



January 30, 2019

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

Re: ED Docket No. ED-2018-OCR-0064, RIN 1870-AA14, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.

Dear Mr. Marcus,

I am writing on behalf of the Board and state members of the National Alliance for Partnerships in Equity (NAPE), and as an educator, advisor and national subject matter expert on Equity in career and technical education (CTE), in response to the Department of Education's (the Department) Notice of Proposed Rulemaking ("NPRM" or "proposed rules") to express our strong opposition to the Department's proposal to amend rules implementing Title IX of the Education Amendment Act of 1972 (Title IX) as published in the Federal Register on November 29, 2018.

The National Alliance for Partnerships in Equity (NAPE) is a consortium of state and local agencies, corporations, and national organizations. NAPE's mission of building educators' capacity to implement effective solutions for increasing student access, educational equity, and workforce diversity continues through professional development, technical assistance, research & evaluation, and advocacy.

Since the passage of Title IX in 1972, schools have made earnest efforts to provide equal access to education including adequately and equitably addressing sexual harassment. Any efforts to weaken the implementation of this critical law will hinder any advances to ensure equity in education. Yet today, despite the fact that women make up a majority of undergraduate students on America's college campuses, barriers to education still exist.

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 harassment and assault. The Department's 2001 Guidance, which went through public notice-and-

comment and has been enforced in both Democratic and Republican administrations, defines sexual harassment as “unwelcome conduct of a sexual nature.” 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 Guidance requires schools to address harassment “whether or not the [school] has ‘notice’ of the harassment.” Under the 2001 Guidance, schools that do not “take immediate and effective corrective action” would violate Title IX. These standards have appropriately guided OCR’s enforcement activities, effectuating Title IX’s nondiscrimination mandate by requiring schools to quickly and effectively respond to serious instances of harassment and fulfilling OCR’s purpose of ensuring equal access to education and enforcing students’ civil rights.

What we know:

- 1 in 5 undergraduate women is sexually assaulted;
- Fewer than 10 percent of all sexual assaults are reported, because survivors are afraid of coming forward;
- 89 percent of colleges and universities reported no incidents of rape on campus in 2015.

With realistic guidance currently in place to instill accountability and legal responsibility among school administrators, athletic programs, alumni and others, we cannot afford a political misstep that will leave students vulnerable without protections or recourse. Any effort to diminish established guidance is a giant step backward in the civil rights protection of America’s students.

The proposed rules would hobble Title IX enforcement, discourage reporting of sexual harassment, and prioritize protecting schools over protecting survivors.

The proposed rules ignore the devastating impact of sexual violence in schools. Instead of effectuating Title IX’s purpose of keeping students safe from sexual abuse and other forms of sexual harassment - that is, from unlawful sex discrimination - they make it harder for students 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.

Directly, the standard for opening an investigation into an individual student’s complaint of harassment should not be as high as the standard for actually holding a school liable as an institution. All credible allegations of sexual harassment deserve an investigation. Instead of the use of a standard of proof in disciplinary proceedings that is higher than that used in civil litigation generally and that, without justification, favors the respondent over the complainant, NAPE favors a “preponderance of the evidence” standard that is equally fair to both the accused and the accuser, and that is used in all other sexual harassment proceedings.

The proposed rule would turn back the clock to a time when it was incredibly hard and humiliating for students who experienced harassment, assault and rape to report incidents and pursue justice.

The proposed rule's requirement that a respondent be presumed not responsible for harassment is inequitable and inappropriate in school proceedings.

Under proposed rule § 106.45(b)(1)(iv), 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 rape myths upon which many of the proposed rules are based—namely, the myth that women and girls often lie about sexual assault.¹ The presumption of innocence is a criminal law principle, incorrectly imported into this context²; 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 or civil rights proceedings, and Title IX is a civil rights law that ensures that sexual harassment is never the end to anyone's education.

Section 106.45(b)(1)(iv) would only encourage schools to ignore or punish historically marginalized and underrepresented groups that report sexual harassment for “lying” about it.³ Schools may be more likely to ignore or punish survivors who are women and girls of color,⁴ pregnant and parenting students,⁵ and LGBTQ students⁶ because of harmful race and sex stereotypes that label them as “promiscuous.”

The proposed rules would allow schools to pressure survivors into traumatizing mediation procedures with their assailants.

