STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
CIVIL RIGHTS BUREAU

January 30, 2019

The Honorable Betsy DeVos
Secretary
U.S. Department of Education
400 Maryland Avenue SW
Washington, DC 20202

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

RE: Comments on Notice of Proposed Rulemaking, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61,462 (Nov. 29, 2018), RIN 1870-AA14.

Dear Secretary DeVos and Ms. Bull:

The New York State Office of the Attorney General ("NYSOAG") submits this comment to oppose the Department of Education's Proposed Rule: *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*.[1]

The NYSOAG enforces local, state, and federal civil rights statutes that protect State residents from discrimination in all its forms. Title IX of the Education Amendments of 1972 ("Title IX") guarantees students the right to participate in federally-funded education programs and activities free from sexual discrimination, harassment, and violence. New York Education Law Article 129-B institutes practices for schools to employ to achieve Title IX's objectives. Both laws were enacted because "[s]exual assault, domestic violence, dating violence and

[1] 83 Fed. Reg. 61,462 (Nov. 29, 2018).

stalking affect thousands of college students in New York State and across the nation. In addition to the trauma caused by such violence, many victims drop out of school, experience difficulty working, and see promising opportunities cut short."[2] Both laws and their implementing regulations are critical to the NYSOAG's efforts to ensure that New York students are afforded the right to an education free from sexual harassment and abuse.

The Department's proposed rule would undermine the key objectives of both Title IX and New York State law. It would release schools from their legal duty to prevent and remediate offending conduct that interferes with students' ability to fully participate in an institution's academic and extracurricular programs. It would have a chilling effect on the reporting of sexual discrimination, harassment, and violence; create confusion among both students and educational institutions; and unduly complicate the process for investigating and resolving allegations of Title IX violations.

I. The proposed rule would relieve schools of the responsibility to appropriately respond to all conduct that denies students equal access to educational programs and activities that are free from sexual discrimination, harassment, and violence.

The proposed rule would unduly narrow the definitions of key terms and create an unjustifiably high bar for investigating or remedying discrimination on the basis of sex.

1. The Department's proposal to narrow the definition of "sexual harassment" would undermine the objectives of Title IX and New York State law. The Department proposes to limit the definition of sexual harassment to situations in which there is a direct *quid pro quo* request for sexual activity by an employee of an educational institution, or unwelcome conduct that is "so severe, pervasive, and objectively offensive that it effectively denies" equal educational access on the basis of sex.[3] This unduly narrow definition is inconsistent with the law and does not capture conduct that will deprive students of equal educational opportunity. As the Department's own 2000 guidance on sexual harassment recognized, students can be deprived of a discrimination-free educational environment by harassment of a sexual nature that is "severe, persistent, *or* pervasive . . . ."[4] This standard, which comports with New York State law, recognizes that a single instance of severe misconduct may be sufficiently serious to deprive a person of equal educational opportunity. Rather than furthering Title IX's purpose of providing an educational environment free of sex-based discrimination, the proposed rule would substantially undermine that goal by impermissibly narrowing the type of conduct that is actionable.

2. The proposed rule would limit investigations of actionable sexual harassment by narrowly defining "education program or activity" inconsistent with Title IX's text. Next,

---

[2] Memorandum from Governor Andrew Cuomo In Support of 2015-16 New York State Executive Budget, Education, Labor and Family Assistance, Article VII Legislation to the N.Y. State Senate at 10-11.

[3] 83 Fed. Reg. at 61496 (to be codified at 34 C.F.R. §106.30).

[4] Dep't of Educ., Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 65 Fed. Reg. 66092, 66097 (Nov. 2, 2000) (emphasis added) (quoting *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 649-50 (1999)).

according to the proposed rule, "a recipient is only responsible for responding to conduct that occurs within its 'education program or activity.'"[5] This interpretation directly conflicts with the plain language of Title IX.[6] Title IX states that individuals shall not "be excluded from participation in" or "be denied the benefits of" a recipient's program or activity on the basis of sex. Title IX does not require that the sex-based harassment or discrimination *actually occur within* a recipient's program or activity, as the proposed rule provides. Rather, Title IX covers any sex-based harassment or discrimination that will exclude an individual from "participation in" a recipient's program or activity. Any effort to narrow this definition would not only be inconsistent with Title IX's plain text, but would leave students without any administrative recourse for a wide range of misconduct, thus effectively excluding such students from participation in federally-funded programs or activities. For example, a student who is sexually assaulted in off-campus housing by a classmate may be effectively excluded from participation in classes that he or she shares with their assailant. Under the proposed rule, the victim would be precluded from obtaining remedies through the school's Title IX administrative process. Instead, the victim would be compelled to seek action through the justice system, rely on the school's voluntary election to provide some other informal complaint forum, or do nothing. Such an approach would deter reporting of sexual harassment and expose other students to the possibility of harm from repeat assailants.

