New York State Coalition Against Sexual Assault

Working for a World Without Violence.

January 30, 2019

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

Via electronic submission at *regulations.gov*

Re: 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 Secretary DeVos:

We are writing on behalf of the New York State Coalition Against Sexual Assault, Inc., (NYSCASA) in response to the Department of Education's (ED) Notice of Proposed Rulemaking ("NPRM," "proposed regulation," or "proposed rule") to express our concerns regarding the proposed changes to rules relating to sexual harassment as published in the Federal Register on November 29, 2018.

NYSCASA is a coalition of community-based rape crisis programs located throughout the State of New York. We work to promote victim services and prevention efforts that are high quality, comprehensive, coordinated, culturally appropriate, and widely accessible. As an organization dedicated to ending sexual violence and all forms of oppression, NYSCASA is committed to ensuring equitable access to a violence-free education for all.

Thank you for the opportunity to review and comment on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance. NYSCASA respectfully submits the following comments, concerns, and recommendations based on the Title IX NPRM.

Prevalence

Sexual harassment and misconduct are widespread in the United States, with 81% of women and 43% of men reporting that they have experienced some form of sexual harassment during their lifetime (Kearl, 2018). Individuals who identify as transgender and gender non-conforming report experiencing higher rates of gender-based discrimination and violence than individuals who identify as cisgender (Grant et al,

2011). In addition, individuals who identify as LGBTQ experience sexual violence at disproportionate rates (Gentlewarrior & Fountain, 2009).

Nearly two-thirds of college students experience sexual harassment while they are students in the United States (Hill & Silva, 2005). A recent AAU Climate Survey revealed that over 11% of students across 27 universities surveyed reported experiencing sexual violence since enrolling at their institution of higher education (Cantor et al., 2017). Researchers found that rates of experiencing sexual violence are highest among undergraduate women (17%) and undergraduate students identifying as transgender, genderqueer, non-conforming, or questioning (19%). The AAU Climate Survey also revealed that a relatively small percentage (25% or less) of even the most serious incidents are reported to an organization or agency, such as an institution's Title IX office or local law enforcement.

Nearly half (48%) of students in grades 7–12 who completed an online AAUW survey in 2011 reported experiencing some form of sexual harassment at school during the 2010–11 school year (Hill & Kearl, 2015). AAUW researchers found that a higher percentage of girls reported experiencing sexual harassment during the 2010–11 school year. According to the report, harassing another student by making derogatory comments about their perceived sexuality or orientation was the most frequently mentioned type of sexual harassment, with 12% of students committing it in person and 7% of students committing it through text, email, or other electronic means (Hill & Kearl, 2015).

Redefining Sexual Harassment

We are concerned that the proposed rule would effectively absolve educational institutions of their obligation to ensure that no one is denied or limited in their ability to participate in or benefit from educational programs or activities on the basis of sex or gender. Under the proposed rule, schools "must dismiss" a formal complaint if it alleges conduct that is not (i) an employee requesting sexual favors in return for good grades or other educational benefits; (ii) "unwelcome 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 (iii) "sexual assault." (§§ 106.30, 106.45(b)(3))

In 1977, the plaintiffs in *Alexander v. Yale* argued that the patterns of sexual harassment and assault that the plaintiffs experienced as students and their university's refusal to institute mechanisms and procedures to address complaints and investigate such harassment interfered with their access to education and constituted sexual discrimination, putting their university in violation of Title IX (*Alexander v. Yale University*, 1977). *Alexander v. Yale* established that sexual harassment and assault in schools is not only a crime, but also impedes equitable access to education.

In its 2010 Dear Colleague letter, the US Department of Education established that sexual harassment may take many forms, including: "verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; or other conduct that may be physically threatening, harmful, or humiliating." Moreover, the letter explains, "[h]arassment creates a hostile environment when the 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" (United States Department of Education, 2010). In the 2011 Dear Colleague letter, the US Department of Education elaborated on the above statement, recognizing that education in the US is "the great equalizer," and explaining that the requirements of Title IX that pertain to sexual harassment also cover

sexual violence. The federal government acknowledged how the "sexual harassment of students, including sexual violence, interferes with a students' right to receive an education free from discrimination" regardless of where the alleged conduct occurs (United States Department of Education, 2011).

