.

The 2001 guidance dovetailed with several United States Supreme Court opinions. The Court first elaborated that monetary damages are available for private actions under Title IX based on sexual harassment between a teacher and a student.⁷ Later, it added that monetary damages are appropriate when a school official with authority has actual notice of the harassment but does not act.⁸ Actual notice included *reasonable* constructive knowledge of sexual harassment allegations.

In a separate Supreme Court Title IX case addressing an instance where one student sexually harassed another student, it created a narrow rule for seeking monetary damages against a school because of the sexual harassment committed by a student in its premises.⁹ To recover monetary damages in this situation, a plaintiff must show that: their school was deliberately indifferent to known sexual harassment; and the sexual harassment was so severe and pervasive that it deprived the student of reasonable access and benefit to the school. Importantly, the Court recognized that this narrow ruling did not apply to all ED administrative enforcement.¹⁰ It specifically noted that ED was still permitted to enforce its rules addressing a broader range of conduct under Title IX’s nondiscrimination directives. The 2001 guidance

⁴ See 20 U.S.C. 1681(a).

⁵ To date, ED has only issued non-binding guidance. See, e.g., Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 FR 12034 (March 13, 1997); Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (January 19, 2001) (2001 Guidance); Dear Colleague Letter on Sexual Harassment (January 25, 2006); Dear Colleague Letter: Sexual Violence (issued April 4, 2011, withdrawn September 22, 2017) (2011 Dear Colleague Letter); Questions and Answers on Title IX and Sexual Violence (issued April 29, 2014, withdrawn September 22, 2017) (2014 Q&A); Questions and Answers on Campus Sexual Misconduct (September 22, 2017) (2017 Q&A).

⁶ See Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties. 66 FR 5512.

⁷ Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60 (1992).

⁸ Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274 (1998).

⁹ Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629 (1999).

¹⁰ Id. at 661.

which followed this ruling correctly addressed this issue by directing that ED would not impose the narrowly-crafted uniform deliberate indifference standard for all sexual harassment discrimination claims under Title IX.¹¹

Despite this clear court precedent and ED's own prior guidance regarding sexual harassment discrimination, ED now proposes to create grossly prohibitive and unfair standards that will effectively leave survivors of harassment without any reasonable recourse from reprehensible conduct. In doing so, it will rescind all its prior guidance and eliminate its current standard for enforcing sexual harassment claims – a standard that has been in effect for nearly 20 years.

ED proposes requiring that *any* new sexual harassment claimants show that a Title IX school had actual knowledge of the harassment in an educational program or activity and, with that knowledge, responded in a way that was not deliberately indifferent. This standard imposes five deliberately harmful changes to current law protections for sexual harassment survivors. These changes include:

1. Applying a new deliberate indifference standard to *all* incidences of sexual harassment;
2. Requiring proof that sexual harassment was severe, pervasive, *and* objectively offensive;
3. A showing that the conduct denied a student reasonable access to a school's program or activity;
4. Proving that the sexual harassment occurred within the school's program or activity; and
5. Providing actual notice to a Title IX employee who has authority to institute corrective measures.

Because of the sensitivity and unequal bargaining power that survivors already face when litigating Title IX discrimination claims, ED's proposed heightened rules are vastly unfair and inappropriate. Not only does ED deliberately ignore the original intent of Title IX, it also incorrectly strays from long-standing current legal standards and agency guidance. Instead of protecting students from discrimination, this proposal will vigorously shield Title IX universities from any accountability, leading to severe and incurable harm.

A. A deliberate indifference standard will permit schools to virtually do nothing in response to valid sexual harassment claims.

ED currently requires schools to act reasonably and take immediate effective corrective action to resolve sexual harassment complaints.¹² This standard falls in line with Title IX requirements to immediately respond and correct discriminatory practices to schools who receive federal funding. Against the clear intent of Title IX, ED proposes switching to an automatic assumption that schools are always acting reasonably – without indifference. By doing so, it will place the burden on survivors to affirmatively show that a school was deliberately indifferent to sexual harassment misconduct. Reasonable interpretation of this provision will allow a school to comply with Title IX discrimination laws so long as

¹¹ See 66 FR 5512.

¹² 2001 Guidance, (“if an employee who is acting (or who reasonably appears to be acting) in the context of carrying out these responsibilities over students engages in sexual harassment – generally this means harassment that is carried out during an employee’s performance of his or her responsibilities in relation to students, including teaching, counseling, supervising, advising, and transporting students – and the harassment denies or limits a student’s ability to participate in or benefit from a school program on the basis of sex, the recipient is responsible for the discriminatory conduct”).

it follows *any* of its internal policies and procedures when responding to valid sexual harassment claims, including doing nothing at all.¹³

This deliberate indifference standard will improperly shield schools from any accountability under Title IX. In fact, it will make it next to impossible for any survivor of sexual harassment to ever bring a Title IX discrimination claim against a school. The burden should instead always remain on the school, not the student, to justify that it is complying with Title IX discrimination requirements in a fair and reasonable manner.

