ROBERT C. "BOBBY" SCOTT, VA
Chairman

MAJORITY – (202) 225–3725
FAX – (202) 225–2350

COMMITTEE ON
EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
2176 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6100

VIRGINIA FOXX, NC
Ranking Member

MINORITY – (202) 225–4527
FAX – (202) 225–9571

January 30, 2019

The Honorable Betsy DeVos
Secretary, U.S. Department of Education
400 Maryland Ave SW
Washington, DC 20002

Re: Docket ID ED-2018-OCR-0064-0001

Dear Secretary DeVos:

I write to express opposition to the U.S. Department of Education's (Department) proposed rule on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, published on November 29th, 2018.[1] Title IX of the Educational Amendments Act of 1972 has a simple premise: no person shall be discriminated against on the basis of sex in the provision of educational programs or activities receiving federal assistance. Federal courts and the Department have long recognized that an educational institution that fails to adequately respond to instances of sexual assault and harassment can be found guilty of Title IX sex discrimination. This response must include redress for victims of sexual assault and harassment and consequences for the perpetrators of such acts.

Your claim that the proposed rule corrects for a lack of due process protections for respondents in Title IX grievances and other instances of "overreach" in sub-regulatory guidance issued under previous administrations does not accurately describe the content of the proposed rule, nor reflect that due process protections have been included in previous guidance. This characterization presents an incomplete description of the proposal, as the NPRM includes several concerning provisions that will have the effect of preventing many victims of sexual harassment from continuing their education in a safe and secure learning community. If adopted without substantive and significant revision, this rule will excuse large swaths of harassing activity from scrutiny under Title IX, creating a chilling effect on the reporting of sexual harassment and assault and making an already arduous grievance process even more difficult for victims.

[1] Title IX of the Education Amendments of 1972 [hereinafter Title IX NPRM], 83 Fed. Reg. 61462 (No. 230) (Proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106) *available at* https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-nprm.pdf.

This proposed rule could not come at a worse time, as instances of sexual harassment and assault are rising in our elementary and secondary schools and institutions of higher education.[2] Sadly, the proposed rule's response to this crisis is to raise legal standards and procedural bars in such a way that will curtail the number of investigations of sexual assault and harassment, and defining some of these acts out of existence. This is the exact wrong path to take, and I oppose the proposed rule for the following reasons:

- **Appropriate due process protections have been included in Department Title IX guidance for over 20 years.** Guidance on due process and equitable treatment of respondents has been included in department subregulatory guidance since 1997.[3] Guidance from 2001 includes a list of elements the Department's Office for Civil Rights (OCR) identified to determine whether a school's grievance procedures are equitable and reminds schools that, in many cases, respondents have constitutional and state law due process protections that will also bear on the grievance process.[4] The 2001 Guidance is clear, "[t]he rights established under Title IX must be interpreted consistent with any federally guaranteed due process rights involved in a complaint proceeding.".[5] Guidance documents issued by the Department in 2011 and 2014[6], documents the Department now claims "lacked basic elements of due process",[7] expounded even further on how schools should ensure equitable treatment of parties in Title IX grievance actions. While including similar "prompt and equitable" language from previous versions of the guidance, the 2011 document illustrated the need for equitable process even further:

> Throughout a school's Title IX investigation, including at any hearing, the parties must have an equal opportunity to present relevant witnesses and other evidence. The complainant and the alleged perpetrator must be afforded similar and timely access to any information that will be used at the hearing. For example, a school should not conduct a pre-hearing meeting during which only the alleged perpetrator is present and given an opportunity to present his or her side of the story, unless a similar meeting takes place with the complainant; a hearing officer or disciplinary board should not allow only the alleged perpetrator to present character witnesses at a hearing; and a school should not

---

[2] National Women's Law Center, *DeVos' Proposed Changes to Title IX, Explained* (November 30, 2018), https://nwlc.org/resources/devos-proposed-changes-to-title-ix-explained/.

[3] U.S. Department of Education, Office for Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, (hereinafter 1997 Guidance) at 13, (1997) ("OCR has identified a number of elements in evaluating whether a school's grievance procedures are prompt and equitable, including whether the procedures provide for… adequate, reliable and impartial investigation of complaints, including the opportunity to present witnesses and other evidence…") *available at* https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html

[4] U.S. Department of Education, Office for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, (hereinafter 2001 Guidance) at 19-22, (2001) *available at* https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.

[5] 2001 Guidance at 22.

