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**U.S. Senate Committee on Health, Education, Labor and Pensions**

**Reauthorizing the Higher Education Act: Addressing Campus Sexual Assault and Ensuring  
Student Safety and Rights**

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Thank you for the opportunity to submit testimony to the Committee on addressing campus sexual assault and fair campus disciplinary processes in the reauthorization of the Higher Education Act.

**I. INTRODUCTION**

The National Women's Law Center ("the Center") is a nonprofit organization that has worked since 1972 to combat sex discrimination and expand opportunities for women and girls in every facet of their lives, including education. Founded the same year Title IX of the Education Amendments of 1972 was enacted, the Center has participated in all major Title IX cases before the Supreme Court as counsel<sup>1</sup> or amici. The Center is committed to eradicating all forms of sex discrimination in school, specifically including discrimination against pregnant and parenting students, LGBTQ students, and students who are vulnerable to multiple forms of discrimination, such as girls of color and girls with disabilities. This work includes a deep commitment to eradicating sexual harassment, including sexual assault, as a barrier to educational success. We equip students with the tools to advocate for their own rights at school, assist policymakers in strengthening protections against sexual harassment and other forms of sex discrimination, and litigate on behalf of students whose schools fail to adequately address their reports of sexual harassment.

As attorneys representing those who have been harmed by sexual violence and other forms of sexual harassment, we know that too often when students seek help from their schools to address the harassment or assault, they experience retaliation, including being pushed out of school altogether. We also know how important it is for schools to intervene when students are sexually harassed, before it escalates in severity or to the point where students no longer feel safe in school.

## II. THE REALITY OF CAMPUS SEXUAL ASSAULT

While we have made major strides to address campus sexual assault, too many colleges and universities still fail to make even efforts to support survivors' opportunities to learn in the wake of sexual violence. Students are still urged to leave school until their assailants graduated,<sup>2</sup> discouraged from filing formal disciplinary reports or telling friends,<sup>3</sup> and denied essential accommodations like dorm changes to allow them to live separately from their assailants.<sup>4</sup> Survivors sometimes still face severe retaliation, including disciplinary complaints, for speaking out about the abuse they faced.<sup>5</sup> Some schools imposed unique procedural burdens on student victims<sup>6</sup> of sexual harassment seeking disciplinary remedies, such as corroboration requirements and short windows to report – approaches that are steeped in long rejected myths that women frequently lie about rape.<sup>7</sup>

As a result of injustices like these, we routinely hear from students, most of them women,<sup>8</sup> who drop out of school, change majors, miss class, or otherwise lose crucial educational opportunities as a result of experiencing sexual violence.<sup>9</sup> As one lawyer who represents victims explained:

Probably ... 95% of the time, students will skip class for one reason or another. And...the reasons are because the perp's in the class, because the perp's friends are in the class, because, sometimes schoolwork just gets to be too much, again in the aftermath of the assault. Sometimes, they've come out to the professor as a survivor, and the professor hasn't...been particularly supportive, so they won't go back to the class. . . . I think victims will oftentimes think, "So I would rather miss class for the next 3 weeks and then just take my final, than go to class where I know he's going to be there."<sup>10</sup>

Those survivors who do stay in school may experience a drop in their academic performance. As another lawyer noted, and as we have also seen in our own cases at the Center, "I have not had a client yet whose grades did not, not just slightly diminish, but markedly diminish. Going from A's and B's to D's and F's. No doubt. It happens every time."<sup>11</sup>

The threat that inadequate university support poses to a survivor's continued education can have particularly grave costs for survivors without significant financial means: they often experience heavy financial costs, including lost scholarships, additional loans to finance additional semesters, reduced future wages due to diminished academic performance, and hefty expenses for housing changes and medical care that should be provided, free of cost, by colleges and universities.<sup>12</sup>

Only over the last few years, under pressure from student advocates<sup>13</sup> and the federal government,<sup>14</sup> have schools begun to rise to their legal and ethical duty to preserve survivors' educational opportunities.<sup>15</sup> Without a doubt, there is still much work to be done. Now that many schools have acknowledged their responsibility to address sexual violence, we are tasked with hard questions about how to get those responses right. We cannot forget the high stakes of our mission, colleges' very recent history of apathy, and the brave student advocates who pushed schools to change.

**a. CAMPUS SEXUAL ASSAULT IS PERVASIVE IN SCHOOLS ACROSS THE COUNTRY**

Students in college experience high rates of sexual harassment and sexual assault. During college, 62 percent of women and 61 percent of men experience sexual harassment,<sup>16</sup> and more than one in five women and nearly one in 18 men are sexually assaulted.<sup>17</sup> Nearly one in four transgender and gender-nonconforming students are sexually assaulted during college.<sup>18</sup> When schools fail to provide effective responses, the impact of sexual harassment and assault can be devastating.<sup>19</sup> For example, 34 percent of college student survivors of sexual assault drop out of college.<sup>20</sup>

**b. CAMPUS SEXUAL ASSAULT IS CONSISTENTLY AND VASTLY UNDERREPORTED**

Reporting sexual assault can be hard for most victims. Only 12 percent of college survivors who experience sexual assault,<sup>21</sup> and only 7.7 percent of college students who experience sexual harassment, report to their schools or the police.<sup>22</sup> Students often choose not to report for fear of reprisal, because they believe their abuse was not important enough,<sup>23</sup> because they are "embarrassed, ashamed or that it would be too emotionally difficult,"<sup>24</sup> because they think the no one would do anything to help,<sup>25</sup> and because they fear that reporting would make the situation even worse.<sup>26</sup> Common rape myths that victims could have prevented their assault if they had only acted differently, wore something else, or did not consume alcohol, only exacerbate underreporting.

Survivors of sexual assault may also be unlikely to make a report to law enforcement because, in some instances, criminal reporting often does not serve survivors' best interests or address their most pressing needs. Police officers are concerned with investigating crimes and catching perpetrators; they are not in the business of providing supportive measures to survivors and making sure that they feel safe at school. And some students—especially students of color, undocumented students,<sup>27</sup> LGBTQ students,<sup>28</sup> and students with disabilities—can be expected to be even less likely than their peers to report sexual assault to the police due to increased risk of being subjected to police violence and/or deportation. Survivors of color also may not want to report to the police if their assailant is non-white, in order to avoid exacerbating the

overcriminalization of men and boys of color. Whatever the reason, it is critical that survivors maintain the ability to determine whether, when and how to report sexual violence.

### **C. STUDENTS WHO DO REPORT CAMPUS SEXUAL ASSAULT ARE OFTEN IGNORED AND SOMETIMES EVEN PUNISHED BY THEIR SCHOOLS**

Unfortunately, students who do report to their schools too often face hostility. Reliance on common rape myths that blame individuals for the assault and other harassment they experience<sup>29</sup> can lead schools to minimize and discount sexual harassment reports. An inaccurate perception that false accusations of sexual assault are common<sup>30</sup>—despite the fact that men and boys are far more likely to be victims of sexual assault than to be falsely accused of it<sup>31</sup>—can also lead schools to dismiss reports of assault and assume that complainants are being less than truthful. Indeed, students report that after complaining to their schools about sexual assault, they faced discipline, including for engaging in so-called “consensual” sexual activity<sup>32</sup> or premarital sex,<sup>33</sup> for defending themselves against their harassers,<sup>34</sup> or for merely talking about their assault with other students in violation of a school “gag order” or nondisclosure agreement imposed by their school.<sup>35</sup> The Center regularly receives requests for legal assistance from student survivors across the country who have been disciplined by their schools after reporting sexual assault.<sup>36</sup>

Women and girls of color, particularly Black women and girls, already face discriminatory discipline due to race and sex stereotypes.<sup>37</sup> Schools are also more likely to ignore, blame, and punish women and girls of color who report sexual harassment due to harmful race and sex stereotypes that label them as “promiscuous.”<sup>38</sup>

Similarly, LGBTQ students are less likely to be believed and more likely to be blamed due to stereotypes that they are more “promiscuous,” “hypersexual,” “deviant,” or bring the “attention” upon themselves.<sup>39</sup> Students with disabilities, too, are less likely to be believed because of stereotypes about people with disabilities being less credible<sup>40</sup> and because they may have greater difficulty describing or communicating about the harassment they experienced, particularly if they have a cognitive or developmental disability.<sup>41</sup>

### **III. PREVENTION PROGRAMS ON CAMPUSES**

Since the reauthorization of the Violence Against Women Act (VAWA) in 2013 amended the Clery Act, campuses have been required to implement prevention and awareness programs for incoming students and employees on dating violence, domestic violence, sexual assault and stalking.<sup>42</sup> These prevention and awareness programs must include the definition of consent, a description of safe and positive options for bystander intervention, definitions of sexual assault, dating violence, domestic violence, and stalking, and information on risk reduction.<sup>43</sup> The prevention programs include positive and healthy behaviors to foster healthy relationships,

programs that seek to change behavior and social norms in healthy and safe manners, and programs to increase understanding of domestic violence, dating violence, sexual assault, and stalking.<sup>44</sup> Clery specifies that these programs would be “informed by research or assessed for value, effectiveness, or outcome that are intended to stop dating violence, domestic violence, sexual assault, and stalking before they occur.”<sup>45</sup> Since Clery was amended and these changes went into effect in 2014, campuses have been experimenting with promising prevention programs and should continue to build to on this in addressing campus sexual assault.

Clery also requires that officials who conduct investigations receive annual training on dating violence, domestic violence, stalking, and sexual assault, and “on how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability.”<sup>46</sup> In addition to the Clery requirements, in ensuring that trainings focus on “protect[ing] the safety of victims and promot[ing] accountability,” these trainings, and trainings for employees who respond to sexual assault generally on campuses, should also should include practical ways to prevent and identify sexual assault, including the behaviors that may lead to assault, the attitudes of bystanders that may allow conduct to continue, the potential for revictimization of survivors by employees responding to and investigating sexual assault, trauma-informed methods for responding to students who are sexually assaulted, including the use of nonjudgmental language and an understanding of the neurobiology of trauma.

#### **IV. CAMPUS PROCESSES NEED TO BE FAIR TO ALL STUDENTS**

Since the Clery Act and Title IX already requires that schools adopt and enforce procedures to address sexual assault that is prompt, equitable, and impartial reauthorization of the Higher Education Act should support and reaffirm the principles and requirements of both Clery and Title IX, including ensuring that schools address sexual harassment before it causes greater harm to a student’s education and create equitable processes that preserve and restore access to education for survivors of sexual violence.<sup>47</sup>

However, recently, the Department of Education proposed changes to its Title IX regulations i, which would impose upon the nearly 7,000 colleges and universities across the country, prescriptive and confusing requirements. Under these rules, schools would be forced to ignore sexual assault in many cases and create confusing, unfair, and harmful grievance processes that would only deter survivors and witnesses from participating in their schools’ investigations. Title IX protects all students from sex discrimination, including sexual violence, and so any changes to the Department’s Title IX rules will necessarily have an impact on how colleges and universities respond to sexual assault.

**a. SCHOOLS MUST TAKE EFFECTIVE AND IMMEDIATE ACTION WHEN RESPONDING TO SEXUAL ASSAULT AND OTHER FORMS OF HARASSMENT THAT SCHOOL EMPLOYEES KNOW ABOUT OR REASONABLY SHOULD KNOW ABOUT**

For the better part of two decades, the Department has used one consistent standard to determine if a school violated Title IX by failing to adequately address sexual assault or other forms of sexual harassment. The Department’s 2001 Guidance, which went through public notice-and-comment and has been enforced in both Democratic and Republican administrations,<sup>48</sup> defines sexual harassment as “unwelcome conduct of a sexual nature.”<sup>49</sup> This definition and the obligation rightly charges schools with responding to harassment before it escalates to a point that students suffer severe harm. The 2001 Guidance requires schools to address student-on-student harassment if *any employee* “knew, or in the exercise of reasonable care should have known” about the harassment. In the context of employee-on-student harassment, the 2001 Guidance requires schools to address harassment “whether or not the [school] has ‘notice’ of the harassment.”<sup>50</sup> Under the 2001 Guidance, the Department would consider schools that failed to “take immediate and effective corrective action” to be in violation of Title IX.<sup>51</sup> For years, these standards have appropriately guided colleges in understanding their obligations around responding to campus sexual assault.

This standard considers the reality that many students disclose sexual abuse to employees who do not have the authority to institute corrective measures, both because students seeking help turn to whatever adult they trust the most, regardless of that adult’s official role, and because students are likely 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.”<sup>52</sup> The 2001 Guidance recognized the particular harms of students being preyed on by adults in positions of authority, and students’ vulnerability to pressure from adults to remain silent, and accordingly acknowledged schools’ heightened responsibilities to address harassment by their employees.

There are, however, some employees who would not be required to report sexual assault of which it receives notice in confidential settings – such as campus mental-health counselors, social workers, psychologist, or other employees with a professional license requiring confidentiality. It is important to ensure that these relationships continued to exist in these settings so that students get the help that they need and that these professionals are trained to understand when they may keep a report confidential.

