

January 30, 2019

The Honorable Ken Marcus
Assistant Secretary for Civil Rights
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

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

Dear Assistant Secretary Marcus:

On behalf of the National Congress of American Indians (NCAI) and the National Indian Education Association (NIEA), we thank you for the opportunity to provide these comments. We write to express disappointment in, and 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.

1. The proposed rule narrows the definition of sexual harassment.

Since 2001, the Department has defined sexual harassment as "unwelcome conduct of a sexual nature" for purposes of Title IX enforcement.¹ Narrowing this definition to "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 recipient's education program or activity"² allows a school to dismiss a student's complaint if the issue has not risen to a point that it is actively denying them an education. This proposed change discourages reporting and excludes the many forms of sexual harassment that interfere with a student's access to educational opportunities.

This disproportionately affects our American Indian and Alaska Native women, who are 1.2 times more likely than non-Hispanic white women to have experienced violence, and also more likely to have experienced stalking, psychological aggression, and physical violence by an intimate partner.³ The proposed rule's narrow definition encourages this reality to continue, and allows schools to ignore and deny students the ability to advocate for themselves and report harassment.

¹ U.S. Department of Educ., Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001) [hereinafter 2001 Guidance], available at <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>.

² Proposed rule § 106.30.

³ *National Institute of Justice*, 2016, "Violence Against American Indian and Alaska Native Women and Men." Rosay, Andre. nij.gov/journals/277/Pages/violence-against-american-indians-alaska-natives.aspx.

2. The proposed rule creates barriers and weakens a school’s ability to protect students who are abused off-campus.

Currently, a school is responsible to address sexual misconduct “when sexual misconduct is so severe, persistent, or pervasive as to deny or limit a student’s ability to participate in or benefit from the school’s programs or activities.”⁴ This standard does not limit the responsibility of schools to address misconduct based on the location or circumstance of the conduct from which an incident arises. To that end, in many cases the Department has rescinded funding from educational entities due to failure to address off-campus sexual assaults.⁵

Allowing schools to ignore complaints of off-campus sexual harassment that happen outside of a school-sponsored program, even if the harassment directly impacts a victim’s education, is a step in the wrong direction. With 41% of college sexual assaults involving off-campus parties,⁶ the proposed rule would encourage, and in some cases require, schools to decline to conduct an investigation of these incidents, which could jeopardize an individual’s access to a safe educational environment.

Title IX is intended protect students, keep them in school, and provide accommodations for a safe educational environment – including areas off campus property.

3. The proposed rule places a burden on survivors to provide a higher standard of evidence of sexual assault in regards to schools adopting and publishing grievance procedures.

The Department in 2011 identified the preponderance of the evidence standard as the correct standard of proof in campus sexual misconduct cases.⁷ The proposed change in the grievance procedure (See § 106.45(b)(4)(i)) from a preponderance of the evidence standard to a “clear and convincing evidence” standard tilts the investigation process in favor of the alleged perpetrator, and against the victim. Although it is important that the law provides all parties due process, shifting the burden to favor the alleged perpetrator is inconsistent with the intent of Title IX.

The 2011 rules also recommend that schools finish investigations within 60 days, and prohibit schools from delaying a Title IX investigation because of an ongoing criminal investigation. The proposed rules weaken this standard by allowing a school to create a “temporary delay” or “limited extension” for “good causes,” which include criminal investigations. Students should not be forced to wait months or years until after a criminal investigation is completed to seek resolution of an incident from their schools under Title IX. While sexual assault carries criminal

⁴ U.S. Department Of Education, Office for Civil Rights. “Q&A on Campus Sexual Misconduct”, September 2017. Found here: <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>

⁵ See David Jackson et al., *Federal officials withhold grant money from Chicago Public Schools, citing failure to protect students from sexual abuse*, CHICAGO TRIBUNE (Sept. 28, 2018), <https://www.chicagotribune.com/news/local/breaking/ct-met-cps-civil-rights-20180925-story.html>.

⁶ United Educators, *Facts from United Educators’ Report - Confronting Campus Sexual Assault: An Examination of Higher Education Claims*

⁷ U.S. Department of Education, Office for Civil Rights, *Dear Colleague Letter*, April 4, 2011. See more here: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>

consequences, Title IX guidance should be about insuring students have a safe learning environment and educational supports.

4. The proposed rule at § 106.44(a) would require schools to respond to sexual harassment only if an employee has “actual knowledge” of the harassment.