B. A severe, pervasive, and objectively offensive burden of proof would be effectively impossible for a student to meet.

Sexual harassment is presently defined as “unwelcome conduct of a sexual nature.” The 2001 guidance imposes civil liability under Title IX when a school employee who reasonably has some responsibility over a student engages in sexual harassment. ED’s current uniform standard for sexual harassment claims is disjunctive, requiring that conduct “must be sufficiently severe, persistent, *or* pervasive that it adversely affects a student's education.”¹⁴ (emphasis added). ED now proposes to replace this standard with a conjunctive requirement that claims must be severe, pervasive, *and* objectively offensive. ED additionally notes that the focus of any inquiries should be on the conduct being severe and pervasive, which are increasingly different burdens to meet given the factual contexts of each claim.

A substitution of the word “and” for “or” means that conjunctively, survivors will now need to prove a three-step test that discriminatory conduct was “severe,” “pervasive” and “objectively offensive.” Courts generally define “pervasive” as “persistent.”¹⁵ A required showing of pervasiveness will lead many courts to incorrectly look at frequency of conduct when determining liability.¹⁶ Existing Title IX claims that follow this narrow framework look to certain factors in determining the severity of sexual harassment. These standards include: the frequency of the offensive conduct; nature of unwelcome sexual acts or words; physical or verbal harassment; and the relationship between the parties.¹⁷

Single instances of sexual harassment will be in-actionable because of lack of pervasiveness. There is no question that incidences of rape or assault are diametrically discriminatory under Title IX. ED’s proposal will provide a survivor with zero recourse unless he or she can somehow prove extensive and severe sexual misconduct, limiting many valid sexual harassment claims. It will also inappropriately send the message that a single act of sexual harassment is just not morally bad enough to rise to the level of discrimination under Title IX.

¹³ 83 FR 61462, at 61468 (ED notes that if the school follows its policies and procedures, disciplinary decisions related to sexual harassment will not be challenged.)

¹⁴ Norma V. Cantu, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties, Office For Civil Rights, *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/sexhar00.html> (last modified Mar. 14, 2005).

¹⁵ Misa Scharfen, Peer Sexual Harassment in School: Why Title IX Doctrine Leaves Children Unprotected, 24 S. Cal. Rev. L. & Soc. Just. 81, 95–99 (2014)

¹⁶ C.f. Davis, 526 U.S. 629 (1999) (which created the narrow rule for Title IX claims against a school for student-to-student sexual harassment discrimination).

¹⁷ Proof of Public School District Liability for Student Peer-to-Peer Sexual Harassment or Harassment on the Basis of Gender or Sexual Orientation. 106 Am. Jur. Proof of Facts 3d 437 (Originally published in 2009).

C. Ignoring sexual harassment that occurs outside of a school program or activity, when still under the control of the Title IX school, provides inadequate protection of survivors.

Title IX discrimination claims do not currently depend on where an underlying sexual harassment occurred in physical location. Tellingly, Title IX prohibits *all* discrimination that “exclude[s a person] from participation in, . . . denie[s a person] the benefits of, or . . . subject[s a person] to discrimination under any education program or activity . . .”.¹⁸ The 2001 guidance places responsibility on Title IX schools to address all sexual harassment incidences if it is “sufficiently serious to deny or limit a student’s ability to participate in or benefit from the education program,” regardless of where it occurs.

ED proposes to allow Title IX schools to ignore sexual harassment complaints for off-campus or online misconduct occurring outside of a school-sponsored program. This proposal clearly runs contrary to ED’s own recent mandates and mission to prohibit any discrimination resulting from failures of Title IX schools to address and correct sexual harassment.¹⁹ Requiring sexual harassment to transpire in an “education program or activity” is ambiguous as to what exactly a school must address or must ignore. What is clear is that the proposed rule ignores that sexual harassment undoubtedly occurs off-campus and outside of the school’s activity, despite it being under the control of the Title IX school. This provision will remove any accountability for these valid complaints, providing no protection for survivors despite a clear responsibility to do so.

D. Requiring a survivor to actively search out a Title IX coordinator to provide actual notice creates another barrier to reporting sexual harassment.

The ED’s long-standing uniform requirements direct schools to address sexual harassment if almost any school employee either knew or should reasonably have known about the misconduct. The 2001 guidance clarifies that Title IX schools must address all employee-on-student sexual harassment, “whether or not the [school] has ‘notice’ of the harassment.” The policy behind this standard is that many survivors are scared and embarrassed to disclose sexual abuse, opting instead to talk to the Title IX-school-employees they trust, such as counselors, sports-coaches, therapists, or psychologists.