**b. COMPLAINANTS MUST BE AFFORDED NON-PUNITIVE INTERIM MEASURES TO PRESERVE AND RESTORE ACCESS TO EDUCATIONAL PROGRAMS**

Campuses should afford complainants non-punitive interim measures that preserve and restore their access to educational programs. As the Department appropriately noted in its 2001 guidance, schools “should take reasonable, timely, age-appropriate and effective corrective action, including steps tailored to the specific situation.”<sup>53</sup> Schools should also take into account the severity or pervasiveness of the alleged incident(s) and any continuing effects of the incident(s) on the complainant.

This means that in some instances, a school may need to transfer the respondent to another class or dorm even if it may burden him. Because the school should aim to restore and preserve access to the school’s programs for the victim, it would be inappropriate to force the complainant to change all of her own classes and housing assignments in order to avoid her harasser.

Schools should also use *restorative* supportive measures that are often necessary to ensure a complainant’s equal access to educational opportunities. These include the ability to retake a class, to remove a “Withdrawal” or failing grade from the harassment victim’s transcript, or to obtain reimbursement of lost tuition after being forced to withdraw and retake a course as a result of sexual assault. Also, schools may need to review any disciplinary actions taken against the complainant to ascertain if there is a causal connection between the harassment and the misconduct that may result in disciplinary action against the complainant (for example, a complainant may be disciplined for skipping class, even though she skipped that class to avoid seeing her perpetrator).

Schools also should make all necessary interim measures available to all parties and at no cost to them.<sup>54</sup> Examples of effective interim measures include:

- (1) health accommodations (e.g., counseling, other mental health and substance abuse services, medical services not covered by health insurance, disability services);
- (2) safety accommodations (e.g., changes to academic, extracurricular, housing, transportation, dining, and employment assignments; no-contact orders; protection from retaliation; campus escort services; housing assistance; increased security and monitoring); and
- (3) academic accommodations (e.g., academic support services; homework extensions; exam retakes; excused absences; preserved eligibility for grants, scholarships, and other activities or honors).

In addition, schools should never require a survivor to agree to a *mutual* no-contact order. Such a requirement would be contrary to decades of expert consensus that *mutual* no-contact orders are harmful to victims, because it gives abusers an opportunity to manipulate their

victims into violating the mutual order,<sup>55</sup> and allowing perpetrators to potentially turn what was intended to be a protective measure into a punitive measure against the survivor. Groups such as the Association for Student Conduct Administration (ASCA) agree that “[e]ffective interim measures, including . . . *actions restricting the accused*, should be offered and used while cases are being resolved, as well as without a formal complaint.”<sup>56</sup>

### **C. INVESTIGATIONS MUST BE EQUITABLE AND MUST NOT CREATE BARRIERS TO PARTICIPATION**

Institutions of higher education have worked to respond to sexual assault in ways that are tailored to their campus community and culture, size, location, resources, and state or local legal requirements. There is no one-size-fits all model. As ASCA has noted, “[w]ith different missions, resources, staffing models, funding sources, system policies, and especially campus cultures and student populations at postsecondary institutions across the United States, each college or university must develop its own policies and procedures.”<sup>57</sup> But there are effectively four types of hearing and investigatory models for adjudicating campus sexual assault in place now: the “investigative model,” the “hearing model,” the “investigation and hearing hybrid,” and the “investigation and deliberative panel hybrid.”<sup>58</sup> The investigative model relies on skilled investigators gather evidence and interview the parties [] and any other witness in separate, individual meetings, then write an investigative report where they review the evidence and fact factual findings.”<sup>59</sup> Sometimes, after the investigator completes the investigation report, the report is forwarded to an adjudicator to issue findings and sanctions.<sup>60</sup> This model is common in the employment context to address workplace discrimination, including sexual harassment.<sup>61</sup> The “hearing model” relies more on the parties, rather than the investigator and the school, to gather and present evidence to support their claims, to a hearing panel that does not do their own investigation, but rather “passively hear[s] testimony and consider[s] evidence presented by all parties and witnesses, then make factual findings based on that testimony and evidence.”<sup>62</sup> The “investigation and hearing hybrid” combines both and factual findings are made by a hearing panel based on the investigative report and witness testimony.<sup>63</sup> The investigation with the deliberative panel requires the “investigator to appear before the panel to answer questions before the panel makes a final decision.”<sup>64</sup> Any of these models can be an appropriate response to sexual assault and other forms of sexual harassment.

In one comment submitted by 24 private liberal arts colleges and universities, the comment noted that the schools have different policies, and that “[t]he model chosen by each Institution is based on careful consideration of many factors, including what has worked for them in years of experience, what best fits their individual school’s mission, culture, and values, what is most sensible given the size and unique organization of their administrations and programs, and what kinds of sexual harassment cases they each most commonly face, which can differ significantly in nature, scope, and quantity in ways that may warrant significantly differing

approaches.”<sup>65</sup> Representing 60 of the leading public and private research universities in the country, the American Association of Universities noted in its comment that “approaches [should] allow institutions to maintain, utilize, and respect the different schools’ values, student populations, community resources, and educational philosophies. Student populations vary widely in terms of the proportion of students residing on-campus or off-campus, the mix of undergraduate and graduate/ professional students, the presence of nontraditional students, and so on. Mandating that all schools address these issues in the same way will limit their ability to tailor their policies and procedures to their campus community and implement their individual educational missions.”<sup>66</sup> Finally, the Association of Independent Colleges and Universities in Massachusetts, which represents 55 colleges and universities, wrote in its comment that “[r]ather than prescribing highly specific, ‘one size fits all’ rules that would be rigidly applied to large research universities, small colleges, commuter colleges, institutions that feature experiential education, and others, the Department should limit its concern to whether a school has adopted procedures that are intended to provide fundamental fairness to the rights of all parties.”<sup>67</sup>

While no one investigatory model fits all, whatever investigation or hearing the school uses must be equitable—that is, fair to all students. Under Title IX and Clery, schools are already required to have proceedings for investigating sexual assault that are prompt and equitable. In addition, no investigatory model should place the burden on a student—whether complainant or respondent -- to “prove” the case; rather, institutions have their own independent interest in finding out what happened in order to respond appropriate to ensure its campus community is safe, which should not depend on the advocacy skills or resources of student parties.

Fair processes also require that institutions train employees on the policies addressing campus sexual assault, investigation requirements and techniques, trauma-informed responses to sexual assault, and resources and options for support; balance a survivor’s request for confidentiality with its obligation to its student body; provide effective interim measures that preserve, and if necessary, restore, equal access to education; designate reasonable timeframes for each part of the investigation; provide timely and clear notice to the parties in advance of any meeting or hearing concerning the investigation, and of their rights and responsibilities under school policy and law; use of the preponderance of the evidence standard for investigations; allow parties an equal opportunity to produce witnesses and other evidence, and an equal opportunity to respond to each other’s claims, evidence, or testimony (if applicable); eliminate direct questioning or cross-examination of the parties and witnesses given there are not corresponding safeguards; provide notice to the parties of the outcome of the investigation; provide appropriate remedies that would prevent recurrence of the sexual assault or harassment and restore equal access to the complainant’s education; and allow equal

appeal rights. These principles have also recognized by the Department in earlier Title IX guidance<sup>68</sup> and by ASCA.<sup>69</sup>

During an investigation, to the extent possible, a school should only disclose information regarding allegations of sexual assault to those who are responsible for handling the schools' response or investigation. If a student requests that their name not be revealed to the alleged perpetrator or asks the school to not take action or investigate, the school should explain that its response will therefore be limited, including pursuing any disciplinary action against the alleged perpetrator. The school will also need to determine whether or not they can still provide a safe educational environment by honoring that request, considering for example, whether or not there would be an increased risk of the alleged perpetrator committing additional acts of sexual violence.

Ensuring an equitable process also means that the school must use the preponderance-of-the-evidence standard. Resolving sexual harassment reports using the preponderance of the evidence is necessary to assure fairness and equality. Only that standard, the same one used in nearly all civil actions, including civil rights claims, places both parties on a level playing field, acknowledging that both students' educations are equally important.<sup>70</sup> For this reason, student conduct professionals have long endorsed using the preponderance standard for making determinations in all student misconduct investigations, including sexual assault, and continue to do so.<sup>71</sup> The standard that places both parties on an equal footing is particularly necessary in the case of disciplinary proceedings that implicate students' civil rights – rights that demand universities protect and value those students that have historically been systemically *unprotected* and *undervalued*, excluded from education and public life.

Requiring a heightened “clear and convincing evidence” of a sexual assault before taking disciplinary or restorative action prioritizes the educational interests and well-being of named assailants over complainants and creates too much risk that sexual assault complaints will be dismissed based on the very biases that have long led to women and girls being disbelieved, belittled, and blamed when they speak out about their experiences of sexual assault and other forms of sexual harassment.<sup>72</sup> A clear and convincing standard would do the most harm to the students whose credibility is most likely to be doubted, including and especially LGBTQ people and women of color.<sup>73</sup> Most likely, administrators judging student complaints under such a heightened standard would functionally reinstate the old, and long discarded, common law corroborating witness requirement for sexual assault, resulting in virtually automatic finding that no assault could be substantiated in the large number of cases that lack a third-party witness. (Of course, the lack of such a witness would not be dispositive in a civil, or even a criminal, proceeding.) As a result, complainants will be less likely to come forward under such a

system, knowing that the applicable standard will require administrators to view their side of the story with a *de facto* presumption against their veracity.

**d. LIVE-CROSS EXAMINATION WOULD DETER REPORTING OF CAMPUS SEXUAL ASSAULT AND IS UNNECESSARY**

The systems we build on campus to investigate and address student reports of sexual harassment must both enable truth-seeking and avoid perpetuating a hostile environment. Direct cross-examination of a victim by his or her assailant or the assailant’s representative in campus misconduct proceeding is likely to result in the latter without uniquely promoting the former. 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<sup>74</sup> would understandably discourage many students—parties and witnesses—from participating in the grievance process, chilling those who have experienced or witnessed harassment from coming forward.<sup>75</sup> This is especially the case in student misconduct proceedings, where schools are less likely to be equipped to apply general rules of evidence or trial procedure or apply the procedural protections that witnesses have during cross-examination in criminal or civil court proceedings<sup>76</sup> and ensure that they are not subject to improper questions. Nor is there a judge available to rule on objections. Any live cross-examination requirement would also lead to sharp inequities, due especially to the “huge asymmetry” that would arise when respondents are able to afford attorneys and complainants cannot.<sup>77</sup> According to the president of Association of Title IX Administrators (ATIXA), the live cross-examination provision alone—“even with accommodations like questioning from a separate room—would lead to a 50 percent drop in the reporting of misconduct.”<sup>78</sup>

Many advocates of live cross-examination in school grievance procedures, assume that cross-examination will improve the reliability of a decision-maker’s determinations of responsibility and allow them to discern “truth.”<sup>79</sup> But the reality is much more complicated, particularly in schools, where procedural protections against abusive, misleading, confusing, irrelevant, or inappropriate tactics are largely unavailable. Empirical studies show that adults give significantly more inaccurate responses to questions that involve the features typical of cross-examination, like relying on leading questions, compound or complex questions, rapid-fire questions, closed (i.e., yes or no) questions, questions that jump around from topic to topic, questions with double negatives, and questions containing complex syntax or complex vocabulary.<sup>80</sup> While these common types of questions are likely to confuse adults and result in inaccurate or misleading answers, these problems are compounded and magnified when such questions are targeted at young people and minors.<sup>81</sup>

Neither the Constitution nor any other federal law requires live cross-examination in public school conduct proceedings. The Supreme Court has not required any form of cross-

examination (live or indirect) in disciplinary proceedings in public schools under the Due Process clause. Instead, the Court has explicitly said that a 10-day suspension does not require “the opportunity ... to confront and cross-examine witnesses.”<sup>82</sup> 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.<sup>83</sup> Moreover, requiring cross-examination of both parties could put respondents in the position of self-incrimination; if the school allows a respondent to not be cross-examined in order to avoid self-incrimination, but requires the complainant to be cross-examined, it would create an inequity that at the very least would violate Title IX.

While requiring cross-examination “is problematic for all institutions, regardless of size and resources available,”<sup>84</sup> it would fall particularly heavily on community colleges, vocational schools, online schools, and other educational institutions that lack the resources of a traditional four-year college or university. The difficulty and burden imposed by live cross-examination will also likely ensure that proceedings to address sexual assault allegations are consistently delayed, harming all who seek prompt resolution of such matters and especially harming those who are depending on final determinations to address and remedy sexual assault.