The new proposed rule would significantly limit the definition of sexual harassment and would drastically narrow the kind of behavior considered discriminatory and therefore needing to be addressed. Thus, the new proposed rule would require schools to only investigate the most severe forms of harassment and assault. Redefining sexual harassment worthy of an institutional response as "severe, pervasive, *and* objectively offensive" raises the threshold of what kind of harmful behavior demands response and intervention. Further clarification is needed to define what behaviors constitute conduct that is sufficiently "severe, pervasive, and objectively offensive." Some courts have argued that even a single incident of sexual assault does not count under this standard, because a one-time act is not sufficiently "pervasive." (*Ross v. Corporation of Mercer University*, 2007) As a result, a survivor of sexual assault that occurred off-campus may have their claims ignored by their school, regardless of how the trauma of sexual violence impacts educational access. The proposed rule would allow schools to ignore a significant amount of sexual harassment and misconduct that occurs in schools, as well as the impact on the particular student survivor. Students will be left to endure repeated and escalating levels of abuse until it becomes sufficiently "severe, pervasive, *and* objectively offensive." While schools have long been obligated to respond to sexual violence under Title IX, the US Department of Education's 2011 Dear Colleague letter outlined specific actions schools were expected to take to comply with the law. In contrast with the proposed rule, the 2011 letter appropriately recognized that schools should never permit violence and harassment to interfere with students' access to education.

Duty to Respond

We are concerned that the proposed rule would allow schools to ignore reports of sexual harassment and misconduct in educational settings by narrowing which school employees are required to act and when they are required to act.

Under the proposed rule, schools would not be required to address sexual harassment unless there was "actual knowledge" of the harassment by (i) a designated Title IX coordinator; (ii) a K-12 teacher (but only for student-on-student harassment, not employee-on-student harassment); or (iii) an official who has "the authority to institute corrective measures." (§§ 106.44(a), 106.30) Therefore, schools would only be responsible for addressing claims of sexual assault or harassment when one of a small subset of school employees has received a formal complaint of the incident(s). Existing Title IX guidance, however, requires schools to respond to sexual harassment and assault if almost any school employee either knows about it or should reasonably have known about it.

Under the proposed rule, if a K-12 student told a non-teacher school employee they trust—such as a playground supervisor, guidance counselor, or athletics coach—that they had experienced sexual harassment, their school would have no obligation to help them if the school employee is not an official who has "the authority to institute corrective measures." Under the proposed rule, if a K-12 student tells their teacher that they were sexually harassed by a school employee, their school would have no obligation to help them, because only "student-on-student" harassment would fall under this category. Under the proposed rule, if a college student told their RA, TA, or professor that they had been harassed

or assaulted, their school would have no obligation to help them because this employee is not an official who has "the authority to institute corrective measures."

By reducing the number of school employees who are required to respond to claims of sexual harassment or misconduct and limiting the ways students can disclose their experiences to school employees, the proposed rule would limit the school's accountability and responsibility and increase barriers to reporting incidents of sexual harassment and misconduct, rather than providing support for students who experience violence and preventing future violence from occurring.

Potential for Neglect of Off-Campus, Study Abroad, and Online Incidents

The new proposed regulations would require schools to dismiss formal complaints of sexual violence if the alleged conduct "did not occur within the [school's] program or activity" (§§ 106.30, 106.45(b)(3)).

We are concerned that the proposed rule would therefore exclude alleged sexual harassment or misconduct that occurs off-campus, in study abroad programs, or online, even when the after-effects of sexual harassment or assault impair students' ability to learn and continue their education (Mengo & Black, 2016). 87% of college students live off-campus (Sharpe, 2016). However, under the new proposed rule, if a student reports that they were sexually assaulted in off-campus housing by another student, the school would be prohibited from investigating the report as a Title IX violation because it did not occur "within the [school's] program or activity," even if the survivor suffers post-traumatic stress each time they share an academic space with the person who harmed them (Patel, 2018).