ED proposes that Title IX schools will no longer be responsible for addressing any valid sexual harassment claims unless an employee with “actual knowledge” is acutely aware of the misconduct. The “actual knowledge” of the harassment can only be satisfied by a[n]: Title IX coordinator; K-12 teacher;²⁰ or official who has “the authority to institute corrective measures.”

The topic of sexual assault is already extremely difficult and embarrassing for survivors to talk about. Students must be able to seek help from those they trust most. ED places a senseless additional

¹⁸ 20 U.S.C. 1681(a).

¹⁹ See, e.g., Chicago Schools Lose Millions For Allegedly Not Shielding Students From Sexual Abuse, Sasha Ingber, September 28, 2018, *available at* <https://www.npr.org/2018/09/28/652802708/chicago-schools-lose-millions-for-allegedly-not-shielding-students-from-sexual-a> (where ED cut off partial funding to Chicago Public Schools for failing to address rampant reports of off-campus sexual assault which the ED described as serious violations under Title IX. In one case, a 10th grade student was forced to perform oral sex in an abandoned building by a group of 13 boys, 8 of which she recognized from school. In the other case, another 10th grade student was given alcohol and sexually abused by a teacher in his car.)

²⁰ For student-on-student harassment only, not employee-on-student harassment.

burden on survivors to identify who their Title IX coordinator is, or whomever is the authority official who can institute corrective measures. Like most of the other ED proposed provisions, this “actual knowledge” requirement runs contrary to the intent of Title IX and would arguably have absolved liability for some of the worst Title IX offenders in United States history.²¹

II. The proposed grievance procedures will delay or deny a survivor’s ability to seek justice.

ED in its proposal sets out specific grievance procedures by which Title IX schools should employ in response to formal complaints of sexual harassment, including: allowing schools to delay investigations indefinitely; and allowing schools to choose between a preponderance of the evidence standard and a clear and convincing standard of proof. These proposed changes will deny survivors justice by making it nearly impossible to meet the standard imposed.

A. The proposed investigation process will severely delay justice.

In recent years, a 60-day timeframe has been the federal standard for Title IX investigations.²² The new investigation process proposed by ED risks significantly delaying, or in some cases effectively denying, a survivor’s ability to seek justice by allowing the school’s investigation process to wait until the conclusion of any law enforcement investigation. ED proposes to allow Title IX schools to delay its investigation “for good cause” which includes waiting for “concurrent law enforcement activity”, such as until police release certain evidence. This could lead to significant or indefinite delays, for example in the case of rape kit backlogs which could delay an investigation by the school for months or even years.

If the survivor decides to bring a civil case against the school, a court may be unwilling to find deliberate indifference on the part of the school before the school has had the opportunity to finish or close any investigation, further significantly delaying a case. If a school’s investigation is delayed until the conclusion of a criminal investigation, the survivor may be denied justice all together as they may have graduated by that time or have had to drop out because they felt so unsafe attending school with their abuser.

If a survivor chooses to wait until the conclusion of the school’s investigation before moving forward with a civil case, this could potentially lead them to run afoul of any statute of limitations law,

²¹ Specifically, Larry Nassar, (Michigan State) an osteopathic doctor who molested at least 250 girls, and Jerry Sandusky, (Penn State) a college football coach, who molested young boys for decades. Both cases would have been dismissed under the ED proposal because their survivors reported sexual harassment experiences to school employees such as athletic trainers and coaches who are not considered school officials who have the “authority to institute corrective measures.”

²² Introduced in 2011 as part of a “Dear Colleague” letter from the United States Department of Education Office for Civil Rights (“OCR”), the letter included a provision that recommended a 60-day investigation limit. In the letter, OCR noted that based on its experience “a typical investigation takes approximately 60 calendar days following receipt of the complaint.” See pg. 12 of the letter April 4, 2011, available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>. Later, in a 2014 “Frequently Asked Questions” document by OCR, OCR restated the 60-day timeline clarifying it refers to the entire investigation process, while noting that some investigations may take longer depending on a case’s complexity and severity. See pages 31-32 of the document Questions and Answers on Title IX and Sexual Violence, available at: <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

such as in the case where a school delays their investigation so long waiting on a criminal investigation that a survivor misses their statute of limitation deadline.²³

B. A clear and convincing standard of proof would be extremely difficult for a survivor to meet.

In its proposed rule, ED allows schools to choose between a “preponderance of the evidence” (POTE) standard of proof and a higher “clear and convincing” (CC) standard when determining guilt. This departs from a long history where the POTE standard has been recognized by ED as the correct standard when determining proof in sexual harassment cases.²⁴ Similarly, most schools have long used the POTE standard.²⁵ And, for over “60 years courts across the country have upheld campus-imposed discipline on students where POTE was the standard utilized.”²⁶ ED proposes that a school can choose which standard to use so long as the standard used is consistent across all student misconduct cases. Allowing a school to change to the CC standard instead of the POTE standard would unfairly tilt the investigation process in favor of schools to the direct detriment of survivors.