Most fundamentally, any rule requiring institutions of higher education to conduct live, quasi-criminal trials with live cross-examination to address allegations of sexual harassment, when no such requirement exists for addressing any other form of student or employee misconduct at schools, communicates the message that those alleging sexual assault or other forms of sexual harassment are uniquely unreliable and untrustworthy. Implicit in requiring cross-examination for complaints of sexual harassment, but not for complaints of other types of student misconduct, is an extremely harmful, persistent, deep-rooted, and misogynistic skepticism of sexual assault and other harassment complaints. Sexual assault is already dramatically underreported. This underreporting, which significantly harms schools’ ability to create safe and inclusive learning environments, will only be exacerbated if any such reporting forces complainants into traumatic, burdensome, and unnecessary procedures built around the presumption that their allegations are false. This selective requirement of cross-examination harms complainants and educational institutions.

Unsurprisingly, Title IX experts, student conduct experts, institutions of higher education,<sup>85</sup> and mental health experts overwhelmingly oppose live cross-examination. ATIXA, for example, opposes live, adversarial cross-examination, instead recommending that investigators “solicit questions from the parties, and pose those questions the investigators deem appropriate in the investigation interviews.”<sup>86</sup> ASCA agrees that schools should “limit[] advisors’ participation in student conduct proceedings.”<sup>87</sup> The American Bar Association recommends that schools provide “the opportunity for both parties to ask questions through the hearing chair.”<sup>88</sup> The

Association of Independent Colleges and Universities in Massachusetts (AICUM), representing 55 accredited, nonprofit institutions of higher education, oppose the cross-examination requirement because it would “deter complainants from coming forward, making it more difficult for institutions to meet Title IX’s very purpose—preventing discrimination and harassment, stopping it when it does occur, and remedying its effects.”<sup>89</sup> The Association of American Universities (AAU), representing 60 leading public and private universities, oppose the requirement because it can be “traumatizing and humiliating” and “undermines other educational goals like teaching acceptance of responsibility.”<sup>90</sup> And over 900 mental health experts who specialize in trauma state that subjecting a survivor of sexual assault to cross-examination in the school’s investigation would “almost guarantee[] to aggravate their symptoms of post-traumatic stress,” and “is likely to cause serious to harm victims who complain and to deter even more victims from coming forward.”<sup>91</sup>

Instead of allowing for cross examination, colleges and universities have developed creative systems that allow parties to challenge each other’s and witnesses’ accounts. For example, some schools allow parties to submit questions through a neutral and trained school official, such as a hearing panel member, to ask questions on their behalf and screen for abusive, irrelevant, and inappropriate questions.<sup>92</sup> Alternatively, under a “single investigator model,” students can be re-interviewed to dispute the other party’s testimony.<sup>93</sup> Crucially, these models demonstrate that fair and effective hearings need not, and affirmatively should not, replicate criminal trials.

#### **e. CAMPUSES MUST NOT ALLOW MEDIATION FOR SEXUAL ASSAULT**

Mediation is a strategy often used in schools to resolve peer conflict, where both sides must take responsibility for their actions and come to a compromise. However, mediation is never appropriate for resolving sexual assault, even on a voluntary basis, because of the power differential between assailants and victims, the potential for re-traumatization, and the implication that survivors somehow share “partial” responsibility for their own assault. It also is difficult to ensure such programs are truly voluntary.

The dangers of mediation are also exacerbated at schools where mediators are untrained in trauma and sexual assault and at some religious schools, where mediators may be especially like to rely on harmful rape myths, such as “good girls forgive,” that retraumatize survivors.<sup>94</sup> Furthermore, students with developmental disabilities—both complainants and respondents—are vulnerable to being pressured or manipulated into participating in mediation and agreeing to harmful mediation outcomes, including outcomes that unfairly remove a complainant or respondent with a disability from their current school and instead push them into an alternative school.

Experts also agree that mediation is inappropriate for resolving sexual violence. For example, the National Association of Student Personnel Administrators (NASPA), representing student affairs administrators in higher education, stated in 2018 that it was concerned about students being “pressured into informal resolution against their will.”<sup>95</sup> Mental health experts also oppose mediation for sexual assault because it would “perpetuate sexist prejudices that blame the victim” and “can only result in further humiliation of the victim.”<sup>96</sup>

In light of the many risks from informal processes, we recommend the following safeguards be met for any informal resolution process: such processes should not presume any shared responsibility for the assault or pressure the complainant to “forgive” the respondent; should be conducted by trained facilitators who understand the dynamics of sexual assault, particularly on college campuses; should be trauma-informed; should ensure that students fully understand what the process entails before agreeing to participate in it; and should allow parties to stop the informal process and start with the formal process at any time.

**f. CAMPUSES MUST NOT CONSIDER IRRELEVANT OR PREJUDICIAL EVIDENCE**

In campus investigations of sexual assault, evidence should be excluded if it is irrelevant,<sup>97</sup> or if it is relevant but its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the factfinder, undue delay, wasting time, and/or needlessly presenting cumulative evidence.<sup>98</sup>

Schools should not be allowed to improperly consider any evidence related to the sexual history between the parties, even if it is “offered to prove consent” — if such evidence relies on victim-blaming and “slut-shaming” myths that cause unfair prejudice to the complainant, mislead the investigator(s) or decisionmaker(s), or render the evidence entirely irrelevant to the investigation. Also, schools should recognize that the fact that students have a current or previous consensual dating relationship, it does not imply any consent.

**g. CAMPUSES MUST PROVIDE REMEDIES TO PRESERVE OR RESTORE ACCESS TO EDUCATION**

Upon completing an investigation, schools should inform both sides in writing at the same time of (1) whether the alleged sex-based harassment occurred; (2) school-wide remedies to eliminate any hostile environment that exists and to prevent its recurrence;<sup>99</sup> and (3) the parties’ right to appeal, if any. Schools should also inform the complainant of (4) any individual remedies available to the complainant; and (5) (i) if *non-physical* sexual harassment occurred, any sanctions on the respondent that *directly affect* complainant;<sup>100</sup> or (ii) if sexual *violence* occurred, *all* sanctions on the respondent.<sup>101</sup> Finally, schools should also inform the respondent of (6) all sanctions on the respondent; and (7) none of the individual remedies offered to the complainant.

Examples of school-wide remedies include training students and staff on identifying and responding to sex-based harassment or taking additional steps to address the way a school handles its athletics program.<sup>102</sup> Individual remedies for the complainant include extending any necessary interim measures and, where necessary to remedy a hostile environment, the ability to withdraw from and retake classes without financial penalties, extension of the complainant's eligibility for grants and scholarships for any additional time needed to complete their degree, and reimbursement of any lost tuition or student loan interest. Sanctions on the respondent that *directly affect* the complainant include no-contact orders, suspensions, expulsions, and transfers.<sup>103</sup>

#### **h. CAMPUSES MUST HAVE EQUITABLE APPEAL RIGHTS**

Experts and school leaders alike support equal appeal rights. While the Department's proposed Title IX rules may require schools to provide respondents appeal rights that they deny complainants,<sup>104</sup> the American Bar Association recommends that the grounds for appeal include "a sanction disproportionate to the findings in the case (that is, too lenient or too severe)."<sup>105</sup> Even the white paper by four Harvard professors that is cited by the Department<sup>106</sup> in support of it NPRM recognizes that schools should allow "[e]ach party (respondent and complainant) [to] request an impartial appeal."<sup>107</sup>

#### **i. CAMPUSES MUST PROHIBIT RETALIATION AGAINST PARTIES AND WITNESSES**

Schools should have explicit prohibitions against retaliation, not only from the moment that a complaint is initiated, but prohibitions against threats of retaliation made to discourage survivors from filing complaints and to intimidate witnesses and complainants from participating in the grievance process.

### **V. THE DEPARTMENT OF EDUCATION'S PROPOSED TITLE IX RULES, IF FINALIZED, WOULD FORCE SCHOOLS TO IGNORE SEXUAL HARASSMENT AND TO CREATE UNFAIR GRIEVANCE PROCEDURES**

The Department of Education's proposed Title IX rules remove significant protections for students and employees who experience sexual assaults and other forms of sexual harassment, apparently motivated by invidious sex stereotypes that women and girls are likely to lie about sexual assault and other forms of sexual harassment and by the perception that sexual assault and other forms of sexual harassment have a relatively trivial impact on those who experience it.

As also described in NWLC's comment on the proposed rules, which is appended to this testimony, proposed rules ignore the devastating impact of sexual violence and other forms of sexual harassment in schools. Instead of effectuating Title IX's purpose of protecting students

and school employees from sexual abuse and other forms of sexual harassment—that is, from unlawful sex discrimination—they make it harder for individuals to report abuse, allow (and sometimes require) schools to ignore reports when they are made, and unfairly tilt the investigation process in favor of respondents, to the direct detriment of survivors.

**a. THE DEPARTMENT’S PROPOSED RULES WOULD DISCOURAGE REPORTING AND MANDATE DISMISSAL OF COMPLAINTS OF SEXUAL ASSAULT**

Under the proposed rules, schools would not be required to address any sexual harassment and assault unless one of a small subset of school employees had “actual knowledge” of it.<sup>108</sup> The proposed rules also unjustifiably limits the set of school employees for whom actual notice of sexual assault or other forms of harassment triggers the school’s Title IX duties. For example, under the proposed rules, if a college or graduate student told their professor, residential advisor, or teaching assistant that they had been raped by another student or by a professor or other university employee, the university would have no obligation to help them.

Under the Department’s proposed rules, even when students find the courage to talk to the adult school employees they trust, schools would frequently have no obligation to respond. For example, if the proposed rules had been in place, colleges like Michigan State and Penn State would have had no responsibility to stop Larry Nassar and Jerry Sandusky—even though their victims reported their experiences to at least 14 school employees over a 20-year period—including athletic trainers, coaches, counselors, and therapists<sup>109</sup>—because those employees are not considered to be school officials who have the “authority to institute corrective measures.”<sup>110</sup> These proposed provisions would absolve some of the worst Title IX offenders of legal liability.

The Department’s proposed rules would also *require* schools to dismiss all complaints of off-campus or online sexual harassment that happen outside of a school-sponsored program—even if the student is forced to see their harasser at school every day and the harassment directly impacts their education as a result. The proposed rules conflict with Title IX’s statutory language, which does not depend on where the *underlying conduct* occurred but instead prohibits 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 . . . .”<sup>111</sup> For almost two decades, the Department’s guidance documents have agreed that schools are responsible for addressing sexual harassment if it is “sufficiently serious to deny or limit a student’s ability to participate in or benefit from the education program,”<sup>112</sup> regardless of where it occurs.<sup>113</sup> No student who experiences out-of-school harassment should be forced to wait until they are sexually harassed again on school grounds or during a school activity in order to receive help from their school. Nor should they be required to sit in class next to their assailant with no recourse.

Sexual harassment and assault occur both on-campus and in off-campus spaces closely associated with school. Nearly nine in ten college students live off campus.<sup>114</sup> According to a 2014 U.S. Department of Justice report, 95 percent of sexual assaults of female students ages 18-24 occur outside of school.<sup>115</sup> Forty-one percent of college sexual assaults involve off-campus parties<sup>116</sup> and many fraternity and sorority houses are located off campus. Students are also far more likely to experience sexual assault if they are in a sorority (nearly one and a half times more likely) or fraternity (nearly three times more likely).<sup>117</sup> But under the proposed rules, if a college or graduate student is sexually assaulted by a classmate in off-campus housing, their university would be required to dismiss their complaint—even though almost nine in ten college students live off campus.<sup>118</sup> The proposed rules would also pose particular risks to students at community colleges and vocational schools. Approximately 5.8 million students attend community college (out of 17.0 million total undergraduate students),<sup>119</sup> and 16 million students attend vocational school.<sup>120</sup> But because none of these students live on campus, the harassment they experience by faculty or other students is especially likely to occur outside of school, and therefore outside of the protection of the proposed Title IX rules. Finally, proposed § 106.8(d) would create a unique harm to the 10 percent of U.S. undergraduate students who participate in study abroad programs. If any of these students report experiencing sexual harassment during their time abroad, including within their study abroad program, their schools would be required to dismiss their complaints—even if they are forced to see their harasser in the study abroad program every day, and even if they continue to be put into close contact with their harasser when they return to their home campus.

By forcing schools to dismiss complaints of out-of-school sexual harassment, the proposed rules would “unduly tie the hands of school leaders who believe every child deserves a safe and healthy learning environment.”<sup>121</sup> It would also require schools to single out complaints of sexual assault and other forms of harassment by treating them differently from other types of student misconduct that occur off-campus, perpetuating the pernicious notion that sexual assault is somehow less significant than other types of misconduct and making schools vulnerable to litigation by students claiming unfairness or discrimination in their school’s policies treating harassment based on sex differently from other forms of misconduct.