3. The proposal to require "actual knowledge" of sexual harassment is inconsistent with Title IX and New York State law. The Department's proposal that schools should only be required to act on complaints of sexual harassment if there is "actual knowledge" by school personnel who have authority to take corrective action would undermine Title IX and eliminate well-established principles of agency and constructive knowledge. Under the proposed rule, only a recipient's "actual knowledge" of sexual harassment would trigger an obligation to respond; "imputation of knowledge based solely on *respondeat superior* or constructive notice is insufficient."[7] As part of its justification, the proposed rule states that it is the recipient's own misconduct, rather than the conduct of its students or employees, that subjects it to Title IX liability.[8] Yet, the proposed rule frustrates rather than furthers this justification. Rather than place the onus on the recipient to remedy harassment of which it is, or should be, aware, the proposal would place the burden on the victim of such harassment to both locate and notify the proper individuals before any corrective action can be taken. Further, by requiring victims to inform a specific individual to initiate the grievance process, the proposed rule would increase both the likelihood that the victim will have to recount their harassment to multiple individuals, thus compounding the trauma, and the likelihood that their harassment will go unremedied due to the victim's inability to locate the proper individual to whom to report. Such consequences would enhance sex-based discrimination and harassment in educational settings rather than eradicate it, per Title IX's mandate and the objectives of New York State law.

4. The proposal to limit liability to instances of "deliberate indifference" would violate Title IX and undermine New York State law. Lastly, without any rational justification, the

[5] 83 Fed. Reg. at 61468.

[6] 20 U.S.C. § 1681(a) (emphasis added).

[7] 83 Fed. Reg. at 61466.

[8] *Id.*

Department proposes to restrict institutional liability under Title IX to only those situations in which "a recipient acts with deliberate indifference," defined as a response to sexual harassment in a manner that is 'clearly unreasonable in light of the known circumstances.'"[9] Again, this change to longstanding guidance that imposed Title IX liability where a recipient failed to take reasonable corrective measures, would completely thwart the statute's primary purpose. According to the Department of Justice, "[t]he principal objective of Title IX is to avoid the use of federal money to support sex discrimination in education programs and to provide individual citizens effective protection against those practices."[10] But, instead of furthering the statute's purpose of protecting students from sex-based discrimination in federally-funded educational programs, the proposed rule would transform the statute into one with a primary purpose of shielding institutions from liability except in the most egregious cases. This change would discourage institutions from taking proactive measures to protect the educational environment of its students, and would also likely chill reporting because victims would not be able to expect even a reasonable response from school authorities—only one that is not clearly unreasonable.

5. The proposed definitions of "complainant" and "formal complaint" when read together, will impermissibly narrow the number and source of complaints. Section 106.44(e)(2) of the proposed rule defines "complainant" as "an individual who has reported being the victim of conduct that could constitute sexual harassment, or on whose behalf the Title IX Coordinator has filed a formal complaint."[11] "Formal complaint" is defined as a "document signed by a complainant or by the Title IX Coordinator."[12] Read together, the proposed rule would prevent third parties—including parents, witnesses, teachers, and other school employees besides the Title IX Coordinator—from filing complaints to trigger the school's Title IX investigative process.

The proposed definition of "complainant" is a significant departure from the standards found in past Department guidance. The Department's 2014 Questions and Answers guidance, for example, instructed schools to investigate possible incidents of sexual violence "regardless of whether the student, student's parent, or a third party files a formal complaint."[13] In addition, because the proposed rule appears to prevent third parties from filing complaints, schools may be unable to investigate and remediate a hostile environment. Prior guidance instructed that a hostile environment could be created "even if the harassment is not targeted specifically at the individual complainant," such as where "a student, group of students, or a teacher regularly directs sexual comments toward a particular student," but where that harassment affects "others

[9] *Id.* at 61468.