While the POTE standard requires a fact finder to conclude that the accused has more likely than not engaged in the conduct giving rise to liability, the CC standard is more difficult to meet. Courts vary in their interpretations of the CC standard, ranging from “highly probably true” to it necessitating evidence that “enables the fact finders to come to a clear conviction, without hesitation.”²⁷ In addition to being a higher standard, the CC standard has been interpreted differently by different courts. What may be CC to one person may very well not be to another. Schools that switch to the higher standard, will deter survivors from coming forward. This deterrence factor, along with a standard of proof that is nebulous and difficult to define, would lead to inconsistent results and make it less likely that those who commit sexual misconduct will be held accountable. To that end, since courts are often deferential to college disciplinary decisions, this may cause a survivor to be denied justice in their pursuit of any civil claim.

²³ See Sexual Assault Civil Statutes of Limitations by State, available at <https://injury.findlaw.com/torts-and-personal-injuries/sexual-assault-civil-statutes-of-limitations-by-state.html>

²⁴ The 2011 “Dear Colleague” letter identified the preponderance of the evidence standard to be the correct standard stating: “In addressing complaints filed with OCR under Title IX, OCR reviews a school’s procedures to determine whether the school is using a preponderance of the evidence standard to evaluate complaints. The Supreme Court has applied a preponderance of the evidence standard in civil litigation involving discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e et seq. Like Title IX, Title VII prohibits discrimination on the basis of sex.” See pgs.10-11 of the letter, April 4, 2011, available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

²⁵ In fact, prior to the 2011 letter, a 2002 study submitted to the National Institute of Justice found that approximately 81.4% of institutions that identified a specific evidentiary standard for sexual assault disciplinary proceedings utilized the preponderance of the evidence standard. See Karjane, H.K., Fisher, B.S., & Cullen, F.T. (2002). Campus Sexual Assault: How America’s Institutions of Higher Education Respond. Final Report, NIJ Grant # 1999-WA-VX-0008, available at <https://ncjrs.gov/pdffiles1/nij/grants/196676.pdf>

²⁶ Sokolow, Brett A., ATIXA Guide to Choosing Between Preponderance of the Evidence v. Clear and Convincing Evidence, September 22, 2017, pg. 2, available at <https://atixa.org/wordpress/wp-content/uploads/2017/09/ATIXA-Guide-to-Choosing-Between-Preponderance-of-the-Evidence-v.-Clear-and-Convincing-Evidence-9.22.17.pdf>

²⁷ Chmielewski, Amy, Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault, Brigham Young University Education and Law Journal, Volume 2013, Number 1, Article 8 (Spring 3-1-2013), pg. 150 citing 21 B Wright et al., supra note 29, at nn.94, 96, 97 (citing Har v. Boreiko, 986 A.2d 1072, 1080 (Conn. App. Ct. 2010); Cobb v. Levendecker, 200 S.W.3d 924, 926 (Ark. Ct. App. 2005)).

The POTE standard is one that is used for nearly all civil cases. Since Title IX is a federal civil rights statute it follows that this standard should be the appropriate standard for investigating allegations of sexual harassment or assault.²⁸ The POTE standard should continue to be the correct standard as it is the only standard that treats the survivor and the accused equally. The preponderance standard embodies equality – calling for equal consideration of the rights of the survivor and the accused – by not giving one person’s word greater weight than the others.²⁹ The POTE standard is the only standard that creates a level playing field and treats parties equally, in line with the original intent of Title IX.

III. Conclusion

This proposal is a clear attack on the rights of sexual harassment survivors. Survivors will be affirmatively prevented from enforcing their rights and seeking any recourse for an institution’s clearly discriminatory practices. ED should not and cannot seek to abandon long-standing guidance in its own agency, coupled with Supreme Court precedent that provides important safeguards for survivors of sexual harassment.

Strong accountability standards are paramount in holding universities in check for discriminatory practices. Rampant sexual discrimination cannot be prevented if survivors are denied their day in court. AAJ therefore strongly opposes this improper re-drafting of Title IX sexual harassment standards. If you have any questions or comments, please contact Charlotte McBirney, Federal Relations Counsel at (202) 684-9517, or Brian McMillan, Federal Relations Counsel at (202) 684-9551.

Sincerely,



Elise Sanguinetti
President
American Association for Justice

²⁸ Chmielewski, pg. 150 citing 32A C.J.S. Evidence § 1627 n. 7 (20 12) (noting that "the few exceptions to the preponderance standard in civil cases are very limited and include only those cases involving fraud or possible loss of individual liberty, citizenship, or parental rights.").

²⁹ Id. at page 148.