**b. THE PROPOSED DEFINITION OF SEXUAL HARASSMENT IMPROPERLY PREVENTS SCHOOLS FROM PROVIDING A SAFE LEARNING ENVIRONMENT**

The Department’s proposed rules would also *require* schools to dismiss all complaints of sexual harassment that do not meet its proposed narrow definition. The proposed rules<sup>122</sup> define sexual harassment as (1) “[a]n 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”; (2) “[u]nwelcome 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 (3) “[s]exual assault, as defined in 34 CFR 668.46(a).” The proposed rules mandate dismissal of all complaints of harassment that do not meet this standard. Thus, if a complaint did not allege quid pro quo harassment or sexual assault, a school would be *required* to dismiss a student’s Title IX complaint if the harassment has not yet advanced to a point that it is actively harming a student’s education. A school would be required to dismiss such a complaint even if it involved harassment by a teacher or other school employee. A school would be required to dismiss such a complaint even if the school would typically take action to address behavior that was not based on sex but was similarly harassing, disruptive, or intimidating. The Department’s proposed definition is out of line with Title IX purposes and precedent, discourages reporting, unjustifiably creates a higher standard for sexual harassment than other types of harassment and misconduct, and excludes many forms of sexual harassment that interfere with equal 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.”<sup>123</sup> 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 professor, before their schools would be permitted to take steps to investigate and stop the harassment.

In addition, the proposed rules are inconsistent with the Supreme Court’s liability standard for money damages, which holds schools liable for sexual harassment that, *inter alia*, “effectively denie[s] [a person] *equal* access to an institution’s *resources* and *opportunities*” or its “*opportunities* or *benefits*.”<sup>124</sup> Setting aside for a moment the fact that agency enforcement standards need not—and should not—be as demanding as litigation standards for money damages, the proposed rule is nonetheless still more burdensome than the Supreme Court’s standard because denial of equal access to a school’s “program” or “activity” is a more burdensome threshold than denial of equal access to a school’s “resources,” “opportunities,” and “benefits.”

The Department’s proposed definition is also vague and complicated. Administrators, employees, and students would struggle to understand which complaints meet the standard. These difficulties would be significantly compounded for students with developmental disabilities. Students confronted with this lengthy, complicated definition of sexual harassment would have a hard time understanding whether the harassment they endured meets the Department’s narrow standard. How would these students know what allegations and information to put in their formal complaint in order to avoid mandatory dismissal? A student may believe that she suffered harassment that was both severe and pervasive, but does she

know whether it was also “objectively offensive” and whether it “effectively denied” her of “equal access” to a “program or activity?”

The Department’s proposed definition would discourage students from reporting sexual harassment. Already, the most commonly cited reason for students not reporting sexual harassment is the fear that it is “insufficiently severe” to yield a response.<sup>125</sup> Moreover, if a student is turned away by her school after reporting sexual harassment because it does not meet the proposed narrow definition of sexual harassment, the student is even more unlikely to report a second time when the harassment escalates. Similarly, if a student knows of a friend or classmate who was turned away after reporting sexual harassment, the student is unlikely to make even a first report. By the time a student reports sexual harassment that the school can or must respond to, it may already be too late: because of the impact of the harassment, the student might already be ineligible for an important AP course, disqualified from applying to a dream college, or derailed from graduating altogether.

In addition, the proposed definition excludes many forms of sexual harassment, including some that schools are required to report under the Clery Act’s requirements. Under the proposed rules, schools would be required to dismiss some complaints of stalking, dating violence, and domestic violence, while also being required to report those complaints to the Department under Clery.<sup>126</sup> These inconsistent requirements would cause confusion among school administrators struggling to make sense of their obligations under federal law and demonstrate the perverse nature of sharply limiting schools’ ability to respond to harassment complaints.

Finally, the Department’s harassment definition and mandatory dismissal requirement would create inconsistent rules for sexual harassment as compared to other misconduct. Harassment based on race or disability, for example, would continue to be governed by the more inclusive “severe or pervasive” standard for creating a hostile educational environment.<sup>127</sup> And schools could address harassment that was not sexual in nature even if that harassment was not “severe and pervasive” while, at the same time, being required to dismiss complaints of similar conduct if it is deemed sexual. This would create inconsistent and confusing rules for schools in addressing different forms of harassment. It would send a message that sexual harassment is less deserving of response than other types of harassment and that victims of sexual harassment are inherently less deserving of assistance than victims of other forms of harassment. It would also force students who experience multiple and intersecting forms of harassment to slice and dice their requests for help from their schools in order to maximize the possibility that the school might respond, carefully excluding reference to sexual taunts and only reporting racial slurs by a harasser, for example.<sup>128</sup> Further, it would also make schools vulnerable to litigation by students who rightfully claim that being subjected to more burdensome requirements in order to get help for sexual harassment than their peers who experience other forms of student misconduct, is discrimination based on their sex, in direct

violation of Title IX. In other words, schools would be hard-pressed to figure out how to comply with Title IX when they are instructed to follow a new set of rules that demands responses that violate Title IX.

**c. THE PROPOSED DELIBERATE INDIFFERENCE STANDARD WOULD ALLOW SCHOOLS TO DO VIRTUALLY NOTHING IN RESPONSE TO COMPLAINTS OF SEXUAL ASSAULT AND OTHER FORMS OF SEXUAL HARASSMENT**

Under the proposed rules, schools would simply have to not be deliberately indifferent<sup>129</sup> to sexual harassment and assault; in other words, their response to harassment would be deemed to comply with Title IX as long as it was not *clearly* unreasonable. The deliberate indifference standard is a much more lax standard than that set out by the current Department guidance, which requires schools to act “reasonably” and “take immediate and effective corrective action” to resolve harassment complaints.<sup>130</sup>

The Department’s proposed “safe harbors” within this deliberate indifference standard weaken it still further, allowing schools to avoid liability even if they unreasonably handled a Title IX complaint. As long as a school follows the requirements set out in the proposed rules,<sup>131</sup> the school’s response to harassment complaints could not be challenged, effectively insulating them from any review.<sup>132</sup> And by codifying the rule that the Department would not find a school deliberately indifferent based on a school’s erroneous determination regarding responsibility, the Department further provides a safe harbor for schools that erroneously determine that sexual harassment *did not occur*, but does not provide a corresponding rule protecting schools from liability if they erroneously decide that sexual harassment *did* occur.<sup>133</sup> This means it would always be safer for a school to make a finding of non-responsibility for sexual harassment. Indeed, such a rubber stamp finding would be completely permissible under the proposed rules as long as the school went through the motions of even a weak required process.

The practical effects of this proposed rule would shield schools from any accountability under Title IX, even if a school mishandles a complaint, fails to provide effective supports for survivors and other harassment victims, and wrongly determines against the weight of the evidence that no sexual assault or harassment occurred.

**d. THE DEPARTMENT’S PROPOSED RULES CREATE INCONSISTENT AND UNFAIR STANDARDS**

The Department’s longstanding interpretation of Title IX requires that schools use a “preponderance of the evidence” standard—which means “more likely than not”—to decide whether sexual assault or other forms of harassment occurred.<sup>134</sup> The proposed rules<sup>135</sup> depart from that practice, and establishes a system where schools could elect to use the more demanding “clear and convincing evidence” standard in sexual harassment matters, while

allowing all other student or employee misconduct investigations to be governed by the preponderance of the evidence standard, even if they carry the same maximum penalties.<sup>136</sup> Indeed in some instances, the proposed rules would require that schools utilize the “clear and convincing evidence” standard.<sup>137</sup>

The Department’s decision to allow schools to impose a more burdensome standard in sexual harassment matters than in any other investigations of student or employee misconduct appears to rely on the stereotype and false assumption that those who report sexual assault and other forms of sexual harassment (mostly women) are more likely to lie than those who report physical assault, plagiarism, or the wide range of other school disciplinary violations and employee misconduct. When this unwarranted skepticism of sexual assault and other harassment allegations, grounded in gender stereotypes, infect sexual misconduct proceedings, even the preponderance standard “could end up operating as a clear-and-convincing or even a beyond-a-reasonable-doubt standard in practice.”<sup>138</sup> Previous Department guidance recognized that, given these pervasive stereotypes, the preponderance standard was required to ensure that the playing field, at least on paper, was as even as possible. The Department now ignores the reality of these harmful stereotypes by imposing a standard of evidence that encourages, rather than dispels, the stereotype that women and girls lie about sexual assault and other harassment, a result that is contrary to Title IX.

The preponderance standard is used for nearly all civil cases, including where the conduct at issue could also be the basis for a criminal prosecution.<sup>139</sup> The preponderance standard is also used for people facing more severe deprivations than suspension, expulsion or other school discipline, or termination of employment or other workplace discipline, including in proceedings to determine paternity,<sup>140</sup> competency to stand trial,<sup>141</sup> enhancement of prison sentences,<sup>142</sup> and civil commitment of defendants acquitted by the insanity defense.<sup>143</sup> The Supreme Court has only required something higher than the preponderance standard in a narrow handful of civil cases “to protect particularly important individual interests,”<sup>144</sup> where consequences far more severe than suspension, expulsion, or firing are threatened, such as termination of parental rights,<sup>145</sup> civil commitment for mental illness,<sup>146</sup> deportation,<sup>147</sup> denaturalization,<sup>148</sup> and juvenile delinquency with the “possibility of institutional confinement.”<sup>149</sup> In all of these cases, incarceration or a permanent loss of a profound liberty interest was a possible outcome—unlike in school sexual harassment proceedings. Moreover, in all of these cases, the government and its vast power and resources was in conflict with an individual—in contrast to school harassment investigations involving two students with roughly equal resources and equal stakes in their education, two employees who are also similarly situated, or a student and employee, where any power imbalance would tend to favor the employee respondent rather than the student complainant.<sup>150</sup> Preponderance is the only

standard of proof that treats both sides equally and is consistent with Title IX's requirement that grievance procedures be "equitable."<sup>151</sup>

For this reason, Title IX experts and school leaders alike support the preponderance standard, which is used to address harassment complaints at over 80 percent of colleges.<sup>152</sup> The National Center for Higher Education Risk Management (NCHERM) Group, whose white paper *Due Process and the Sex Police* was cited by the Department,<sup>153</sup> has promulgated materials that require schools to use the preponderance standard, because "[w]e believe higher education can acquit fairness without higher standards of proof."<sup>154</sup> And even the Department admits it is "reasonable" for a school to use the preponderance standard.<sup>155</sup>

By permitting and sometimes mandating the clear and convincing evidence standard in sexual harassment proceedings, the Department treats sexual harassment differently from other types of school disciplinary violations and employee misconduct, uniquely targeting and disfavoring sexual harassment complainants. First, the Department argues that Title IX harassment investigations are different from civil cases, and therefore may appropriately require a more burdensome standard of proof, because many Title IX harassment investigations do not use full courtroom procedures, such as active participation by lawyers, rules of evidence, and full discovery.<sup>156</sup> However, the Department does not exhibit this concern for the lack of full-blown judicial proceedings to address other types of student or employee misconduct, including other examples of student or employee misconduct implicating the civil rights laws enforced by the Department. Schools have not, as a general rule, imposed higher evidentiary standards in other misconduct matters, nor have employers more generally in employee misconduct matters, to compensate for the proceedings' failure to be full-blown judicial trials, and the Department does not explain why such a standard is appropriate in this context alone.

Second, although the proposed rules would require schools to use the "clear and convincing" standard for sexual harassment investigations if they use it for *any* other student or employee misconduct investigations with the same maximum sanction,<sup>157</sup> and would require that it be used in student harassment investigations if it is used in *any* employee harassment investigations, the proposed rules would not prohibit schools from using the clear and convincing standard in sexual harassment proceedings *even if* they use a lower proof standard for *all* other student conduct violations.<sup>158</sup> School leaders agree that requiring different standards for sexual misconduct as opposed to other misconduct is inequitable.

Further, many school employees have bargained for contracts that require using a more demanding standard of evidence than the preponderance standard for employee misconduct investigations.<sup>159</sup> The proposed rules would force those schools to either (1) impose the same evidentiary for *all* cases of misconduct that carry the same maximum sanction as Title IX proceedings<sup>160</sup> or (2) maintain the clear and convincing evidence standard for only employee

misconduct and student sexual misconduct proceedings. The latter choice would leave schools vulnerable to liability for sex discrimination, as schools cannot defend specifically disfavoring sexual harassment investigations, which is a form of sex discrimination, by pointing to collective bargaining agreements or other contractual agreements for employees that require a higher standard.<sup>161</sup>

**e. THE DEPARTMENT’S PROPOSED RULES WOULD CREATE UNFAIR GRIEVANCE PROCESSES**

Current Title IX regulations require schools to “adopt and publish grievance procedures that provide for a prompt and equitable resolution of student and employee complaints” of sexual misconduct.<sup>162</sup> The proposed rules<sup>163</sup> purports to require “equitable” processes as well. However, the proposed rules are also riddled with language that would require schools to conduct their grievance procedures in a fundamentally *inequitable* way that favors respondents. In so doing, it distorts the very fundamental notions of due process it claims to protect.