During the 2010–11 school year, 36% of girls, 24% of boys, and 30% of all students in grades 7–12 reported experiencing sexual harassment online (Hill & Kearl, 2011). 18% of these students did not want to go to school afterward, while 13% found it more difficult to study, 17% had trouble sleeping, and 8% stayed home from school (Hill & Kearl, 2011). Under the new proposed rule, if a middle school student reports that their classmates are sharing nude photographs of them on social media outside of school hours, the school would be forced to dismiss the complaint because the harassment did not occur during an educational program or activity, even if the harassment severely impacts the student's ability to participate in or benefit from educational programs or activities.

The Fourth Circuit recently held that institutions of higher education could be liable for Title IX violations if they fail to adequately respond to harassment that occurs online. (Robinson & Cole LLP, 2019). In this case, the Fourth Circuit held that the University of Mary Washington's inaction to student-on-student sexual harassment on the anonymous messaging app, Yik Yak, constituted a deliberately indifferent response to reported student-on-student sexual harassment, rejecting the University's argument that it was unable to control the harassers because the posts were anonymous without seeking to discern whether it could identify the harassers (*Feminist Majority Foundation v. Hurley*, 2018).

In addition, the proposed rule does not offer guidance regarding incidents of sexual harassment or misconduct that occur in study abroad programs. Very few federal cases have addressed whether Title IX applies to allegations of sex discrimination occurring abroad, and courts have reached different results in these cases (*Phillips v. St. George's University*, 2007; *Mattingly v. University of Louisville*, 2006; *King v. Board of Control of Eastern Michigan University*, 2002). However, in 2002, the US District Court for the

Eastern District of Michigan had occasion to address Title IX's extraterritorial reach in *King v. Board of Control of Eastern Michigan University* (2002). In this case, six students at Eastern Michigan University brought a claim of sex discrimination in violation of Title IX against the Board of Control of Eastern Michigan University (EMU); the defendants sought to have the court dismiss the case on the basis that the alleged misconduct occurred outside of the United States. The plaintiffs participated in the Intensive Educational and Cultural Program in South Africa (IECPSA), EMU's five-week study abroad program in South Africa, which was administered by two EMU professors. The plaintiffs assertedly left the program early as the result of harassing conduct of three male EMU students who were either participating in or working for the program. The court denied the defendants' motion to dismiss the Title IX claim, concluding:

> Even were the court were to read the words "persons in the United States" to impose an extraterritorial limitation, Plaintiffs are persons in the United States who have allegedly been denied the benefits of an education at EMU. Plaintiffs here have alleged hostile environment sexual harassment. [...] Sexual harassment which is sufficiently severe and pervasive creates a denial of equal access to institutional resources and and opportunities as a whole, as an entire institution, not just within a particular class, activity or program. Such harassment, if proven, undermines Plaintiffs' education at EMU as a whole, and such detriment can not be confined to the limits of any one class, program or activity.
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> As continuing students at EMU, Plaintiffs were "persons in the United States" when a denial of equal access to EMU's resources, created by EMU's failure to address and stop the actions of McCauley, Frame and Miller, happened. Study abroad programs are an integral part of college education today. A denial of equal opportunity in those programs has ramifications on students' education as a whole and detracts from their overall education. Such detriment, denial of institutional resources and discrimination on the basis of sex, although initiated abroad, clearly happen to students attending universities and colleges in the U.S., that is to persons in the United States. This conclusion is especially fitting here, where the programs were always under the control of Eastern Michigan University in every respect, rather than under the control of any foreign educational facility. (*King v. Board of Control of Eastern Michigan University*, 2002)

Here, the court held that Title IX applied to students at Eastern Michigan University who participated in EMU's study abroad program, arguing that the EMU students were entitled to Title IX protection particularly "where the programs were always under the control of Eastern Michigan University in every respect, rather than under the control of any foreign educational facility." (*King v. Board of Control of Eastern Michigan University*, 2002).