[10] U.S. Dep't of Justice: Civil Rights Div., *Overview of Title IX of the Education Amendments of 1972*, JUSTICE.GOV, https://www.justice.gov/crt/overview-title-ix-education-amendments-1972-20-usc-1681-et-seq (last visited Jan. 28, 2019).

[11] 83 Fed. Reg. at 61496 (to be codified at 34 C.F.R. § 106.30).

[12] 83 Fed. Reg. at 61496 (to be codified at 34 C.F.R. § 106.30).

[13] U.S. Dep't of Educ. Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence (2014), at 15-16, *available at* https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

who witness the conduct" as well.[14] Under the proposed rule, these individuals would question whether they are able to file Title IX complaints.

Similarly, the proposed rule's definition of "formal complaint" will deter reporting and reduce school efforts to address offending behavior. As noted, the proposed rule defines "formal complaint" as a "document signed by a complainant or by the Title IX Coordinator alleging sexual harassment against a respondent about conduct within its education program or activity" and which specifically requests the "initiation of the recipient's grievance procedures."[15] Under the proposed rule, complainants must file a formal complaint to trigger the school's grievance procedures. This new definition of "formal complaint" will chill reporting and deny survivors and others, including those third parties who report problematic, harmful conduct, from fully accessing a school's investigative and grievance procedures. Students may be unsure if they satisfy the requisite "complainant" standard and choose to forego reporting. Likewise, students who report incidents to school employees and officials who are not the Title IX coordinator may think they have triggered a formal grievance process only to discover that they have not done so because they have not filed a "formal complaint." This concern is especially prevalent in the K-12 context, where it is common for complaints to be conveyed verbally to parents, teachers, and school administrators. It also unclear whether the proposed rule includes reasonable accommodations for those students whose disabilities may prevent them from writing and signing the requisite "formal complaint."

II. The proposed rule would chill reporting of sexual discrimination, harassment, and violence, and make the complaint process unnecessarily confusing and burdensome.

The proposed rule will deter the reporting of harmful conduct, create unnecessary confusion among current and prospective students, and undermine school efforts to establish prompt and equitable processes to redress discrimination based on sex. Sexual assault and sexual harassment are common on college campuses, yet these incidents consistently remain underreported.[16] The proposed rule's definition of sexual harassment, which, as discussed in Part I above, excludes many contexts in which harassment commonly occurs, would exacerbate underreporting. For example, the proposed rule may lead survivors of sexual assault and harassment to question whether an incident satisfies the new heightened standard for sexual harassment. Students—many of whom have experienced trauma—may ultimately forego reporting the incident due to this uncertainty. Indeed, evidence indicates that among the reasons

[14] Dep't of Educ.: Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 65 Fed. Reg. 66092, 66102-03 (Nov. 2, 2000).

[15] 83 Fed. Reg. at 61496 (to be codified at 34 C.F.R. § 106.30).

[16] According to the Department of Justice's Bureau of Justice Statistics, 20.5% of college women have experienced sexual assault since entering college. Christopher Krebs et al., RTI Int'l & Michael Planty et al., Bureau of Justice Statistics, Campus Climate Survey Validation Study: Final Technical Report app. at E-2 (2016), *available at* https://www.bjs.gov/content/pub/pdf/App_E_Sex-Assault-Rape-Battery.pdf. Studies indicate, however, that incidents of sexual assault are underreported. For example, a 2015 poll found that among the 70% of college women survivors who told anyone about their sexual assault incident, just 12% reported the incident to the police or college authorities. *Poll: One in 5 Women Say They Have Been Sexually Assaulted in College*, WASH. POST (June 12, 2015), https://www.washingtonpost.com/graphics/local/sexual-assault-poll/ (presenting the results of a Washington Post-Kaiser Family Foundation poll of college students living on or near campus).

students chose not to report incidents is an uncertainty concerning a college's reporting processes and a belief that their complaints will not be handled seriously.[17] Moreover, the proposed rule's program or activity requirement[18] could lead to underreporting due to questions about whether offending conduct occurring off campus falls within a school's purview to investigate and remediate. These and other changes depart from previous Department guidance, which advised schools that a "grievance procedure applicable to sexual harassment complaints cannot be prompt or equitable unless students know it exists, how it works, and how to file a complaint."[19]