A 2018 report studying more than 1,000 reports of sexual misconduct in institutions of higher education found that “[f]ew incidents reported to Title IX Coordinators resulted in a formal Title IX complaint, and fewer still resulted in a finding of responsibility or suspension/expulsion of the responsible student.”<sup>164</sup> Despite the Department’s unsubstantiated concern for respondents, the study found that “[t]he primary outcome of reports were victim services, not perpetrator punishments.”<sup>165</sup> The Department’s due process arguments totally ignore the complainants who are still treated unfairly in violation of Title IX and are often pushed out of schools from inadequate and unfair responses to their reports.

While the Department repeatedly cites the purported need to increase protections of respondents’ “due process rights” to justify weakening Title IX protections for complainants, current Title IX regulations already provide more rigorous due process protections than are required under the Constitution. The Supreme Court has held that students facing short-term suspensions from public schools<sup>166</sup> require only “some kind of” “oral or written notice” and “some kind of hearing.”<sup>167</sup> The Court has explicitly said that a 10-day suspension does not require “the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident.”<sup>168</sup> However, the proposed rule’s flat prohibition on reliance on testimony that is not subject to cross-examination<sup>169</sup> would force survivors to a “Hobson’s choice” between being revictimized by their assailant’s advisor or having their testimony completely disregarded, and would prohibit schools from simply “factoring in the victim’s level of participation in [its] assessment of witness credibility.”<sup>170</sup> It would also make no allowance for the unavailability of a witness and would not allow any reliance at all on previous statements, regardless of whether those statements have other indicia of reliability, such as being made under oath or against a party’s

own interest. This would require schools to disregard relevant evidence in a variety of situations in a manner that could pose harms to both parties and would hinder the school's ability to ensure that their findings concerning responsibility are not erroneous.

Under the proposed rules,<sup>171</sup> schools would be required to presume that the reported harassment did not occur, which would ensure partiality to the respondent. This presumption would also exacerbate the rape myth upon which many of the proposed rules are based—namely, the myth that women and girls often lie about sexual assault.<sup>172</sup> The presumption of innocence is a criminal law principle, inappropriately imported into this context.<sup>173</sup> Criminal defendants are presumed innocent until proven guilty because their very liberty is at stake: criminal defendants go to prison if they are found guilty. There is no such principle in civil proceedings generally or civil rights proceedings specifically.

The proposed non-responsibility presumption is inconsistent with the Department's own explanation of why it is proposed. The Department explains that the requirement "is added to ensure impartiality by the recipient until a determination is made," but requiring a presumption *against the complainant's account* that harassment occurred is anything but impartial. In fact, the presumption ensures partiality to the named harasser, particularly because officials in this Administration have spread false narratives about survivors and other harassment victims being untruthful and about the "pendulum swinging too far" in school grievance proceedings against named harassers. This undoubtedly will influence schools to conclude this proposed rule means that a higher burden should be placed on complainants. The presumption of non-responsibility may also discourage schools from providing crucial supportive measures to complainants, in order to avoid being perceived as punishing respondents.<sup>174</sup> This proposed rule<sup>175</sup> would also only encourage schools to ignore or punish historically marginalized groups that report sexual harassment for "lying" about it.<sup>176</sup>

Finally, the changes to Title IX enforcement that ED proposes must be considered against the backdrop of underreporting and a pervasive culture in which those who do report sexual harassment, including sexual assault, are likely to be blamed and disbelieved. Unfortunately, and as explained in great detail throughout this comment, rather than seeking to remedy that culture, ED's proposed rule reinforces false and harmful stereotypes about those who experience sexual harassment and proposes rules that would further discourage reporting and make it harder for schools to adequately respond to complaints.

## **VI. CAMPUS RESPONSES TO SEXUAL ASSAULT SHOULD BE CONSISTENT WITH THE CLERY ACT**

A number of the Department's proposed rules are inconsistent with the Clery Act, which the Department also enforces, and which also addresses the obligation of institutions of higher education to respond to sexual assault and other behaviors that may constitute sexual

harassment, including dating violence, domestic violence, and stalking. First, the proposed rules prohibiting schools from investigating off-campus and online sexual harassment conflict with Clery's notice and reporting requirements. The Clery Act requires institutions of higher education to notify all students who report sexual assault, stalking, dating violence, and domestic violence of their rights, regardless of "whether the offense occurred on or off campus."<sup>177</sup> The Clery Act also requires institutions of higher education to report all sexual assault, stalking, dating violence, and domestic violence that occur on "Clery geography," which includes all property controlled by a school-recognized student organization (such as an off-campus fraternity); nearby "public property"; and "areas within the patrol jurisdiction of the campus police or the campus security department."<sup>178</sup> The proposed rules would undermine Clery's mandate and create a perverse system in which schools would be required to report instances of sexual assault that occur off-campus to the Department, yet would also be required by the Department to dismiss these complaints instead of investigating them.

Second, the Department's definition of "supportive measures" is inconsistent with Clery, which requires institutions of higher education to provide "accommodations" and "*protective measures*" if "reasonably available" to students who report sexual assault, dating violence, domestic violence, and stalking.<sup>179</sup> The Clery Act does not prohibit accommodations or protective measures that are "punitive," "disciplinary," or "unreasonably burden[] the other party." Third, the proposed rules' unequal appeal rights conflict with the preamble to the Department's Clery rules stating that institutions of higher education are required to provide "an equal right to appeal if appeals are available," which would necessarily include the right to appeal a sanction.<sup>180</sup>

Finally, the proposed rules' indefinite timeframe for investigations conflicts with Clery's mandate that investigations be prompt.<sup>181</sup> And the many proposed rules discussed above that tilt investigation procedures in favor of the respondent are anything but fair and impartial.

Although the Department acknowledges that Title IX and the Clery Act's "jurisdictional schemes ... may overlap in certain situations,"<sup>182</sup> it fails to explain how institutions of higher education should resolve the conflicts between two different sets of rules when addressing sexual harassment. These different sets of rules would likely create widespread confusion for schools.

With careful consideration of the needs of students to be able to learn, thrive, and feel safe on campus, the procedures required to make campus processes fair and equitable to all parties, and the various ways that schools can appropriately respond to campus sexual assault that takes into account their student body, size, resources, culture, location, and state and local requirements, reauthorization of the Higher Education Act should reaffirm the principles of Title IX and Clery to ensure that campuses everywhere are safe places for students.

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<sup>1</sup> *E.g.*, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005); *Davis v. Monroe Cnty Bd. of Educ.*, 526 U.S. 629 (1999).

<sup>2</sup> Dana Bolger, *Where Rape Gets a Pass*, N.Y. DAILY NEWS (July 6, 2014), <http://www.nydailynews.com/opinion/rape-pass-article-1.1854420> (“In 2011, my sophomore year of college, I was raped and then stalked by a fellow student. When I went to report my assault to my college dean, he encouraged me to take time off, go home, be “safe,” focus on my own healing, and put my education on hold - so that the man who raped me could comfortably conclude his.”).

<sup>3</sup> Anonymous, *On Assault Narratives*, Yale Daily News (Feb. 1, 2010), <http://yaledailynews.com/blog/2012/02/01/anonymous-on-assault-narratives/>.

<sup>4</sup> Angie Epifano, *An Account of Sexual Assault at Amherst College*, Amherst Student (Oct. 17, 2012), <http://amherststudent.amherst.edu/?q=article/2012/10/17/account-sexual-assault-amherst-college>.

<sup>5</sup> Annie-Rose Strasser, *University of North Carolina rape victim may be expelled for speaking about her case*, ThinkProgress (Feb. 23, 2013), <https://thinkprogress.org/university-of-north-carolina-rape-victim-may-be-expelled-for-speaking-about-her-case-2d6e6b0eb24e>.

<sup>6</sup> We use the terms “victim” and “survivor” interchangeably to acknowledge students’ range of responses to violence. For critiques of the limiting function of either term, see Dana Bolger, “Hurry Up and Heal”: Pain, Productivity, and the Inadequacy of “Victim vs. Survivor”, *Feministing.com* (Dec. 10, 2014), <http://feministing.com/2014/12/10/hurry-up-and-heal-pain-productivity-and-the-inadequacyof-victim-vs-survivor/>; Parul Sehgal, *The Forced Heroism of the ‘Survivor’*, N.Y. Times Mag., May 3, 2016, [http://www.nytimes.com/2016/05/08/magazine/the-forced-heroism-of-thesurvivor.html?\\_r=0](http://www.nytimes.com/2016/05/08/magazine/the-forced-heroism-of-thesurvivor.html?_r=0).

<sup>7</sup> See generally Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. Rev. 945 (2004) (describing onerous university requirements for rape victims not imposed on students reporting other forms of harm).

<sup>8</sup> Nick Anderson and Susan Svrluga, *What a massive sexual assault survey found at 27 top universities*, The Washington Post (Sept. 21, 2015), [https://www.washingtonpost.com/news/grade-point/wp/2015/09/21/what-a-massive-sexual-assault-survey-showed-about-27-top-u-s-universities/?utm\\_term=.07c97b1f0c90](https://www.washingtonpost.com/news/grade-point/wp/2015/09/21/what-a-massive-sexual-assault-survey-showed-about-27-top-u-s-universities/?utm_term=.07c97b1f0c90).

<sup>9</sup> Rebecca Marie Loya, *Economic Consequences of Sexual Violence for Survivors: Implications for Social Policy and Social Change* 96-100 (June 2012) (unpublished Ph.D. dissertation, Brandeis University), <https://static1.squarespace.com/static/551e0348e4b0c1bae0983f61/t/55b19581e4b01705b03e0b1c/1437701505305/Loya2012EconomicConsequencesRape.pdf>.

<sup>10</sup> *Id.* at 96. See also *id.* at 94 (“For a lot of the students that I’ve seen, the biggest problem is that the perpetrator...goes to their school as well, and in a lot of cases, even has classes with them. So in that sense, being able to concentrate in class when the person who assaulted you is sitting two rows behind you, obviously is going to make it almost impossible for you to do anything. So I think to the biggest degree it’s just being able to concentrate, even passing, you know- going through the regular reaction, for them to also have to deal with the fact that the person might be sitting next to you in class, might be passing you in the hall while you’re walking to class, or even going to class becomes something difficult and can be triggering every- almost every moment.”).

<sup>11</sup> *Id.* at 94.

<sup>12</sup> See generally Dana Bolger, *Gender Violence Costs: Schools’ Financial Obligations Under Title IX*, 125 Yale L.J. 2106 (2016) (describing the financial impact of gender violence on student survivors).

<sup>13</sup> Libby Sander, “Quiet no longer, rape survivors put pressure on colleges,” *the Chronicle of Higher Education* (Aug. 12, 2013), <http://www.chronicle.com/article/Quiet-No-Longer-Rape/141049>.

<sup>14</sup> Alyssa Peterson & Olivia Ortiz, *A Better Balance: Providing Survivors of Sexual Violence with “Effective Protection” Against Sex Discrimination Through Title IX Complaints*, 125 Yale L.J. 2132, 2138-39 (2016); Robin Wilson, *2014 Influence List: Enforcer*, *Chronicle of Higher Education* (Dec. 15, 2014), available at <http://www.chronicle.com/article/enforcer-catherine-e-lhamon/150837> (describing Assistant Secretary for Civil Rights’ Catherine Lhamon’s efforts to strengthen OCR’s Title IX enforcement).

<sup>15</sup> Letter from the National Women’s Law Center, et al. to Education Secretary John King (July 13, 2016), available at <https://nwlc.org/resources/sign-on-letter-supporting-title-ix-guidance-enforcement/> (“These guidance documents and increased enforcement of Title IX by the Office for Civil Rights have spurred schools to address

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cultures that for too long have contributed to hostile environments which deprive many students of equal educational opportunities.”);

<sup>16</sup> AAUW, *Drawing the Line: Sexual Harassment on Campus* 17, 19 (2005) [hereinafter *Drawing the Line*], <https://history.aauw.org/files/2013/01/DTLFinal.pdf> (noting differences in the types of sexual harassment and reactions to it).

<sup>17</sup> E.g., Association of American Universities [AAU], *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, 13-14 (Sept. 2015) [hereinafter *AAU Campus Climate Survey*], [https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU\\_Campus\\_Climate\\_Survey\\_12\\_14\\_15.pdf](https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU_Campus_Climate_Survey_12_14_15.pdf).

<sup>18</sup> *Id.* at 13-14.

<sup>19</sup> E.g., Audrey Chu, *I Dropped Out of College Because I Couldn't Bear to See My Rapist on Campus*, VICE (Sept. 26, 2017), [https://broadly.vice.com/en\\_us/article/qvjzpd/i-dropped-out-of-college-because-i-couldnt-bear-to-see-my-rapist-on-campus](https://broadly.vice.com/en_us/article/qvjzpd/i-dropped-out-of-college-because-i-couldnt-bear-to-see-my-rapist-on-campus).

<sup>20</sup> Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18(2) J.C. STUDENT RETENTION: RES., THEORY & PRAC. 234, 244 (2015), available at <https://doi.org/10.1177/1521025115584750>.