Moreover, most educational institutions add a provision to their codes of conduct which allows the college or university jurisdiction over off-campus behavior that negatively impacts the mission of the institution. For example, at the University at Albany, State University of New York, student codes of conduct apply both to student behavior which occurs on campus or at University sponsored events as well as those occurring off-campus, and the University takes action when a student's off-campus conduct "adversely affects the University community, the pursuit of its objectives, or neighboring communities." (University at Albany, SUNY, Community Rights & Responsibilities, 2015) Per the University's code of student conduct, prohibited conduct that warrants the University's response, investigation, and potential sanctioning includes, but is not limited to, violation of fire safety regulations; possession of weapons and other dangerous objects; threatening or abusive behavior, harassment, or stalking; intimate partner

violence; hazing; academic dishonesty; and sexual harassment, rape, sexual assault, and sexual exploitation.

In 1998, the University of Michigan at Ann Arbor suspended an incoming first-year student after learning that he had three felony charges pending against him for alleged sexual contact with three fourteen-year-old girls. In the student's letter of suspension, the Vice President for Student Affairs explained that it had come to the University's attention that the student "may have engaged in activities which call into serious question whether or not [their] matriculation at the University [...] poses a threat to the safety and welfare of other students and/or is appropriate in light of the University's standards for the judgment and character of incoming students." (Kiplinger, 2006, citing Gose, 1998) Kiplinger (2006) suggests that, with such a strong stance against admitting a student who had been accused of sexual misconduct, it stands to reason that the University of Michigan at Ann Arbor would also deem similar behavior committed by current students to be of the type that impacts the University's mission and poses a threat to the safety and welfare of other students.

Courts have historically been supportive when universities apply student codes of conduct to off-campus behavior. In 1976, the US District Court for the Western District of Virginia maintained that "students enrolled in state supported institutions acquire a contractual right for the period of enrollment to attend, subject to compliance with scholastic and behavioral rules of the institution," arguing that off-campus misconduct can "detrimentally affect the university" (*Krasnow v. Virginia Polytechnic Institute and State University*, 1976). In 2001, the District Court for the Western District of Michigan similarly addressed issues of off-campus misconduct after a student was suspended for allegedly participating in off-campus riots, arguing:

> These acts raise legitimate concern, even fear, as to the safety of the property and persons on campus—i.e., if [they do] it off-campus, [they are] as likely to do it on campus. [Such behavior], even though occurring off-campus, shows a disregard for the property and safety of others that raises a legitimate concern as to the safety of the property and persons on-campus. (*Hill v. Board of Trustees of Michigan State University*, 2001).

In the aforementioned 2002 case, *King v. Board of Control of Eastern Michigan University,* the US District Court for the Eastern District of Michigan held that students participating in study abroad programs are entitled to Title IX protections and are subject to their institution's codes of conduct even in extraterritorial jurisdictions (*King v. Board of Control of Eastern Michigan University*, 2002).

In 2004, the US District Court for the District of Maine addressed a case in which two plaintiffs filed a cause of action against the University of Maine System, which had subjected the plaintiffs to discipline for allegedly committing a sexual assault in 2003 (*Gomes v. University of Maine System*, 2004). The plaintiffs alleged that the University deprived them of their constitutional rights by subjecting them to a disciplinary proceeding for off-campus conduct, arguing that the University's Student Conduct Code did not permit the University to discipline students for sexual assault that occurred off-campus. The court held that "the University's legitimate interest in punishing the student perpetrator of sexual assault or protecting the student victim does not end at the territorial limits of its campus," citing the following cases as precedent: *Slaughter v. Brigham Young University* (1975); *Due v. Florida Agricultural. & Mechanical University* (N.D.Fla. 1963); *Krasnow v. Virginia Polytechnic Institute and State University* (W.D.Va. 1976). Moreover, the court continued, the University's Student Conduct Code provided that jurisdiction extends to conduct "in which the University can demonstrate a clear and distinct interest as an academic

institution regardless of where the conduct occurs and which seriously threatens … the health or safety of any member of the community." (*Gomes* v. *University of Maine System*, 2004).