[6] U.S. Department of Education, Office for Civil Rights, Dear Colleague Letter on Sexual Violence (hereinafter 2011 DCL), (2011), *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf ; U.S. Department of Education, Office for Civil Rights, Questions and Answers on Title IX and Sexual violence [hereinafter 2014 Q&A] *available at* https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

[7] U.S. Department of Education, Department of Education Issues new Interim Guidance on Campus Sexual Misconduct, Sept. 22, 2017, *available at* https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct/.

> allow the alleged perpetrator to review the complainant's statement without also allowing the complainant to review the alleged perpetrator's statement.[8]

The 2014 Q&A includes similar language.[9] The Department now attempts to cite the number of successful cases where respondents have claimed violations of due process as proof that the 2011 and 2014 documents do not include due process protections.[10] If these cases prove anything, it is that Department guidance could be more explicit as to how schools can ensure due process protections to students that courts have found currently exist, not that the Department should create whole cloth new process requirements that may not necessarily be in concert with evolving case law.

- **Formal investigation requirements will chill reporting more than they will ensure fairness.** The proposed rule abandons decades of Department reasoning that the diversity of America's educational settings requires Title IX regulations that afford schools flexibility in determining the structure of their grievance process.[11] In the place of this flexibility, the Department is forcing schools to create what amounts to quasi-judicial system, a task most schools are not equipped to accomplish. Previous Department guidance recognized that sexual harassment claims may involve potential criminal conduct, but stressed that legal standards for criminal culpability and civil standards relating to a school's duties under Title IX are not the same and should not be conflated.[12] The Department's proposed rule requires live hearing and cross examination for proceedings at the postsecondary level, allowing for either party to be cross examined remotely (in another room) via electronic means. School procedures are not deeply rooted in a legal framework which has evolved over centuries, nor are they practiced in these cross examination and investigative procedures. The Department should rethink making live hearings and cross-examinations mandatory parts of the Title IX formal grievance process.

- **Heightened standards for sexual harassment threaten to excuse unacceptable behaviors.** The proposed rule would change the definition of sexual harassment to: "[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."[13] This proposed change abandons a definition in effect at the Department at least since 2001, with no suggestion that a new definition will improve the reporting, response, or management of incidents of sexual harassment in schools or on campuses. By requiring that an action be sufficiently severe, pervasive, **and** objectively offensive, and that such action result in a complete denial of access to the school's education program or activity, the proposed rule sets an arbitrary and unnecessarily high threshold for which

---

[8] 2011 DCL at 11.
[9] 2014 Q&A at F-1.
[10] Title IX NPRM, 83 Fed. Reg. 61464-65.
[11] *E.g.*, 1997 Guidance at 10 ("The specific steps in an investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors).
[12] 2001 Guidance at 21 ("...police investigations and reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively.").
[13] Title IX NPRM, 83 Fed. Reg. 61462.

actions would even constitute harassment. Schools will have the leeway to ignore a multitude of objectionable actions without incurring liability under Title IX, in contravention of statutory intent. This change of definition alone will result in a host of incidents that most reasonable people would consider to be sexual harassment to continue unabated in schools and on campuses.

- **The proposed knowledge standard is set unreasonably high.** The Department proposes to hold an institution liable under Title IX only if it has actual knowledge of harassment or allegations of harassment.[14] Institutions of higher education would be considered to have actual knowledge only if the action is reported to "an official with authority to take corrective action."[15] This standard would be a reversal of longstanding Departmental policy that reasonably triggers institutional liability under Title IX upon direct or general knowledge (when an institution reasonably should have known about an incident of harassment). The Department proposes this unreasonably high standard while offering no evidence that adoption of such standard will improve the reporting or resolution of sexual assault cases. In recent years there have been multiple high-profile cases in which students and/or school faculty/staff were aware of allegations of sexual harassment and assault in violation of Title IX, but about which no action was taken until claims were made known through the media. The Department's arbitrary proposal to limit institutional liability to instances of direct knowledge will undermine the safety of students.

- **Limiting the scope of the "educational program or activity" threatens student safety.** Consistent with the Department's stated goal of limiting actions that would trigger Title IX liability, the proposed rule would informally set arbitrary geographical limits on Title IX liability that fail to acknowledge the reality of student and faculty interactions. On many campuses the lines between on-campus and off-campus, private space and public, official activity and campus tradition, are all blurred. The proposed language would limit the opportunity to expose sexual harassment in these blurred spaces and limit Title IX application to actions perpetrated against a person "in the United States," thus essentially eliminating liability for study abroad programs, even when sponsored and/or conducted by US institutions receiving federal funds. A student participating in a U.S. school-sponsored program abroad, taught by professors from the U.S., would no longer be protected under Title IX. This proposal sends a message to potential bad actors that they can get away with sexual assault and harassment in a foreign program or those that might have a debatable relation to the official education program or activity (e.g., ski trips, tailgates, off-campus formals). Title IX should be interpreted as protecting any person enrolled or attending an educational institution in the United States, including any program or activity the institution conducts or sponsors abroad. Such construction would align with applicability of other federal civil rights protections, including Title VI of the Civil Rights Act of 1964.[16]

---

[14] Title IX NPRM, 83 Fed. Reg. 61467, 61496.