<sup>21</sup> *Poll: One in 5 women say they have been sexually assaulted in college*, WASH. POST (June 12, 2015) [hereinafter *Washington Post Poll*], <https://www.washingtonpost.com/graphics/local/sexual-assault-poll>.

<sup>22</sup> *AAU Campus Climate Survey*, *supra* note 17 at 35.

<sup>23</sup> *Id.* at 36.

<sup>24</sup> *Id.*

<sup>25</sup> RAINN, *Campus Sexual Violence: Statistics*, <https://www.rainn.org/statistics/campus-sexual-violence>.

<sup>26</sup> GLSEN, *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* 27 (2018) [hereinafter *2017 National School Climate Survey*], available at <https://www.glsen.org/article/2017-national-school-climate-survey-1>.

<sup>27</sup> See Jennifer Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation*, N.Y. TIMES (April 30, 2017), <https://www.nytimes.com/2017/04/30/us/immigrants-deportation-sexual-abuse.html?mcubz=3>.

<sup>28</sup> National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey: Executive Summary* 12 (Dec. 2016) [hereinafter *2015 U.S. Transgender Survey*], <https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf>.

<sup>29</sup> See e.g., Bethonie Butler, *Survivors of sexual assault confront victim blaming on Twitter*, WASH. POST (Mar. 13, 2014), <https://www.washingtonpost.com/blogs/she-the-people/wp/2014/03/13/survivors-of-sexual-assault-confront-victim-blaming-on-twitter>.

<sup>30</sup> David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16(12) VIOLENCE AGAINST WOMEN 1318–1334 (2010), available at <https://doi.org/10.1177/1077801210387747>.

<sup>31</sup> E.g., Tyler Kingkade, *Males Are More Likely To Suffer Sexual Assault Than To Be Falsely Accused Of It*, HUFFINGTON POST (Dec. 8, 2014) [hereinafter *Males Are More Likely to Suffer Sexual Assault*] [last updated Oct. 16, 2015], [https://www.huffingtonpost.com/2014/12/08/false-rape-accusations\\_n\\_6290380.html](https://www.huffingtonpost.com/2014/12/08/false-rape-accusations_n_6290380.html).

<sup>32</sup> See, e.g., Brian Entin, *Miami Gardens 9th-grader says she was raped by 3 boys in school bathroom*, WSVN-TV (Feb. 8, 2018), <https://wsvn.com/news/local/miami-gardens-9th-grader-says-she-was-raped-by-3-boys-in-school-bathroom>; Nora Caplan-Bricker, *“My School Punished Me”*, SLATE (Sept. 19, 2016), <https://slate.com/human-interest/2016/09/title-ix-sexual-assault-allegations-in-k-12-schools.html>; Aviva Stahl, *‘This Is an Epidemic’: How NYC Public Schools Punish Girls for Being Raped*, VICE (June 8, 2016), [https://broadly.vice.com/en\\_us/article/59mz3x/this-is-an-epidemic-how-nyc-public-schools-punish-girls-for-being-raped](https://broadly.vice.com/en_us/article/59mz3x/this-is-an-epidemic-how-nyc-public-schools-punish-girls-for-being-raped).

<sup>33</sup> Sarah Brown, *BYU Is Under Fire, Again, for Punishing Sex-Assault Victims*, CHRONICLE OF HIGHER EDUC. (Aug. 6, 2018), <https://www.chronicle.com/article/BYU-Is-Under-Fire-Again-for/244164>.

<sup>34</sup> NAACP Legal Defense and Educ. Fund, Inc. & Nat’l Women’s Law Ctr., *Unlocking Opportunity for African American Girls: A Call to Action for Educational Equity* 25 (2014) [hereinafter *Unlocking Opportunity*], [https://nwlc.org/wp-content/uploads/2015/08/unlocking\\_opportunity\\_for\\_african\\_american\\_girls\\_report.pdf](https://nwlc.org/wp-content/uploads/2015/08/unlocking_opportunity_for_african_american_girls_report.pdf).

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<sup>35</sup> See, e.g., Tyler Kingkade, *When Colleges Threaten To Punish Students Who Report Sexual Violence*, HUFFINGTON POST (Sept. 9, 2015), [https://www.huffingtonpost.com/entry/sexual-assault-victims-punishment\\_us\\_55ada33de4b0caf721b3b61c](https://www.huffingtonpost.com/entry/sexual-assault-victims-punishment_us_55ada33de4b0caf721b3b61c).

<sup>36</sup> As of this writing, NWLC is litigating on behalf of three student survivors who were punished or otherwise unfairly pushed out of their high schools when they reported sexual harassment, including sexual assault. Nat'l Women's Law Ctr., *Miami School Board Pushed Survivor of Multiple Sexual Assaults Out of School, Says NWLC* (Jan. 15, 2019), <https://nwlc.org/press-releases/miami-school-board-pushed-survivor-of-multiple-sexual-assaults-out-of-school-says-nwlc>; Nat'l Women's Law Ctr., *Pennridge School District Consistently Pushes Survivors of Sex-Based Harassment Out of School, Says NWLC* (Aug. 9, 2017), <https://nwlc.org/press-releases/pennridge-school-district-consistently-pushes-survivors-of-sex-based-harassment-out-of-school-says-nwlc>; Nat'l Women's Law Ctr., *NWLC Files Lawsuit against PA School District for Failing to Address Sexual Assault of High School Student* (May 31, 2017), <https://nwlc.org/press-releases/nwlc-files-lawsuit-against-pa-school-district-for-failing-to-address-sexual-assault-of-high-school-student>.

<sup>37</sup> Nat'l Women's Law Ctr., *Let Her Learn: A Toolkit To Stop School Pushout for Girls of Color* 1 (2016) [hereinafter *Let Her Learn: Girls of Color*], available at <https://nwlc.org/resources/let-her-learn-a-toolkit-to-stop-school-pushout-for-girls-of-color>.

<sup>38</sup> E.g., Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARVARD J.L. & GENDER 16, 24-29 (forthcoming) [hereinafter *And Even More of Us Are Brave*], available at <https://ssrn.com/abstract=3168909>.

<sup>39</sup> See, e.g., Gillian R. Chadwick, *Reorienting the Rules of Evidence*, 39 CARDOZO L. REV. 2115, 2118 (2018), <http://cardozolawreview.com/heterosexism-rules-evidence>; Laura Dorwart, *The Hidden #MeToo Epidemic: Sexual Assault Against Bisexual Women*, MEDIUM (Dec. 3, 2017), <https://medium.com/@lauramdorwart/the-hidden-metoo-epidemic-sexual-assault-against-bisexual-women-95fe76c3330a>.

<sup>40</sup> The Arc, *People with Intellectual Disabilities and Sexual Violence* 2 (Mar. 2011), available at <https://www.thearc.org/document.doc?id=3657>.

<sup>41</sup> E.g., Nat'l Inst. of Justice, *Examining Criminal Justice Responses to and Help-Seeking Patterns of Sexual Violence Survivors with Disabilities* 11, 14-15 (2016), available at <https://www.nij.gov/topics/crime/rape-sexual-violence/Pages/challenges-facing-sexual-assault-survivors-with-disabilities.aspx>.

<sup>42</sup> 34 C.F.R. 668.46(j).

<sup>43</sup> 34 C.F.R. 668.46(j)(1)(i).

<sup>44</sup> 34 C.F.R. 668.46(j)(2)(iii) & (iv).

<sup>45</sup> 34 C.F.R. 668.46(k)(2)(ii).

<sup>46</sup> 34 C.F.R. 668.46(j)(2)(iv).

<sup>47</sup> 34 C.F.R. 106.8(b).

<sup>48</sup> These standards have been reaffirmed time and time again, in 2006 by the Bush Administration, in 2010, 2011, and 2014 in guidance documents issued by the Obama Administration, and even in the 2017 guidance document issued by the current Administration. U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter: Sexual Harassment* (Jan. 25, 2006) [hereinafter 2006 Guidance], <https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html>; U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter: Harassment and Bullying* (Oct. 26, 2010) [hereinafter 2010 Guidance], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; U.S. Dep't of Educ. Office of Civil Rights, *Dear Colleague Letter: Sexual Violence* at 4, 6, 9, & 16 (Apr. 4, 2011) [hereinafter 2011 Guidance], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; U.S. Dep't of Educ. Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* 1-2 (Apr. 29, 2014) [hereinafter 2014 Guidance], <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>; U.S. Dep't of Educ. Office for Civil Rights, *Questions and Answers on Campus Sexual Misconduct* (Sept. 2017) [hereinafter 2017 Guidance], <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

<sup>49</sup> U.S. Dep't of Educ., Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001) [hereinafter 2001 Guidance], <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

<sup>50</sup> *Id.*

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 10.

<sup>53</sup> *Id.* at 16.

<sup>54</sup> Know Your IX, Letter to Sec’y Arne Duncan & Asst. Sec’y Catherine Lhamon 3-4 (Nov. 6, 2014), available at <https://www.knowyourix.org/wp-content/uploads/2017/01/2014-11-6-Know-Your-IX-USSA-Letter-to-OCR-Redacted.pdf>. See also TIXPA § 4 (amending DEOA by adding (d)(30)).

<sup>55</sup> E.g., Joan Zorza, *What Is Wrong with Mutual Orders of Protection?* 4(5) DOMESTIC VIOLENCE REP. 67 (1999), available at <https://www.civresearchinstitute.com/online/article.php?pid=18&iid=1005>.

<sup>56</sup> Ass’n for Student Conduct Admin., *ASCA 2014 White Paper: Student Conduct Administration & Title IX: Gold Standard Practices for Resolution of Allegations of Sexual Misconduct on College Campuses 2* (2014) [hereinafter ASCA 2014 White Paper], <https://www.theasca.org/Files/Publications/ASCA%202014%20White%20Paper.pdf>.

<sup>57</sup> *Id.* at 1.

<sup>58</sup> Nancy Chi Cantalupo, Comment Regarding Proposed Rule § 106.45(b)(3) at 4, Filed in Response to the Notice of Proposed Rulemaking regarding Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Office [for] Civil Rights, Department of Education, ED-2018-OCR-0064, RIN 1870-AA14 [hereinafter Cantalupo Comment].

<sup>59</sup> *Id.*

<sup>60</sup> ASCA 2014 White Paper, *supra* note 56 at 16.

<sup>61</sup> Cantalupo Comment, *supra* note 58 at 4.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Letter from Pepper Hamilton to Sec’y Elisabeth DeVos at 2 (Jan. 30, 2019) [hereinafter Pepper Hamilton Comment], <https://www.pepperlaw.com/resource/35026/22G2>, (submitted comment on behalf of 24 private, liberal arts colleges and universities throughout the United States).

<sup>66</sup> See Letter from Ass’n of Am. Univs. (AAU) to Brittany Bull at 2-3 (Jan. 24, 2019) [hereinafter AAU Letter], <https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Higher-Education-Regulation/AAU-Title-IX-Comments-1-24-19.pdf> (discussing “higher costs associated with the regulation’s prescribed quasi-court models”).

<sup>67</sup> Letter from Ass’n of Indep. Colls. and Univs. (AICUM) to Sec’y Elisabeth DeVos at 3 (Jan.23, 2019) [hereinafter AICUM Letter], <http://aicum.org/wp-content/uploads/2019/01/AICUM-public-comments-on-Notice-of-Proposed-Rulemaking-%E2%80%9CNPRM%E2%80%9D-amending-regulations-implementing-Title-IX-of-the-Education-Amendments-of-1972-Title-IX%E2%80%9D-Docket-ID-ED-2018-OCR-0064.pdf>

<sup>68</sup> 2001 Guidance, *supra* note 49 at 20.

<sup>69</sup> ASCA 2014 White Paper, *supra* note 56 at 2.

<sup>70</sup> See Deborah L. Brake, *Fighting the Rape Culture Wars Through the Preponderance of the Evidence Standard*, 78 Mont. L. Rev. 109, 133-37 (2017) [hereinafter *Fighting the Rape Culture Wars*] (arguing that only the preponderance of the evidence standard holds in equipoise the credibility of the parties and the relative interests at stake).

<sup>71</sup> *Id.* at 128 (discussing an influential Model Student Conduct Code published in 2004); Chris Loschiavo & Jennifer L. Waller, Association for Student Conduct Administration, *The Preponderance of the Evidence Standard: Use in Higher Education Campus Conduct Processes*, <http://www.theasca.org/files/The%20Preponderance%20of%20Evidence%20Standard.pdf>.

<sup>72</sup> *Fighting the Rape Culture Wars*, *supra* note 70 at 131.

<sup>73</sup> *Id.* at 137-39.

<sup>74</sup> 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).