Where the safety of the school community is called into question by off-campus, extraterritorial, or online conduct, an educational institution can and should invoke its adjudication process to ensure students' equitable access to educational opportunities.

Religious Exemptions and Risks for LGBTQ+ Student Survivors

In 2014, the US Department of Education released guidance for its 2011 Dear Colleague letter, explaining: "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and OCR accepts such complaints for investigation." (United States Department of Education, 2014) This guidance expanded the reach of Title IX protections to establish that sex discrimination on the basis of gender identity violates federal law. However, some educational institutions in the US have successfully gained exemptions from their obligations under Title IX. Approximately 79 US colleges and universities have petitioned and successfully obtained exemptions from Title IX's guidance on sexual orientation and/or gender identity on the grounds that it violates their institution's religious faith (Movement Advancement Project, 2018).

Under the proposed rule, religiously affiliated institutions would be permitted to assert a religious exemption from Title IX without petitioning the US Department of Education (§ 106.12(b)). The proposed rule would effectively allow schools that receive federal funding to opt out of protecting students from gender-based discrimination and harassment without notifying the federal government or current and prospective students. The consequences of this exemption for students can be severe and detrimental to their education: reports indicate that LGBTQ students in the US face threats of expulsion or increased disciplinary action simply for being LGBTQ, or they are denied participation in extracurricular activities, and forced into conversion therapy or counseling (Goldberg et al., 2018). A religiously affiliated institution that has claimed an exemption from Title IX is subject to little to no oversight from the US Department of Education and would effectively be allowed to maintain a license to discriminate against LGBTQ students while benefiting from federal funding.

According to GLSEN's 2017 National School Climate Survey, the most common reasons that LGBTQ students in grades K-12 did not report incidents of sexual harassment to school staff were doubts that effective intervention would occur, and concerns that reporting would make the situation worse (Kosciw et al., 2018). The proposed rule would have a chilling effect on LGBTQ students' ability to report sexual harassment and misconduct, who are already hesitant to report incidents of sexual violence to their schools out of fear that they will be ignored or punished.

Due Process

Under the US Constitution, the Fourteenth Amendment provides protections to individuals when substantial interests are at stake. A number of cases have examined the expectations of protections to be afforded to college and university students under the student disciplinary processes. *Dixon v. Alabama State Board of Education* (1961) was the landmark case which held that college and university students hold substantial liberty interest in their education, thus, adequate protections should be in place when the ability to continue their education is at risk (Kirkpatrick, 2016). Such proceedings must include a notice of charges and a process for hearing the complaint (Weizel, 2012). Later, *Goss v. Lopez* (1975) identified

that K-12 students hold "property and liberty interests in their education" and required sufficient notice of a hearing (Weizel, 2012; p. 1621; Harper et al., 2017); this determination has also been applied to college and university student interests in the decisions of *Gaspar v. Bruton* (1975) and *Smyth v. Lubbers* (1975). *Matthews v. Eldridge* (1976) further elaborated on this determination by establishing a three-part balancing test for due process procedures within administrative bodies. These decisions have been significant in establishing the obligation for and context of due process protections under administrative and disciplinary policies at institutions of higher education. It is important to note that these decisions did not establish the standard of proof that should be utilized under the University disciplinary process. In fact, the *Goss* decision suggested the use of "substantial evidence" (Stolz, 1975; p. 1018), which would imply a lower burden of proof than the preponderance standard. Harper and colleagues (2017) remind us that the due process protections afforded to individuals under civil processes, like disciplinary hearings, are less rigorous than those under criminal process, as the risks are less severe.