Proposed § 106.45(b)(6) would allow schools to use “any informal resolution process, such as mediation” to resolve a complaint of sexual harassment, as long as the school

¹ 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., Kingkade, *supra* note **Error! Bookmark not defined.**

² See also the Department's reference to “inculpatory and exculpatory evidence” (§ 106.45(b)(1)(ii)), the Department's assertion that “guilt [should] not [be] predetermined” (83 Fed. Reg. 61464), and Secretary DeVos' discussion of the “presumption of innocence” (Betsy DeVos, *Betsy DeVos: It's time we balance the scales of justice in our schools*, Washington Post (Nov. 20, 2018), https://www.washingtonpost.com/opinions/betsy-devos-its-time-we-balance-the-scales-of-justice-in-our-schools/2018/11/20/8dc59348-ecd6-11e8-9236-bb94154151d2_story.html).

³ 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.

⁴ 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 1, 16, 24-29 (forthcoming), available at <https://ssrn.com/abstract=3168909>; National Women's Law Center, *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-push-out-for-girls-of-color>.

⁵ Chambers & Erausquin, *The Promise of Intersectional Stigma to Understand the Complexities of Adolescent Pregnancy and Motherhood*, JOURNAL OF CHILD ADOLESCENT BEHAVIOR (2015), available at <https://www.omicsonline.org/open-access/the-promise-of-intersectional-stigma-to-understand-the-complexities-of-adolescent-pregnancy-and-motherhood-2375-4494-1000249.pdf>.

⁶ See e.g., David Pinsof, et al., *The Effect of the Promiscuity Stereotype on Opposition to Gay Rights* (2017), available at <https://doi.org/10.1371/journal.pone.0178534>.

obtains the students' "voluntary, written consent." Once consent is obtained and the informal process begins, schools may "preclude[] the parties from resuming a formal complaint."

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. Mediation is never appropriate for resolving sexual assault or harassment, even on a voluntary basis. Survivors should not be pressured to "work things out" with their assailant (as though they share responsibility for the assault) or be exposed to the risk of being re-traumatized, coerced, or bullied during the mediation process. As the Department recognized in the 2001 Guidance, students in both K-12 and higher education can be pressured into mediation without informed consent, and even "voluntary" consent to mediation is inappropriate to resolve cases of sexual assault.

The proposed rules would allow schools to claim "religious" exemptions for violating Title IX with no warning to students or prior notification to the Department.

The current rules allow religious schools to claim religious exemptions by notifying the Department in writing and identifying which Title IX provisions conflict with their religious beliefs. The proposed rules remove that requirement and permit schools to opt out of Title IX without notice or warning to the Department or students. This would allow schools to conceal their intent to discriminate, exposing students to harm, especially women and girls, LGBTQ students, pregnant or parenting students (including those who are unmarried), and students who access or attempt to access birth control or abortion.

Further, the Department's proposed assurances directly conflict with the current and proposed rules requiring that each covered educational institution "notifies" all applicants, students, employees, and unions "that it does not discriminate on the basis of sex." The Department is creating a system that enables schools to actively mislead students by requiring a school to tell students that it does not discriminate while simultaneously allowing it to opt out of anti-discrimination provisions whenever it chooses. This practice would establish a precedent that the Department is more interested in protecting schools from liability than protecting students from discrimination.

For these reasons, the National Alliance for Partnerships in Equity (NAPE) unequivocally opposes the Department's proposed rule.

The Administration's actions roll back critical civil rights guidelines which curtail discriminatory practices, provide protections, and ensure that the dignity and humanity of EVERY individual is respected. The proposed rules set in motion an insidious ideology that marginalizes and demeans a significant segment of the American population, setting the stage to potentially deconstruct civil rights law and establishing a slippery slope of equally damaging discrimination in terms of gender, race, and underrepresentation in American society.

America's democracy demands that we not remain silent in the face of injustice—and inequity in any form is injustice. All students regardless of age, ethnicity, gender, race,

sexual orientation, gender identity, disability, and economic or socioeconomic status have the right to live and pursue their goals in safety and without fear or limitations.

The National Alliance for Partnerships in Education adamantly opposes the Administration's restrictive proposed rules and their negative implications for equity, inclusion and protections in education and employment.

Respectfully,

A handwritten signature in black ink, appearing to read 'Ben Williams', with a long, sweeping flourish extending to the right.

Ben Williams, Ph.D.
Chief Executive Officer