<sup>75</sup> See, e.g., Eliza A. Lehner, *Rape Process Templates: A Hidden Cause of the Underreporting of Rape*, 29 YALE J. OF LAW & FEMINISM 207 (2018) (“rape victims avoid or halt the investigatory process” due to fear of “brutal cross-examination”); Michelle J. Anderson, *Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 VILL. L. REV. 907, 932 936-37 (2001) (decision not to report (or to drop complaints) is influenced by repeated questioning and fear of cross-examination); As one defense attorney recently

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acknowledged, “Especially when the defense is fabrication or consent—as it often is in adult rape cases—you have to go *at* the witness. There is no way around this fact. Effective cross-examination means exploiting every uncertainty, inconsistency, and implausibility. More, it means attacking the witness’s very character.” Abbe Smith, *Representing Rapists: The Cruelty of Cross-Examination and Other Challenges for a Feminist Criminal Defense Lawyer*, 53 AM. CRIM. L. REV. 255, 290 (2016).

<sup>76</sup> The proposed rules impose only mild restrictions on what it considers “relevant” evidence. See proposed § 106.45(b)(3)(vi) (excluding evidence “of the complainant’s sexual behavior or predisposition, unless such evidence about the complainant’s sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged” or to prove consent). The problems inherent in the evidence restrictions the Department chooses to adopt (and those it chooses not to) are discussed in Part IV.E.

<sup>77</sup> Andrew Kreighbaum, *New Uncertainty on Title IX*, INSIDE HIGHER EDUCATION (Nov. 20, 2018), <https://www.insidehighered.com/news/2018/11/20/title-ix-rules-cross-examination-would-make-colleges-act-courts-lawyers-say>.

<sup>78</sup> *Id.*

<sup>79</sup> See, e.g., 83 Fed. Reg. at 61476. The Department of Education offers no evidence to support its assumption that live cross examination will improve the reliability of schools’ determinations regarding sexual assault; it merely cites a case which relies on John Wigmore’s evidence treatise. See *id.* (citing *California v. Green*, 399 U.S. 149, 158 (1970) (quoting John H. Wigmore, 5 Evidence sec. 1367, at 29 (3d ed., Little, Brown & Co. 1940))).

<sup>80</sup> Emily Henderson, *Bigger Fish to Fry: Should the Reform of Cross-Examination Be Expanded Beyond Vulnerable Witnesses*, 19(2) INTERNATIONAL J. OF EVIDENCE AND PROOF 83, 84-85 (2015) (collecting studies of adults).

<sup>81</sup> Saskia Righarts, Sarah O’Neill & Rachel Zajac, *Addressing the Negative Effect of Cross-Examination Questioning on Children’s Accuracy: Can We Intervene?*, 37 (5) LAW AND HUMAN BEHAVIOR 354, 354 (2013) (“Cross-examination directly contravenes almost every principle that has been established for eliciting accurate evidence from children.”).

<sup>82</sup> *Goss v. Lopez*, 419 U.S. 565, 583 (1975). *Coplin v. Conejo Valley Unified Sch. Dist.*, 903 F. Supp. 1377, 1383 (C.D. Cal. 1995); *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 247 (D. Vt. 1994).

<sup>83</sup> The Department cites to one case, *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018) to support its proposed cross-examination requirement. However, *Baum* is anomalous. See e.g., *Dixon*, 294 F.2d at 158, *cert. denied* 368 U.S. 930 (1961) (expulsion does not require a *full-dress judicial hearing, with the right to cross-examine witnesses.*); *Osteen v. Henley*, 13 F.3d 221, 225 (7<sup>th</sup> Cir. 1993) (holding no due process violation in expulsion of college student without providing him right to cross-examination); *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.”); *Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 16 (1st Cir. 1988) (a public institution need not conduct a hearing which involves the right to confront or cross-examine witnesses). See also 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>.

<sup>84</sup> E.g., Letter from Liberty University to Sec’y Elisabeth DeVos at 4 (Jan. 24, 2019) [hereinafter Liberty University Letter], <http://www.liberty.edu/media/1617/2019/jan/Title-IX-Public-Comments.pdf>.

<sup>85</sup> Pepper Hamilton Comment at 15 (“[A]dversarial cross-examination will unnecessarily increase the anxiety of both parties going through the process. For complainants in particular, this may lead them to simply not come forward or utilize the school’s process, no matter how meritorious their claims may be. As a result, our campuses will be less safe.”); Letter from Georgetown University to Sec’y Elisabeth DeVos at 7 (Jan. 30, 2019), <https://georgetown.app.box.com/s/fwk978e3oai8i5hqq0wqa70cq9iml2re> (“Mandatory cross-examination by advisors will have a chilling effect on reporting and therefore diminish accountability of perpetrators. We already know that the majority of students who experience sexual misconduct never proceed with a formal complaint. There is little doubt that the specter of being cross-examined by a trained criminal defense attorney during a school’s grievance procedure would drive down the number of students seeking redress through formal process even further.”).

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- <sup>86</sup> ATIXA, *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](https://atixa.org/wordpress/wp-content/uploads/2018/10/ATIXA-Position-Statement_Cross-Examination-final.pdf).
- <sup>87</sup> ASCA 2014 White Paper, *supra* note 56 at 2.
- <sup>88</sup> Am. Bar Ass'n, *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) [hereinafter Am. Bar Ass'n Task Force].
- <sup>89</sup> AICUM Letter, *supra* note 67.
- <sup>90</sup> AAU Letter, *supra* note 66.
- <sup>91</sup> Letter from 903 Mental Health Professionals and Trauma Specialists to Ass't Sec'y Kenneth L. Marcus at 3 (Jan. 30, 2019) [hereinafter Mental Health Professionals Letter], <https://nwlc.org/wp-content/uploads/2019/01/Title-IX-Comment-from-Mental-Health-Professionals.pdf>.
- <sup>92</sup> At Harvard Law School, for example, students can now submit questions through a panel. HLS Sexual Harassment Resources and Procedure for Students, Harvard Law School 3.4.1 (Dec. 2014), <https://hls.harvard.edu/content/uploads/2015/07/HLSTitleIXProcedures150629.pdf>.
- <sup>93</sup> Djuna Perkins, *Behind the headlines: An insider's guide to Title IX and the student discipline process for campus sexual assaults*, Boston Bar Journal (July 8, 2015), <https://bostonbarjournal.com/2015/07/08/behind-the-headlines-an-insiders-guide-to-title-ix-and-the-student-discipline-process-for-campus-sexual-assaults/>.
- <sup>94</sup> E.g., Grace Watkins, *Sexual Assault Survivor to Betsy DeVos: Mediation Is Not a Viable Resolution*, TIME (Oct. 2, 2017), <http://time.com/4957837/campus-sexual-assault-mediation>.
- <sup>95</sup> Nat'l Ass'n of Student Personnel Administrators (NASPA), *NASPA Priorities for Title IX: Sexual Violence Prevention & Response 1-2* [hereinafter *NASPA Title IX Priorities*], available at [https://www.naspa.org/images/uploads/main/NASPA\\_Priorities\\_re\\_Title\\_IX\\_Sexual\\_Assault\\_FINAL.pdf](https://www.naspa.org/images/uploads/main/NASPA_Priorities_re_Title_IX_Sexual_Assault_FINAL.pdf).
- <sup>96</sup> Mental Health Professionals Letter, *supra* note 91 at 3.
- <sup>97</sup> See Fed. R. Evid. 401, 402.
- <sup>98</sup> See Fed. R. Evid. 403.
- <sup>99</sup> 34 C.F.R. 106.8(b) (requiring "equitable" procedures).
- <sup>100</sup> 20 U.S.C. § 1221(d) (specifying that "[n]othing in this chapter," including the Family Educational Rights and Privacy Act (FERPA), "shall be construed to affect the applicability of ... [T]itle IX"). See also 2001 Guidance, *supra* note 49 at vii n.3.
- <sup>101</sup> FERPA, 20 U.S.C. § 1232g(b)(6); 34 C.F.R. § 668.46(k)(3)(iv).
- <sup>102</sup> 2001 Guidance, *supra* note 49 at 16, 19.
- <sup>103</sup> See *id.* at vii n.3.
- <sup>104</sup> Proposed §§ 106.45(b)(1)(i), 106.45(b)(1)(vi), 106.45(b)(4)(ii)(E), 106.45(b)(5), and 106.45(b)(7)(i)(A) (Although Secretary DeVos has claimed that the proposed rules make "[a]ppeal rights equally available to both parties," they may not in fact provide equal *grounds for appeal* to both parties. In the proposed rules, the Department's repeatedly draws a distinction between "remedies" and "sanctions," implying that sanctions are not a category of remedies. (Elisabeth DeVos, *Betsy DeVos: It's time we balance the scales of justice in our schools*, WASH. POST (Nov. 20, 2018), [https://www.washingtonpost.com/opinions/betsey-devos-its-time-we-balance-the-scales-of-justice-in-our-schools/2018/11/20/8dc59348-ecd6-11e8-9236-bb94154151d2\\_story.html](https://www.washingtonpost.com/opinions/betsey-devos-its-time-we-balance-the-scales-of-justice-in-our-schools/2018/11/20/8dc59348-ecd6-11e8-9236-bb94154151d2_story.html))).
- <sup>105</sup> Am. Bar Ass'n Task Force, *supra* note 88 at 5.
- <sup>106</sup> 83 Fed. Reg. at 61464 n.2.
- <sup>107</sup> Elizabeth Bartholet, Nancy Gertner, Janet Halley & Jeannie Suk Gersen, *Fairness For All Students Under Title IX* 5 (Aug. 21, 2017) [hereinafter *Fairness For All Students Under Title IX*], <https://dash.harvard.edu/bitstream/handle/1/33789434/Fairness%20for%20All%20Students.pdf>.
- <sup>108</sup> Proposed §§ 106.30, 106.44.
- <sup>109</sup> Julie Mack & Emily Lawler, *MSU doctor's alleged victims talked for 20 years. Was anyone listening?*, MLIVE (Feb. 8, 2017), [https://www.mlive.com/news/index.ssf/page/msu\\_doctor\\_alleged\\_sexual\\_assault.html](https://www.mlive.com/news/index.ssf/page/msu_doctor_alleged_sexual_assault.html).
- <sup>110</sup> Proposed § 106.30.
- <sup>111</sup> 20 U.S.C. § 1681(a).
- <sup>112</sup> 2001 Guidance, *supra* note 49.

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<sup>113</sup> 2017 Guidance, *supra* note 48 at 1 n.3 (“Schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities”); 2014 Guidance (“a school must process all complaints of sexual violence, regardless of where the conduct occurred”); 2011 Guidance (“Schools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school’s education program or activity”); 2010 Guidance at 2 (finding Title IX violation where “conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school,” regardless of location of harassment).

<sup>114</sup> Rochelle Sharpe, *How Much Does Living Off-Campus Cost? Who Knows?*, N.Y. TIMES (Aug. 5, 2016) [hereinafter *How Much Does Living Off-Campus Cost?*], <https://www.nytimes.com/2016/08/07/education/edlife/how-much-does-living-off-campus-cost-who-knows.html> (87 percent).

<sup>115</sup> U.S. Dep’t of Justice, Bureau of Justice Statistics, *Rape and Sexual Assault Victimization Among College-Age Females, 1995–2013* at 6 (Dec. 2014), <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf>.

<sup>116</sup> United Educators, *Facts From United Educators’ Report - Confronting Campus Sexual Assault: An Examination of Higher Education Claims* (2015), [https://www.ue.org/sexual\\_assault\\_claims\\_study](https://www.ue.org/sexual_assault_claims_study).

<sup>117</sup> Jennifer J. Freyd, *The UO Sexual Violence and Institutional Betrayal Surveys: 2014, 2015, and 2015-2016* (Oct. 16, 2014), available at <https://www.uwire.com/2014/10/16/sexual-assault-more-prevalent-in-fraternities-and-sororities-study-finds> (finding that 48.1 percent of females and 23.6 percent of males in Fraternity and Sorority Life (FSL) have experienced non-consensual sexual contact, compared with 33.1 percent of females and 7.9 percent of males not in FSL).

<sup>118</sup> *How Much Does Living Off-Campus Cost?*, *supra* note 114.

<sup>119</sup> Statista, *Community colleges in the United States - Statistics & Facts*, <https://www.statista.com/topics/3468/community-colleges-in-the-united-states>; National Center for Education Statistics, *Fast Facts*, <https://nces.ed.gov/fastfacts/display.asp?id=372> (about 17.0 million students enrolled in undergraduate programs in fall 2018).

<sup>120</sup> David A. Tomar, *Trade Schools on the Rise*, THE BEST SCHOOLS (last visited Jan. 20, 2019), <https://thebestschools.org/magazine/trade-schools-rise-ashes-college-degree> (an estimated 16 million students were enrolled in vocational schools in 2014).

<sup>121</sup> Letter from The School Superintendents Ass’n (AASA) to Sec’y Elisabeth DeVos at 5 Jan. 22, 2019) [hereinafter AASA Letter], [http://aasa.org/uploadedFiles/AASA\\_Blog\(1\)/AASA Title IX Comments Final.pdf](http://aasa.org/uploadedFiles/AASA_Blog(1)/AASA%20Title%20IX%20Comments%20Final.pdf)

<sup>122</sup> §§ 106.30 and 106.45(b)(3).