Further, the proposed changes to the process by which religious institutions claim exemptions from Title IX will deprive students of adequate notice of their rights under Title IX, and thus also create confusion. The proposed regulation removes the requirement that religious institutions claiming exemptions do so in writing to the Department's Assistant Secretary.[20] Under the proposed rule, religious institutions "are not required to seek assurance from the Assistant Secretary in order to assert" an exemption.[21] The proposed rule also permits religious institutions to raise a claim for an exemption from Title IX processes for the first time upon learning that the institution is under investigation by the Department for noncompliance with Title IX.[22] In order for students to have access to a prompt and equitable Title IX process, they must know what the Title IX rules are at their school and how those rules work. Under the proposed changes, prospective and current students may believe that a school has one Title IX process in place to ensure equal access to education only to learn at a later date—and after experiencing and reporting sexual harassment—that that process has changed or does not exist. To ensure that students have adequate advanced knowledge of a school's Title IX program, the Department should abandon the proposed changes governing the religious institution exemption.

III. The proposed rule lacks key procedural protections that are needed to ensure a fair and impartial process when institutions respond to allegations of sexual harassment and abuse.

In New York State the right to an appeal is equally guaranteed to all parties. There are also no limits on what aspects of the determination are appealable.[23] By contrast, the proposed rule makes it optional for recipients to offer an appeal.[24] The right to an appeal and the ability to access multiple levels of review is important to guaranteeing a fair and impartial process.

---

[17] Sarah McMahon et al., Rutgers Sch. of Soc. Work: Center on Violence Against Women and Children, #iSpeak Student Experience, Attitudes and Beliefs about Sexual Violence, Campus Climate Assessment Results, at 13-14 (2015), *available at* https://socialwork.rutgers.edu/centers/center-violence-against-women-and-children/research-and-evaluation/campus-climate-project/reports-findings).

[18] 83 Fed. Reg. at 61474 (to be codified at §106.45(b)(3)).

[19] U.S. Dep't of Educ., Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, at 20 (66 Fed. Reg. 5512, Jan. 19 2001).

[20] 83 Fed. Reg. at 61496 (to be codified at 34 C.F.R. § 106.12).

[21] *Id.*

[22] *Id.*

[23] N.Y. Educ. Law § 6444(5)(b)(iii) (McKinney).

[24] 83 Fed. Reg. at 61499 (to be codified at 34 C.F.R. §106.45(b)(5)).

Moreover, the proposed rule potentially limits the grounds on which a complainant can appeal. It states that "[i]n cases where there has been a finding of responsibility, although a complainant may appeal on the ground that the remedies are not designed to restore or preserve the complainant's access to the recipient's education program or activity, a complainant is not entitled to a particular sanction against the respondent."[25] This language could be read to suggest that once there is a finding of responsibility the complainant is limited to appealing the remedy; it is unclear whether or not the complainant can appeal the substantive responsibility determination and concomitant findings in such a case. The final version of the proposed rule should clarify that the complainant is authorized to appeal the substantive determination and findings as well as the remedy in all cases and that access to an appeal is available on equal grounds for both parties.

Lastly, the final rule should allow schools to retain their discretion to immediately address threatening conduct by taking protective measures when necessary to protect the health and safety of the community, even if that response significantly burdens one or more students, and even if there has not yet been a formal complaint or an adjudication of responsibility. New York State provides for interim suspensions in order to protect the wellbeing of all students from a respondent determined to be a continuing threat to community safety.[26] Safeguards ensure that the duration of an interim suspension is reasonably limited and that all parties receive "a prompt review, reasonable under the circumstances, of the need for and terms of an interim suspension, including potential modification, and shall be allowed to submit evidence in support of his or her request."[27] Institutions have a responsibility to combat a continuing threat to community safety and protect the wellbeing of everyone in the community. The final rule should not impede a nimble and circumspect response in this area.

***

Any changes to the Department's Title IX regulations should take these comments into account in the interest of complying with Title IX's statutory text and providing appropriate recourse to victims of sexual harassment and sex discrimination in federally-funded educational institutions.

Respectfully submitted,

Letitia James

Letitia James
Attorney General of the State of New York

[25] *Id.*

[26] N.Y. Educ. Law § 6444 (4)(f) (McKinney).

[27] *Id.*