Under 2011 sexual harassment guidance regarding Title IX reporting, schools are required to address sexual harassment if any school employee knows, or should reasonably have known about it.⁸ As proposed in the NPRM, §106.30 would define “actual knowledge” to apply only to the *small group of school employees* “who ha[ve] the authority to institute corrective measures on behalf of the” school. This small group of employees would include (i) the Title IX coordinator; and (ii) if the student is a K-12 student reporting student-on-student harassment, a K-12 teacher.⁹ These proposed rules are unworkable for Native students, including Native students with disabilities, who should not be required to meet the burdensome standard of actual knowledge to get help. Students in elementary, middle, and high school often have closer relationships with their teacher aides, school psychologists, members of a special education team, and other school employees who are not their teachers or the Title IX coordinator. They should not be foreclosed from reporting sexual harassment to these other school employees.

The proposed rule at § 106.44(a) also creates a litigation risk for the Department of Education. The Court in *Davis Next Friend LaShonda D. v. Monroe County Brd. Of Ed.*, 526 U.S. 629, 644-46 (1999), found that where Title IX funding recipients act “deliberate[ly] indifferent” to harassment they can be liable under Title IX, noting that “the nature of [the State’s] power [over public school children] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.” (citing *Vernonia School Dist. 47j v. Acton*, 515 U.S. 646, 655 (1995)). For example, under the proposed rule, where a student reports sexual abuse to a guidance counselor or teacher aid, and the school fails to act on that report claiming improper reporting process by the student, the school actions, or lack thereof, may be considered “deliberate[ly] indifferent.” Therefore, it is in the Department’s best interest to expand who may receive a student report of sexual abuse to ensure the school acts on every instance where needed and avoid possible litigation.

5. The proposed rule fails to enforce systems to hold schools and institutions accountable when misconduct occurs.

Under the 2011 guidance, OCR enforcement led to more schools taking sexual harassment reports seriously.¹⁰ The proposed rule does not clarify the Department’s enforcement of civil rights laws, thereby reducing the Office of Civil Rights’ leadership in ensuring schools are accountable for violations of Title IX. Specifically, the proposed rule does not provide guidance on who will be implementing these rules, as well as strategies to effectively and appropriately

⁸ U.S. Department of Education, Office of Civil Rights, “Revised Sexual Harassment Guidance: Harassment Of Students By School Employees, Other Students, Or Third Parties Title IX”, Found here: <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>

⁹ See Section 106.44(a) General; Section 106.30 (p. 61466, second column)

¹⁰ U.S. Department of Education, Office of Civil Rights. “Title IX Enforcement Highlights.” June 2012. Found here: <https://www2.ed.gov/documents/press-releases/title-ix-enforcement.pdf>

execute these rules to protect students' rights to educational opportunities. The proposed rules enable schools to avoid their Title IX responsibilities at the expense of the civil rights of students.

Conclusion:

Ensuring that our Native students and employees are safe in schools and institutions is core to our organizational missions. Sadly, 14.4% of American Indian and Alaska Native woman experience sexual violence each year, as compared to 5.4% of Non-Hispanic White women.¹¹ Title IX is intended to ensure a safe learning environment for students, and preserving its integrity is essential for Native students having success in the classroom. Therefore, we call on the Department of Education to withdraw this NPRM and enforce Title IX requirements that ensure schools promptly and effectively respond to sexual harassment.

Founded in 1944, the National Congress of American Indians is the oldest, largest and most representative American Indian and Alaska Native organization in the country. NCAI advocates on behalf of tribal governments and communities, promoting strong tribal-federal government-to-government policies, and promoting a better understanding among the general public regarding American Indian and Alaska Native governments, people and rights. For more information, visit www.ncai.org

NIEA is the Nation's most inclusive advocacy organization advancing comprehensive culture-based educational opportunities for American Indians, Alaska Natives, and Native Hawaiians. Formed by Native educators in 1969 to encourage a national discourse on education, NIEA adheres to the organization's founding principles- to convene educators to explore ways to improve schools and the educational systems serving Native children; to promote the maintenance and continued development of language and cultural programs; and to develop and implement strategies for influencing local, state, and federal policy and decision makers. For more information visit www.niea.org.

¹¹ National Institute of Justice, 2016, "Violence Against American Indian and Alaska Native Women and Men." Rosay, Andre. nij.gov/journals/277/Pages/violence-against-american-indians-alaska-natives.aspx.