<sup>123</sup> *Id.*

<sup>124</sup> *Davis*, 526 U.S. at 631 (emphasis added).

<sup>125</sup> Kathryn J. Holland & Lilia M. Cortina, “It Happens to Girls All the Time”: Examining Sexual Assault Survivors’ Reasons for Not Using Campus Supports”, 59 AM. J. COMMUNITY PSYCHOL. 50, 61 (2017), available at <https://doi.org/10.1002/ajcp.12126>.

<sup>126</sup> See 20 U.S.C. § 1092(f)(6)(iii); 20 U.S.C § 1092(f)(6)(iv)); 34 C.F.R. § 668.46(a)).

<sup>127</sup> See e.g., *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002) (applying “severe or pervasive” standard to racial discrimination hostile work environment claim).

<sup>128</sup> See *A Sharp Backward Turn*, *supra* note 83.

<sup>129</sup> Proposed 34 C.F.R. § 106.44(a).

<sup>130</sup> 2001 Guidance, *supra* note 49.

<sup>131</sup> Proposed § 106.45.

<sup>132</sup> See proposed § 106.44(b)(2) (“If the Title IX Coordinator files a formal complaint in response to the reports, and the recipient follows procedures (including implementing any appropriate remedy as required) consistent with proposed § 106.45 in response to the formal complaint, the recipient’s response to the reports is not deliberately indifferent.”).

<sup>133</sup> See proposed § 106.44(b)(5), 83 Fed. Reg. at 61471 (explaining that proposed § 106.44(b)(5) is meant to clarify that OCR will not “conduct a de novo review of the recipient’s investigation and determination of responsibility for a particular respondent”).

<sup>134</sup> The Department has required schools to use the preponderance standard in Title IX investigations since as early as 1995 and throughout both Republican and Democratic administrations. For example, its April 1995 letter to

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Evergreen State College concluded that its use of the clear and convincing standard “adhere[d] to a heavier burden of proof than that which is required under Title IX” and that the College was “not in compliance with Title IX.” U.S. Dep’t of Educ., Office for Civil Rights, *Letter from Gary Jackson, Regional Civil Rights Director, Region X, to Jane Jervis, President, The Evergreen State College* (Apr. 4, 1995), at 8, [http://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed\\_ehd\\_1995.pdf](http://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed_ehd_1995.pdf). Similarly, the Department’s October 2003 letter to Georgetown University reiterated that “in order for a recipient’s sexual harassment grievance procedures to be consistent with Title IX standards, the recipient must ... us[e] a preponderance of the evidence standard.” U.S. Dep’t of Educ., Office for Civil Rights, *Letter from Howard Kallem, Chief Attorney, D.C. Enforcement Office, to Jane E. Genster, Vice President and General Counsel, Georgetown University* (Oct. 16, 2003), at 1, <http://www.nchem.org/documents/202-GeorgetownUniversity--110302017Genster.pdf>.

<sup>135</sup> Proposed § 106.45(b)(4)(i).

<sup>136</sup> Proposed § 106.45(b)(4)(i) would permit schools to use the preponderance standard *only if* it uses that standard for all other student misconduct cases that carry the same maximum sanction *and* for all cases against employees. This is a one-way ratchet: a school would be permitted to use the higher clear and convincing evidence standard in sexual assault cases, while using a lower standard in all other cases.

<sup>137</sup> Proposed § 106.45(b)(4)(i) (explaining that the clear and convincing evidence standard must be used if schools use that standard for complaints against employees, and whenever a school uses clear and convincing evidence for any other case of student misconduct).

<sup>138</sup> Michael C. Dorf, *Further Questions About the Scope of the Dep’t of Education’s Authority Under Title IX*, DORF ON LAW (Dec. 3, 2018), <https://dorfonlaw.org/2018/12/further-questions-about-scope-of-dept.html#more>.

<sup>139</sup> To take one famous example, O.J. Simpson was found responsible for wrongful death in civil court under the preponderance standard after he was found not guilty for murder in criminal court under the beyond-a-reasonable-doubt standard. See B. Drummond Ayres, Jr., *Jury Decides Simpson Must Pay \$25 Million in Punitive Award*, N.Y. TIMES (Feb. 11, 1997), <https://www.nytimes.com/1997/02/11/us/jury-decides-simpson-must-pay-25-million-in-punitive-award.html>.

<sup>140</sup> *Rivera v. Minnich*, 483 U.S. 574, 581 (1987).

<sup>141</sup> *Cooper v. Oklahoma*, 517 U.S. 348, 368 (1996).

<sup>142</sup> *McMillan v. Pennsylvania*, 477 U.S. 79, 91-92 (1986).

<sup>143</sup> *Jones v. United States*, 463 U.S. 354, 368 (1983).

<sup>144</sup> *Addington v. Texas*, 441 U.S. 418, 424 (1979) (civil commitment).

<sup>145</sup> *Santosky v. Kramer*, 455 U.S. 745, 758 (1982).

<sup>146</sup> *Addington*, 441 U.S. at 432.

<sup>147</sup> *Woodby v. INS*, 385 U.S. 276, 286 (1966).

<sup>148</sup> *Chaunt v. United States*, 364 U.S. 350, 353 (1960); *Schneiderman v. United States*, 320 U.S. 118, 125 (1943).

<sup>149</sup> *In re Winship*, 397 U.S. 358, 367-68 (1970).

<sup>150</sup> Despite overwhelming Supreme Court and other case law in support of the preponderance standard, the Department cites just two state court cases and one federal court district court case to argue for the clear and convincing standard. 83 Fed. Reg. at 61477. The Department claims that expulsion is similar to loss of a professional license and that held that the clear and convincing standard is required in cases where a person may lose their professional license *Id*. However, even assuming expulsion is analogous to loss of a professional license, which is certainly debatable as it is usually far easier to enroll in a new school than to enter a new profession, this is a weak argument, as there are numerous state and federal cases that have held that the preponderance standard is the correct standard to apply when a person is at risk of losing their professional license. See, e.g., *In re Barach*, 540 F.3d 82, 85 (1st Cir. 2008); *Granek v. Texas State Bd. of Med. Examiners*, 172 S.W. 3d 761, 777 (Tex. Ct. App. 2005). As an example, the Department cites to *Nguyen v. Washington State Dep’t of Health*, 144 Wash.2d 516 (Wash. 2001), *cert. denied* 535 U.S. 904 (2002) for the contention that courts “often” employ a clear and convincing evidence standard to civil administrative proceedings. In that case, the court required clear and convincing evidence in a case where a physician’s license was revoked after allegations of sexual misconduct. But that case is an anomaly; a study commissioned by the U.S. Department of Health and Human Services found that two-thirds of the states use the preponderance of the evidence standard in physician misconduct cases. See Randall R. Bovbjerg et al., *State Discipline of Physicians* 14-15 (2006),

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<https://aspe.hhs.gov/sites/default/files/pdf/74616/stdiscp.pdf>. See also Kidder, William, *(En)forcing a Foolish Consistency?: A Critique and Comparative Analysis of the Trump Administration’s Proposed Standard of Evidence Regulation for Campus Title IX Proceedings* (January 27, 2019), available at <http://ssrn.com/abstract=3323982> (providing an in depth comparative analysis of the many instances in which the preponderance standard is used instead of the clear and convincing evidence standard).

<sup>151</sup> The Department’s bizarre claim that the preponderance standard is the “lowest possible standard of evidence” (83 Fed. Reg. at 61464) is simply wrong as a matter of law. Courts routinely apply lower standard of proof in traffic stops (“reasonable suspicion”) and conducting searches (“probable cause”). *Terry v. Ohio*, 392 U.S. 1 (1968) (traffic stops); U.S. Const. amend. IV (searches).

<sup>152</sup> Heather M. Karjane, et al., *Campus Sexual Assault: How America’s Institutions of Higher Education Respond* 120 (Oct. 2002), <https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf>.

<sup>153</sup> 83 Fed. Reg. at 61464 n.2.

<sup>154</sup> The NCHERM Group, *Due Process and the Sex Police 2*, 17-18 (Apr. 2017), available at <https://www.ncher.org/wp-content/uploads/2017/04/TNG-Whitepaper-Final-Electronic-Version.pdf>.

<sup>155</sup> 83 Fed. Reg. at 61477.

<sup>156</sup> *Id.*

<sup>157</sup> Proposed § 106.45(b)(4)(i).

<sup>158</sup> See *A Sharp Backward Turn*, *supra* note 83 (“It is a one-way ratchet.”).

<sup>159</sup> See *id.* (clear and convincing evidence is “the standard the [American Association of University Professors] has urged on colleges and universities for faculty discipline and which some unionized institutions have incorporated in collective bargaining agreements with institutions”).

<sup>160</sup> Although the Department claims that it wants to give schools “flexibility” in choosing their standard of proof,<sup>160</sup> Proposed § 106.45(b)(4)(i) would effectively force schools to use “clear and convincing evidence” for student sexual harassment investigations if “clear and convincing evidence” is used by that school in *employee* sexual harassment investigations. Given that most schools already use the preponderance standard in student Title IX proceedings, many of them would be forced to change their procedures—hardly the “flexibility” that the Department claims it wishes to provide.

<sup>161</sup> See 34 C.F.R. § 106.51 (“A recipient shall not enter into a contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination....”).

<sup>162</sup> 34 C.F.R. § 106.8(b).

<sup>163</sup> Proposed § 106.8(c).

<sup>164</sup> Tara N. Richards, *No Evidence of “Weaponized Title IX” Here: An Empirical Assessment of Sexual Misconduct Reporting, Case Processing, and Outcomes*, L. & HUMAN BEHAVIOR (2018), available at <http://dx.doi.org/10.1037/lhb0000316>.

<sup>165</sup> *Id.*

<sup>166</sup> Constitutional due process requirements do not apply to private institutions.

<sup>167</sup> *Goss v. Lopez*, 419 U.S. 565, 566, 579 (1975).

<sup>168</sup> *Id.* at 583. See also *Gomes v. Univ. of Maine Sys.*, 365 F. Supp. 2d 6, 23 (D. Me. 2005); *B.S. v. Bd. of Sch. Trs.*, 255 F. Supp. 2d 891, 899 (N.D. Ind. 2003); *Coplin v. Conejo Valley Unified Sch. Dist.*, 903 F. Supp. 1377, 1383 (C.D. Cal. 1995); *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 247 (D. Vt. 1994).

<sup>169</sup> See proposed § 106.45(b)(3)(vii) (“If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility.”).

<sup>170</sup> Liberty University Letter, *supra* note 84 at 5.

<sup>171</sup> Proposed § 106.45(b)(1)(iv).

<sup>172</sup> Indeed, the data shows that men and boys are far more likely to be victims of sexual assault than to be falsely accused of it. See, e.g., *Males Are More Likely to Suffer Sexual Assault*, *supra* note 31.

<sup>173</sup> See also the Department’s reference to “inculpatory and exculpatory evidence” (proposed § 106.45(b)(1)(ii)), the Department’s assertion that “guilt [should] not [be] predetermined” (83 Fed. Reg. at 61464), and Secretary DeVos’s discussion of the “presumption of innocence” (Elisabeth DeVos, *Betsy DeVos: It’s time we balance the scales of justice in our schools*, WASH. POST (Nov. 20, 2018), <https://www.washingtonpost.com/opinions/betsey->

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[devos-its-time-we-balance-the-scales-of-justice-in-our-schools/2018/11/20/8dc59348-ecd6-11e8-9236-bb94154151d2\\_story.html](https://www.dorfonlaw.org/2018/11/20/8dc59348-ecd6-11e8-9236-bb94154151d2_story.html).

<sup>174</sup> See Michael C. Dorf, *What Does a Presumption of Non-Responsibility Mean in a Civil Context*, DORF ON LAW (Nov. 28, 2018), <https://dorfonlaw.org/2018/11/what-does-presumption-of-non.html>.

<sup>175</sup> Proposed § 106.45(b)(1)(iv).

<sup>176</sup> See, e.g., *Males Are More Likely to Suffer Sexual Assault*, *supra* note 31.

<sup>177</sup> 20 U.S.C. § 1092(f)(8)(C).

<sup>178</sup> 20 U.S.C. § 1092(f)(6)(iii); 20 U.S.C § 1092(f)(6)(iv)); 34 C.F.R. § 668.46(a)).

<sup>179</sup> 20 U.S.C. § 1092(f)(8)(B)(vii); 34 C.F.R. § 668.46(b)(11)(v).

<sup>180</sup> U.S. Dep't of Educ.; Violence Against Women Act; Final Rule, 79 Fed. Reg. at 62752, 62778 (Oct. 20, 2014) (codified at 36 C.F.R. Pt. 668), <https://www.gpo.gov/fdsys/pkg/FR-2014-10-20/pdf/2014-24284.pdf>.

<sup>181</sup> 20 U.S.C. § 1092(f)(8)(b)(iv)(I)(aa).

<sup>182</sup> 83 Fed. Reg. at 61468.