The proposed rule would require schools to use "clear and convincing evidence" for Title IX proceedings except in limited circumstances (§ 106.45(b)(4)(i)). In contrast, under previous administrations, the Department of Education required schools to use the preponderance standard, and the Title IX rules require schools to treat both students "equitabl[y]." In fact, the Department of Education has required schools to use the preponderance standard in Title IX investigations since as early as 1995. The Supreme Court identified the preponderance of evidence standard as the most appropriate measure to resolve Title VII complaints of discrimination (United States Department of Education, 2011), after which Title IX is modeled. The Association of Title IX Administrators (ATIXA) and the Association of Student Conduct Administration (ASCA) have expressed support the preponderance of evidence standard in Title IX proceedings (Loschiavo & Waller, 2017; Sokolow, 2017). Brett Sokolow, CEO of The NCHERM Group, LLC and President of ATIXA, noted that the preponderance standard is the only standard which ensures equity among all involved parties, including the complaining and responding students, as well as the institution (Sokolow, 2017). Prior to the 2011 Dear Colleague letter, many institutions were already utilizing the preponderance of the evidence standard in campus adjudication of misconduct, including forms of sexual misconduct. A 2002 National Institute of Justice study found over 80 percent of higher education institutions had established the preponderance of evidence standard as the measure appropriate for conduct adjudication (Karjane, Fisher, & Cullen, 2002).

Critics of the preponderance standard argue the standard inherently tips the process in favor of complaints, resulting in harsher outcomes for respondents. Data from the Office of Violence Against Women appears to illustrate a different outcome. Lombardi (2010) found up to 25 percent of respondents were expelled for being found responsible of sexual assault prior to the 2011 DCL. In contrast, Anderson (2014) found among 100 institutions of higher education and 478 sanctions for sexual assault between 2012 and 2013, only 12 percent of those sanctions were expulsions.

The protections provided under relevant case law including: notice of charges, a hearing process and sufficient notice of a hearing, as well as the right to submit evidence and witnesses (Harper et al., 2017), are sufficiently proportionate to the risk of deprivation under university disciplinary processes to allow for the preponderance of evidence standard to be the appropriate standard to base determinations of fact. Further, this standard provides an equitable process for all parties involved. The clear and convincing standard will inevitably skew proceedings in favor of the responding individual, and likely contribute to a

chilling effect over complainants. This standard would also continue to move universities closer towards a criminal process, which is beyond the scope of Title IX.

Allowing institutions this discretion to determine which evidentiary standard to be used fosters the very inequity the Department of Education has indicated it intends to address about the 2011 Dear Colleague letter. One of the Department of Education's criticisms of the previous administration's approach is in regards to the ambiguous guidelines set forth in 2011; though, the Department would perpetuate this trend by failing to identify the appropriate evidentiary standard and allowing "flexibility" (p. 62) of institutions to decide. This provision cultivates inconsistent responses to campus sexual misconduct across the nation.

The proposed rules would also require institutions of higher education to hold a live hearing and allow for cross-examination of parties by the other party's "advisor of choice." (§ 106.45(b)(3)(vi)-(vii)). The provision indicates that, if requested, parties must be allowed to sit in "separate rooms" connected by "technology." If a student "does not submit to cross-examination," the school "must not rely on any statement of that [student] in reaching a determination."

The proposed regulations present substantial issues for complaining individuals, and further contribute to favorability tipped towards responding individuals. The Department of Education fails to provide a differentiation between the requirements of a hearing provided for K-12 and higher education institutions. Requiring a live hearing and participation from all parties (or else their statements would not be considered) is an overreach by the Department of Education and goes beyond the scope of due process afforded in this educational setting. It is important to remember that the disciplinary process at colleges and universities are rooted in an educational philosophy and are not punitive.

The Department also neglected to provide sufficient justification for limiting the information that can be considered from a party if they do not submit for cross-examination. This rule neglects to consider the complexities and nuances of students participating in such hearings. Complainants and witnesses often fear retaliation by the responding student(s), which impacts their willingness to participate in the process. Further, telling the complainant or witness that they would be subject to direct cross-examination from the responding student(s) advisor of choice, likely a trained attorney, will make the process more adversarial, thereby deterring complainants from reporting all together. This will not mitigate the potential for re-traumatization and, in fact, would contribute to inequity in the process. This will allow for one party, who may have the means of obtaining a highly skilled attorney, to have an advantage over the other party who may not have the means to obtain such an attorney or an attorney at all. Resources and funding at institutions will vary across the nation, and the ability of these institutions to provide an advisor to a student will vary as well.