[15] *Id.* Under the proposed rule in elementary and secondary school settings, actual knowledge can come from notice to any teacher, but does not come from other classes of school employees a student may be more comfortable reporting to (e.g., paraprofessionals).

[16] U.S. Department of Justice, Civil Rights Division, Title VI Legal Manual; §V, Defining Title VI, 5-7, 2016 ("To date, however, the only application of extraterritoriality appears in cases involving schools and study abroad

- **Proposed standards seek to limit liability at the expense of student safety.** Under the proposed rule schools will only be held liable in cases of *deliberate indifference*, defined as "clearly unreasonable in light of the known circumstances."[17] When combined with the Department's proposed change in the definition of sexual harassment, the Department creates a safe harbor for educational institutions to avoid liability. Thus, a response that conforms to the new regulations would rarely, if ever, be considered "clearly unreasonable." The rule also requires that Title IX Coordinators who have actual knowledge of reports by multiple complainants of conduct by the same respondent, must file a formal complaint, even against the will of the complainants. This requirement lacks clarity with questions remaining as to how a school will conduct a meaningful investigation of the complaint without the cooperation of the complainant, and if such a required investigation further victimize a complainant.

- **The proposed "choice" of standard of evidence is a false one.** When the Department rescinded Obama-era guidance in 2017, it gave schools the choice of using either the preponderance of the evidence standard or the higher "clear and convincing" standard.[18] While the NPRM alleges to provide schools with a choice to apply either the preponderance of the evidence standard or the clear and convincing standard,[19] in practice, accompanying provisions in this section of the rule will force many schools to adopt the higher clear and convincing standard. Additionally, based on the Department's questionable drafting of these provisions, it is plausible that some schools that will be unable to apply any evidentiary standard that complies with the regulation without revising labor contracts or their entire student code of conduct.

- **The preference of informal resolution belittles the severity of sexual assault and harassment**. The NPRM elevates the use of an informal resolution process, suggesting it can stand in place of formal grievance procedures under Title IX. This not only demeans the serious nature of the offense in question, but also clearly articulates the Department's misunderstanding of campus climate as it relates to sexual assault and harassment. In cases of sexual harassment involving assault, the mere suggestion that the case be resolved through informal resolution is insulting to the survivor and the serious nature of the act. Schools have obvious incentives to resolve complaints through informal procedures, but those incentives may not always be obvious to, or serve the best interest of, students. And students utilizing an informal resolution process at the behest or suggestion of his or her institution may or may not forfeit his or her right to re-file a formal complaint at a later time.

- **The civil rights of students should outweigh the discomfort religious educational institutions may feel when disclosing their discriminatory acts**. Educational institutions

---

programs. For example, a district court ruled that Title IX protects students who participate in study abroad programs through American universities."). *Available at* https://www.justice.gov/crt/file/896541/download

[17] Title IX NPRM, 83 Fed. Reg. 61468.

[18] U.S. Dept. of Education, Office for Civil Rights, Q&A on Campus Sexual Misconduct, *available at* https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf.

[19] Title IX NPRM, 83 Fed. Reg. 61499.

controlled by religious organizations are not bound by Title IX when compliance would "not be consistent with the religious tenets of such organization." The NPRM would eliminate the requirement that schools submit a letter to the Department before claiming exemption from Title IX compliance. Additionally, it would allow a school to delay, until the very moment a Title IX investigation was initiated by the Department, public notification of the religious tenets it believes exempts the school from Title IX compliance. Under the Obama administration, written justifications were posted on the Department's website, providing enrolled and prospective students with transparency to make informed decisions. I urge the department to return to this practice.

No provision of the proposed rule would make it easier for survivors to seek redress, or assure the preservation of due process protections that exist in current (and recently rescinded) sub-regulatory guidance. Instead, it limits institutional compliance liability AND federal enforcement liability, creating less safe learning environments. If the Department wants to focus on issues of due process in Title IX, a rational starting place would be enforcing existing procedural requirements with which many recipients of federal funding fail to comply (requirements the NPRM fails to even acknowledge).

I urge you to abandon the proposed rule change, focus on refining existing guidance to ensure compliance and enforcement of current due process protections, and to protect survivors of sexual assault and harassment in our schools and colleges.

Sincerely,

Bobby Scott

**ROBERT C. "BOBBY" SCOTT**
Chairman