The previous administration discouraged schools from implementing direct cross-examination between parties to prevent from further traumatizing complainants. Adopting a trauma-informed approach to investigation and adjudication procedures is not equivalent to being victim-centered, thus does not tip in favorability of the complainant. Implementing trauma-informed procedures into investigation and adjudication procedures will allow for institutions to obtain information in the most reliable manner without causing additional trauma to any involved party (Henry et al., 2016). Previously, to allow parties sufficient opportunity to ask questions of the other parties, the Department allowed for questions to be submitted to a hearing officer or panel to be asked of the other party or witness, with the discretion to

determine relevance (O'Toole, 2018). Clarification is needed as to how the previous practice is not sufficient enough under the mandate. Additionally, this provision fails to consider the logistics of a matter which involves multiple complainants, respondents or witnesses. This process could set institutions up for having to manage hearings that could span multiple days, placing an undue burden and cost on the institutions and students involved, as well as delay the timeliness of the overall process. The requirement of a live hearing and cross-examination perpetuates the criminalization of this process and neglects the very benefits of establishing an educational process. Such provisions are not required under Title VII, after which, again, Title IX is modeled. The Department of Education also fails to provide adequate justification for the different process mandates between the two Civil Rights acts.

New York's Enough is Enough Act (Article 129-B), codified in 2016, will be discussed in more detail later in this comment. The Department of Education should recognize that its proposed regulations will place institutions in the State of New York in direct conflict with the rules the current administration wishes to implement. This will include how parties participate in the overall grievance process and the rights that have been afforded to students under state legislation.

Underreporting and Survivors' Experiences with Reporting

Sexual harassment and assault are already underreported. We are concerned that the proposed rule would further prevent reporting for the reasons detailed above.

In the non-student population, 63% of sexual assaults are not reported to law enforcement (Rennison, 2002). Among the student population, more than 90% of sexual assault survivors do not report the assault (Fisher et al., 2000). In addition, according to the American Association of University Women (AAUW), 89% of US college campuses reported zero incidents of rape, domestic and dating violence, and stalking in 2015 (AAUW, 2017). The data provided in these annual safety reports, produced to comply with Clery Act requirements, do not reflect the data included in campus climate surveys, academic research, and student narratives. The AAUW's analysis of this discrepancy demonstrates that students do not feel comfortable coming forward with their experiences (AAUW, 2017). Survivors often don't report sexual assaults because they fear being disbelieved or not having their experience taken seriously (Holland & Cortina, 2017).

Moreover, survivors of sexual harassment and assault who do report often experience "secondary victimization" as a result of interacting with community service providers and law enforcement that frequently partake in attitudes, behaviors, and practices that reinforce victim-blaming (Campbell, 2005). 69% of sexual assault survivors have reported that police officers discouraged them from filing a report, and one-third of survivors had police refuse to take their reports (Campbell, 2005). After interacting with law enforcement, 71% of survivors reported feeling depressed; 89% reported feeling violated; and 91% reported feeling disappointed. As a result, 80% of survivors reported that they were reluctant to seek further help from law enforcement.

In addition, reporting to law enforcement is not safe for everyone. Some students—especially students of color, undocumented students, LGBTQ students, and students with disabilities—are less likely than their peers to report sexual assault to law enforcement due to increased risk of being subjected to police violence and/or deportation. For these students, reporting to their school is often the only avenue for relief, serving as a parallel option for survivors based in civil rights, rather than criminal, law. However,

students who do report sexual harassment or assault to their institution may be ignored or even punished by their schools, or ostracized by their peers. Per our analysis above, the requirement of a live hearing and cross-examination in the proposed rule would perpetuate the criminalization of the grievance process and neglects the very benefits of offering a parallel option for survivors based in civil rights.

In a social and cultural climate that already hinders reporting, the proposed rules would further discourage students from coming forward and asking their schools and communities for help. In particular, students of color, undocumented students, LGBTQ students, and students with disabilities would be even less likely to report incidents of sexual harassment and misconduct and would receive less support and fewer opportunities for redress.

Model Policies Addressing Campus Sexual Violence: NYS Education Law Article 129-B ("Enough is Enough")

The State of New York provides significant leadership on addressing collegiate sexual violence, protecting students' rights, and promoting best practices in prevention and response to sexual misconduct in educational institutions. In 2015, New York State Governor Andrew Cuomo signed into law Education Law Article 129-B, commonly referred to as "Enough is Enough" or "EIE." EIE is the most comprehensive policy in place in the US to combat sexual violence in institutions of higher education, describing standards and procedures for New York colleges and universities to follow in addressing campus sexual misconduct and discrimination.

The law went into effect statewide in September 2016, with all colleges and universities in the state certifying to the State Education Department that they were in compliance. EIE requires all colleges to adopt a set of comprehensive procedures and guidelines, including a statewide uniform definition of affirmative consent to sexual activity; a statewide alcohol and/or drug use amnesty policy; expanded access to law enforcement; and mandatory reporting of aggregate data to the New York State Education Department (New York State Education Law Article 129-B, 2016). EIE also requires New York colleges and universities to: train staff and students on domestic violence, dating violence, stalking, and sexual assault prevention; adopt and implement a statutory campus sexual assault "students' bill of rights"; enter into memoranda of understanding, agreements, or collaborative partnerships with community-based organizations, to refer students for assistance or make services available to students where on-campus resources or services are unavailable; conduct a campus climate assessment at least once every two years; adopt written rules and procedures for complying with EIE provisions; and annually certify to the State Education Department that they are in compliance with all EIE provisions.

Whether all parties consented to sexual activity or contact is to be determined through the student conduct or grievance process. Per Section 6444(5)(c)ii, the burden of showing that a student had sexual activity or contact with another person without affirmative consent as defined in EIE is on the institution, not on the respondent to prove a negative, nor is the burden on the reporting individual, who may participate at the level to which they are comfortable (New York State Education Law Article 129-B, 2016). Through the process, appropriate officials may listen to witnesses and review available evidence to determine, to the best of their ability, whether it is more likely than not that a policy violation occurred.

In September 2017, the New York State Office of Campus Safety issued a preliminary report after completing Phase I of a statewide review of EIE compliance (New York State Department of Criminal

Justice Services, 2017). Phase I consisted of a paper review of the written policies and procedures required uner EIE, which measured compliance with the law, where such could be demonstrated through documentation. In sharing the report and raw data publicly, the collaborating state agencies demonstrated their commitment to transparency, accountability, and removing barriers to reporting sexual violence and obtaining support. In the report, colleges and universities were designated as compliant (38.9%), significantly compliant (49.2%), or non-compliant (11.9%). By sharing this information publicly, students and staff are given the information they need to hold their institutions accountable, and organizations like NYSCASA can support non-compliant and significantly compliant institutions in improving their responses to campus sexual violence. In addition, the audit sets a powerful precedent for protecting students' rights, ensuring accountability, and promoting transparency in educational institutions.

In contrast, the proposed rule, if enacted, would prevent survivors from reporting sexual harassment and assault, allow schools to avoid investigating Title IX complaints, and create unnecessary confusion while educational institutions seek clarity and guidance from the US Department of Education. For the reasons detailed above, ED should immediately withdraw its current proposal and dedicate its efforts to advancing policies that ensure equitable access to education for all students, including students who experience sexual harassment and assault.

Thank you again for the opportunity to review and submit comments on the NPRM. Please do not hesitate to contact Chelsea R. Miller at cmiller@nyscasa.org if you require further information.

Regards,

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